VIRGINIA STATE BAR DISCIPLINARY BOARD
NEW MEMBER ORIENTATION
Virginia Crossings Hotel
Wednesday, July 24, 2019
4:00 p.m.
Richmond, Virginia

AGENDA

I. Welcome – Sandra L. Havrilak, Chair

A. Officers
1. Sandra L. Havrilak, Chair
2. Michael A. Beverly, 1st Vice Chair
3. Yvonne S. Gibney, 2nd Vice Chair

B. Introduction of New Members
1. Stephanie G. Cox
2. Devika E. Davis
3. Mary L. Costello Daniel
4. David J. Gogal
5. Kamala H. Lannetti

C. Virginia State Bar Staff
1. Karen A. Gould, Executive Director
2. Cameron Rountree, Deputy Executive Director
3. DaVida M. Davis, Clerk
4. Vivian R. Byrd, Deputy Clerk

II. General Information **– Sandra Havrilak – Tab 1**
A. So You've Been Appointed to the Disciplinary Board
B. How to Comport Yourself as a Quasi-Judicial Disciplinary Board Member
C. What happens to your Email(s) with the Clerk's office?

III. Hearings and Dockets – **DaVida Davis** – **Tab 2**
A. Hearing Dates and Locations
B. Board Hearing Schedule, Post Committee and Web Docket
C. Panel Member Scheduling Conflicts
D. Continuances and Cancellations
E. Two-Day Hearings
F. Hotels and Travel Expense Reimbursement Guidelines
G. Clerk's Office Phone/Email List

IV. Communication **– Yvonne Gibney - Tab 3**
- A. Ex Parte Communication
- B. Dealing with the Press/Media
- C. Researching the parties' background prior to a hearing

V. Disciplinary Board FOIA Policy What is it and how does it impact Board Members **– Michael Beverly– Tab 4**

VI. Overview of a Prehearing Conference Call **– Yvonne Gibney - Tab 5**

VII. Hearing Procedure – **Officers** – **Tab 6**
- A. Aggravating or Mitigating Factors
- B. Rules Most Frequently Implicated in Disciplinary Proceedings
- C. Types of Hearings
  1. Misconduct - public
  1. Reinstatement – public
  2. Reciprocal - public
  3. Criminal – public
  4. Appeals of District Committee Sanctions - public
  5. Expedited Petition - public
  6. Impairment- private
  8. RESA – public
  9. Show Cause/Interim Suspensions – Noncompliance with SDT – private
  10. Show Cause/Noncompliance with Board order - public
  11. Show Cause/Certification for Sanction Determination – public
  12. Show Cause/13-29 and Failure to Comply with Terms – public
  13. Motions
- D. Pleadings/Stipulated Documents – **Sandra Havrilak** – **Tab 7**
  1. Encrypted Email
  2. Dropbox
  3. Tablets – Navigating Pleadings and Board Resources
     a. ABA Standards for Imposing Lawyer Sanctions
     b. Case Law Summary – 2019
     c. Terms of Alternative Discipline
     d. Disciplinary Board Handbook/2019-2020 and Paragraph 13
     e. Legal Dictionary

VIII. Starting Time – **Michael Beverly**

IX. Affirmation of no conflicts – **Michael Beverly – Tab 8**
- A. Disqualifying Factors for Subcommittee, District Committee and Disciplinary Board Members

X. Questions from Panel – **Yvonne Gibney**

XI. Conversations on entering and leaving Courtroom and Decorum – **Sandra Havrilak**

XII. Telephone Conference Hearings/Agreed Dispositions – **Sandra Havrilak**
- A. Email instructions from Clerk
- B. Chair – roll call
- C. Required Preparation Time
- D. Panel can offer alternative disposition

XIII. Disciplinary Board Orders – **Sandra Havrilak – Tab 9**
- A. Order Writing Responsibility
  1. Attorney Rotation
  2. Symbol - ✍
- B. Note Taking/Prompt Preparation/Circulation
  - i. Presentation on order writing by Karen Gould
  - ii. Court Reporter – Transcript Rule
  3. Use Board Form Order
     - a. Nicholas Smith Memorandum Order – model for misconduct cases
  4. Effective Date of Sanction
  5. Case-by-Case Specification of Findings of Fact and Violations found & not found
  6. Include Rulings from the Bench
     - a. Pre-hearing Orders
     - b. Motions
     - c. Continuances
     - d. Exhibits Admitted
  7. Subject line in email when circulating order: "Confidential**,** Deliberative and Privileged"
  8. Circulation of Order
  9. Dissenting Opinion
  10. Collection of Board Orders

So You've Been Appointed to the Disciplinary Board

Membership implicitly recognizes the lawyer members' professionalism in the practice of law and the lay members' stature in the community. Membership is also an awesome responsibility. It entails an investment of your time and talent. The career of the respondents is in your hands. Your vote on the panel can make the difference whether a respondent leaves the hearing with or without a license to practice law.

The Board is composed of sixteen lawyers and four lay members. The Board hears cases in panels composed of four lawyers and one lay member. Either the chair of the Board or the first or second Vice Chair presides on the panels, except that a member may be designated as chair of a panel if the chair of the Board and the vice chairs are unavailable to sit. Former members of the Board are eligible to serve. They are enlisted occasionally.

Several days before a hearing, the Clerk's Office will send you the pre-filed exhibits of the Bar and the respondent. They may be voluminous at times. It is important that you review the materials prior to the hearing.

You are not a judge, but conduct yourself as if you were a judge. Be temperate in your language. Listen to all the evidence. Avoid the temptation to make a snap decision. The panel's deliberations will often influence your thinking.

Keep in mind that the proceeding is not a trial although the rules of procedure are substantially the same. The proceeding is essentially an inquest

into the conduct of a lawyer. Hence, the rules of evidence are not stringently applied. The test is what serves the ends of justice. You will, therefore, listen to hearsay evidence, or even hearsay on hearsay. The weight given hearsay lies in your sound discretion.

Pay close attention to the testimony and the argument of counsel. Take notes to preserve your memory. This is especially important if you have been designated to write the memorandum order for the proceeding. Your notes will be a ready source of information. If you are designated to write the memorandum order, you should use your best effort to circulate a draft to the panel members by the Friday next following the hearing.

If you are a lay member, you will not have responsibility to write memorandum orders. Otherwise, you will fully participate on the hearing panel. You are the public's representative, and your participation is an important aspect of the disciplinary system.

The Board ordinarily meets on the last Friday of a month. From time to time a panel convenes by telephone conference call to hear an agreed disposition reached by Bar Counsel and the respondent. Most are completed in less than an hour.

The chair of the panel presides and rules on objections and motions made during the hearing, subject to being overruled by a majority of the other panel members. If you believe a ruling is wrongly decided, ask the chair to retire to a closed session to consider the ruling.

Speak your mind in the panel's deliberations. A candid discussion will produce a consensus. Compromise is usually a virtue.

In misconduct cases you will vote on a sanction if the misconduct is proved by clear and convincing evidence. Sanctions range from admonition to revocation. Precedents are not controlling. Each case turns on its peculiar facts. Your job is not to punish the respondent. Rather, in imposing a sanction your job is to maintain the integrity of the bar and to protect the public.

Above all, remember that you are the face of the Bar's disciplinary system.

Your membership will be a rewarding experience. The bond developed among the members will produce enduring friendships. Welcome to the Board!

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How to Comport Yourself as a Quasi-Judicial Disciplinary Board Member

Prepared by The Honorable W. Allan Sharrett

Chief Judge, Sixth Judicial Circuit

I. Constructive Leadership & Effective Communication

A. Opening remarks

1. Don't read the opening remarks as a script, but modulate your voice so that you are **talking** to the persons assembled.
2. A copy of the script with the blanks filled in with the style of the case, names of the attorneys, respondent, case number, panel members, etc., can be very helpful.
3. Thorough preparation here is indispensable.
4. This is an important point in the hearing – tension and anxiety is high – on all sides; Bar Counsel, witnesses, Respondent's Counsel, Respondent, Panel Members
5. Effective leadership here will help to put everyone at ease.

B. Lead by example

1. Be courteous, patient and dignified.
2. Never even *appear* to be discourteous, impatient or unnecessarily casual.
3. Remember that these proceedings are stressful for the litigant.
    i. It must be mortifying for them to be there defending their behavior, with their future in the profession at stake.
    ii. Are they thinking the deck is stacked against them already, or that they are appearing before a kangaroo tribunal where the panel and the prosecutor already know what the outcome will be?

C. Perception may heighten the appearance of a lack of impartiality. Guard against indicators of a lack of impartiality, and remain aware of this issue

1. Always be mindful that each person present is someone's sibling, parent, spouse or child. They entitled to be treated with dignity and respect.
2. Treating everyone with dignity and respect is part of exercising constructive leadership. This leadership requirement applies not just to the chair but also to the panel members.

D. Panel members must maintain an appropriate demeanor throughout the proceeding

1. No rolling of eyes, stares of disbelief, or like behavior. Maintain your impassivity throughout the proceeding.
2. Canon 3.B(5): "A judge shall perform judicial duties without bias or prejudice…."

Commentary: "A judge must perform judicial duties impartially and fairly….Facial expression and body language, in addition to oral communication, can give … an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial."

3. Panel members must be engaged in the proceedings. You cannot look at your phone, close your eyes, or otherwise evidence that you are not fully paying attention to the hearing. You are part of the tribunal who will be deciding the respondent's fate and the validity of the Bar's assertions. You owe both sides your full attention, your active listening. There is no substitute for eye contact.
4. If you need to take a break, raise your hand and ask the chair for such an opportunity.

II. Judicial Decorum

Canon 2.A.: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Judicial Canon 3.B(4): "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control."

This is a serious adversarial proceeding.

A. Be patient

Remember, you are going to hear two sides of a story.

1. The hearing wouldn't be taking place if everyone agreed on everything.
2. Keep an open mind until you hear all of the evidence and argument, and until other panel members, and you, have had an opportunity to discuss and comment upon the evidence.
3. There is undoubtedly somewhere else you would rather be. But, this is what you've committed to do today, and nothing at this moment is more important than giving a fair hearing to both sides, and to making it obvious that you are doing so.

B. Be courteous

1. Extend the same courtesy, civility and dignity to the respondent, witnesses, counsel, panel members and court personnel that you would want for you or your family member.
2. Know how to pronounce participant's names correctly, and do so.
3. All communications must be directed to the bench, not to opposing counsel.

C. Act with dignity

1. Humor rarely has a place in the courtroom. Jokes are generally inappropriate. Appropriate moments of levity seem to create themselves. If sparingly used, humor should only and always be self-deprecating.
2. Watch how you address each other and VSB staff. Don't publically use 1st names with anyone.
3. You are not part of a good old boy or girl club when you are part of a disciplinary proceeding, even before it begins or after it concludes.

III. Disruptive Observers, Witnesses, Litigants and Counsel

Canon 3.B(3): "A judge shall require order, decorum, and civility in proceedings before the judge."

A. **Public observers**
   1. Admonish them courteously. Sometimes it is helpful to remind them that they are observers of, and not participants in, the proceeding.
   2. This forum is sacred secular space. They, like everyone involved, must accord it the dignity to which it is entitled, otherwise they will have to leave.
   3. Same admonition applies for both verbal and nonverbal communication.

B. Witnesses
   1. Testifying can be a traumatic, fraught experience for witnesses.
   2. Treat them gently, but firmly and fairly
   3. Admonish outbursts, incivility, discursions from the subject, and comments directed to the respondent.
   4. Politely control their testimony; "Counsel, it would be helpful if perhaps you asked more specific questions of the witness."

C. Respondents

If respondents are disruptive, speak to their attorney and ask them to inform their client that the behavior in question (e.g., shaking their head, rolling their eyes, voicing their disbelief over the testimony), is inappropriate and will not be tolerated. Such behavior amounts to unsolicited non-verbal testimony which cannot be cross-examined.

D. Counsel
   1. If lawyers address each other in argument instead of the panel, admonish them that they must address their comments to the panel. "Everything is directed to the panel."

E. Control of the courtroom is very important
   1. Treat everyone with respect and modulate your tone while doing so.

2. Part of being patient is not letting people seize control. You must rein them in. Don't let them control the situation.
3. Never forget you control the pace of the hearing. If tensions arise, take a break/recess, or any panel member can make a request for a break.
4. Reserve moments of sternness for extreme situations. Remember that the record can take down *what* you say but not *how* you say it.
4. If you are concerned that someone is leaving the courtroom to prep witnesses after observing the proceedings, admonish them that they may not have any contact with any witness. In addition, you could inform them that they may step out, but they will not be permitted to reenter the courtroom. Deal with the situation and move on. Do not have a hearing within a hearing about what may have been overheard in the hallway.

IV. Time Management

Control the time without appearing to be rushed

A. Any preliminary motions that have not already been dealt with should be disposed of immediately prior to the start of the evidence by offering each side a short period of time (~5 minutes). This can be expanded if necessary.

B. Ask counsel how much time they believe they will need for opening/closing. Don't set a time limit unless they are long-winded. An effective approach is to get a time commitment from the attorneys, then "remind them when their time is up," though not actually cutting them off.

C. Rambling or repetitive testimony
   1. Make a comment directed to the attorney and tell them to ask questions of the witness.
   2. If the respondent is rambling, you have to let them do some of that. Then admonish them: "We've heard that before - thank you for telling us. Do you have anything additional?"

V. Lessons Learned from Panel Hearings v. Single Judge Proceedings

A. In a panel hearing, the chair must act collaboratively while conducting the proceeding.
   1. *Objections* – handled by chair, subject to dissent from the panel members.
   2. *Deliberations* – It is important to present, if possible, a united front in a panel's decision.
      a. The chair will be speaking on behalf of the panel about what is hopefully a **unanimous** opinion.

b. The panel should "deliberate with a view towards reaching a unanimous agreement, if it can be done without violence to individual judgment." That is, the panel should attempt to find common ground. Members may have to make concessions to reach unanimity.
c. It is important to give every member of the panel a chance to speak during deliberations and to express their views.
d. During the course of deliberations, members should not hesitate to examine their own view, and to change them if convinced they are erroneous. However, no one should "surrender (their) honest conviction solely because of the opinion of a fellow (panel member) or for the mere purpose of returning a verdict."
e. Listen carefully to the views and opinion of your fellow panel members.
f. It takes courage, both to speak and to stand for your convictions, OR to change your mind if convinced you are wrong.

3. The chair announces the decision, but, others may want to comment (a concurring perspective). However, use this sparingly. Impromptu remarks should be avoided.
    a. If the verdict is unanimous, state so at the outset.
    b. Best to either script the verdict, or to make substantial notes re the same.
    c. Then, stay on script! Little good happens when you go off script on the record.
    d. It's always appropriate to make comments, if applicable, regarding the more personal side of the decision. (E.g., "the panel was aware that this was a very difficult time in the respondent's life"; or, "the panel understands that no one was seriously injured as a result of the misconduct; however…").
    e. Likewise, if the verdict is in favor of the respondent, offer a summary of the panel's reasoning. (E.g., "the panel simply could not find, by clear and convincing evidence, that the respondent in fact…"), or (to quote the Va S.Ct. in overruling a decision of the JIRC) "…although (the judge's actions and conduct did not exemplify the level of professionalism that judges in this Commonwealth should exhibit, we cannot say that (the judge's) actions and conduct violated the Canons."; or, as judges sometimes say to criminal defendants just before acquitting them, "you're guilty, but not beyond a reasonable doubt."
    f. Both verdicts - culpability and sanction (if necessary) - should be carefully scripted and choreographed before leaving deliberations and publically reconvening.
    g. Once back in the hearing forum and on the record, stick to the script upon which you agreed while deliberating. "Throwing the floor open" to additional comments by panel members is fraught with pitfalls, and should be avoided.

VI. Applicable Paragraph 13 Language

Paragraph 13-6.A, Disciplinary Board Qualifications: Board members have agreed to "conscientiously discharge the[ir] responsibilities as a member of the Board."

Paragraph 13-14 Disqualification of District Committee Member or Board Member

Personal or Financial Interest. A member or former member of a District Committee or the Board **shall be disqualified from adjudicating any matter with respect to which the member has any personal or financial interest that might affect or reasonably be perceived to affect the member's ability to be impartial**. The Chair shall rule on the issue of disqualification, subject to being overruled by a majority of the Panel or Subcommittee. [Emphasis added.]

A. Complaint Against a Member. Upon the referral of any Complaint against a member or former member of a District Committee or the Board to a District Committee for Investigation, the member shall be recused from any service on the District Committee or the Board until the Dismissal of the Complaint without the imposition of any form of discipline.

B. Imposition of Discipline. Upon the final imposition of a Private Reprimand, a Public Reprimand, an Admonition, a Suspension or a Revocation against a member or former member of a District Committee or the Board, the member shall automatically be terminated from membership or further service on the District Committee or Board. Upon the final imposition of any other form of Attorney discipline, COLD shall have sole discretion to determine whether the member shall be terminated from membership or further service on the District Committee or the Board.

C. Interpretation. Unless otherwise stated, all questions of interpretation under this subparagraph 13-14 shall be decided by the tribunal before which the proceeding is pending, except that COLD shall determine discretionary termination of membership or further service.

D. Ineligibility. Any member or former member of a District Committee or the Board **shall be ineligible** to serve in a Disciplinary Proceeding in which:

1. The District Committee or Board member or any member of his or her firm is **involved in any significant way with the matter on which the District Committee or Board would act**;

2. **The Board member or any member of the Board member's firm was serving on the District Committee that certified the matter to the Board or has otherwise acted on the matter**;

3. **A Judge would be required to withdraw from consideration of, or presiding over, the matter under the Canons of Judicial Conduct adopted by this Court**;

4. The District Committee or **Board member previously represented the Respondent**; or

5. **The** District Committee or **Board member, upon reasonable notice to the Clerk of the Disciplinary System or to the Chair presiding over a matter, disqualifies himself or herself from participation in the matter, because such member believes that he or she is unable to participate objectively in consideration of the matter or for any other reason.**

[Emphasis added.]

Directions to the State CorporationCommission (Tyler Building):

Address: 1300 East Main Street, Richmond, VA 23219

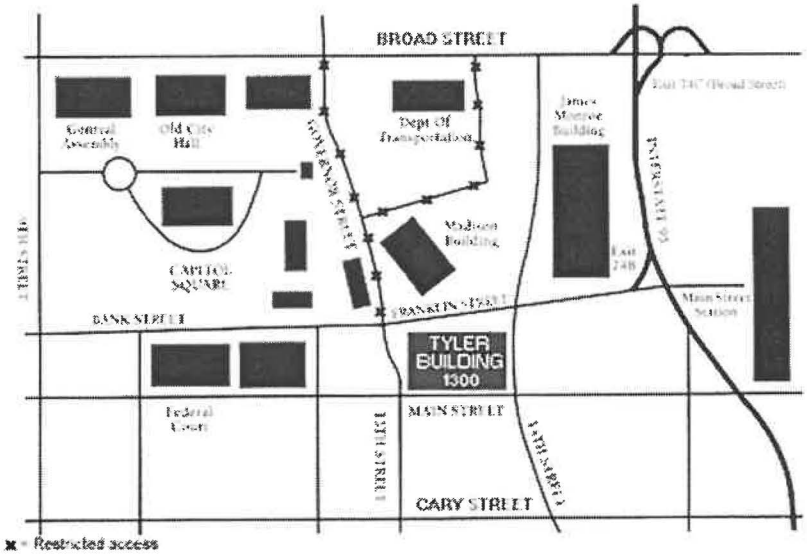
Approaching Richmond from the North: Take I-95 South into Richmond. Take the Franklin Street exit (74B). At the end of the exit ramp, take a right, drive two blocks. The Tyler Building is on the left - between Main and Bank streets.

Approaching Richmond from the South: Take I-95 North into Richmond. After crossing the James River, take the Broad Street Exit (74C). Stay in right lane onto ramp to 17th Street. Follow 17th Street to Broad Street intersection. Take a right on Broad Street and get in left lane. Make a left on 14th Street. Go two blocks. Take a right on Main Street. Tyler Building is on the right at the corner of 13th and Main.

Approaching Richmond from the East: Take I-64 West to Richmond. Exit onto I-95 South, stay in right lane to the Franklin Street Exit (74B). At the end of the exit ramp, take a right, drive two blocks. The Tyler Building is on the left - between Main and Bank streets.

Approaching Richmond from the West: Take I-64 East to I-95 South into Richmond. Take the Franklin Street exit (74B). At the end of the exit ramp, take a right, drive two blocks. The Tyler Building is on the left - between Main and Bank streets.

From the RMA Downtown Expressway (Rt. 195):- Take Rt. 195 South into Richmond (through 50-cent toll), and take the 7th/9th Street exit. After exiting, stay in left lane and take first left onto 7th Street. Go two blocks and take right onto Cary Street. Tum left on 14th Street. Go one block and tum left on Main Street. The Tyler Building is on the right at the corner of 13th and Main.



Directions to Virginia Workers' Compensation Commission:

Address: 333 E Franklin Street, Richmond VA 23219

Approaching Richmond from the North: From I-95 South, take exit 75 towards I-64 East. Merge onto N. 3rd Street toward Coliseum/Convention Center. Turn left onto E. Franklin Street.

Approaching Richmond from the South: From I-95 North merge onto VA-195 via exit 74A. Take the exit toward US-1/US-301/Belvidere Street. Turn right onto S. Adams Street, then turn right onto W. Cary Street. Turn left on S. 2nd Street, then right on E. Franklin Street.

Approaching Richmond from the East: From I-64 West, take exit 190 towards 5th Street/Downtown/Coliseum. Keep straight onto 5th Street. Turn right onto E. Grace Street. Turn left onto N. 3rd Street, then take the first left onto E. Franklin Street.

Approaching Richmond from the West: From I-64 East, take exit 75 towards Williamsburg/Norfolk. Merge onto N 3rd Street toward Coliseum/Convention Center. Turn left onto E. Franklin Street.

VWC Parking Information

Virginia State Bar Disciplinary Board Hearing Schedule

July 16, 2019

Legend: ***Lay Member; Bold: Definite Dates; Unbold: Tentative Dates**

AUGUST 2019

Date & Location:	**August 23, 2019 – Workers' Compensation Commission – Courtroom 1**		
Panel:	Beverly, Bloom*, Daniel, Grady, Feeley		
Unavailable:	Gogal, Scott	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:	**John Good Jr**	***Clerk:***	
Bar Counsel:	**Prescott Prince**	✍	
Docket No(s).:	**19-060-113221,19-060-113987,19-060-114295**	**PHCC:**	**8/14/19 @9:30am**
Case Type(s):	**Misconduct**		

Date & Location:	**August 23, 2019 - State Corporation Commission – Courtroom A**		
Panel:	Havrilak, Goodman*, Cox, Sobey, Novey		
Unavailable:	Gogal, Scott	***Resp. Counsel:***	Leslie Haley
Conflicts:		***GAL***	
Respondent:	**Glenn Cameron Alexander**	***Clerk:***	**Debbie**
Bar Counsel:	**Katie Uston**	✍	
Docket No(s).:	**17-042-108212**	**PHCC:**	**8/2/19 @ 9:00am**
Case Type(s):	**Misconduct**		

Date & Location:	**August 23, 2019, 2019 - State Corporation Commission – Courtroom B**		
Panel:	Gibney, Wannall*, King, Lannetti, Whittington		
Unavailable:	Gogal, Scott	***Resp. Counsel:***	**Marvin Miller**
Conflicts:		***GAL***	
Respondent:	**Barry Ray Taylor**	***Clerk:***	
Bar Counsel:	**Christine Corey**	✍	
Docket No(s).:	**16-022-104365, 16-022-104887, 18-022-111398**	**PHCC**	**8/14/19 @ 2:30pm**
Case Type(s):	**Misconduct**		

SEPTEMBER 2019

Date & Location:	**September 27, 2019 – Workers' Compensation Commission – Courtroom 1**		
Panel:	Havrilak, Bloom*, King, Feeley, Lannetti		
Unavailable:	Whittington, Beverly	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:	**Paul G. Watson, IV**	***Clerk:***	
Bar Counsel:	**Brent Saunders**	✍	
Docket No(s).:	**18-022-109297,18-022-109873,18-022-111481,18-022-111852**	**PHCC:**	**9/17/19 @9:00am**
Case Type(s):	**Misconduct**		

Respondent:	**Justin Torres**	***Clerk:***	
Bar Counsel:	**Brent Saunders**	✍	
Docket No(s).:	**19-000-114709**	**PHCC**	
Case Type(s):	**Criminal Conviction**		

Date & Location:	**September 27, 2019 – State Corporation Commission – Courtroom A**		
Panel:	Scott, Stephenson*, Grady, Davis, Novey		
Unavailable:	Whittington, Beverly	***Resp. Counsel:***	Gregory Wade
Conflicts:		***GAL***	
Respondent:	Craig Baumann	***Clerk:***	
Bar Counsel:	Kathleen Uston	✍	
Docket No(s).:	17-042-108422	***PHCC:***	
Case Type(s):	District Committee Appeal		

Respondent:	**Jerry Mack Douglas**	***Clerk:***	
Bar Counsel:	**Laura Booberg**	✍	
Docket No(s).:	**19-000-114086**	**PHCC:**	
Case Type(s):	**Criminal Conviction**		

SEPTEMBER 2019 cont.

Date & Location:	**September 27, 2019 - State Corporation Commission – Courtroom B**		
Panel:	Gibney, Wannall*, Gogal, Rohrstaff, Daniel		
Unavailable:	Whittington, Beverly	***Resp. Counsel:***	
Conflicts:	*Beverly*	***GAL***	
Respondent:	**Marc Ericson Darnell**	***Clerk:***	
Bar Counsel:	**Christine Corey**	✍	
Docket No(s).:	**18-010-109107,110173,110371,112242**	**PHCC**	**9/18/19 @9:00am**
Case Type(s):	**Misconduct**		

OCTOBER 2019

Date & Location:	**October 25, 2019 – Workers' Compensation Commission – Courtroom 1**		
Panel:	Gibney, Wannall*, Scott, King, Novey		
Unavailable:	Lannetti, Goodman, Bloom	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:	**John B. Russell Jr**	***Clerk:***	
Bar Counsel:	**Laura Booberg**	✍	
Docket No(s).:	**18-032-110165, 18-032-110860, 17-032-108377**	**PHCC:**	**10/16/19 @10:00am**
Case Type(s):	**Misconduct**		

Date & Location:	**October 25, 2019 – State Corporation Commission – Courtroom A**		
Panel:	Havrilak, Douthat*, Rohrstaff, Sobey, Gogal		
Unavailable:	Lannetti, Goodman, Bloom	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:	**Jordan Jones Hays**	***Clerk:***	
Bar Counsel:	**Paulo Franco**	✍	
Docket No(s).:	**19-080-113789**	**PHCC:**	**10/17/19 @10:00am**
Case Type(s):	**Misconduct**		

Respondent:	**Bradley Field**	***Clerk:***	
Bar Counsel:	**Ed Dillon**	✍	
Docket No(s).:	**19-000-112903**	**PHCC:**	
Case Type(s):	**Criminal Conviction**		

Date & Location:	**October 25, 2019 - State Corporation Commission – Courtroom B**		
Panel:	Beverly, Stephenson*, Grady, Davis, Whittington		
Unavailable:	Lannetti, Goodman, Bloom	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:	**Ellen Lynch**	***Clerk:***	
Bar Counsel:	**Katie Uston**	✍	
Docket No(s).:	**18-051-112300**	**PHCC**	**10/16/19 @9:00a.m.**
Case Type(s):	**Misconduct**		

NOVEMBER 2019

Date & Location:	**November 15, 2019 – Workers' Compensation Commission – Courtroom 1**		
Panel:	Beverly, Goodman*, Whittington, Grady, Gogal		
Unavailable:	Wannall	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:		***Clerk:***	
Bar Counsel:		✍	
Docket No(s).:		**PHCC:**	
Case Type(s):			

Date & Location:	**November 15, 2019 – State Corporation Commission – Courtroom A**		
Panel:	Gibney, Bloom*, Daniel, King, Feeley		
Unavailable:	Wannall	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:		***Clerk:***	
Bar Counsel:		✍	
Docket No(s).:		**PHCC:**	
Case Type(s):			

Date & Location:	**November 15, 2019 - State Corporation Commission – Courtroom B**		
Panel:	Havrilak, Stephenson*, Cox, Scott, Sobey		
Unavailable:	Wannall	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:		***Clerk:***	
Bar Counsel:		✍	
Docket No(s).:		**PHCC**	
Case Type(s):			

DECEMBER 2019

Date & Location:	**December 6, 2019 – Workers' Compensation Commission – Courtroom 1**		
Panel:	Scott, Stephenson*, Feeley, Cox, Daniel		
Unavailable:	Whittington, Gibney, Grady	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:		***Clerk:***	
Bar Counsel:		✍	
Docket No(s).:		**PHCC:**	
Case Type(s):			

Date & Location:	**December 6, 2019 – State Corporation Commission – Courtroom A**		
Panel:	Beverly, Wannall*, Davis, Novey, Lannetti		
Unavailable:	Whittington, Gibney. Grady	***Resp. Counsel:***	**Timothy Battle**
Conflicts:		***GAL***	
Respondent:	**Alfred Robertson Jr.**	***Clerk:***	
Bar Counsel:	**Katie Uston**	✍	
Docket No(s).:	**18-042-110577, 19-042-110580**	**PHCC:**	**11/26/19 @9:30am**
Case Type(s):	**Misconduct**		

Date & Location:	**December 6, 2019 - State Corporation Commission – Courtroom B**		
Panel:	Havrilak, Goodman*, Rohrstaff, Sobey, Gogal		
Unavailable:	Whittington, Gibney, Grady	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:		***Clerk:***	
Bar Counsel:		✍	
Docket No(s).:		**PHCC**	
Case Type(s):			

JANUARY 2020

Date & Location:	**January 24, 2020 – Workers' Compensation Commission – Courtroom 1**		
Panel:			
Unavailable:	Feeley, Whittington, Beverly, Gogal	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:		***Clerk:***	
Bar Counsel:		✍	
Docket No(s).:		**PHCC:**	
Case Type(s):			

Date & Location:	**January 24, 2020 – State Corporation Commission – Courtroom A**		
Panel:	Gibney, Wannall*, King, Novey, Rohrstaff		
Unavailable:	Feeley, Whittington, Beverly, Gogal	***Resp. Counsel:***	Timothy Battle
Conflicts:		***GAL***	
Respondent:	David Colin Jones, Jr	***Clerk:***	
Bar Counsel:	Katie Uston	✍	
Docket No(s).:	19-051-114067	**PHCC:**	
Case Type(s):	Misconduct		

Date & Location:	**January 24, 2020 - State Corporation Commission – Courtroom B**		
Panel:	Havrilak, Bloom*, Lannetti, Sobey, Scott		
Unavailable:	Feeley, Whittington, Beverly, Gogal	***Resp. Counsel:***	
Conflicts:		***GAL***	
Respondent:		***Clerk:***	
Bar Counsel:		✍	
Docket No(s).:		**PHCC**	
Case Type(s):			

Unscheduled Active Cases

Respondent:	[redacted]	***Resp. Counsel***	
Bar Counsel:	[redacted]		
Docket No(s).:	[redacted]		
Case Type(s)	[redacted]		

Respondent:	Katina C. Whitfield	***Resp. Counsel***	
Bar Counsel:	Renu Brennan		
Docket No(s).:	19-03-112732		
Case Type(s)	Misconduct		

Respondent:	Cynthia Ann King	***Resp. Counsel***	
Bar Counsel:	Brent Saunders		
Docket No(s).:	18-021-107966, 18-021-110809, 18-021-112030		
Case Type(s)	Misconduct		

Respondent:	James McMurray Johnson	***Resp. Counsel***	
Bar Counsel:	Scott Prince		
Docket No(s).:	19-060-113652		
Case Type(s)	Misconduct		

VIRGINIA STATE BAR
POST COMMITTEE
DOCKET

07/01/2019 - 08/09/2019

Pri	Docket Number	Respondent	Attorney	Date Received	Certified Date	Hearing Date
			Circuit Court - Awaiting Trial			
2	17-010-108035	Weisbrod	Corey	01/03/2017	06/21/2019	TBA
2	17-010-109004	Weisbrod	Corey	04/10/2017	06/21/2019	TBA
1	18-010-110420	Farthing	Saunders	09/11/2017	04/01/2019	11/12/2019
2	18-010-111053	Weisbrod	Corey	11/27/2017	06/21/2019	TBA
2	18-010-111831	Weisbrod	Corey	02/22/2018	06/21/2019	TBA
1	18-010-112146	Weisbrod	Corey	03/27/2018	06/21/2019	TBA
			Disciplinary Board - Awaiting Trial			
2	16-022-104365	Taylor	Corey	11/03/2015	03/19/2019	08/23/2019
1	16-022-104887	Taylor	Corey	01/04/2016	03/19/2019	08/23/2019
2	17-032-108377	Russell	Booberg	02/07/2017	05/10/2019	10/25/2019
2	17-042-108212	Alexander	Uston	01/18/2017	02/08/2019	08/23/2019
2	18-010-109107	Darnell	Corey	04/18/2017	04/01/2019	09/27/2019
2	18-010-110173	Darnell	Corey	08/15/2017	04/01/2019	09/27/2019
2	18-010-110371	Darnell	Corey	09/06/2017	04/01/2019	09/27/2019
2	18-010-112242	Darnell	Corey	04/09/2018	04/01/2019	09/27/2019
2	18-021-107996	King	Saunders	12/28/2016	06/28/2019	TBA
2	18-021-110809	King	Saunders	10/06/2017	06/28/2019	TBA
2	18-021-112030	King	Saunders	03/12/2018	06/28/2019	TBA
2	18-022-109297	Watson	Saunders	05/09/2017	03/25/2019	09/27/2019
2	18-022-109873	Watson	Saunders	07/13/2017	03/25/2019	09/27/2019
1	18-022-111398	Taylor	Corey	01/03/2018	03/19/2019	08/23/2019
2	18-022-111481	Watson	Saunders	01/16/2018	03/25/2019	09/27/2019
2	18-022-111852	Watson	Saunders	02/23/2018	03/25/2019	09/27/2019
2	18-032-110165	Russell	Booberg	08/11/2017	05/10/2019	10/25/2019
2	18-032-110860	Russell	Booberg	10/30/2017	05/10/2019	10/25/2019
2	18-042-110577	Robertson	Uston	09/26/2017	05/07/2019	12/06/2019
2	18-042-110580	Robertson	Uston	09/26/2017	05/07/2019	12/06/2019
2	18-051-112300	Lynch	Uston	04/16/2018	04/09/2019	10/25/2019
1	18-060-111833	Keeve	Prince	02/22/2018	10/15/2018	TBA
2	19-031-112732	Whitfield	Brennan	06/01/2018	06/28/2019	TBA
2	19-051-108422	Baumann	Uston	02/09/2017		09/27/2019
2	19-051-114067	Jones	Uston	11/06/2018	06/04/2019	01/24/2020
2	19-060-113221	Good	Prince	08/02/2018	05/06/2019	08/23/2019
1	19-060-113987	Good	Prince	10/25/2018	05/06/2019	08/23/2019
1	19-060-114295	Good	Prince	12/06/2018	05/06/2019	08/23/2019
2	19-080-113789	Hays	Franco	10/04/2018	06/03/2019	10/25/2019
			Disciplinary Board - Closed (Discipline Imposed)			
1	18-070-112538	Spitler	Franco	05/09/2018	01/28/2019	05/17/2019
			Disciplinary Board - Crime, conviction Summary Suspension - Awaiting Show Cause			
1	19-000-112903	Field	Dillon	06/22/2018		10/25/2019
			Disciplinary Board - Crime, guilty plea Summary Suspension - Awaiting Show Cause			

07/01/2019 - 08/09/2019

Pri	Docket Number	Respondent	Attorney	Date Received	Certified Date	Hearing Date
1	19-000-114086	Douglas	Booberg	11/09/2018		09/27/2019
1	19-000-114709	Torres	Saunders	02/04/2019		09/27/2019
			Disciplinary Board - Failure to fulfill terms - Awaiting Trial			
1	19-000-116040	Kmetz	Corey	06/25/2019		TBA
			Disciplinary Board - Failure to notify for suspension or revocation - Awaiting Trial			
1	19-000-114710	Breneman	Booberg	02/04/2019		TBA
1	19-000-114711	Breneman	Booberg	02/04/2019		TBA
			Disciplinary Board - Impairment - Awaiting Impairment, determination			
1	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
			Disciplinary Board - Impairment - Awaiting Impairment, order medical examination and/or relea			
1	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
			Disciplinary Board - Impairment Granted- Order Received			
1	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
			Disciplinary Board - Reciprocal Disciplinary Suspension w/Terms- Order Received			
0	19-000-115574	Gonzalez	Brennan	05/09/2019		06/28/2019
			Disciplinary Board - Reciprocal Granted- Order Received			
1	18-000-111641	Song	Booberg	02/02/2018		06/28/2019
			Disciplinary Board - Reinstatement Denied- Needs Order			
1	18-000-112748	Tribbey	Booberg	06/05/2018		06/28/2019
			Disciplinary Board - Revocation- Needs Order			
2	18-052-111817	Ghobadi	Shoenfeld	02/21/2018	10/19/2018	06/28/2019
2	18-052-112490	Ghobadi	Shoenfeld	05/03/2018	10/19/2018	06/28/2019
			VA Supreme Court - Awaiting Order - Appeal			
2	15-033-100800	Morrissey	Davis	10/01/2014	01/03/2017	03/30/2018
2	15-033-102037	Morrissey	Davis	02/23/2015	01/03/2017	03/30/2018
1	16-033-104333	Morrissey	Corey	10/30/2015	07/31/2017	03/30/2018

VIRGINIA STATE BAR
POST COMMITTEE
DOCKET

07/01/2019 - 08/09/2019

Pri	Docket Number	Respondent	Attorney	Date Received	Certified Date	Hearing Date
2	17-010-108850	Ayer	Corey	03/23/2017	09/04/2018	02/15/2019
2	17-010-108870	Ayer	Corey	03/23/2017	09/04/2018	02/15/2019
2	17-010-109322	Ayer	Corey	05/12/2017	09/04/2018	02/15/2019
2	18-010-110422	Ayer	Corey	09/11/2017	09/04/2018	02/15/2019
1	18-032-110445	Daniel	Shoenfeld	09/14/2017	09/20/2018	02/22/2019
2	18-032-111046	Daniel	Shoenfeld	11/17/2017	09/20/2018	02/22/2019
1	18-032-111733	Daniel	Shoenfeld	02/12/2018	09/20/2018	02/22/2019

Additional info.
Phone: (804) 775-0539
Email: clerk@vsb.org
Clerk: DaVida M. Davis

Virginia State Bar
Public Disciplinary Hearings

Updated July 16, 2019

Public access to disciplinary records is governed by Part 6, §IV, ¶13-30 of the Rules of the Virginia Supreme Court

DISTRICT COMMITTEE HEARINGS

ATTORNEY	DOCKET NUMBER	HEARING DATE & TIME	HEARING LOCATION
Baumann, Craig Edward Alexandria, VA	18-042-110663	Continued	United States Bankruptcy Courthouse 200 South Washington St., Alexandria, VA 22314

CONFERENCE CALL HEARINGS

ATTORNEY	DOCKET NUMBER	HEARING DATE & TIME	CONTACT

DISCIPLINARY BOARD HEARINGS

ATTORNEY	DOCKET NUMBER	HEARING DATE & TIME	HEARING LOCATION	CASE TYPE
Alexander, Glenn Cameron Alexandria, VA	17-042-108212	August 23, 2019 9:00 a.m.	State Corporation Commission, Courtroom A, Richmond, VA	Misconduct
Baumann, Craig Edward Alexandria, VA	19-051-108422	September 27, 2019 9:00 a.m.	State Corporation Commission, Courtroom A, Richmond, VA	Appeal of a District Committee Determination
Darnell, Marc Ericson Newport News, VA	18-010-109107 18-010-110371 18-010-110173 18-010-112242	September 27, 2019 9:00 a.m.	State Corporation Commission, Courtroom B Richmond, VA	Misconduct

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Virginia State Bar
Public Disciplinary Hearings

Updated July 16, 2019

Douglas, Jr., Jerry M. Virginia Beach, VA	19-000-114086	September 27, 2019 9:00 a.m.	State Corporation Commission, Courtroom A, Richmond, VA	Criminal Conviction
Field, Bradley Harlan Malibu, CA	19-000-112903	October 25, 2019 9:00 a.m.	State Corporation Commission, Courtroom A, Richmond, VA	Criminal Conviction
Good, John James, Jr. Stafford, VA	19-060-113221 19-060-113987 19-060-114295	August 23, 2019 9:00 a.m.	Workers' Compensation Commission, Courtroom 1, Richmond, VA	Misconduct
Hays, Jordan Jones Staunton, VA	19-080-113789	October 25, 2019 9:00 a.m.	State Corporation Commission, Courtroom A, Richmond, VA	Misconduct
Jones Jr., David Colin Fairfax, VA	19-051-114067	January 24, 2020 9:00 a.m.	State Corporation Commission, Courtroom A, Richmond, VA	Misconduct
Keeve., Jr. Vernon Fredericksburg, VA	18-060-111833	Continued	To Be Scheduled	Misconduct
Lynch, Ellen Mary Washington, DC	18-051-112300	October 25, 2019 9:00 a.m.	State Corporation Commission, Courtroom B, Richmond, VA	Misconduct
Robertson, Jr., Alfred Lincoln Springfield, VA	18-042-110577 18-042-110580	December 6, 2019 9:00 a.m.	State Corporation Commission, Courtroom A, Richmond, VA	Misconduct
Russell, Jr., John B. Midlothian, VA	18-032-110165 18-032-110860 17-032-108377	October 25, 2019 9:00 a.m.	Workers' Compensation Commission, Courtroom 1, Richmond, VA	Misconduct
Taylor, Barry Ray Chesapeake, VA	16-022-104365 16-022-104887 18-022-111398	August 23, 2019 9:00 a.m.	State Corporation Commission, Courtroom B Richmond, VA	Misconduct
Torres, Justin Alan Alexandria, VA	19-000-114709	September 27, 2019 9:00 a.m.	State Corporation Commission, Courtroom A, Richmond, VA	Criminal Conviction
Watson IV, Paul Granville Eastville, VA	18-022-109297 18-022-109873 18-022-111481 18-022-111852	September 27, 2019 9:00 a.m.	Workers' Compensation Commission, Courtroom 1, Richmond, VA	Misconduct

Additional info.
Phone: (804) 775-0539
Email: clerk@vsb.org
Clerk: DaVida M. Davis

Virginia State Bar
Public Disciplinary Hearings

Updated July 16, 2019

THREE-JUDGE CIRCUIT COURT HEARINGS

ATTORNEY	DOCKET NUMBER	HEARING DATE & TIME	HEARING LOCATION	CASE TYPE
Farthing, Philip P. Norfolk, VA	18-010-110420	November 12 and 13, 2019 9:00 a.m.	Norfolk Circuit Court Courtroom 6A 7th Floor 150 St. Paul's Boulevard Norfolk, VA	Misconduct

DISCIPLINARY MATTERS TO BE SCHEDULED FOR BOARD HEARING

ATTORNEY	DOCKET NUMBER	STATUS	TYPE OF CASE
Johnson, James McMurray Woodbridge, VA 22192	19-060-113652	To Be Scheduled	Misconduct
King, Cynthia Ann Virginia Beach, VA	18-021-107996 18-021-110809 18-021-112030	To Be Scheduled	Misconduct
Reid, Neal Orion Richmond, VA	19-031-113956	To Be Scheduled	Misconduct
Whitfield, Katina C. Chesterfield, VA	19-031-112732	To Be Scheduled	Misconduct

DISCIPLINARY MATTERS TO BE SCHEDULED FOR CIRCUIT COURT HEARING

ATTORNEY	DOCKET NUMBER	STATUS	TYPE OF CASE
Weisbrod, Stephen John Hampton, VA	17-010-108035 17-010-109004 18-010-111053 18-010-111831 18-010-112146	To Be Scheduled	Misconduct

Additional info.
Phone: (804) 775-0539
Email: clerk@vsb.org
Clerk: DaVida M. Davis

Virginia State Bar
Public Disciplinary Hearings

Updated July 16, 2019

DISCIPLINARY BOARD COURTROOM LOCATIONS

State Corporation Commission, Courtrooms A and B, Tyler Building, 1300 East Main Street, Richmond, VA 23219

Virginia Workers' Compensation Commission, 333 E. Franklin Street, Richmond, Virginia 23219

TYPES OF CASES

Misconduct – Complaints and Charges of Misconduct certified to the Disciplinary Board by a Subcommittee or a District Committee

Criminal Conviction – Any offense declared to be a felony by federal or state law; Any other offense involving theft, fraud, forgery, extortion, bribery, or perjury; An attempt, solicitation or conspiracy to commit any of the foregoing; Any of the foregoing found by a foreign jurisdiction.

Reciprocal – Disbarment or Suspension in another jurisdiction

Expedited Petition – Expedited Charges of Misconduct Appeals –

Appeals of a District Committee Determination

Reinstatement – Petitions for the Reinstatement of a License after Disbarment

RESA – Violations of the Virginia Real Estate Settlement Act

Hearings of impairment matters are not public.

Hearing dates and times frequently change as a result of continuances, consent to the revocation of bar licenses, or settlement by means of an agreed disposition. The Disciplinary Board or a three-judge circuit court panel has the authority to consider an agreed disposition prior to a trial date. These proceedings are usually held by telephone conferences and are open to the public.

HOTEL RATES

MAY 31, 2019

Please note the following rates for Disciplinary Board Members traveling to Richmond on State Bar business. VSB Policy, if necessary, allows for the current state rate of $147.00 + tax. VSB will reimburse up to $249.17 plus tax. The current mileage reimbursement rate is $0.58 cents per mile.

DOWNTOWN

Commonwealth Park Hotel 901 Bank Street Richmond, VA 23219 Telephone: (804) 343-7300 -Single Rate = $147 + taxes, based on availability Valet Package: $25.00 + tax ($26.33 total)	**Berkeley Hotel** 1200 East Cary Street Richmond, VA 23219 Telephone: (804) 780-1300 -Single Rate = $189.00 to $229.00 + taxes Thu to Mon) (Government rate $147.00 – requires government ID.)
Hampton Inn & Suites/Homewood Suites (Two hotels share the same building.) 700 E. Main St. Richmond VA 23219 Telephone: 804-643-5400 -Single/government Rate = $147.00 + taxes, based on availability, requires government I.D.	**Delta Hotels by Marriott Richmond Downtown** 555 E. Canal Street Richmond, VA 23219 Telephone: (804) 788-0900 -Single/government Rate = $147.00 + taxes, based on availability, requires government I.D. A VSB card will suffice. -The on-line reservation link is: www.deltarichmond.com -The VSB Corporate code is: 13296. -**NOTE:** Discount $10.00 parking and shuttle service within 2 miles of the hotel.
Marriott Hotel 500 East Broad Street Richmond, VA 23219 Telephone: (804) 643-3400 -Single/government Rate = $147.00 + taxes, based on availability, requires government I.D.	**Omni Richmond Hotel** 100 South 12th Street Richmond, VA 23210 Telephone: (804) 344-7000 -Single/government Rate = $147.00 + taxes, based on availability, requires government I.D.

Courtyard by Marriott Richmond Downtown
1320 E. Cary Street
Richmond VA 23219
Telephone: 804-754-0007
-Single/government Rate = $147.00 + taxes, based on availability, requires government I.D.

VIRGINIA STATE BAR
VOLUNTEER REIMBURSEMENT VOUCHER GUIDELINES

The Virginia State Bar (VSB) follows the Commonwealth of Virginia Travel Regulations with certain exceptions. Reasonable and necessary travel expenses incurred by committee members attending committee meetings are reimbursable by the Virginia State Bar. This includes mileage or fares, lodging and certain meal expenses; however, alcoholic beverages and spousal expenses are NOT reimbursable. Committee members are encouraged to minimize travel expenses by reducing overnight stays in connection with committee business. To this end, committee chairs are requested to call meetings at such times and in such places that costs of travel by committee members will be held to a minimum.

Travel reimbursement requests should be filed IMMEDIATELY after a meeting. All vouchers received more than 30 days after the completion of the trip must be approved by the Executive Director. Reimbursement requests received more than thirty days after completion of travel may not be honored.

With reasonable notice, arrangements can be made for a committee to use a VSB meeting room. Meetings at "resort" hotels are usually not allowed and must be cleared in advance by the Executive Committee.

Members attending the VSB Annual Meeting held in June at Virginia Beach are expected to pay their own expenses as a part of their professional responsibility. Hence, expenses of members attending committee meetings scheduled immediately before, after or during the Annual Meeting are NOT REIMBURSABLE. This also applies to committee meetings scheduled immediately before, after or during regular meetings of various voluntary state associations (i.e., VBA, VTLA and VADA) and are considered to be held for the convenience of lawyers attending those association meetings. This policy is in accord with that of the American Bar Association and other state bar associations.

Please refer to the attached sample Travel Expense Reimbursement Voucher for details. Travel Vouchers should be typed or handwritten legibly. Travel expense reimbursement vouchers are available from the bar office (Excel spreadsheet or PDF version via e-mail). Send your email request to: huband@vsb.org. **Each day's expenses must be itemized separately on the voucher. You must attach appropriate itemized receipts.** Travel reimbursements will not be made from credit card receipts or statements.

VIRGINIA STATE BAR
VOLUNTEER REIMBURSEMENT VOUCHER
Detailed Instructions

The Virginia State Bar (VSB) follows the Commonwealth of Virginia Travel Regulations with certain exceptions. Since the Virginia State Bar operates entirely on its own revenue, and is a non-Executive Branch agency, some flexibility is allowed in our internal guidelines.

The voucher must be presented for payment within thirty (30) days after completion of travel. All expenses must be reasonable and necessary and related to official VSB business.

The following expenses are reimbursable on the travel voucher:

Mileage: $0.58/mile for travel by personal automobile (eff. 1/1/2019)

Transportation: **ORIGINAL RECEIPTS REQUIRED, PHOTOCOPIES NOT ACCEPTED**; includes necessary train, cab, bus fares. For reimbursement of airline ticket charges, ticket stubs or a hardcopy of the confirmation from an Internet reservation site showing the total cost and confirmed services must be attached to the travel voucher. If you choose to fly to and from a meeting, you will be reimbursed for the most economical means of travel; airfare or mileage, meals, and lodging, whichever is less. Car rental is only allowed in rare cases; contact the VSB Fiscal Office for advance approval.

Lodging: **ORIGINAL RECEIPTS REQUIRED, PHOTOCOPIES NOT ACCEPTED**. State travel regulations set the standard lodging rate at $94 within the state of Virginia. This standard rate may vary for different locations. **Effective 10/1/2018, the standard lodging rate for Richmond city limits is $147.** State guidelines should be followed when possible; otherwise, reimbursement may be allowed for a higher amount, not to exceed 150% of the state approved rates. Please consult your liaison or the Virginia State Bar Fiscal Office for rates in specific locations. Please note that whenever a staff person has established a negotiated rate for a specific event, this rate overrides the standard rate for that area.

Telephone: Personal telephone calls are not a reimbursable expense.

Parking/Tolls/Tips: Must be claimed as "Other Expense"; if parking or toll charge exceeds $20, an original receipt is required. Tolls incurred for using Express Lanes or High Occupancy Toll (HOT) lanes for

convenience purposes are NOT a reimbursable expense. Valet parking is reimbursable only when a special need justifies the expense. Incidental tips for bellman, transportation, parking and other similar travel related services is limited to $10 per day.

Meals: Necessary & reasonable; meal reimbursement is normally allowed only when overnight travel is involved. Reimbursement for meal gratuity is limited to 20% for exceptional service. In order to be reimbursed for meals, you must indicate the time of departure and arrival on your voucher. The following amounts are allowed for meal reimbursement, including taxes and gratuity:

Breakfast	$15
Lunch	$15
Dinner	$35

Snacks are not a reimbursable expense.

If you claim reimbursement for another VSB volunteer in addition to yourself, you must list the names(s) of the individual(s) included.

The following information must be included on the travel voucher (refer to numbers on attached sample copy):

1. Agency – Virginia State Bar
2. Social Security #: – enter social security number of traveler – **required**
3. Name & address of traveler, LAST NAME FIRST
4. State employee? – mark the appropriate box
5. Signature of traveler – **required**
6. Date & explanation – refer to information printed on voucher for required information
7. Purpose of travel – in most cases, check "other" and indicate in the space provided which meeting you attended

Note: On the departure or return day of an overnight trip, meal expenses incurred while traveler is en route may be reimbursed, depending on departure, arrival and travel time. Departure and arrival times must be noted in order to be reimbursed for meal expenses.

All other items will be filled in by the Virginia State Bar Fiscal Office. **Mail the original form and original receipts to the State Bar office (1111 E. Main Street, Suite 700, Richmond, VA 23219-0026). FAXES AND EMAILS ARE NOT ACCEPTABLE.**
Please direct your questions to the State Bar Fiscal Office, (804) 775-0526.

VOLUNTEER REIMBURSEMENT VOUCHER

DEPARTMENT, INSTITUTION, OR AGENCY

1 **Virginia State Bar**

PREPARE WITH INK OR TYPEWRITER. USE ADDITIONAL SHEETS WHEN NECESSARY

3

Name:	
Address:	
City:	
State:	Zip: -
2 Social Security # -	Suffix:

PERSONAL VEHICLE USE STATEMENT - VOLUNTEER

X PERSONAL VEHICLE - COST BENEFICIAL TO THE STATE - PERSONAL MILEAGE RATE

__ STATE VEHICLE - NOT AVAILABLE OR ACCESSIBLE - PERSONAL MILEAGE RATE

__ STATE VEHICLE - AVAILABLE OR NOT REQUESTED - FLEET RATE

I HEREBY CERTIFY THAT EXPENSES LISTED BELOW WERE INCURRED BY ME ON OFFICIAL BUSINESS OF THE COMMONWEALTH OF VIRGINIA AND INCLUDE ONLY SUCH EXPENSES AS WERE NECESSARY IN THE CONDUCT OF BUSINESS.

4 STATE EMPLOYEE? [ ] YES [X] NO

5 SIGNATURE OF TRAVELER | DATE

TITLE

I HEREBY CERTIFY THAT THE TRAVEL UNDERTAKEN IN THIS REIMBURSEMENT VOUCHER HAS BEEN REVIEWED AND APPROVED AS NECESSARY FOR THE CONDUCT OF BUSINESS OF THE COMMONWEALTH.

VA STATE BAR APPROVAL DATE

1. DATE	2. LOCATION AT WHICH EXPENSE WAS INCURRED. POINTS BETWEEN WHICH TRAVEL WAS NECESSARY, METHOD OF TRANSPORTATION USED AND MILEAGE RATE ALLOWED. EACH DAYS EXPENSES MUST BE SHOWN SEPARATELY.	3. MILES TRAVELED	4. MILEAGE AMOUNT		6. MEALS #	6. MEALS AMT.	7. LODGING	8. OTHER (ITEMIZE IN SECOND COLUMN)	AMOUNT
6				x					
				x					
				x					
				x					
				x					
				x					
				x					
				x					
				x					
I certify all computations are correct and that all necessary and required receipts are attached. Initial _____		**TOTALS**		x					

VOUCHER NUMBER | DATE(MMDDYY)

TOTAL SHEET 2

GRAND TOTAL

PURPOSE OF TRIP

7

FOR VIRGINIA STATE BAR USE ONLY

DEPT CC ACCOUNT TASK AMOUNT

Form **W-9**

Commonwealth of Virginia
Substitute W-9 Form

Revised December 2017

Request for Taxpayer Identification Number and Certification

Section 1 -Taxpayer Identification

☐ **Social Security Number (SSN)**

☐ **Employer Identification Number (EIN)**

— — — — — — — — — —

Please select the appropriate Taxpayer Identification Number (EIN or SSN) type and enter your 9 digit ID number . The EIN or SSN provided must match the name given on the "Legal Name" line to avoid backup withholding. If you do not have a Tax ID number, please reference "Specific Instructions - Section 1." If the account is in more than one name, provide the name of the individual who is recognized with the IRS as the responsible party.

Dunn & Bradstreet Universal Numbering System (DUNS) (see instructions)

— — — — — — — — — —

Legal Name:

Business Name:

Entity Type		**Entity Classification**		**Exemptions (see instructions)**
☐ Individual	☐ Corporation	☐ Professional Services	☐ Medical Services	Exempt payee code (if any):
☐ Sole Proprietorship	☐ S-Corporation	☐ Political Subdivision	☐ Legal Services	(from backup withholding)
☐ Partnership	☐ C-Corporation	☐ Real Estate Agent	☐ Joint Venture	
☐ Trust	☐ Disregarded Entity	☐ VA Local Government	☐ Tax Exempt Organization	Exemption from FATCA reporting code (if any):
☐ Estate	☐ Limited Liability Company	☐ Federal Government	☐ OTH Government	
☐ Government	☐ Partnership	☐ VA State Agency	☐ Other	
☐ Non-Profit	☐ Corporation			

Contact Information

Legal Address:

City: State : Zip Code:

Remittance Address:

City: State : Zip Code:

Name:

Email Address:

Business Phone:

Fax Number:

Mobile Phone:

Alternate Phone:

Section 2 - Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or c) the IRS has notified me that I am no longer subject to backup withholding, and
3. I am a U.S. citizen or other U.S. person (defined later in general instructions), and
4. The FATCA code(s) entered on this form (if any) indicating that I am exempt from FATCA reporting is correct.

Certification instructions: You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See instructions titled Certification

Printed Name:

Authorized U.S. Signature:

Date:

Office of the Clerk of the Disciplinary System
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
CLERK'S OFFICE MAIN NUMBER (804) 775-0539

CLERK'S OFFICE PHONE/EMAIL LIST

STAFF	TITLE	PHONE NUMBER	E-MAIL ADDRESS
DaVida M. Davis, "Dee"	Clerk	775-0573	ddavis@vsb.org
Vivian R. Byrd	Deputy Clerk and Clients' Protection Fund Administrator	775-0572	byrd@vsb.org
Bonnie T. Waldeck	Senior Assistant Clerk	775-0527	waldeck@vsb.org
Sandra K. Heinzman	Assistant Clerk	775-0571	sheinzman@vsb.org
Debbie Hunt	Assistant Clerk	775-0558	hunt@vsb.org
John Isom	Administrative Clerk	775-9427	isom@vsb.org
Dianne Roland	Assistant Clerk	775-0513	roland@vsb.org
Louann Weakland	Assistant Clerk	775-0528	weakland@vsb.org

Ex parte Communications

The discussion of the **merits or substance** of a matter with a party **without the other party present** constitutes an **improper *ex parte* communication**. Disciplinary Board members should avoid improper *ex parte* communications or any communication that can reasonably be interpreted as an improper *ex parte* communication. If a Disciplinary Board member gets the impression that a party is attempting to discuss the merits or substance of a matter when the other party is not present, the Board member should inform the party of the prohibition on improper *ex parte* communications.

Even after a panel has issued its order and the matter has been ruled on by the Board or Court, the panel members must avoid discussing the merits of the case with a party to the matter **or anyone else**. Doing otherwise could potentially undermine the integrity of the system if a party interprets a member's statements as inconsistent with the substance of the order.

The Clerk's Office will schedule all conference calls and notify the parties of any orders or rulings.

Dealing with the Press/Media

Board Members sit as judges. Disciplinary board members must refrain from commenting about the substance or merits of a matter assigned to their panels, especially to the press/media. Remember, the deliberations of the Board members are confidential. In fact, Board members should refrain from making public comments on any matter that is pending within the disciplinary system.

Board members should refer press inquiries to the Clerk of the Disciplinary System.

VIRGINIA FREEDOM OF INFORMATION ACT & VIRGINIA PUBLIC RECORDS ACT

I. INTRODUCTION

The VSB and its boards, committees, conferences, employees, and volunteers are subject to both the:

- Virginia Freedom of Information Act (VFOIA), Va. Code § 2.2-3700, *et seq.*, and
- Virginia Public Records Act (PRA), Va. Code §§ 42.1-76-42.1-91.

- VFOIA ensures Virginians access to both:
  a. **public records** in the custody of a public body, its officers, and employees, and
  b. **meetings** of public bodies, wherein public business is conducted.
- PRA governs how long a government entity must **retain** certain records.

II. RECORDS

Records are broadly defined under both VFOIA and the PRA to include all recorded information, whatever the form, **prepared for or used in the transaction of public business**.

a) VFOIA - all writings and recordings prepared or owned by, or in the possession of, a public body or its officers, employees, or agents in the transaction of public business. Va. Code § 2.2-3701.

1. Examples include but are not limited to:

- e-mails,
- text messages,
- handwritten notes,
- typewritten documents,
- electronic files,
- audio, or video recordings,
- CDs,
- emails,
- photographs, or
- any other written or recorded media; and
- Minutes of meetings of public bodies.

Records include **all drafts** and final versions.

b) PRA - recorded information, regardless of physical form, that documents a transaction or activity by or with any public officer, agency, or employee of an agency.

The recorded information is a public record **if it is produced, collected, received, or retained in pursuance of law or in connection with the transaction of public business**.

The medium upon which such information is recorded has no bearing on the determination of whether the recording is a public record.

c) VFOAI Exemptions - under VFOIA, all public records are **open to the public**, unless a specific exemption in law allows the record to be withheld.

The Rules of Court, Part Six, Section IV, Paragraph 13-30 is treated as an exemption to FOIA.

1. Rules of Court, Part Six, Section IV, Paragraph 13-30.A. Confidential Matters.
   - Bar complaints, unless introduced at a public hearing or incorporated in a Charge of Misconduct, when the matter is placed on the public docket, or a Certification.
   - Bar investigations, except Reports of Investigation admitted as exhibits at a public hearing.
   - Impairment proceedings.
   - Notes, memoranda, work product, research of Bar Counsel.
   - Records protected by RPC 1.6.
   - Subcommittee records and proceedings, except determinations imposing public discipline.
   - Deliberations and working papers of the District Committees, Disciplinary Board, and three-judge Circuit Courts.
2. Rules of Court, Part Six, Section IV, Paragraph 13-30. K. Records of the Disciplinary System. In no case shall confidential records of the attorney disciplinary system be subject to subpoena

d) Requests for Information/Records - if you receive any request for information or records in connection with your work with the VSB Disciplinary Board, please contact the Clerk.

1. Much of the work and records generated in the VSB disciplinary system are exempt from production pursuant to the Rules of Court, Part Six,

Section IV, Paragraph 13. This includes all work done regarding disciplinary matters pending before the Board.

2. Documents or meetings which are administrative in nature (annual disciplinary board meeting, board chairs meeting, and new member training, or project work such as the disciplinary board handbook) are not exempt from FOIA.
3. Whether subject to an exemption or not, the VSB must timely, within five business days, respond to any request for production, including citing any appropriate exemption and/or producing the non-exempt records. Accordingly, please contact the Clerk as soon as possible if you receive any request for records.

e) Retention of Records - the Clerk's Office provides the disciplinary records to the Disciplinary Board members and is the official keeper of the record. Your records are duplicates unless you have taken substantive notes and have documents that should be included as part of the work product of the file.

1. If you create a record outside of what is provided to you by the Clerk's Office, please scan or copy it and send it the Clerk's Office so that it can be included in the case file and become part of the official record. (This includes any notes, etc. that you create or records you obtain in your review of a case.)
2. Once you are confident that the Clerk is in possession of any records you have created or obtained outside of what they provided to you, you may destroy your case file.
3. Try not to commingle personal and official e-mails. Private e-mails do not need to be retained; emails relating to the transaction of public business do. When sending e--mails or otherwise acting on behalf of VSB, please be mindful of the fact that you are creating a public record.
4. If you have any questions, please do not hesitate to call the Clerk.

III. MEETINGS

A meeting is defined as **three or more members of the public body**, or a quorum if the public body is less than three members, **where public business is transacted or discussed**, whether or not minutes or votes or taken. To avoid an accidental electronic meeting, please do not e-mail more than one other member about VSB business, and please do not hit reply all if other members of the committee are copied on the e-mail. Please use the "bcc" (blind carbon copy) option when emailing a group.

a) Meetings requirements - VFOIA imposes various requirements for meetings applicable to all public bodies; these include:

1. post notice of meetings at least three working days in advance of the meeting;
2. ensure the meeting is open to the public; and
3. take and preserve minutes.

b) Reminder - be aware there is a distinction between Disciplinary Board hearings and meetings, or e-mail exchanges regarding disciplinary matters as opposed to administrative matters. Hearings and related communications are exempt under Paragraph 13. The annual administrative meeting, Board chairs meeting, Board training, and any administrative meetings, such as communications related to the Disciplinary Board Handbook, are subject to FOIA.

IV. CONCLUSION

For a helpful discussion about this topic and other FOIA questions, please see the attached publications by the Virginia FOIA Council:

- *A Guide to the Virginia Freedom of Information Act for Members of Boards, Councils, Commissions, and other Deliberative Public Bodies*
- *A Guide to the Virginia Public Records Act, E-Mail: Use, Access & Retention*
- *Access to Public Meetings under the Virginia Freedom of Information Act*

Chapter 37 of Title 2.2
The Virginia Freedom of Information Act
(Effective July 1, 2019)

§ 2.2-3700. Short title; policy.
A. This chapter may be cited as "The Virginia Freedom of Information Act."

B. By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law. This chapter shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.

All public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested.

Any ordinance adopted by a local governing body that conflicts with the provisions of this chapter shall be void.

§ 2.2-3701. Definitions.
As used in this chapter, unless the context requires a different meaning:

"Closed meeting" means a meeting from which the public is excluded.

"Electronic communication" means the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities to transmit or receive information.

"Emergency" means an unforeseen circumstance rendering the notice required by this chapter impossible or impracticable and which circumstance requires immediate action.

"Information" as used in the exclusions established by §§ 2.2-3705.1 through 2.2-3705.7, means the content within a public record that references a specifically identified subject matter, and shall not be interpreted to require the production of information that is not embodied in a public record.

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through electronic communication means pursuant to § 2.2-3708.2, as a body or entity, or as an informal

assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (a) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (b) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting, shall be deemed a "meeting" subject to the provisions of this chapter.

"Open meeting" or "public meeting" means a meeting at which the public may be present.

"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers and private police departments as defined in § 9.1-101 shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

"Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, which unit includes two or more localities.

"Scholastic records" means those records containing information directly related to a student or an applicant for admission and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution.

"Trade secret" means the same as that term is defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.).

§ 2.2-3702. Notice of chapter.
Any person elected, reelected, appointed or reappointed to any body not excepted from this chapter shall (i) be furnished by the public body's administrator or legal counsel with a copy of this chapter within two weeks following election, reelection, appointment or reappointment and (ii) read and become familiar with the provisions of this chapter.

§ 2.2-3703. Public bodies and records to which chapter inapplicable; voter registration and election records; access by persons incarcerated in a state, local, or federal correctional facility.
A. The provisions of this chapter shall not apply to:

1. The Virginia Parole Board, except that (i) information from the Virginia Parole Board providing the number of inmates considered by the Board for discretionary parole, the number of inmates granted or denied parole, and the number of parolees returned to the custody of the Department of Corrections solely as a result of a determination by the Board of a violation of parole shall be open to inspection and available for release, on a monthly basis, as provided by § 2.2-3704; (ii) all guidance documents, as defined in § 2.2-4101, shall be public records and subject to the provisions of this chapter; and (iii) all records concerning the finances of the Virginia Parole Board shall be public records and subject to the provisions of this chapter. The information required by clause (i) shall be furnished by offense, sex, race, age of the inmate, and the locality in which the conviction was obtained, upon the request of the party seeking the information. The information required by clause (ii) shall include all documents establishing the policy of the Board or any change in or clarification of such policy with respect to grant, denial, deferral, revocation, or supervision of parole or geriatric release or the process for consideration thereof, and shall be clearly and conspicuously posted on the Board's website. However, such information shall not include any portion of any document reflecting the application of any policy or policy change or clarification of such policy to an individual inmate;

2. Petit juries and grand juries;

3. Family assessment and planning teams established pursuant to § 2.2-5207;

4. Sexual assault response teams established pursuant to § 15.2-1627.4, except that records relating to (i) protocols and policies of the sexual assault response team and (ii) guidelines for the community's response established by the sexual assault response team shall be public records and subject to the provisions of this chapter;

5. Multidisciplinary child sexual abuse response teams established pursuant to § 15.2-1627.5;

6. The Virginia State Crime Commission; and

7. The records maintained by the clerks of the courts of record, as defined in § 1-212, for which clerks are custodians under § 17.1-242, and courts not of record, as defined in § 16.1-69.5, for which clerks are custodians under § 16.1-69.54, including those transferred for storage, maintenance, or archiving. Such records shall be requested in accordance with the provisions of §§ 16.1-69.54:1 and 17.1-208, as

appropriate. However, other records maintained by the clerks of such courts shall be public records and subject to the provisions of this chapter.

B. Public access to voter registration and election records shall be governed by the provisions of Title 24.2 and this chapter. The provisions of Title 24.2 shall be controlling in the event of any conflict.

C. No provision of this chapter or Chapter 21 (§ 30-178 et seq.) of Title 30 shall be construed to afford any rights to any person (i) incarcerated in a state, local or federal correctional facility, whether or not such facility is (a) located in the Commonwealth or (b) operated pursuant to the Corrections Private Management Act (§ 53.1-261 et seq.) or (ii) civilly committed pursuant to the Sexually Violent Predators Act (§ 37.2-900 et seq.). However, this subsection shall not be construed to prevent such persons from exercising their constitutionally protected rights, including, but not limited to, their right to call for evidence in their favor in a criminal prosecution.

§ 2.2-3703.1. Disclosure pursuant to court order or subpoena.
Nothing contained in this chapter shall have any bearing upon disclosures required to be made pursuant to any court order or subpoena. No discretionary exemption from mandatory disclosure shall be construed to make records covered by such discretionary exemption privileged under the rules of discovery, unless disclosure is otherwise prohibited by law.

§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc.
A. Except as otherwise specifically provided by law, all public records shall be open to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall be provided by the custodian in accordance with this chapter by inspection or by providing copies of the requested records, at the option of the requester. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

B. A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of this chapter or to impose the time limits for response by a public body. Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

1. The requested records are being entirely withheld. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

2. The requested records are being provided in part and are being withheld in part. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.

C. Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

D. Subject to the provisions of subsection G, no public body shall be required to create a new record if the record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.

E. Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter.

F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

G. Public records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases are combined or contain exempt and nonexempt records, the public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by

the requester, if that medium is used by the public body in the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation, or compilation of a new public record.

H. In any case where a public body determines in advance that charges for producing the requested records are likely to exceed $200, the public body may, before continuing to process the request, require the requester to agree to payment of a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

J. In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester. Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia shall be the custodian of such permanently archived records and shall be responsible for responding to requests for such records made pursuant to this chapter.

§ 2.2-3704.01. Records containing both excluded and nonexcluded information; duty to redact.
No provision of this chapter is intended, nor shall it be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other provision of law. A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.

§ 2.2-3704.1. Posting of notice of rights and responsibilities by state and local public bodies; assistance by the Freedom of Information Advisory Council.

A. All state public bodies subject to the provisions of this chapter, any county or city, any town with a population of more than 250, and any school board shall make available the following information to the public upon request and shall post a link to such information on the homepage of their respective official public government websites:

1. A plain English explanation of the rights of a requester under this chapter, the procedures to obtain public records from the public body, and the responsibilities of the public body in complying with this chapter. For purposes of this section, "plain English" means written in nontechnical, readily understandable language using words of common everyday usage and avoiding legal terms and phrases or other terms and words of art whose usage or special meaning primarily is limited to a particular field or profession;

2. Contact information for the FOIA officer designated by the public body pursuant to § 2.2-3704.2 to (i) assist a requester in making a request for records or (ii) respond to requests for public records;

3. A general description, summary, list, or index of the types of public records maintained by such public body;

4. A general description, summary, list, or index of any exemptions in law that permit or require such public records to be withheld from release;

5. Any policy the public body has concerning the type of public records it routinely withholds from release as permitted by this chapter or other law; and

6. The following statement: "A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen as set forth in subsection F of § 2.2-3704 of the Code of Virginia."

B. Any state public body subject to the provisions of this chapter and any county or city, and any town with a population of more than 250, shall post a link on its official public government website to the online public comment form on the Freedom of Information Advisory Council's website to enable any requester to comment on the quality of assistance provided to the requester by the public body.

C. The Freedom of Information Advisory Council, created pursuant to § 30-178, shall assist in the development and implementation of the provisions of subsection A, upon request.

§ 2.2-3704.2. Public bodies to designate FOIA officer.

A. All state public bodies, including state authorities, that are subject to the provisions of this chapter and all local public bodies that are subject to the provisions of this chapter, shall designate and publicly identify one or more Freedom of Information Act officers (FOIA officer) whose responsibility is to serve as a point of contact for members of the public in requesting public records and to coordinate the public body's compliance with the provisions of this chapter.

B. For such state public bodies, the name and contact information of the public body's FOIA officer to whom members of the public may direct requests for public records and who will oversee the public body's compliance with the provisions of this chapter shall be made available to the public upon request and be posted on the respective public body's official public government website at the time of designation and maintained thereafter on such website for the duration of the designation.

C. For such local public bodies, the name and contact information of the public body's FOIA officer to whom members of the public may direct requests for public records and who will oversee the public body's compliance with the provisions of this chapter shall be made available in a way reasonably calculated to provide notice to the public, including posting at the public body's place of business, posting on its official public government website, or including such information in its publications.

D. For the purposes of this section, local public bodies shall include constitutional officers.

E. Any such FOIA officer shall possess specific knowledge of the provisions of this chapter and be trained at least annually by legal counsel for the public body or the Virginia Freedom of Information Advisory Council (the Council) or through an online course offered by the Council. Any such training shall document that the training required by this subsection has been fulfilled.

F. The name and contact information of a FOIA officer trained by legal counsel of a public body shall be (i) submitted to the Council by July 1 of each year on a form developed by the Council for that purpose and (ii) updated in a timely manner in the event of any changes to such information.

G. The Council shall maintain on its website a listing of all FOIA officers, including name, contact information, and the name of the public body such FOIA officers serve.

§ 2.2-3704.3. (Effective July 1, 2020) Training for local officials.
A. The Virginia Freedom of Information Advisory Council (the Council) or the local government attorney shall provide online training sessions for local elected officials on the provisions of this chapter.

B. Each local elected official shall complete a training session described in subsection A within two months after assuming the local elected office and thereafter at least once during each consecutive period of two calendar years commencing with the date on which he last completed a training session, for as long as he holds such office. No penalty shall be imposed on a local elected official for failing to complete a training session.

C. The clerk of each governing body or school board shall maintain records indicating the names of elected officials subject to the training requirements in subsection B and the dates on which each such official completed training sessions satisfying such requirements. Such records shall be maintained for five years in the office of the clerk of the respective governing body or school board.

§ 2.2-3705. Repealed.
Repealed by Acts 2004, c. 690.

§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Personnel information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such information shall be disclosed. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107.

No provision of this chapter or any provision of Chapter 38 (§ 2.2-3800 et seq.) shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1; (ii) records of the name, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subdivision, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is $10,000 or less.

2. Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other information protected by the attorney-client privilege.

3. Legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting under § 2.2-3711.

4. Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by a public body.

As used in this subdivision, "test or examination" shall include (a) any scoring key for any such test or examination and (b) any other document that would jeopardize the security of the test or examination. Nothing contained in this subdivision shall prohibit the release of test scores or results as provided by law, or limit access to individual records as provided by law. However, the subject of such employment tests shall be entitled to review and inspect all records relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered

to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

5. Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711. However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting.

6. Vendor proprietary information software that may be in the public records of a public body. For the purpose of this subdivision, "vendor proprietary information software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

7. Computer software developed by or for a state agency, public institution of higher education in the Commonwealth, or political subdivision of the Commonwealth.

8. Appraisals and cost estimates of real property subject to a proposed purchase, sale, or lease, prior to the completion of such purchase, sale, or lease.

9. Information concerning reserves established in specific claims administered by the Department of the Treasury through its Division of Risk Management as provided in Article 5 (§ 2.2-1832 et seq.) of Chapter 18, or by any county, city, or town; and investigative notes, correspondence and information furnished in confidence with respect to an investigation of a claim or a potential claim against a public body's insurance policy or self-insurance plan. However, nothing in this subdivision shall prevent the disclosure of information taken from inactive reports upon expiration of the period of limitations for the filing of a civil suit.

10. Personal contact information furnished to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information. However, access shall not be denied to the person who is the subject of the record. As used in this subdivision, "personal contact information" means the information provided to the public body for the purpose of receiving electronic mail from the public body and includes home or business (i) address, (ii) email address, or (iii) telephone number or comparable number assigned to any other electronic communication device.

11. Communications and materials required to be kept confidential pursuant to § 2.2-4119 of the Virginia Administrative Dispute Resolution Act (§ 2.2-4115 et seq.).

12. Information relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such information would adversely affect the bargaining position or negotiating strategy of the public body. Such information shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of information relating to such transactions shall be governed by the Virginia Public Procurement Act.

13. Account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. However, access shall not be denied to the person who is the subject of the information. For the purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, savings and loan companies or associations, and credit unions.

§ 2.2-3705.2. Exclusions to application of chapter; records relating to public safety.
The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Confidential information, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses.

2. Information that describes the design, function, operation, or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.

3. Information that would disclose the security aspects of a system safety program plan adopted pursuant to Federal Transit Administration regulations by the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency; and information in the possession of such agency, the release of which would jeopardize the success of an ongoing investigation of a rail accident or other incident threatening railway safety.

4. Information concerning security plans and specific assessment components of school safety audits, as provided in § 22.1-279.8.

Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the effectiveness of security plans after (i) any school building or property has been subjected to fire, explosion, natural disaster, or other catastrophic event or (ii) any person on school property has suffered or been threatened with any personal injury.

5. Information concerning the mental health assessment of an individual subject to commitment as a sexually violent predator under Chapter 9 (§ 37.2-900 et seq.) of Title 37.2 held by the Commitment Review Committee; except that in no case shall information identifying the victims of a sexually violent predator be disclosed.

6. Subscriber data provided directly or indirectly by a communications services provider to a public body that operates a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system if the data is in a form not made available by the communications services provider to the public generally. Nothing in this subdivision shall prevent the disclosure of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

For the purposes of this subdivision:

"Communications services provider" means the same as that term is defined in § 58.1-647.

"Subscriber data" means the name, address, telephone number, and any other information identifying a subscriber of a communications services provider.

7. Subscriber data collected by a local governing body in accordance with the Enhanced Public Safety Telephone Services Act (§ 56-484.12 et seq.) and other identifying information of a personal, medical, or financial nature provided to a local governing body in connection with a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system if such records are not otherwise publicly available.

Nothing in this subdivision shall prevent the disclosure of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

For the purposes of this subdivision:

"Communications services provider" means the same as that term is defined in § 58.1-647.

"Subscriber data" means the name, address, telephone number, and any other information identifying a subscriber of a communications services provider.

8. Information held by the Virginia Military Advisory Council or any commission created by executive order for the purpose of studying and making recommendations regarding preventing closure or realignment of federal military and national security installations and facilities located in Virginia and relocation of such facilities to Virginia, or a local or regional military affairs organization appointed by a local governing body, that would (i) reveal strategies under consideration or development by the Council or such commission or organizations to prevent the closure or realignment of federal military installations located in Virginia or the relocation of national security facilities located in Virginia, to limit the adverse economic effect of such realignment, closure, or relocation, or to seek additional tenant activity growth from the Department of Defense or federal government or (ii) disclose trade secrets provided to the Council or such commission or organizations in connection with their work.

In order to invoke the trade secret protection provided by clause (ii), the submitting entity shall, in writing and at the time of submission (a) invoke this exclusion, (b) identify with specificity the information for which such protection is sought, and (c) state the reason why such protection is necessary. Nothing in this subdivision shall be construed to prevent the disclosure of all or part of any record, other than a trade secret that has been specifically identified as required by this subdivision, after the Department of Defense or federal agency has issued a final, unappealable decision, or in the event of litigation, a court of competent jurisdiction has entered a final, unappealable order concerning the closure, realignment, or expansion of the military installation or tenant activities, or the relocation of the national security facility, for which records are sought.

9. Information, as determined by the State Comptroller, that describes the design, function, operation, or implementation of internal controls over the Commonwealth's financial processes and systems, and the assessment of risks and vulnerabilities of those controls, including the annual assessment of internal controls mandated by the State Comptroller, if disclosure of such information would jeopardize the security of the Commonwealth's financial assets. However, records relating to the investigation of and findings concerning the soundness of any fiscal process shall be disclosed in a form that does not compromise internal controls. Nothing in this subdivision shall be construed to prohibit the Auditor of Public Accounts or the Joint Legislative Audit and Review Commission from reporting internal control deficiencies discovered during the course of an audit.

10. Information relating to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system that (i) describes the design, function, programming, operation, or access control features of the overall system, components, structures, individual networks, and subsystems of the STARS or any other similar local or regional communications system or (ii) relates to radio frequencies assigned to or utilized by STARS or any other similar local or regional communications system, code plugs, circuit routing, addressing schemes, talk groups, fleet maps, encryption, or programming maintained by or utilized by STARS or any other similar local or regional public safety communications system.

11. Information concerning a salaried or volunteer Fire/EMS company or Fire/EMS department if disclosure of such information would reveal the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties.

12. Information concerning the disaster recovery plans or the evacuation plans in the event of fire, explosion, natural disaster, or other catastrophic event for hospitals and nursing homes regulated by the Board of Health pursuant to Chapter 5 (§ 32.1-123 et seq.) of Title 32.1 provided to the Department of Health. Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the effectiveness of executed evacuation plans after the occurrence of fire, explosion, natural disaster, or other catastrophic event.

13. Records received by the Department of Criminal Justice Services pursuant to §§ 9.1-184, 22.1-79.4, and 22.1-279.8 or for purposes of evaluating threat assessment teams established by a public institution of higher education pursuant to § 23.1-805 or by a private nonprofit institution of higher education, to the extent such records reveal security plans, walk-through checklists, or vulnerability and threat assessment components.

14. Information contained in (i) engineering, architectural, or construction drawings; (ii) operational, procedural, tactical planning, or training manuals; (iii) staff meeting minutes; or (iv) other records that reveal any of the following, the disclosure of which would jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure; or public or private commercial office, multifamily residential, or retail building or its occupants:

a. Critical infrastructure information or the location or operation of security equipment and systems of any public building, structure, or information storage facility, including ventilation systems, fire

protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, or utility equipment and systems;

b. Vulnerability assessments, information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities, or security plans and measures of an entity, facility, building structure, information technology system, or software program;

c. Surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational or transportation plans or protocols; or

d. Interconnectivity, network monitoring, network operation centers, master sites, or systems related to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system.

The same categories of records of any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism, cybersecurity planning or protection, or critical infrastructure information security and resilience. Such statement shall be a public record and shall be disclosed upon request.

Any public body receiving a request for records excluded under clauses (a) and (b) of this subdivision 14 shall notify the Secretary of Public Safety and Homeland Security or his designee of such request and the response made by the public body in accordance with § 2.2-3704.

Nothing in this subdivision 14 shall prevent the disclosure of records relating to (1) the structural or environmental soundness of any such facility, building, or structure or (2) an inquiry into the performance of such facility, building, or structure after it has been subjected to fire, explosion, natural disaster, or other catastrophic event.

As used in this subdivision, "critical infrastructure information" means the same as that term is defined in 6 U.S.C. § 131.

15. Information held by the Virginia Commercial Space Flight Authority that is categorized as classified or sensitive but unclassified, including national security, defense, and foreign policy information, provided that such information is exempt under the federal Freedom of Information Act, 5 U.S.C. § 552.

§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Information relating to investigations of applicants for licenses and permits, and of all licensees and permittees, made by or submitted to the Virginia Alcoholic Beverage Control Authority, the Virginia Lottery, the Virginia Racing Commission, the Department of Agriculture and Consumer Services relating to investigations and applications pursuant to Article 1.1:1 (§ 18.2-340.15 et seq.) of Chapter 8 of Title 18.2, or the Private Security Services Unit of the Department of Criminal Justice Services.

2. Records of active investigations being conducted by the Department of Health Professions or by any health regulatory board in the Commonwealth pursuant to § 54.1-108.

3. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management, to such personnel of any local public body, including local school boards, as are responsible for conducting such investigations in confidence, or to any public institution of higher education. However, nothing in this subdivision shall prevent the disclosure of information taken from inactive reports in a form that does not reveal the identity of charging parties, persons supplying the information, or other individuals involved in the investigation.

4. Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1.

5. Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3900 et seq.) or under any local ordinance adopted in accordance with the authority specified in § 2.2-524, or adopted pursuant to § 15.2-965, or adopted prior to July 1, 1987, in accordance with applicable law, relating to local human rights or human relations commissions. However, nothing in this subdivision shall prevent the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

6. Information relating to studies and investigations by the Virginia Lottery of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ 58.1-4014 through 58.1-4018, (iv) defects in the law or regulations that cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) the use of the lottery as a subterfuge for organized crime and illegal gambling where such information has not been publicly released, published or copyrighted. All studies and investigations referred to under clauses (iii), (iv), and (v) shall be open to inspection and copying upon completion of the study or investigation.

7. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for (i) the Auditor of Public Accounts; (ii) the Joint Legislative Audit and Review Commission; (iii) an appropriate authority as defined in § 2.2-3010 with respect to an allegation of wrongdoing or abuse under the Fraud and Abuse Whistle Blower Protection Act (§ 2.2-3009 et seq.); (iv) the Office of the State Inspector General with respect to an investigation initiated through the Fraud, Waste and Abuse Hotline or an investigation initiated pursuant to Chapter 3.2 (§ 2.2-307 et seq.); (v) internal auditors appointed by the head of a state agency or by any public institution of higher education; (vi) the committee or the auditor with respect to an investigation or audit conducted pursuant to § 15.2-825; or (vii) the auditors, appointed by the local

governing body of any county, city, or town or a school board, who by charter, ordinance, or statute have responsibility for conducting an investigation of any officer, department, or program of such body. Information contained in completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is excluded by this subdivision, the information disclosed shall include the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person. Local governing bodies shall adopt guidelines to govern the disclosure required by this subdivision.

8. The names, addresses, and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints or complaints relating to the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.) made to a local governing body.

9. Records of active investigations being conducted by the Department of Criminal Justice Services pursuant to Article 4 (§ 9.1-138 et seq.), Article 4.1 (§ 9.1-150.1 et seq.), Article 11 (§ 9.1-185 et seq.), and Article 12 (§ 9.1-186 et seq.) of Chapter 1 of Title 9.1.

10. Information furnished to or prepared by the Board of Education pursuant to subsection D of § 22.1-253.13:3 in connection with the review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees responsible for the distribution or administration of the tests. However, this section shall not prohibit the disclosure of such information to (i) a local school board or division superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee or (ii) any requester, after the conclusion of a review or investigation, in a form that (a) does not reveal the identity of any person making a complaint or supplying information to the Board on a confidential basis and (b) does not compromise the security of any test mandated by the Board.

11. Information contained in (i) an application for licensure or renewal of a license for teachers and other school personnel, including transcripts or other documents submitted in support of an application, and (ii) an active investigation conducted by or for the Board of Education related to the denial, suspension, cancellation, revocation, or reinstatement of teacher and other school personnel licenses including investigator notes and other correspondence and information, furnished in confidence with respect to such investigation. However, this subdivision shall not prohibit the disclosure of such (a) application information to the applicant at his own expense or (b) investigation information to a local school board or division superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee. Information contained in completed investigations shall be disclosed in a form that does not reveal the identity of any complainant or person supplying information to investigators. The completed investigation information disclosed shall include information regarding the school or facility involved, the identity of the person who was the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation fails to support a complaint or does not lead to corrective action, the identity of the person who was the subject of the complaint may be released only with the consent of the subject person. No personally identifiable information regarding a current or former student shall be released except as permitted by state or federal law.

12. Information provided in confidence and related to an investigation by the Attorney General under Article 1 (§ 3.2-4200 et seq.) or Article 3 (§ 3.2-4204 et seq.) of Chapter 42 of Title 3.2, Article 10 (§ 18.2-246.6 et seq.) of Chapter 6 or Chapter 13 (§ 18.2-512 et seq.) of Title 18.2, or Article 1 (§ 58.1-1000) of Chapter 10 of Title 58.1. However, information related to an investigation that has been inactive for more than six months shall, upon request, be disclosed provided such disclosure is not otherwise prohibited by law and does not reveal the identity of charging parties, complainants, persons supplying information, witnesses, or other individuals involved in the investigation.

§ 2.2-3705.4. Exclusions to application of chapter; educational records and certain records of educational institutions.

A. The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except as provided in subsection B or where such disclosure is otherwise prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, that are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a public institution of higher education in the Commonwealth, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such records shall be disclosed.

2. Confidential letters and statements of recommendation placed in the records of educational agencies or institutions respecting (i) admission to any educational agency or institution, (ii) an application for employment or promotion, or (iii) receipt of an honor or honorary recognition.

3. Information held by the Brown v. Board of Education Scholarship Committee that would reveal personally identifiable information, including scholarship applications, personal financial information, and confidential correspondence and letters of recommendation.

4. Information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues,

whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such information has not been publicly released, published, copyrighted or patented.

5. Information held by the University of Virginia or the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, that contain proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would be harmful to the competitive position of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be.

6. Personal information, as defined in § 2.2-3801, provided to the Board of the Virginia College Savings Plan or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 7 (§ 23.1-700 et seq.) of Title 23.1, including personal information related to (i) qualified beneficiaries as that term is defined in § 23.1-700, (ii) designated survivors, or (iii) authorized individuals. Nothing in this subdivision shall be construed to prevent disclosure or publication of information in a statistical or other form that does not identify individuals or provide personal information. Individuals shall be provided access to their own personal information.

For purposes of this subdivision:

"Authorized individual" means an individual who may be named by the account owner to receive information regarding the account but who does not have any control or authority over the account.

"Designated survivor" means the person who will assume account ownership in the event of the account owner's death.

7. Information maintained in connection with fundraising activities by or for a public institution of higher education that would reveal (i) personal fundraising strategies relating to identifiable donors or prospective donors or (ii) wealth assessments; estate, financial, or tax planning information; health-related information; employment, familial, or marital status information; electronic mail addresses, facsimile or telephone numbers; birth dates or social security numbers of identifiable donors or prospective donors. Nothing in this subdivision, however, shall be construed to prevent the disclosure of information relating to the amount, date, purpose, and terms of the pledge or donation, or the identity of the donor unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation. The exclusion provided by this subdivision shall not apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the institution for the performance of research services or other work or (ii) the terms and conditions of such grants or contracts.

8. Information held by a threat assessment team established by a local school board pursuant to § 22.1-79.4 or by a public institution of higher education pursuant to § 23.1-805 relating to the assessment or intervention with a specific individual. However, in the event an individual who has been under assessment commits an act, or is prosecuted for the commission of an act that has caused the death of, or

caused serious bodily injury, including any felony sexual assault, to another person, such information of the threat assessment team concerning the individual under assessment shall be made available as provided by this chapter, with the exception of any criminal history records obtained pursuant to § 19.2-389 or 19.2-389.1, health records obtained pursuant to § 32.1-127.1:03, or scholastic records as defined in § 22.1-289. The public body providing such information shall remove personally identifying information of any person who provided information to the threat assessment team under a promise of confidentiality.

9. Records provided to the Governor or the designated reviewers by a qualified institution, as those terms are defined in § 23.1-1239, related to a proposed memorandum of understanding, or proposed amendments to a memorandum of understanding, submitted pursuant to Chapter 12.1 (§ 23.1-1239 et seq.) of Title 23.1. A memorandum of understanding entered into pursuant to such chapter shall be subject to public disclosure after it is agreed to and signed by the Governor.

B. The custodian of a scholastic record shall not release the address, phone number, or email address of a student in response to a request made under this chapter without written consent. For any student who is (i) 18 years of age or older, (ii) under the age of 18 and emancipated, or (iii) attending an institution of higher education, written consent of the student shall be required. For any other student, written consent of the parent or legal guardian of such student shall be required.

§ 2.2-3705.5. Exclusions to application of chapter; health and social services records.
The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § 32.1-127.1:03.

Where the person who is the subject of health records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the health records if the administrator or chief medical officer has reasonable cause to believe that such confined person has an infectious disease or other medical condition from which other persons so confined need to be protected. Health records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the health records of a person so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

Where the person who is the subject of health records is under the age of 18, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated, a court of competent jurisdiction has restricted or denied such access, or a parent has been denied access to the health record in accordance with § 20-124.6. In instances where the person who is the subject thereof is an emancipated minor, a student in a public institution of higher education, or is a minor who has consented to his own treatment as authorized by § 16.1-338 or 54.1-2969, the right of access may be asserted by the subject person.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning abuse of individuals receiving services compiled by the Commissioner of Behavioral Health and Developmental Services shall be disclosed. No such summaries or data shall include any information that identifies specific individuals receiving services.

2. Applications for admission to examinations or for licensure and scoring records maintained by the Department of Health Professions or any board in that department on individual licensees or applicants; information required to be provided to the Department of Health Professions by certain licensees pursuant to § 54.1-2506.1; information held by the Health Practitioners' Monitoring Program Committee within the Department of Health Professions that identifies any practitioner who may be, or who is actually, impaired to the extent that disclosure is prohibited by § 54.1-2517; and information relating to the prescribing and dispensing of covered substances to recipients and any abstracts from such information that are in the possession of the Prescription Monitoring Program (Program) pursuant to Chapter 25.2 (§ 54.1-2519 et seq.) of Title 54.1 and any material relating to the operation or security of the Program.

3. Reports, documentary evidence, and other information as specified in §§ 51.5-122 and 51.5-141 and Chapter 1 (§ 63.2-100 et seq.) of Title 63.2 and information and statistical registries required to be kept confidential pursuant to Chapter 1 (§ 63.2-100 et seq.) of Title 63.2.

4. Investigative notes; proprietary information not published, copyrighted or patented; information obtained from employee personnel records; personally identifiable information regarding residents, clients or other recipients of services; other correspondence and information furnished in confidence to the Department of Social Services in connection with an active investigation of an applicant or licensee pursuant to Chapters 17 (§ 63.2-1700 et seq.) and 18 (§ 63.2-1800 et seq.) of Title 63.2; and information furnished to the Office of the Attorney General in connection with an investigation or litigation pursuant to Article 19.1 (§ 8.01-216.1 et seq.) of Chapter 3 of Title 8.01 and Chapter 9 (§ 32.1-310 et seq.) of Title 32.1. However, nothing in this subdivision shall prevent the disclosure of information from the records of completed investigations in a form that does not reveal the identity of complainants, persons supplying information, or other individuals involved in the investigation.

5. Information collected for the designation and verification of trauma centers and other specialty care centers within the Statewide Emergency Medical Services System and Services pursuant to Article 2.1 (§ 32.1-111.1 et seq.) of Chapter 4 of Title 32.1.

6. Reports and court documents relating to involuntary admission required to be kept confidential pursuant to § 37.2-818.

7. Information acquired (i) during a review of any child death conducted by the State Child Fatality Review Team established pursuant to § 32.1-283.1 or by a local or regional child fatality review team to the extent that such information is made confidential by § 32.1-283.2; (ii) during a review of any death conducted by a family violence fatality review team to the extent that such information is made confidential by § 32.1-283.3; (iii) during a review of any adult death conducted by the Adult Fatality Review Team to the extent made confidential by § 32.1-283.5 or by a local or regional adult fatality review team to the extent that such information is made confidential by § 32.1-283.6; (iv) by a local or regional overdose fatality review team to the extent that such information is made confidential by §

32.1-283.7; or (v) during a review of any death conducted by the Maternal Mortality Review Team to the extent that such information is made confidential by 32.1-283.8.

8. Patient level data collected by the Board of Health and not yet processed, verified, and released, pursuant to § 32.1-276.9, to the Board by the nonprofit organization with which the Commissioner of Health has contracted pursuant to § 32.1-276.4.

9. Information relating to a grant application, or accompanying a grant application, submitted to the Commonwealth Neurotrauma Initiative Advisory Board pursuant to Article 12 (§ 51.5-178 et seq.) of Chapter 14 of Title 51.5 that would (i) reveal (a) medical or mental health records or other data identifying individual patients or (b) proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant.

10. Any information copied, recorded, or received by the Commissioner of Health in the course of an examination, investigation, or review of a managed care health insurance plan licensee pursuant to §§ 32.1-137.4 and 32.1-137.5, including books, records, files, accounts, papers, documents, and any or all computer or other recordings.

11. Records of the Virginia Birth-Related Neurological Injury Compensation Program required to be kept confidential pursuant to § 38.2-5002.2.

12. Information held by the State Health Commissioner relating to the health of any person subject to an order of quarantine or an order of isolation pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1. However, nothing in this subdivision shall be construed to prevent the disclosure of statistical summaries, abstracts, or other information in aggregate form.

13. The names and addresses or other contact information of persons receiving transportation services from a state or local public body or its designee under Title II of the Americans with Disabilities Act, (42 U.S.C. § 12131 et seq.) or funded by Temporary Assistance for Needy Families (TANF) created under § 63.2-600.

14. Information held by certain health care committees and entities that may be withheld from discovery as privileged communications pursuant to § 8.01-581.17.

15. Data and information specified in § 37.2-308.01 relating to proceedings provided for in Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title 16.1 and Chapter 8 (§ 37.2-800 et seq.) of Title 37.2.

16. Records of and information held by the Emergency Department Care Coordination Program required to be kept confidential pursuant to § 32.1-372.

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.
The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such

disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-132.4 or 62.1-134.1.

2. Financial statements not publicly available filed with applications for industrial development financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.

3. Proprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.

4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992.

5. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § 28.2-204.

6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.

7. Proprietary information related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy contingency planning purposes or for developing consolidated statistical information on energy supplies.

8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.

9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects if disclosure of such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad

Administration. However, the exclusion provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

10. Confidential information designated as provided in subsection F of § 2.2-4342 as trade secrets or proprietary information by any person in connection with a procurement transaction or by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

11. a. Memoranda, staff evaluations, or other information prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) where (i) if such information was made public prior to or after the execution of an interim or a comprehensive agreement, § 33.2-1820 or 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be adversely affected and (ii) the basis for the determination required in clause (i) is documented in writing by the responsible public entity; and

b. Information provided by a private entity to a responsible public entity, affected jurisdiction, or affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) if disclosure of such information would reveal (i) trade secrets of the private entity; (ii) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity where if such information was made public prior to the execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining position of the public or private entity would be adversely affected. In order for the information specified in clauses (i), (ii), and (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the responsible public entity:

(1) Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

(2) Identifying with specificity the data or other materials for which protection is sought; and

(3) Stating the reasons why protection is necessary.

The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by the private entity from disclosure, the responsible public entity shall determine whether public disclosure prior to the execution of an interim agreement or a comprehensive agreement would adversely affect the financial interest or bargaining position of the public or private entity. The responsible public entity shall make a written determination of the nature and scope of the protection to be afforded by the responsible public entity under this subdivision. Once a written determination is made by the responsible public entity, the information afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of any affected jurisdiction or affected local jurisdiction.

Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed to authorize the withholding of (a) procurement records as required by § 33.2-1820 or 56-575.17; (b) information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity and the private entity; (c) information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or (d) information concerning the performance of any private entity developing or operating a qualifying transportation facility or a qualifying project.

For the purposes of this subdivision, the terms "affected jurisdiction," "affected local jurisdiction," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying transportation facility," "responsible public entity," and "private entity" shall mean the same as those terms are defined in the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or in the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.).

12. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity pursuant to a promise of confidentiality to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected.

13. Trade secrets or confidential proprietary information that is not generally available to the public through regulatory disclosure or otherwise, provided by a (i) bidder or applicant for a franchise or (ii) franchisee under Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority pursuant to a promise of confidentiality from the franchising authority, to the extent the information relates to the bidder's, applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies, or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such information were made public, the competitive advantage or financial interests of the franchisee would be adversely affected.

In order for trade secrets or confidential proprietary information to be excluded from the provisions of this chapter, the bidder, applicant, or franchisee shall (a) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (b) identify the data or other materials for which protection is sought, and (c) state the reason why protection is necessary.

No bidder, applicant, or franchisee may invoke the exclusion provided by this subdivision if the bidder, applicant, or franchisee is owned or controlled by a public body or if any representative of the applicable franchising authority serves on the management board or as an officer of the bidder, applicant, or franchisee.

14. Information of a proprietary or confidential nature furnished by a supplier or manufacturer of charitable gaming supplies to the Department of Agriculture and Consumer Services (i) pursuant to subsection E of § 18.2-340.34 and (ii) pursuant to regulations promulgated by the Charitable Gaming Board related to approval of electronic and mechanical equipment.

15. Information related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to § 3.2-1215.

16. Trade secrets submitted by CMRS providers as defined in § 56-484.12 to the former Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to former § 56-484.15, relating to the provision of wireless E-911 service.

17. Information relating to a grant or loan application, or accompanying a grant or loan application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to Chapter 5.3 (§ 32.1-162.23 et seq.) of Title 32.1 if disclosure of such information would (i) reveal proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant.

18. Confidential proprietary information and trade secrets developed and held by a local public body (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2 if disclosure of such information would be harmful to the competitive position of the locality.

In order for confidential proprietary information or trade secrets to be excluded from the provisions of this chapter, the locality in writing shall (a) invoke the protections of this subdivision, (b) identify with specificity the information for which protection is sought, and (c) state the reasons why protection is necessary. However, the exemption provided by this subdivision shall not apply to any authority created pursuant to the BVU Authority Act (§ 15.2-7200 et seq.).

19. Confidential proprietary information and trade secrets developed by or for a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) to provide qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.) of Chapter 15 of Title 56, where disclosure of such information would be harmful to the competitive position of the authority, except that information required to be maintained in accordance with § 15.2-2160 shall be released.

20. Trade secrets or financial information of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, provided to the Department of Small Business and Supplier Diversity as part of an application for certification as a small, women-owned, or minority-owned business in accordance with Chapter 16.1 (§ 2.2-1603 et seq.). In order for such trade secrets or financial information to be excluded from the provisions of this chapter, the business shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary.

21. Information of a proprietary or confidential nature disclosed by a carrier to the State Health Commissioner pursuant to §§ 32.1-276.5:1 and 32.1-276.7:1.

22. Trade secrets, including, but not limited to, financial information, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the State Inspector General for the purpose of an audit, special investigation, or any study requested by the Office of the State Inspector General in accordance with law.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the State Inspector General:

a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

b. Identifying with specificity the data or other materials for which protection is sought; and

c. Stating the reasons why protection is necessary.

The State Inspector General shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. The State Inspector General shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

23. Information relating to a grant application, or accompanying a grant application, submitted to the Tobacco Region Revitalization Commission that would (i) reveal (a) trade secrets, (b) financial information of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant; and memoranda, staff evaluations, or other information prepared by the Commission or its staff exclusively for the evaluation of grant applications. The exclusion provided by this subdivision shall apply to grants that are consistent with the powers of and in furtherance of the performance of the duties of the Commission pursuant to § 3.2-3103.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Commission:

a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

b. Identifying with specificity the data, information or other materials for which protection is sought; and

c. Stating the reasons why protection is necessary.

The Commission shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets, financial information, or research-related information of the applicant. The Commission shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

24. a. Information held by the Commercial Space Flight Authority relating to rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority if disclosure of such information would adversely affect the financial interest or bargaining position of the Authority or a private entity providing the information to the Authority; or

b. Information provided by a private entity to the Commercial Space Flight Authority if disclosure of such information would (i) reveal (a) trade secrets of the private entity; (b) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private entity and (ii) adversely affect the financial interest or bargaining position of the Authority or private entity.

In order for the information specified in clauses (a), (b), and (c) of subdivision 24 b to be excluded from the provisions of this chapter, the private entity shall make a written request to the Authority:

(1) Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

(2) Identifying with specificity the data or other materials for which protection is sought; and

(3) Stating the reasons why protection is necessary.

The Authority shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by the private entity from disclosure, the Authority shall determine whether public disclosure would adversely affect the financial interest or bargaining position of the Authority or private entity. The Authority shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

25. Information of a proprietary nature furnished by an agricultural landowner or operator to the Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Agriculture and Consumer Services, or any political subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9, other than when required as part of a state or federal regulatory enforcement action.

26. Trade secrets provided to the Department of Environmental Quality pursuant to the provisions of § 10.1-1458. In order for such trade secrets to be excluded from the provisions of this chapter, the submitting party shall (i) invoke this exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii) identify the data or materials for which protection is sought, and (iii) state the reasons why protection is necessary.

27. Information of a proprietary nature furnished by a licensed public-use airport to the Department of Aviation for funding from programs administered by the Department of Aviation or the Virginia Aviation Board, where if such information was made public, the financial interest of the public-use airport would be adversely affected.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the public-use airport shall make a written request to the Department of Aviation:

a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

b. Identifying with specificity the data or other materials for which protection is sought; and

c. Stating the reasons why protection is necessary.

28. Information relating to a grant or loan application, or accompanying a grant or loan application, submitted to the Virginia Research Investment Committee established pursuant to Article 8 (§ 23.1-3130 et seq.) of Chapter 31 of Title 23.1, to the extent that such records would (i) reveal (a) trade secrets; (b) financial information of a party to a grant or loan application that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) research-related information produced or collected by a party to the application in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of a party to a grant or loan application; and memoranda, staff evaluations, or other information prepared by the Committee or its staff, or a reviewing entity pursuant to subsection D of § 23.1-3133, exclusively for the evaluation of grant or loan applications, including any scoring or prioritization documents prepared for and forwarded to the Committee pursuant to subsection D of § 23.1-3133.

In order for the information submitted by the applicant and specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Committee:

a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

b. Identifying with specificity the data, information, or other materials for which protection is sought; and

c. Stating the reasons why protection is necessary.

The Virginia Research Investment Committee shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets, financial information, or research-related information of the party to the application. The Committee shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

29. Proprietary information, voluntarily provided by a private business pursuant to a promise of confidentiality from a public body, used by the public body for a solar services agreement, where disclosure of such information would (i) reveal (a) trade secrets of the private business; (b) financial information of the private business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private business and (ii) adversely affect the financial interest or bargaining position of the public body or private business.

In order for the information specified in clauses (i)(a), (b), and (c) to be excluded from the provisions of this chapter, the private business shall make a written request to the public body:

a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

b. Identifying with specificity the data or other materials for which protection is sought; and

c. Stating the reasons why protection is necessary.

30. Information contained in engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit if disclosure of such information would identify specific trade secrets or other information that would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

31. Trade secrets, including, but not limited to, financial information, including balance sheets and financial statements that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Virginia Department of Transportation in accordance with law.

In order for the records specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the Department:

a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

b. Identifying with specificity the data or other materials for which protection is sought; and

c. Stating the reasons why protection is necessary.

The Virginia Department of Transportation shall determine whether the requested exclusion from disclosure is necessary to protect trade secrets or financial records of the private entity. The Virginia Department of Transportation shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

32. Information related to a grant application, or accompanying a grant application, submitted to the Department of Housing and Community Development that would (i) reveal (a) trade secrets, (b) financial information of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant. The exclusion provided by this subdivision shall only apply to grants administered by the Department, the Director of the Department, or pursuant to § 36-139, Article 26 (§ 2.2-2484 et seq.) of Chapter 24, or the Virginia Telecommunication Initiative as authorized by the appropriations act.

In order for the information submitted by the applicant and specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Department:

a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

b. Identifying with specificity the data, information, or other materials for which protection is sought; and

c. Stating the reasons why protection is necessary.

The Department shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or confidential proprietary information of the applicant. The Department shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

§ 2.2-3705.7. Exclusions to application of chapter; records of specific public bodies and certain other limited exclusions.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. State income, business, and estate tax returns, personal property tax returns, and confidential records held pursuant to § 58.1-3.

2. Working papers and correspondence of the Office of the Governor, the Lieutenant Governor, or the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates or the Senate of Virginia; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in the Commonwealth. However, no information that is otherwise open to inspection under this chapter shall be deemed excluded by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence. Further, information publicly available or not otherwise subject to an exclusion under this chapter or other provision of law that has

been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed working papers. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107.

As used in this subdivision:

"Members of the General Assembly" means each member of the Senate of Virginia and the House of Delegates and their legislative aides when working on behalf of such member.

"Office of the Governor" means the Governor; the Governor's chief of staff, counsel, director of policy, and Cabinet Secretaries; the Assistant to the Governor for Intergovernmental Affairs; and those individuals to whom the Governor has delegated his authority pursuant to § 2.2-104.

"Working papers" means those records prepared by or for a public official identified in this subdivision for his personal or deliberative use.

3. Information contained in library records that can be used to identify (i) both (a) any library patron who has borrowed material from a library and (b) the material such patron borrowed or (ii) any library patron under 18 years of age. For the purposes of clause (ii), access shall not be denied to the parent, including a noncustodial parent, or guardian of such library patron.

4. Contract cost estimates prepared for the confidential use of the Department of Transportation in awarding contracts for construction or the purchase of goods or services, and records and automated systems prepared for the Department's Bid Analysis and Monitoring Program.

5. Lists of registered owners of bonds issued by a political subdivision of the Commonwealth, whether the lists are maintained by the political subdivision itself or by a single fiduciary designated by the political subdivision.

6. Information furnished by a member of the General Assembly to a meeting of a standing committee, special committee, or subcommittee of his house established solely for the purpose of reviewing members' annual disclosure statements and supporting materials filed under § 30-110 or of formulating advisory opinions to members on standards of conduct, or both.

7. Customer account information of a public utility affiliated with a political subdivision of the Commonwealth, including the customer's name and service address, but excluding the amount of utility service provided and the amount of money charged or paid for such utility service.

8. Personal information, as defined in § 2.2-3801, (i) filed with the Virginia Housing Development Authority concerning individuals who have applied for or received loans or other housing assistance or who have applied for occupancy of or have occupied housing financed, owned or otherwise assisted by the Virginia Housing Development Authority; (ii) concerning persons participating in or persons on the waiting list for federally funded rent-assistance programs; (iii) filed with any local redevelopment and housing authority created pursuant to § 36-4 concerning persons participating in or persons on the waiting list for housing assistance programs funded by local governments or by any such authority; or

(iv) filed with any local redevelopment and housing authority created pursuant to § 36-4 or any other local government agency concerning persons who have applied for occupancy or who have occupied affordable dwelling units established pursuant to § 15.2-2304 or 15.2-2305. However, access to one's own information shall not be denied.

9. Information regarding the siting of hazardous waste facilities, except as provided in § 10.1-1441, if disclosure of such information would have a detrimental effect upon the negotiating position of a governing body or on the establishment of the terms, conditions, and provisions of the siting agreement.

10. Information on the site-specific location of rare, threatened, endangered, or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. This exclusion shall not apply to requests from the owner of the land upon which the resource is located.

11. Memoranda, graphics, video or audio tapes, production models, data, and information of a proprietary nature produced by or for or collected by or for the Virginia Lottery relating to matters of a specific lottery game design, development, production, operation, ticket price, prize structure, manner of selecting the winning ticket, manner of payment of prizes to holders of winning tickets, frequency of drawings or selections of winning tickets, odds of winning, advertising, or marketing, where such information not been publicly released, published, copyrighted, or patented. Whether released, published, or copyrighted, all game-related information shall be subject to public disclosure under this chapter upon the first day of sales for the specific lottery game to which it pertains.

12. Information held by the Virginia Retirement System, acting pursuant to § 51.1-124.30, or a local retirement system, acting pursuant to § 51.1-803, or by a local finance board or board of trustees of a trust established by one or more local public bodies to invest funds for post-retirement benefits other than pensions, acting pursuant to Article 8 (§ 15.2-1544 et seq.) of Chapter 15 of Title 15.2, or by the board of visitors of the University of Virginia, acting pursuant to § 23.1-2210, or by the board of visitors of The College of William and Mary in Virginia, acting pursuant to § 23.1-2803, or by the Virginia College Savings Plan, acting pursuant to § 23.1-704, relating to the acquisition, holding, or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, if disclosure of such information would (i) reveal confidential analyses prepared for the board of visitors of the University of Virginia, prepared for the board of visitors of The College of William and Mary in Virginia, prepared by the retirement system, a local finance board or board of trustees, or the Virginia College Savings Plan, or provided to the retirement system, a local finance board or board of trustees, or the Virginia College Savings Plan under a promise of confidentiality of the future value of such ownership interest or the future financial performance of the entity and (ii) have an adverse effect on the value of the investment to be acquired, held, or disposed of by the retirement system, a local finance board or board of trustees, the board of visitors of the University of Virginia, the board of visitors of The College of William and Mary in Virginia, or the Virginia College Savings Plan. Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the identity of any investment held, the amount invested, or the present value of such investment.

13. Financial, medical, rehabilitative, and other personal information concerning applicants for or recipients of loan funds submitted to or maintained by the Assistive Technology Loan Fund Authority under Chapter 11 (§ 51.5-53 et seq.) of Title 51.5.

14. Information held by the Virginia Commonwealth University Health System Authority pertaining to any of the following: an individual's qualifications for or continued membership on its medical or teaching staffs; proprietary information gathered by or in the possession of the Authority from third parties pursuant to a promise of confidentiality; contract cost estimates prepared for confidential use in awarding contracts for construction or the purchase of goods or services; information of a proprietary nature produced or collected by or for the Authority or members of its medical or teaching staffs; financial statements not publicly available that may be filed with the Authority from third parties; the identity, accounts, or account status of any customer of the Authority; consulting or other reports paid for by the Authority to assist the Authority in connection with its strategic planning and goals; the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority; and information of a proprietary nature produced or collected by or for employees of the Authority, other than the Authority's financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical, or scholarly issues, whether sponsored by the Authority alone or in conjunction with a governmental body or a private concern, when such information has not been publicly released, published, copyrighted, or patented. This exclusion shall also apply when such information is in the possession of Virginia Commonwealth University.

15. Information held by the Department of Environmental Quality, the State Water Control Board, the State Air Pollution Control Board, or the Virginia Waste Management Board relating to (i) active federal environmental enforcement actions that are considered confidential under federal law and (ii) enforcement strategies, including proposed sanctions for enforcement actions. Upon request, such information shall be disclosed after a proposed sanction resulting from the investigation has been proposed to the director of the agency. This subdivision shall not be construed to prevent the disclosure of information related to inspection reports, notices of violation, and documents detailing the nature of any environmental contamination that may have occurred or similar documents.

16. Information related to the operation of toll facilities that identifies an individual, vehicle, or travel itinerary, including vehicle identification data or vehicle enforcement system information; video or photographic images; Social Security or other identification numbers appearing on driver's licenses; credit card or bank account data; home addresses; phone numbers; or records of the date or time of toll facility use.

17. Information held by the Virginia Lottery pertaining to (i) the social security number, tax identification number, state sales tax number, home address and telephone number, personal and lottery banking account and transit numbers of a retailer, and financial information regarding the nonlottery operations of specific retail locations and (ii) individual lottery winners, except that a winner's name, hometown, and amount won shall be disclosed. If the value of the prize won by the winner exceeds $10 million, the information described in clause (ii) shall not be disclosed unless the winner consents in writing to such disclosure.

18. Information held by the Board for Branch Pilots relating to the chemical or drug testing of a person regulated by the Board, where such person has tested negative or has not been the subject of a disciplinary action by the Board for a positive test result.

19. (Effective until October 1, 2019) Information pertaining to the planning, scheduling, and performance of examinations of holder records pursuant to the Uniform Disposition of Unclaimed Property Act (§ 55-210.1 et seq.) prepared by or for the State Treasurer or his agents or employees or persons employed to perform an audit or examination of holder records.

19. (Effective October 1, 2019) Information pertaining to the planning, scheduling, and performance of examinations of holder records pursuant to the Virginia Disposition of Unclaimed Property Act (§ 55.1-2500 et seq.) prepared by or for the State Treasurer or his agents or employees or persons employed to perform an audit or examination of holder records.

20. Information held by the Virginia Department of Emergency Management or a local governing body relating to citizen emergency response teams established pursuant to an ordinance of a local governing body that reveal the name, address, including e-mail address, telephone or pager numbers, or operating schedule of an individual participant in the program.

21. Information held by state or local park and recreation departments and local and regional park authorities concerning identifiable individuals under the age of 18 years. However, nothing in this subdivision shall operate to prevent the disclosure of information defined as directory information under regulations implementing the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, unless the public body has undertaken the parental notification and opt-out requirements provided by such regulations. Access shall not be denied to the parent, including a noncustodial parent, or guardian of such person, unless the parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For such information of persons who are emancipated, the right of access may be asserted by the subject thereof. Any parent or emancipated person who is the subject of the information may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such information for inspection and copying.

22. Information submitted for inclusion in the Statewide Alert Network administered by the Department of Emergency Management that reveal names, physical addresses, email addresses, computer or internet protocol information, telephone numbers, pager numbers, other wireless or portable communications device information, or operating schedules of individuals or agencies, where the release of such information would compromise the security of the Statewide Alert Network or individuals participating in the Statewide Alert Network.

23. Information held by the Judicial Inquiry and Review Commission made confidential by § 17.1-913.

24. Information held by the Virginia Retirement System acting pursuant to § 51.1-124.30, a local retirement system acting pursuant to § 51.1-803 (hereinafter collectively referred to as the retirement system), or the Virginia College Savings Plan, acting pursuant to § 23.1-704 relating to:

a. Internal deliberations of or decisions by the retirement system or the Virginia College Savings Plan on the pursuit of particular investment strategies, or the selection or termination of investment managers,

prior to the execution of such investment strategies or the selection or termination of such managers, if disclosure of such information would have an adverse impact on the financial interest of the retirement system or the Virginia College Savings Plan; and

b. Trade secrets provided by a private entity to the retirement system or the Virginia College Savings Plan if disclosure of such records would have an adverse impact on the financial interest of the retirement system or the Virginia College Savings Plan.

For the records specified in subdivision b to be excluded from the provisions of this chapter, the entity shall make a written request to the retirement system or the Virginia College Savings Plan:

(1) Invoking such exclusion prior to or upon submission of the data or other materials for which protection from disclosure is sought;

(2) Identifying with specificity the data or other materials for which protection is sought; and

(3) Stating the reasons why protection is necessary.

The retirement system or the Virginia College Savings Plan shall determine whether the requested exclusion from disclosure meets the requirements set forth in subdivision b.

Nothing in this subdivision shall be construed to prevent the disclosure of the identity or amount of any investment held or the present value and performance of all asset classes and subclasses.

25. Information held by the Department of Corrections made confidential by § 53.1-233.

26. Information maintained by the Department of the Treasury or participants in the Local Government Investment Pool (§ 2.2-4600 et seq.) and required to be provided by such participants to the Department to establish accounts in accordance with § 2.2-4602.

27. Personal information, as defined in § 2.2-3801, contained in the Veterans Care Center Resident Trust Funds concerning residents or patients of the Department of Veterans Services Care Centers, except that access shall not be denied to the person who is the subject of the information.

28. Information maintained in connection with fundraising activities by the Veterans Services Foundation pursuant to § 2.2-2716 that reveal the address, electronic mail address, facsimile or telephone number, social security number or other identification number appearing on a driver's license, or credit card or bank account data of identifiable donors, except that access shall not be denied to the person who is the subject of the information. Nothing in this subdivision, however, shall be construed to prevent the disclosure of information relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor, unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation. The exclusion provided by this subdivision shall not apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the foundation for the performance of services or other work or (ii) the terms and conditions of such grants or contracts.

29. Information prepared for and utilized by the Commonwealth's Attorneys' Services Council in the training of state prosecutors or law-enforcement personnel, where such information is not otherwise available to the public and the disclosure of such information would reveal confidential strategies, methods, or procedures to be employed in law-enforcement activities or materials created for the investigation and prosecution of a criminal case.

30. Information provided to the Department of Aviation by other entities of the Commonwealth in connection with the operation of aircraft where the information would not be subject to disclosure by the entity providing the information. The entity providing the information to the Department of Aviation shall identify the specific information to be protected and the applicable provision of this chapter that excludes the information from mandatory disclosure.

31. Information created or maintained by or on the behalf of the judicial performance evaluation program related to an evaluation of any individual justice or judge made confidential by § 17.1-100.

32. Information reflecting the substance of meetings in which (i) individual sexual assault cases are discussed by any sexual assault response team established pursuant to § 15.2-1627.4, (ii) individual child abuse or neglect cases or sex offenses involving a child are discussed by multidisciplinary child sexual abuse response teams established pursuant to § 15.2-1627.5, or (iii) individual cases of abuse, neglect, or exploitation of adults as defined in § 63.2-1603 are discussed by multidisciplinary teams established pursuant to §§ 15.2-1627.5 and 63.2-1605. The findings of any such team may be disclosed or published in statistical or other aggregated form that does not disclose the identity of specific individuals.

33. Information contained in the strategic plan, marketing plan, or operational plan prepared by the Virginia Economic Development Partnership Authority pursuant to § 2.2-2237.1 regarding target companies, specific allocation of resources and staff for marketing activities, and specific marketing activities that would reveal to the Commonwealth's competitors for economic development projects the strategies intended to be deployed by the Commonwealth, thereby adversely affecting the financial interest of the Commonwealth. The executive summaries of the strategic plan, marketing plan, and operational plan shall not be redacted or withheld pursuant to this subdivision.

34. (Effective January 1, 2020) Information discussed in a closed session of the Physical Therapy Compact Commission or the Executive Board or other committees of the Commission for purposes set forth in subsection E of § 54.1-3491.

§ 2.2-3705.8. Limitation on record exclusions.
Nothing in this chapter shall be construed as denying public access to the nonexempt portions of a report of a consultant hired by or at the request of a local public body or the mayor or chief executive or administrative officer of such public body if (i) the contents of such report have been distributed or disclosed to members of the local public body or (ii) the local public body has scheduled any action on a matter that is the subject of the consultant's report.

§ 2.2-3706. Disclosure of law-enforcement and criminal records; limitations.
A. Records required to be released. All public bodies engaged in criminal law-enforcement activities shall provide the following records when requested in accordance with the provisions of this chapter:

1. Criminal incident information relating to felony offenses, which shall include:

a. A general description of the criminal activity reported;

b. The date the alleged crime was committed;

c. The general location where the alleged crime was committed;

d. The identity of the investigating officer or other point of contact; and

e. A general description of any injuries suffered or property damaged or stolen.

A verbal response as agreed to by the requester and the public body is sufficient to satisfy the requirements of subdivision 1.

Where the release of criminal incident information, however, is likely to jeopardize an ongoing investigation or prosecution or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information. Nothing in subdivision 1 shall be construed to authorize the withholding of those portions of such information that are not likely to cause the above-referenced damage;

2. Adult arrestee photographs taken during the initial intake following the arrest and as part of the routine booking procedure, except when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of the photograph will no longer jeopardize the investigation;

3. Information relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest; and

4. Records of completed unattended death investigations to the parent or spouse of the decedent or, if there is no living parent or spouse, to the most immediate family member of the decedent, provided the person is not a person of interest or a suspect. For the purposes of this subdivision, "unattended death" means a death determined to be a suicide, accidental or natural death where no criminal charges will be initiated, and "immediate family" means the decedent's personal representative or, if no personal representative has qualified, the decedent's next of kin in order of intestate succession as set forth in § 64.2-200.

B. Discretionary releases. The following records are excluded from the mandatory disclosure provisions of this chapter, but may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law:

1. Criminal investigative files, defined as any documents and information, including complaints, court orders, memoranda, notes, diagrams, maps, photographs, correspondence, reports, witness statements, and evidence relating to a criminal investigation or prosecution, other than criminal incident information subject to release in accordance with subdivision A 1;

2. Reports submitted in confidence to (i) state and local law-enforcement agencies, (ii) investigators authorized pursuant to Chapter 3.2 (§ 2.2-307 et seq.), and (iii) campus police departments of public institutions of higher education established pursuant to Article 3 (§ 23.1-809 et seq.) of Chapter 8 of Title 23.1;

3. Records of local law-enforcement agencies relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such agencies under a promise of anonymity;

4. All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment;

5. Records of law-enforcement agencies, to the extent that such records contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public;

6. All records of adult persons under (i) investigation or supervision by a local pretrial services agency in accordance with Article 5 (§ 19.2-152.2 et seq.) of Chapter 9 of Title 19.2; (ii) investigation, probation supervision, or monitoring by a local community-based probation services agency in accordance with Article 9 (§ 9.1-173 et seq.) of Chapter 1 of Title 9.1; or (iii) investigation or supervision by state probation and parole services in accordance with Article 2 (§ 53.1-141 et seq.) of Chapter 4 of Title 53.1;

7. Records of a law-enforcement agency to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties;

8. Those portions of any records containing information related to undercover operations or protective details that would reveal the staffing, logistics, or tactical plans of such undercover operations or protective details. Nothing in this subdivision shall operate to allow the withholding of information concerning the overall costs or expenses associated with undercover operations or protective details;

9. Records of (i) background investigations of applicants for law-enforcement agency employment, (ii) administrative investigations relating to allegations of wrongdoing by employees of a law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement agencies that are made confidential by law;

10. The identity of any victim, witness, or undercover officer, or investigative techniques or procedures. However, the identity of any victim or witness shall be withheld if disclosure is prohibited or restricted under § 19.2-11.2; and

11. Records of the Sex Offender and Crimes Against Minors Registry maintained by the Department of State Police pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, including information obtained from state, local, and regional officials, except to the extent that information is required to be posted on the Internet pursuant to § 9.1-913.

C. Prohibited releases. The identity of any individual providing information about a crime or criminal activity under a promise of anonymity shall not be disclosed.

D. Noncriminal records. Public bodies (i) engaged in emergency medical services, (ii) engaged in fire protection services, (iii) engaged in criminal law-enforcement activities, or (iv) engaged in processing calls for service or other communications to an emergency 911 system or any other equivalent reporting system may withhold those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical, or financial nature where the release of such information would jeopardize the safety or privacy of any person. Access to personnel records of persons employed by a law-enforcement agency shall be governed by the provisions of subdivision B 9 of this section and subdivision 1 of § 2.2-3705.1, as applicable.

E. Records of any call for service or other communication to an emergency 911 system or communicated with any other equivalent reporting system shall be subject to the provisions of this chapter.

F. Conflict resolution. In the event of conflict between this section as it relates to requests made under this section and other provisions of law, this section shall control.

§ 2.2-3707. Meetings to be public; notice of meetings; recordings; minutes.
A. All meetings of public bodies shall be open, except as provided in §§ 2.2-3707.01 and 2.2-3711.

B. No meeting shall be conducted through telephonic, video, electronic or other electronic communication means where the members are not physically assembled to discuss or transact public business, except as provided in § 2.2-3708.2 or as may be specifically provided in Title 54.1 for the summary suspension of professional licenses.

C. Every public body shall give notice of the date, time, and location of its meetings by:

1. Posting such notice on its official public government website, if any;

2. Placing such notice in a prominent public location at which notices are regularly posted; and

3. Placing such notice at the office of the clerk of the public body or, in the case of a public body that has no clerk, at the office of the chief administrator.

All state public bodies subject to the provisions of this chapter shall also post notice of their meetings on a central, publicly available electronic calendar maintained by the Commonwealth. Publication of meeting notices by electronic means by other public bodies shall be encouraged.

The notice shall be posted at least three working days prior to the meeting.

D. Notice, reasonable under the circumstance, of special, emergency, or continued meetings shall be given contemporaneously with the notice provided to the members of the public body conducting the meeting.

E. Any person may annually file a written request for notification with a public body. The request shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any. The public body receiving such request shall provide notice of all meetings directly to each such person. Without objection by the person, the public body may provide electronic notice of all meetings in response to such requests.

F. At least one copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body. The proposed agendas for meetings of state public bodies where at least one member has been appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.

G. Any person may photograph, film, record or otherwise reproduce any portion of a meeting required to be open. The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting to prevent interference with the proceedings, but shall not prohibit or otherwise prevent any person from photographing, filming, recording, or otherwise reproducing any portion of a meeting required to be open. No public body shall conduct a meeting required to be open in any building or facility where such recording devices are prohibited.

H. Minutes shall be recorded at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly; (ii) legislative interim study commissions and committees, including the Virginia Code Commission; (iii) study committees or commissions appointed by the Governor; or (iv) study commissions or study committees, or any other committees or subcommittees appointed by the governing bodies or school boards of counties, cities and towns, except where the membership of any such commission, committee or subcommittee includes a majority of the governing body of the county, city or town or school board.

Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter.

Minutes shall be in writing and shall include (a) the date, time, and location of the meeting; (b) the members of the public body recorded as present and absent; and (c) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. In addition, for electronic communication meetings conducted in accordance with § 2.2-3708.2, minutes of state public bodies shall include (1) the identity of the members of the public body at each remote location identified in the notice who participated in the meeting through electronic communication means, (2) the identity of the members of the public body who were physically assembled at the primary or central meeting location, and (3) the identity of the members of the public body who were not present at the locations identified in clauses (1) and (2) but who monitored such meeting through electronic communication means.

§ 2.2-3707.01. Meetings of the General Assembly.

A. Except as provided in subsection B, public access to any meeting of the General Assembly or a portion thereof shall be governed by rules established by the Joint Rules Committee and approved by a

majority vote of each house at the next regular session of the General Assembly. At least 60 days before the adoption of such rules, the Joint Rules Committee shall (i) hold regional public hearings on such proposed rules and (ii) provide a copy of such proposed rules to the Virginia Freedom of Information Advisory Council.

B. Floor sessions of either house of the General Assembly; meetings, including work sessions, of any standing or interim study committee of the General Assembly; meetings, including work sessions, of any subcommittee of such standing or interim study committee; and joint committees of conference of the General Assembly; or a quorum of any such committees or subcommittees, shall be open and governed by this chapter.

C. Meetings of the respective political party caucuses of either house of the General Assembly, including meetings conducted by telephonic or other electronic communication means, without regard to (i) whether the General Assembly is in or out of regular or special session or (ii) whether such caucuses invite staff or guests to participate in their deliberations, shall not be deemed meetings for the purposes of this chapter.

D. No regular, special, or reconvened session of the General Assembly held pursuant to Article IV, Section 6 of the Constitution of Virginia shall be conducted using electronic communication means pursuant to § 2.2-3708.2.

§ 2.2-3707.1. Posting of minutes for state boards and commissions.
All boards, commissions, councils, and other public bodies created in the executive branch of state government and subject to the provisions of this chapter shall post minutes of their meetings on such body's official public government website and on a central electronic calendar maintained by the Commonwealth. Draft minutes of meetings shall be posted as soon as possible but no later than 10 working days after the conclusion of the meeting. Final approved meeting minutes shall be posted within three working days of final approval of the minutes.

§§ 2.2-3708 and 2.2-3708.1. Repealed.
Repealed by Acts 2018, c. 55, cl. 2.

§ 2.2-3708.2. Meetings held through electronic communication means.
A. The following provisions apply to all public bodies:

1. Subject to the requirements of subsection C, all public bodies may conduct any meeting wherein the public business is discussed or transacted through electronic communication means if, on or before the day of a meeting, a member of the public body holding the meeting notifies the chair of the public body that:

a. Such member is unable to attend the meeting due to a temporary or permanent disability or other medical condition that prevents the member's physical attendance; or

b. Such member is unable to attend the meeting due to a personal matter and identifies with specificity the nature of the personal matter. Participation by a member pursuant to this subdivision is limited each calendar year to two meetings.

2. If participation by a member through electronic communication means is approved pursuant to subdivision 1, the public body holding the meeting shall record in its minutes the remote location from which the member participated; however, the remote location need not be open to the public. If participation is approved pursuant to subdivision 1 a, the public body shall also include in its minutes the fact that the member participated through electronic communication means due to a temporary or permanent disability or other medical condition that prevented the member's physical attendance. If participation is approved pursuant to subdivision 1 b, the public body shall also include in its minutes the specific nature of the personal matter cited by the member.

If a member's participation from a remote location pursuant to subdivision 1 b is disapproved because such participation would violate the policy adopted pursuant to subsection C, such disapproval shall be recorded in the minutes with specificity.

3. Any public body may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided that (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii) the purpose of the meeting is to address the emergency. The public body convening a meeting in accordance with this subdivision shall:

a. Give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided to members of the public body conducting the meeting;

b. Make arrangements for public access to such meeting; and

c. Otherwise comply with the provisions of this section.

The nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held shall be stated in the minutes.

B. The following provisions apply to regional public bodies:

1. Subject to the requirements in subsection C, regional public bodies may also conduct any meeting wherein the public business is discussed or transacted through electronic communication means if, on the day of a meeting, a member of a regional public body notifies the chair of the public body that such member's principal residence is more than 60 miles from the meeting location identified in the required notice for such meeting.

2. If participation by a member through electronic communication means is approved pursuant to this subsection, the public body holding the meeting shall record in its minutes the remote location from which the member participated; however, the remote location need not be open to the public.

If a member's participation from a remote location is disapproved because such participation would violate the policy adopted pursuant to subsection C, such disapproval shall be recorded in the minutes with specificity.

C. Participation by a member of a public body in a meeting through electronic communication means pursuant to subdivisions A 1 and 2 and subsection B shall be authorized only if the following conditions are met:

1. The public body has adopted a written policy allowing for and governing participation of its members by electronic communication means, including an approval process for such participation, subject to the express limitations imposed by this section. Once adopted, the policy shall be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting;

2. A quorum of the public body is physically assembled at one primary or central meeting location; and

3. The public body makes arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location.

D. The following provisions apply to state public bodies:

1. Except as provided in subsection D of § 2.2-3707.01, state public bodies may also conduct any meeting wherein the public business is discussed or transacted through electronic communication means, provided that (i) a quorum of the public body is physically assembled at one primary or central meeting location, (ii) notice of the meeting has been given in accordance with subdivision 2, and (iii) members of the public are provided a substantially equivalent electronic communication means through which to witness the meeting. For the purposes of this subsection, "witness" means observe or listen.

If a state public body holds a meeting through electronic communication means pursuant to this subsection, it shall also hold at least one meeting annually where members in attendance at the meeting are physically assembled at one location and where no members participate by electronic communication means.

2. Notice of any regular meeting held pursuant to this subsection shall be provided at least three working days in advance of the date scheduled for the meeting. Notice, reasonable under the circumstance, of special, emergency, or continued meetings held pursuant to this section shall be given contemporaneously with the notice provided to members of the public body conducting the meeting. For the purposes of this subsection, "continued meeting" means a meeting that is continued to address an emergency or to conclude the agenda of a meeting for which proper notice was given.

The notice shall include the date, time, place, and purpose for the meeting; shall identify the primary or central meeting location and any remote locations that are open to the public pursuant to subdivision 4;

shall include notice as to the electronic communication means by which members of the public may witness the meeting; and shall include a telephone number that may be used to notify the primary or central meeting location of any interruption in the telephonic or video broadcast of the meeting. Any interruption in the telephonic or video broadcast of the meeting shall result in the suspension of action at the meeting until repairs are made and public access is restored.

3. A copy of the proposed agenda and agenda packets and, unless exempt, all materials that will be distributed to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body conducting the meeting.

4. Public access to the remote locations from which additional members of the public body participate through electronic communication means shall be encouraged but not required. However, if three or more members are gathered at the same remote location, then such remote location shall be open to the public.

5. If access to remote locations is afforded, (i) all persons attending the meeting at any of the remote locations shall be afforded the same opportunity to address the public body as persons attending at the primary or central location and (ii) a copy of the proposed agenda and agenda packets and, unless exempt, all materials that will be distributed to members of the public body for the meeting shall be made available for inspection by members of the public attending the meeting at any of the remote locations at the time of the meeting.

6. The public body shall make available to the public at any meeting conducted in accordance with this subsection a public comment form prepared by the Virginia Freedom of Information Advisory Council in accordance with § 30-179.

7. Minutes of all meetings held by electronic communication means shall be recorded as required by § 2.2-3707. Votes taken during any meeting conducted through electronic communication means shall be recorded by name in roll-call fashion and included in the minutes. For emergency meetings held by electronic communication means, the nature of the emergency shall be stated in the minutes.

8. Any authorized state public body that meets by electronic communication means pursuant to this subsection shall make a written report of the following to the Virginia Freedom of Information Advisory Council by December 15 of each year:

a. The total number of meetings held that year in which there was participation through electronic communication means;

b. The dates and purposes of each such meeting;

c. A copy of the agenda for each such meeting;

d. The primary or central meeting location of each such meeting;

e. The types of electronic communication means by which each meeting was held;

f. If possible, the number of members of the public who witnessed each meeting through electronic communication means;

g. The identity of the members of the public body recorded as present at each meeting, and whether each member was present at the primary or central meeting location or participated through electronic communication means;

h. The identity of any members of the public body who were recorded as absent at each meeting and any members who were recorded as absent at a meeting but who monitored the meeting through electronic communication means;

i. If members of the public were granted access to a remote location from which a member participated in a meeting through electronic communication means, the number of members of the public at each such remote location;

j. A summary of any public comment received about the process of conducting a meeting through electronic communication means; and

k. A written summary of the public body's experience conducting meetings through electronic communication means, including its logistical and technical experience.

E. Nothing in this section shall be construed to prohibit the use of interactive audio or video means to expand public participation.

§ 2.2-3709. Expired.
Expired.

§ 2.2-3710. Transaction of public business other than by votes at meetings prohibited.
A. Unless otherwise specifically provided by law, no vote of any kind of the membership, or any part thereof, of any public body shall be taken to authorize the transaction of any public business, other than a vote taken at a meeting conducted in accordance with the provisions of this chapter. No public body shall vote by secret or written ballot, and unless expressly provided by this chapter, no public body shall vote by telephone or other electronic communication means.

B. Notwithstanding the foregoing, nothing contained herein shall be construed to prohibit (i) separately contacting the membership, or any part thereof, of any public body for the purpose of ascertaining a member's position with respect to the transaction of public business, whether such contact is done in person, by telephone or by electronic communication, provided the contact is done on a basis that does not constitute a meeting as defined in this chapter or (ii) the House of Delegates or the Senate of Virginia from adopting rules relating to the casting of votes by members of standing committees. Nothing in this subsection shall operate to exclude any public record from the provisions of this chapter.

§ 2.2-3711. Closed meetings authorized for certain limited purposes.
A. Public bodies may hold closed meetings only for the following purposes:

1. Discussion, consideration, or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining, or resignation of specific public officers, appointees, or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board. Nothing in this subdivision, however, shall be construed to authorize a closed meeting by a local governing body or an elected school board to discuss compensation matters that affect the membership of such body or board collectively.

2. Discussion or consideration of admission or disciplinary matters or any other matters that would involve the disclosure of information contained in a scholastic record concerning any student of any public institution of higher education in the Commonwealth or any state school system. However, any such student, legal counsel and, if the student is a minor, the student's parents or legal guardians shall be permitted to be present during the taking of testimony or presentation of evidence at a closed meeting, if such student, parents, or guardians so request in writing and such request is submitted to the presiding officer of the appropriate board.

3. Discussion or consideration of the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.

4. The protection of the privacy of individuals in personal matters not related to public business.

5. Discussion concerning a prospective business or industry or the expansion of an existing business or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities in the community.

6. Discussion or consideration of the investment of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the governmental unit would be adversely affected.

7. Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body. For the purposes of this subdivision, "probable litigation" means litigation that has been specifically threatened or on which the public body or its legal counsel has a reasonable basis to believe will be commenced by or against a known party. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

8. Consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

9. Discussion or consideration by governing boards of public institutions of higher education of matters relating to gifts, bequests and fund-raising activities, and of grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants, and contracts made by a foreign government, a foreign legal entity, or a foreign person and accepted by a public institution of higher education in the Commonwealth shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a political subdivision thereof, (ii) "foreign legal entity" means any legal entity (a) created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such entity is composed of foreign persons or foreign legal entities or (b) created under the laws of a foreign government, and (iii) "foreign person" means any individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.

10. Discussion or consideration by the boards of trustees of the Virginia Museum of Fine Arts, the Virginia Museum of Natural History, the Jamestown-Yorktown Foundation, the Fort Monroe Authority, and The Science Museum of Virginia of matters relating to specific gifts, bequests, and grants from private sources.

11. Discussion or consideration of honorary degrees or special awards.

12. Discussion or consideration of tests, examinations, or other information used, administered, or prepared by a public body and subject to the exclusion in subdivision 4 of § 2.2-3705.1.

13. Discussion, consideration, or review by the appropriate House or Senate committees of possible disciplinary action against a member arising out of the possible inadequacy of the disclosure statement filed by the member, provided the member may request in writing that the committee meeting not be conducted in a closed meeting.

14. Discussion of strategy with respect to the negotiation of a hazardous waste siting agreement or to consider the terms, conditions, and provisions of a hazardous waste siting agreement if the governing body in open meeting finds that an open meeting will have an adverse effect upon the negotiating position of the governing body or the establishment of the terms, conditions and provisions of the siting agreement, or both. All discussions with the applicant or its representatives may be conducted in a closed meeting.

15. Discussion by the Governor and any economic advisory board reviewing forecasts of economic activity and estimating general and nongeneral fund revenues.

16. Discussion or consideration of medical and mental health records subject to the exclusion in subdivision 1 of § 2.2-3705.5.

17. Deliberations of the Virginia Lottery Board in a licensing appeal action conducted pursuant to subsection D of § 58.1-4007 regarding the denial or revocation of a license of a lottery sales agent; and discussion, consideration or review of Virginia Lottery matters related to proprietary lottery game

information and studies or investigations excluded from disclosure under subdivision 6 of § 2.2-3705.3 and subdivision 11 of § 2.2-3705.7.

18. Those portions of meetings in which the Board of Corrections discusses or discloses the identity of, or information tending to identify, any prisoner who (i) provides information about crimes or criminal activities, (ii) renders assistance in preventing the escape of another prisoner or in the apprehension of an escaped prisoner, or (iii) voluntarily or at the instance of a prison official renders other extraordinary services, the disclosure of which is likely to jeopardize the prisoner's life or safety.

19. Discussion of plans to protect public safety as it relates to terrorist activity or specific cybersecurity threats or vulnerabilities and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such matters or a related threat to public safety; discussion of information subject to the exclusion in subdivision 2 or 14 of § 2.2-3705.2, where discussion in an open meeting would jeopardize the safety of any person or the security of any facility, building, structure, information technology system, or software program; or discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure.

20. Discussion by the Board of the Virginia Retirement System, acting pursuant to § 51.1-124.30, or of any local retirement system, acting pursuant to § 51.1-803, or by a local finance board or board of trustees of a trust established by one or more local public bodies to invest funds for postemployment benefits other than pensions, acting pursuant to Article 8 (§ 15.2-1544 et seq.) of Chapter 15 of Title 15.2, or by the board of visitors of the University of Virginia, acting pursuant to § 23.1-2210, or by the Board of the Virginia College Savings Plan, acting pursuant to § 23.1-706, regarding the acquisition, holding or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, to the extent that such discussion (i) concerns confidential analyses prepared for the board of visitors of the University of Virginia, prepared by the retirement system, or a local finance board or board of trustees, or the Virginia College Savings Plan or provided to the retirement system, a local finance board or board of trustees, or the Virginia College Savings Plan under a promise of confidentiality, of the future value of such ownership interest or the future financial performance of the entity, and (ii) would have an adverse effect on the value of the investment to be acquired, held, or disposed of by the retirement system, a local finance board or board of trustees, the board of visitors of the University of Virginia, or the Virginia College Savings Plan. Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the identity of any investment held, the amount invested or the present value of such investment.

21. Those portions of meetings in which individual child death cases are discussed by the State Child Fatality Review Team established pursuant to § 32.1-283.1, those portions of meetings in which individual child death cases are discussed by a regional or local child fatality review team established pursuant to § 32.1-283.2, those portions of meetings in which individual death cases are discussed by family violence fatality review teams established pursuant to § 32.1-283.3, those portions of meetings in which individual adult death cases are discussed by the state Adult Fatality Review Team established pursuant to § 32.1-283.5, those portions of meetings in which individual adult death cases are discussed by a local or regional adult fatality review team established pursuant to § 32.1-283.6, those portions of meetings in which individual death cases are discussed by overdose fatality review teams established

pursuant to § 32.1-283.7, and those portions of meetings in which individual maternal death cases are discussed by the Maternal Mortality Review Team pursuant to § 32.1-283.8.

22. Those portions of meetings of the board of visitors of the University of Virginia or the Eastern Virginia Medical School Board of Visitors, as the case may be, and those portions of meetings of any persons to whom management responsibilities for the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, have been delegated, in which there is discussed proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would adversely affect the competitive position of the Medical Center or Eastern Virginia Medical School, as the case may be.

23. Discussion or consideration by the Virginia Commonwealth University Health System Authority or the board of visitors of Virginia Commonwealth University of any of the following: the acquisition or disposition by the Authority of real property, equipment, or technology software or hardware and related goods or services, where disclosure would adversely affect the bargaining position or negotiating strategy of the Authority; matters relating to gifts or bequests to, and fund-raising activities of, the Authority; grants and contracts for services or work to be performed by the Authority; marketing or operational strategies plans of the Authority where disclosure of such strategies or plans would adversely affect the competitive position of the Authority; and members of the Authority's medical and teaching staffs and qualifications for appointments thereto.

24. Those portions of the meetings of the Health Practitioners' Monitoring Program Committee within the Department of Health Professions to the extent such discussions identify any practitioner who may be, or who actually is, impaired pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1.

25. Meetings or portions of meetings of the Board of the Virginia College Savings Plan wherein personal information, as defined in § 2.2-3801, which has been provided to the Board or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 7 (§ 23.1-700 et seq.) of Title 23.1 is discussed.

26. Discussion or consideration, by the former Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to former § 56-484.15, of trade secrets submitted by CMRS providers, as defined in § 56-484.12, related to the provision of wireless E-911 service.

27. Those portions of disciplinary proceedings by any regulatory board within the Department of Professional and Occupational Regulation, Department of Health Professions, or the Board of Accountancy conducted pursuant to § 2.2-4019 or 2.2-4020 during which the board deliberates to reach a decision or meetings of health regulatory boards or conference committees of such boards to consider settlement proposals in pending disciplinary actions or modifications to previously issued board orders as requested by either of the parties.

28. Discussion or consideration of information subject to the exclusion in subdivision 11 of § 2.2-3705.6 by a responsible public entity or an affected locality or public entity, as those terms are defined in § 33.2-1800, or any independent review panel appointed to review information and advise the responsible public entity concerning such records.

29. Discussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body.

30. Discussion or consideration of grant or loan application information subject to the exclusion in subdivision 17 of § 2.2-3705.6 by (i) the Commonwealth Health Research Board or (ii) the Innovation and Entrepreneurship Investment Authority or the Research and Technology Investment Advisory Committee appointed to advise the Innovation and Entrepreneurship Investment Authority.

31. Discussion or consideration by the Commitment Review Committee of information subject to the exclusion in subdivision 5 of § 2.2-3705.2 relating to individuals subject to commitment as sexually violent predators under Chapter 9 (§ 37.2-900 et seq.) of Title 37.2.

32. Discussion or consideration of confidential proprietary information and trade secrets developed and held by a local public body providing certain telecommunication services or cable television services and subject to the exclusion in subdivision 18 of § 2.2-3705.6. However, the exemption provided by this subdivision shall not apply to any authority created pursuant to the BVU Authority Act (§ 15.2-7200 et seq.).

33. Discussion or consideration by a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) of confidential proprietary information and trade secrets subject to the exclusion in subdivision 19 of § 2.2-3705.6.

34. Discussion or consideration by the State Board of Elections or local electoral boards of voting security matters made confidential pursuant to § 24.2-410.2 or 24.2-625.1.

35. Discussion or consideration by the Forensic Science Board or the Scientific Advisory Committee created pursuant to Article 2 (§ 9.1-1109 et seq.) of Chapter 11 of Title 9.1 of criminal investigative files subject to the exclusion in subdivision B 1 of § 2.2-3706.

36. Discussion or consideration by the Brown v. Board of Education Scholarship Committee of information or confidential matters subject to the exclusion in subdivision A 3 of § 2.2-3705.4, and meetings of the Committee to deliberate concerning the annual maximum scholarship award, review and consider scholarship applications and requests for scholarship award renewal, and cancel, rescind, or recover scholarship awards.

37. Discussion or consideration by the Virginia Port Authority of information subject to the exclusion in subdivision 1 of § 2.2-3705.6 related to certain proprietary information gathered by or for the Virginia Port Authority.

38. Discussion or consideration by the Board of Trustees of the Virginia Retirement System acting pursuant to § 51.1-124.30, by the Investment Advisory Committee appointed pursuant to § 51.1-124.26, by any local retirement system, acting pursuant to § 51.1-803, by the Board of the Virginia College Savings Plan acting pursuant to § 23.1-706, or by the Virginia College Savings Plan's Investment Advisory Committee appointed pursuant to § 23.1-702 of information subject to the exclusion in subdivision 24 of § 2.2-3705.7.

39. Discussion or consideration of information subject to the exclusion in subdivision 3 of § 2.2-3705.6 related to economic development.

40. Discussion or consideration by the Board of Education of information relating to the denial, suspension, or revocation of teacher licenses subject to the exclusion in subdivision 11 of § 2.2-3705.3.

41. Those portions of meetings of the Virginia Military Advisory Council or any commission created by executive order for the purpose of studying and making recommendations regarding preventing closure or realignment of federal military and national security installations and facilities located in Virginia and relocation of such facilities to Virginia, or a local or regional military affairs organization appointed by a local governing body, during which there is discussion of information subject to the exclusion in subdivision 8 of § 2.2-3705.2.

42. Discussion or consideration by the Board of Trustees of the Veterans Services Foundation of information subject to the exclusion in subdivision 28 of § 2.2-3705.7 related to personally identifiable information of donors.

43. Discussion or consideration by the Virginia Tobacco Region Revitalization Commission of information subject to the exclusion in subdivision 23 of § 2.2-3705.6 related to certain information contained in grant applications.

44. Discussion or consideration by the board of directors of the Commercial Space Flight Authority of information subject to the exclusion in subdivision 24 of § 2.2-3705.6 related to rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority and certain proprietary information of a private entity provided to the Authority.

45. Discussion or consideration of personal and proprietary information related to the resource management plan program and subject to the exclusion in (i) subdivision 25 of § 2.2-3705.6 or (ii) subsection E of § 10.1-104.7. This exclusion shall not apply to the discussion or consideration of records that contain information that has been certified for release by the person who is the subject of the information or transformed into a statistical or aggregate form that does not allow identification of the person who supplied, or is the subject of, the information.

46. Discussion or consideration by the Board of Directors of the Virginia Alcoholic Beverage Control Authority of information subject to the exclusion in subdivision 1 of § 2.2-3705.3 related to investigations of applicants for licenses and permits and of licensees and permittees.

47. Discussion or consideration of grant or loan application records subject to the exclusion in subdivision 28 of § 2.2-3705.6 related to the submission of an application for an award from the

Virginia Research Investment Fund pursuant to Article 8 (§ 23.1-3130 et seq.) of Chapter 31 of Title 23.1 or interviews of parties to an application by a reviewing entity pursuant to subsection D of § 23.1-3133 or by the Virginia Research Investment Committee.

48. Discussion or development of grant proposals by a regional council established pursuant to Article 26 (§ 2.2-2484 et seq.) of Chapter 24 to be submitted for consideration to the Virginia Growth and Opportunity Board.

49. Discussion or consideration of (i) individual sexual assault cases by a sexual assault response team established pursuant to § 15.2-1627.4, (ii) individual child abuse or neglect cases or sex offenses involving a child by a child sexual abuse response team established pursuant to § 15.2-1627.5, or (iii) individual cases involving abuse, neglect, or exploitation of adults as defined in § 63.2-1603 pursuant to §§ 15.2-1627.5 and 63.2-1605.

50. Discussion or consideration by the Board of the Virginia Economic Development Partnership Authority, the Joint Legislative Audit and Review Commission, or any subcommittees thereof, of the portions of the strategic plan, marketing plan, or operational plan exempt from disclosure pursuant to subdivision 33 of § 2.2-3705.7.

51. Those portions of meetings of the subcommittee of the Board of the Virginia Economic Development Partnership Authority established pursuant to subsection F of § 2.2-2237.3 to review and discuss information received from the Virginia Employment Commission pursuant to subdivision C 2 of § 60.2-114.

B. No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation, or motion that shall have its substance reasonably identified in the open meeting.

C. Public officers improperly selected due to the failure of the public body to comply with the other provisions of this section shall be de facto officers and, as such, their official actions are valid until they obtain notice of the legal defect in their election.

D. Nothing in this section shall be construed to prevent the holding of conferences between two or more public bodies, or their representatives, but these conferences shall be subject to the same procedures for holding closed meetings as are applicable to any other public body.

E. This section shall not be construed to (i) require the disclosure of any contract between the Department of Health Professions and an impaired practitioner entered into pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1 or (ii) require the board of directors of any authority created pursuant to the Industrial Development and Revenue Bond Act (§ 15.2-4900 et seq.), or any public body empowered to issue industrial revenue bonds by general or special law, to identify a business or industry to which subdivision A 5 applies. However, such business or industry shall be identified as a matter of public record at least 30 days prior to the actual date of the board's authorization of the sale or issuance of such bonds.

§ 2.2-3712. Closed meetings procedures; certification of proceedings.

A. No closed meeting shall be held unless the public body proposing to convene such meeting has taken an affirmative recorded vote in an open meeting approving a motion that (i) identifies the subject matter, (ii) states the purpose of the meeting as authorized in subsection A of § 2.2-3711 or other provision of law and (iii) cites the applicable exemption from open meeting requirements provided in subsection A of § 2.2-3711 or other provision of law. The matters contained in such motion shall be set forth in detail in the minutes of the open meeting. A general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting.

B. The notice provisions of this chapter shall not apply to closed meetings of any public body held solely for the purpose of interviewing candidates for the position of chief administrative officer. Prior to any such closed meeting for the purpose of interviewing candidates, the public body shall announce in an open meeting that such closed meeting shall be held at a disclosed or undisclosed location within 15 days thereafter.

C. The public body holding a closed meeting shall restrict its discussion during the closed meeting only to those matters specifically exempted from the provisions of this chapter and identified in the motion required by subsection A.

D. At the conclusion of any closed meeting, the public body holding such meeting shall immediately reconvene in an open meeting and shall take a roll call or other recorded vote to be included in the minutes of that body, certifying that to the best of each member's knowledge (i) only public business matters lawfully exempted from open meeting requirements under this chapter and (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the meeting by the public body. Any member of the public body who believes that there was a departure from the requirements of clauses (i) and (ii), shall so state prior to the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body.

E. Failure of the certification required by subsection D to receive the affirmative vote of a majority of the members of the public body present during a meeting shall not affect the validity or confidentiality of such meeting with respect to matters considered therein in compliance with the provisions of this chapter. The recorded vote and any statement made in connection therewith, shall upon proper authentication, constitute evidence in any proceeding brought to enforce the provisions of this chapter.

F. A public body may permit nonmembers to attend a closed meeting if such persons are deemed necessary or if their presence will reasonably aid the public body in its consideration of a topic that is a subject of the meeting.

G. A member of a public body shall be permitted to attend a closed meeting held by any committee or subcommittee of that public body, or a closed meeting of any entity, however designated, created to perform the delegated functions of or to advise that public body. Such member shall in all cases be permitted to observe the closed meeting of the committee, subcommittee or entity. In addition to the requirements of § 2.2-3707, the minutes of the committee or other entity shall include the identity of the member of the parent public body who attended the closed meeting.

H. Except as specifically authorized by law, in no event may any public body take action on matters discussed in any closed meeting, except at an open meeting for which notice was given as required by § 2.2-3707.

I. Minutes may be taken during closed meetings of a public body, but shall not be required. Such minutes shall not be subject to mandatory public disclosure.

§ 2.2-3713. Proceedings for enforcement of chapter.

A. Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause. Such petition may be brought in the name of the person notwithstanding that a request for public records was made by the person's attorney in his representative capacity. Venue for the petition shall be addressed as follows:

1. In a case involving a local public body, to the general district court or circuit court of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied;

2. In a case involving a regional public body, to the general district or circuit court of the county or city where the principal business office of such body is located; and

3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

B. In any action brought before a general district court, a corporate petitioner may appear through its officer, director or managing agent without the assistance of counsel, notwithstanding any provision of law or Rule of Supreme Court of Virginia to the contrary.

C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing. However, if the petition or the affidavit supporting the petition for mandamus or injunction alleges violations of the open meetings requirements of this chapter, the three-day notice to the party against whom the petition is brought shall not be required. The hearing on any petition made outside of the regular terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

D. The petition shall allege with reasonable specificity the circumstances of the denial of the rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs,

including costs and reasonable fees for expert witnesses, and attorney fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position.

E. In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exclusion by a preponderance of the evidence. No court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

F. Failure by any person to request and receive notice of the time and place of meetings as provided in § 2.2-3707 shall not preclude any person from enforcing his rights and privileges conferred by this chapter.

§ 2.2-3714. Violations and penalties.

A. In a proceeding commenced against any officer, employee, or member of a public body under § 2.2-3713 for a violation of § 2.2-3704, 2.2-3705.1 through 2.2-3705.7, 2.2-3706, 2.2-3707, 2.2-3708.2, 2.2-3710, 2.2-3711 or 2.2-3712, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such officer, employee, or member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than $500 nor more than $2,000, which amount shall be paid into the Literary Fund. For a second or subsequent violation, such civil penalty shall be not less than $2,000 nor more than $5,000.

B. In addition to any penalties imposed pursuant to subsection A, if the court finds that any officer, employee, or member of a public body failed to provide public records to a requester in accordance with the provisions of this chapter because such officer, employee, or member altered or destroyed the requested public records with the intent to avoid the provisions of this chapter with respect to such request prior to the expiration of the applicable record retention period set by the retention regulations promulgated pursuant to the Virginia Public Records Act (§ 42.1-76 et seq.) by the State Library Board, the court may impose upon such officer, employee, or member in his individual capacity, whether or not a writ of mandamus or injunctive relief is awarded, a civil penalty of up to $100 per record altered or destroyed, which amount shall be paid into the Literary Fund.

C. In addition to any penalties imposed pursuant to subsections A and B, if the court finds that a public body voted to certify a closed meeting in accordance with subsection D of § 2.2-3712 and such certification was not in accordance with the requirements of clause (i) or (ii) of subsection D of § 2.2-3712, the court may impose on the public body, whether or not a writ of mandamus or injunctive relief is awarded, a civil penalty of up to $1,000, which amount shall be paid into the Literary Fund. In determining whether a civil penalty is appropriate, the court shall consider mitigating factors, including reliance of members of the public body on (i) opinions of the Attorney General, (ii) court cases substantially supporting the rationale of the public body, and (iii) published opinions of the Freedom of Information Advisory Council.

§ 2.2-3715. Effect of advisory opinions from the Freedom of Information Advisory Council on liability for willful and knowing violations.

Any officer, employee, or member of a public body who is alleged to have committed a willful and knowing violation pursuant to § 2.2-3714 shall have the right to introduce at any proceeding a copy of a relevant advisory opinion issued pursuant to § 30-179 as evidence that he did not willfully and knowingly commit the violation if the alleged violation resulted from his good faith reliance on the advisory opinion.

E-MAIL AND MEETINGS: The VA Supreme Court has held that e-mails may constitute a "meeting" under FOIA if there is simultaneous e-mail communication between three or more board members. Avoid "reply to all" as a general rule. See FOIA Council handout entitled *"Email and Meetings"* available on the FOIA Council website.

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RECORDS

WHAT is a PUBLIC RECORD?

ALL writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

ALL public records are OPEN to the public UNLESS a specific exemption in law allows the record to be withheld.

FOIA AND MEMBERS OF PUBLIC BODIES

WHAT about RETENTION of PUBLIC RECORDS?

Public records MUST be retained according to retention schedules set by the Library of Virginia. The length of retention depends on the content of the record. After expiration of the applicable retention period, the records may be destroyed or discarded.

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E-MAILS

Emails that relate to the public business are public records, regardless of whether you use your home or office computer, text or other forms of social media. It is the **content** of the record, not the equipment used, that controls.

As such, these emails must be retained as required by the VA Public Records Act. For practical advice for email use, access and retention, see FOIA Council handout entitled *"Email: Use, Access and Retention"* available on the FOIA Council website.

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VA Freedom of Information Advisory Council:

Alan Gernhardt, *Executive Director*
Ashley Binns, *Attorney*
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A Guide to the Freedom of Information Act for Members of Boards, Councils, Commissions, and other Deliberative Public Bodies

Prepared by the Virginia Freedom of Information Advisory Council

POLICY OF FOIA

By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to records in the custody of public officials and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.

Unless a public body or public official specifically elects to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

FOIA AND MEMBERS OF PUBLIC BODIES

MEETING REQUIREMENTS

What is considered a MEETING under FOIA?

ANY gathering, including work sessions, of the constituent membership, sitting (or through telephonic or video equipment pursuant to § 2.2-3708.2) as:

- the board, or
- an informal assemblage of
  - (i) as many as three members, or
  - (ii) a quorum, if less than three, of the constituent membership,

WHEREVER the gathering is held;
REGARDLESS OF WHETHER minutes are taken OR votes are cast.
NOTE: This requirement also applies to ANY meeting, including work sessions, of any subgroup of the board, regardless how subgroup is designated (i.e. subcommittee, task force, workgroup, etc.).

WHAT is *NOT* a MEETING?

- The gathering of employees; or
- The gathering or attendance of two or more board/council members at:
  - Any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business; OR

A public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to discuss or transact public business.

FOIA AND MEMBERS OF PUBLIC BODIES

OTHER FOIA PROVISIONS

MINUTES: Minutes **ARE REQUIRED** for any meeting of the board/subgroup of the board.

VOTING: NO secret or written ballots are ever allowed.

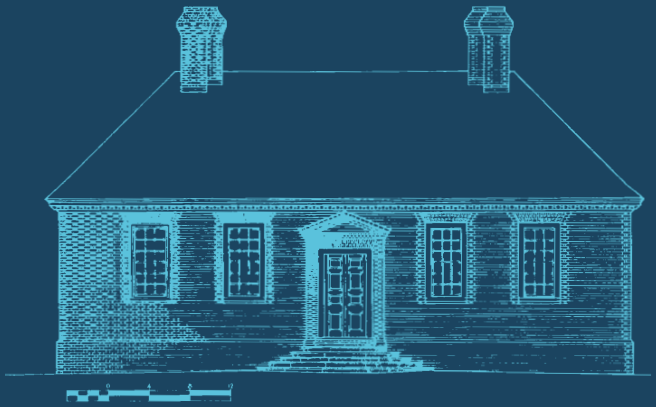
POLLING: You MAY contact individual members **separately (one-on-one)** to ascertain their positions by phone, letter or email. REMEMBER: This exemption CANNOT be used in lieu of a meeting. REMEMBER ALSO: If you choose to use email to poll, you are creating a public record!

CLOSED MEETINGS: Allowed **ONLY** as specifically authorized by FOIA or other law and **REQUIRES** a motion stating the purpose, the subject *and* Code cite. [See § 2.2-3711 of FOIA for allowable purposes for closed meetings.]

E-MEETINGS: Are allowed for state public bodies under heightened procedural and reporting requirements (i.e. quorum must be physically assembled in one location, annual report to FOIA Council, etc.). For all public bodies, limited individual participation by electronic means is allowed under certain circumstances (personal matter, medical reason, or distance in the case of regional public bodies). [See § 2.2-3708.2 of FOIA.]

A GUIDE TO THE

Virginia Public Records Act



LIBRARY OF VIRGINIA

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CONTENTS

In 2004, House Joint Resolution No. 6 authorized an eleven-member joint subcommittee to study the Virginia Public Records Act (VPRA). Thirty years had passed since its enactment and no major revisions had been made to the act. Over the next two years, the subcommittee solicited comments from interested parties with the objective of updating the act in order to reflect and meet the demands of rapidly changing technology. The work of the subcommittee was presented to the General Assembly and passed in 2006.

While there were a number of significant changes to the act, the intent remained to ensure that procedures used to manage and preserve public records are uniform throughout the Commonwealth. To that end, the act directs that any person elected, reelected, appointed, or reappointed to the governing body of any agency subject to the Public Records Act be furnished a copy of the act within two weeks following election, reelection, appointment, or reappointment. Such individuals are to read and become familiar with the provisions of the act.

This guide is provided for convenient reference to the Virginia Public Records Act. The Library of Virginia administers a program for the efficient and effective management of Virginia's public records with services and resources available to state agencies, local governments, and regional authorities. Direct any questions about the program or requests for more VPRA booklets to the Records Management Section, Library of Virginia, 800 East Broad Street, Richmond, VA 23219, 804.692.3600, or visit www.lva.virginia.gov/agencies/records.

Sandra G. Treadway
LIBRARIAN OF VIRGINIA
& STATE ARCHIVIST

YOUR RESPONSIBILITIES FOR PUBLIC RECORDS

Officers, executives, appointees, elected officials, faculty, staff, and/or other employees (hereinafter collectively referred to as "employee(s)") in all state, local, and regional government agencies (agency) create and maintain public records as a part of their official responsibilities. These records may be in paper, electronic, or other formats. This guide will assist you in:

- Identifying public records that must be incorporated into agency files and maintained under the control of the Commonwealth
- Distinguishing public records from extra or convenience copies
- Identifying personal material that contains information not used to conduct agency business
- Maintaining, separating, and removing personal material from public records

WHY SHOULD I CARE ABOUT RECORDS?

Every elected or appointed official has an obligation to ensure that his or her agency establishes appropriate records creation and maintenance procedures. Everyone in government has an obligation to follow those procedures. Good recordkeeping:

- Ensures accountability to the administration, the General Assembly, and all Virginians
- Contributes to effective and efficient agency operations by making the information needed for decision making and smooth operations readily available
- Provides information useful to successor officials and staff for background and analysis, facilitating successful transitions between administrations
- Creates a complete record of official actions that will remain with the agency for future use and may later be transferred to the Library of Virginia as a historical record
- Ensures that electronic records, especially those generated by desktop applications, will be available to all authorized personnel

- Protects records from inappropriate and unauthorized access
- Simplifies decisions about which records are of permanent historical value; which records are of temporary administrative, fiscal, or legal value; which records are past their retention period and can be destroyed; and which materials are personal or otherwise not useful in the pursuit of state business.

WHAT ARE PUBLIC RECORDS?

Public records are recorded information documenting a transaction or activity by or with any public officer, agency, or employee of state government or its political subdivisions. Regardless of physical form or characteristics, the recorded information is a public record if it is produced, collected, received, or retained in pursuance of law or in connection with the transaction of public business.

There are distinctions between what constitutes a record, the format by which the record is captured, and the media on which that record may be stored. The "record" is the textual, pictorial, video, and/or sound depiction of an action, decision, or event, e.g., correspondence, meeting minutes, accounts payables, or speeches. The "format" is the method or application by or with which the record is created, e.g., handwriting, typewriter, word processor, or audio/video recording. The "media" is the instrument or device on which the record is stored, e.g., paper, microfilm, audio disc, magnetic tape, or disk drive. Regardless of the format used to create/access a record or the media used to store a record, it is the *record*—the content depicting the action, decision, or event—that is of primary consideration.

Each agency is responsible for determining whether the documentary materials it creates meet this definition of a public record. Agencies must create and maintain records containing a full accounting of their organization, functions, policies, and activities. Agency records must also contain the information needed to protect the interests of the Commonwealth and the rights of its citizens.

Records may be originals or copies, such as file copies of outgoing correspondence or copies forwarded for action. Multiple copies of the same document are each considered to be a record only in the instance that each serves a separate administrative purpose and if they are kept in separate filing or recordkeeping systems. Extra copies, such as distribution copies, stock copies, and copies maintained for convenience or reference, are not public records. Records may be stored in their native format and/or media or may be migrated to others. In the case of any migration, care must be taken to ensure that the context of the record is preserved.

Many factors contribute to the determination that documentary materials are public records. If the answer to any of the following questions is "yes," the document is a public record.

- Did the agency require creation or submission and maintenance of the document?
- Was the document used to conduct or facilitate agency business?
- If the document is a draft or preliminary document created for background or a similar purpose, does it contain unique information that explains formulation of significant program policies and decisions?
- Was the document distributed to other offices or agencies for formal approval or clearance?
- Is the document part of an electronic information system used to conduct government business?

WHAT DOCUMENTARY MATERIALS ARE NOT PUBLIC RECORDS?

The Virginia Public Records Act (§ 42.1-76) definition of records excludes three specific types of materials: reference books and exhibition materials made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience or reference, and stocks of publications.

ARE PRELIMINARY DRAFTS AND WORKING PAPERS PUBLIC RECORDS?

Drafts and working papers should be filed and maintained as part of the agency's records if they explain how the agency formulated and executed significant program policies, decisions, actions, or responsibilities, or if they contain unique information such as annotations or comments.

WHAT ARE PERSONAL MATERIALS?

"Personal materials" refers to documentary information that is either unrelated to the conduct of agency business (e.g., political activities, personal and family matters, or nongovernmentally related social or civic activities) or indirectly related to agency business, but outside the scope of the definition of public records (i.e., not used to conduct government business, except at the gubernatorial and secretariat level).

Personal materials belong to an individual, not the agency. The creation and use of personal material (paper and electronic) should be kept to a minimum.

Personal materials may contain references to or comments on agency business, but they are considered personal if they are not used in the conduct of business. Traditionally, personal files have included the following categories of material:

- Business or professional files created before entering government service, files created during or relating to previously held positions, political materials, and reference files.
- Private files brought into, created, or received in the office, and family and personal correspondence and materials documenting professional activities and outside business or political pursuits.
- Manuscripts and drafts for articles and books as well as

volunteer and community service records are considered personal, even if created or received while in office, because they do not relate to agency business.
- Work-related personal materials including diaries, journals, notes, and personal calendars and appointment schedules (below the gubernatorial and secretariat level). Though work-related, they may be personal if they are used only as reminders and personal observations on work-related topics, not for the transaction of government business. This category is the most difficult to distinguish from records because of its work-related content.

Restricting agency e-mail accounts to work activities and using a personal e-mail account for personal messages eliminates the need to sort one from the other.

WHAT DO I NEED TO DO WHEN I ENTER STATE SERVICE?

Government employees should follow these recommended recordkeeping practices upon taking the position and throughout the tenure in the position.

- Contact the agency's records officer for agency records management policies and procedures.
- Implement the records management policies and procedures issued by the agency records officer. Follow retention schedules for all records.
- Establish separate files and directories for public records and, for minimal use, personal materials.
- Document the substance of meetings and telephone or face-to-face conversations where decisions are made, issues are resolved, or policies are established.
- Extract government business information from documents that contain a mix of personal and business matters and include the business information in agency files.

WHAT HAPPENS TO PUBLIC RECORDS?

The life cycle of a public record is determined by consulting the appropriate records retention schedules, which are compiled in collaboration between records management and archival staff at the Library of Virginia and public records custodians. The schedules provide legal, written directives to agencies that specify the retention period and disposition of their records. Library staff, in consultation with agency records officers, will appraise the records and determine which are permanent—that is, records that have historical value that justifies permanent preservation. All records not designated as permanent are considered temporary, though their retention periods may vary considerably. Temporary records should be destroyed at the end of the retention period specified in the retention schedule, with the destruction process documented by the appropriate forms.

WHAT DO I NEED TO DO WHEN I LEAVE STATE SERVICE?

An orderly transfer of records from departing employees to their successors is vital to the continuity of government. The agency records officer will help ensure that records are clearly identified and retention schedules are applied so that the functions of the position can continue to be performed as smoothly as possible following the transition. If a position or an agency is being terminated without successor(s), contact the Library of Virginia for consultation on the disposition of any pertinent records. Per the *Code of Virginia* (§ 42.1-88), any custodian of public records shall, at the expiration of his or her term of office, appointment, or employment, deliver to his or her successor—or, if there be none, to the Library of Virginia—all books, writings, letters, documents, public records, or other information kept or received in the transaction of official business. Any person who shall refuse or neglect to deliver public records for a period of ten days after a request is made in writing by the successor or the Librarian of Virginia shall be guilty of a Class 3 misdemeanor.

WHERE CAN I GET FURTHER INFORMATION AND ASSISTANCE?

More information, including a glossary of terms used in this pamphlet, as well as the *Virginia Public Records Management Manual,* is available on the Library of Virginia's website at www.lva.virginia.gov/agencies/records. If you have any questions, contact your agency's designated records officer or the Records Management Section at the Library of Virginia.

Library of Virginia
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July 2016

LIBRARY OF VIRGINIA

CODE OF VIRGINIA, TITLE 42.1 LIBRARIES, CHAPTER 7 VIRGINIA PUBLIC RECORDS ACT (42.1-76 THRU 42.1-91)

§ 42.1-76. *Legislative intent; title of chapter.*

The General Assembly intends by this chapter to establish a single body of law applicable to all public officers and employees on the subject of public records management and preservation and to ensure that the procedures used to manage and preserve public records will be uniform throughout the Commonwealth.

This chapter may be cited as the Virginia Public Records Act.

(1976, c. 746.)

§ 42.1-76.1. *Notice of Chapter.*

Any person elected, reelected, appointed, or reappointed to the governing body of any agency subject to this chapter shall (i) be furnished by the agency or public body's administrator or legal counsel with a copy of this chapter within two weeks following election, reelection, appointment, or reappointment and (ii) read and become familiar with the provisions of this chapter.

(2006, c. 60.)

§ 42.1-77. *Definitions.*

As used in this chapter:

"Agency" means all boards, commissions, departments, divisions, institutions, authorities, or parts thereof, of the Commonwealth or its political subdivisions and includes the offices of constitutional officers.

"Archival quality" means a quality of reproduction consistent with established standards specified by state and national agencies and organizations responsible for establishing such standards, such as the Association for Information and Image Management, the

American National Standards Institute, and the National Institute of Standards and Technology.

"Archival record" means a public record of continuing and enduring value useful to the citizens of the Commonwealth and necessary to the administrative functions of public agencies in the conduct of services and activities mandated by law that is identified on a Library of Virginia–approved records retention and disposition schedule as having sufficient informational value to be permanently maintained by the Commonwealth.

"Archives" means the program administered by the Library of Virginia for the preservation of archival records.

"Board" means the State Library Board.

"Conversion" means the act of moving electronic records to a different format, especially data from an obsolete format to a current format.

"Custodian" means the public official in charge of an office having public records.

"Disaster plan" means the information maintained by an agency that outlines recovery techniques and methods to be followed in case of an emergency that impacts the agency's records.

"Electronic record" means a public record whose creation, storage, and access require the use of an automated system or device. Ownership of the hardware, software, or media used to create, store, or access the electronic record has no bearing on a determination of whether such record is a public record.

"Essential public record" means records that are required for recovery and reconstruction of any agency to enable it to resume its core operations and functions and to protect the rights and interests of persons.

"Librarian of Virginia" means the State Librarian of Virginia or his designated representative.

"Lifecycle" means the creation, use, maintenance, and disposition of a public record.

"Metadata" means data describing the context, content, and structure of records and their management through time.

"Migration" means the act of moving electronic records from one information system or medium to another to ensure continued access to the records while maintaining the records' authenticity, integrity, reliability, and usability.

"Original record" means the first generation of the information and is the preferred version of a record. Archival records should to the maximum extent possible be original records.

"Preservation" means the processes and operations involved in ensuring the technical and intellectual survival of authentic records through time.

"Private record" means a record that does not relate to or affect the carrying out of the constitutional, statutory, or other official ceremonial duties of a public official, including the correspondence, diaries, journals, or notes that are not prepared for, utilized for, circulated, or communicated in the course of transacting public business.

"Public official" means all persons holding any office created by the Constitution of Virginia or by any act of the General Assembly, the Governor and all other officers of the executive branch of the state government, and all other officers, heads, presidents or chairmen of boards, commissions, departments, and agencies of the state government or its political subdivisions.

"Public record" or **"record"** means recorded information that documents a transaction or activity by or with any public officer, agency, or employee of an agency. Regardless of physical form or characteristic, the recorded information is a public record if it is produced, collected, received, or retained in pursuance of law or in connection with the transaction of public business. The medium upon which such information is recorded has no bearing on the determination of whether the recording is a public record.

For purposes of this chapter, **"public record"** shall not include nonrecord materials, meaning materials made or acquired and preserved solely for reference use or exhibition purposes, extra copies of documents preserved only for convenience or reference, and stocks of publications.

"Records retention and disposition schedule" means a Library of Virginia–approved timetable stating the required retention period and disposition action of a records series. The administrative, fiscal, historical, and legal value of a public record shall be considered in appraising its appropriate retention schedule. The terms **"administrative," "fiscal," "historical,"** and **"legal"** value shall be defined as:

1. **"Administrative value":** Records shall be deemed of administrative value if they have continuing utility in the operation of an agency.
2. **"Fiscal value":** Records shall be deemed of fiscal value if they are needed to document and verify financial authorizations, obligations, and transactions.
3. **"Historical value":** Records shall be deemed of historical value if they contain unique information, regardless of age, that provides understanding of some aspect of the government and promotes the development of an informed and enlightened citizenry.
4. **"Legal value":** Records shall be deemed of legal value if they document actions taken in the protection and proving of legal or civil rights and obligations of individuals and agencies.

(1976, c. 746; 1977, c. 501; 1981, c. 637; 1987, c. 217; 1990, c. 778; 1994, cc. 390, 955; 1998, cc. 427, 470; 2005, c.787; 2006, c. 60.)

§ 42.1-78. *Confidentiality safeguarded.*

Any records made confidential by law shall be so treated. Records which by law are required to be closed to the public shall not be deemed to be made open to the public under the provisions of this chapter. Records in the custody of the Library of Virginia which are required to be closed to the public shall be open for public access 75 years after the date of creation of the record. No provision of this chapter shall be construed to authorize or require the opening of any records ordered to be sealed by a court. All records deposited in the archives that are not made confidential by law shall be open to public access.

(1976, c. 746; 1979, c. 110; 1990, c. 778; 1994, c. 64; 2006, c. 60.)

§ 42.1-79. *Records management function vested in the Library of Virginia.*

A. The archival and records management function shall be vested in the Library of Virginia. The Library of Virginia shall be the official custodian and trustee for the Commonwealth of all public records of whatever kind, and regardless of physical form or characteristics, that are transferred to it from any agency. As the Commonwealth's official repository of public records, the Library of Virginia shall assume ownership and administrative control of such records on behalf of the Commonwealth. The Library of Virginia shall own and operate any equipment necessary to manage and retain control of electronic archival records in its custody, but may, at its discretion, contract with third-party entities to provide any or all services related to managing archival records on equipment owned by the contractor, by other third parties, or by the Library of Virginia.
B. The Librarian of Virginia shall name a State Archivist who shall perform such functions as the Librarian of Virginia assigns.

C. Whenever legislation affecting public records management and preservation is under consideration, the Library of Virginia shall review the proposal and advise the General Assembly on the effects of its proposed implementation.

(1976, c. 746; 1986, c. 565; 1990, c. 778; 1994, c. 64; 1998, c. 427; 2005, c. 787; 2006, c. 60.)

§ 42.1-79.1. *Repealed by Acts 2005, c. 787, cl. 2.*

§ 42.1-80. *Repealed by Acts 2003, c. 177.*

§ 42.1-82. *Duties and powers of Library Board.*

A. The State Library Board shall:
   1. Issue regulations concerning procedures for the disposal, physical destruction or other disposition of public records containing social security numbers. The procedures shall include all reasonable steps to destroy such documents by (i) shredding, (ii) erasing, or (iii) otherwise modifying the social security numbers in those records to make them unreadable or undecipherable by any means.
   2. Issue regulations and guidelines designed to facilitate the creation, preservation, storage, filing, reformatting, management, and destruction of public records by agencies. Such regulations shall mandate procedures for records management and include recommendations for the creation, retention, disposal, or other disposition of public records.

B. The State Library Board may establish advisory committees composed of persons with expertise in the matters under consideration to assist the Library Board in developing regulations and guidelines.

(1976, c. 746; 1977, c. 501; 1981, c. 637; 1990, c. 778; 1994, cc. 64, 955; 2003, cc. 914, 918; 2005, c. 787; 2006, c.60.)

§ 42.1-83. *Repealed by Acts 2006, c. 60, cl. 2.*

§ 42.1-84. *Repealed by Acts 2005, c. 787, cl. 2.*

§ 42.1-85. *Records Management Program; agencies to cooperate; agencies to designate records officer.*

A. The Library of Virginia shall administer a records management program for the application of efficient and economical methods for managing the lifecycle of public records consistent with regulations and guidelines promulgated by the State Library Board, including operation of a records center or centers. The Library of Virginia shall establish procedures and techniques for the effective management of public records, make continuing surveys of records and records keeping practices, and recommend improvements in current records management practices, including the use of space, equipment, software, and supplies employed in creating, maintaining, and servicing records.
B. Any agency with public records shall cooperate with the Library of Virginia in conducting surveys. Each agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of such agency. The agency shall be responsible for ensuring that its public records are preserved, maintained, and accessible throughout their lifecycle, including converting and migrating electronic records as often as necessary so that information is not lost due to hardware, software, or media obsolescence or deterioration. Any public official who converts or migrates an electronic record shall ensure that it is an accurate copy of the original record. The converted or migrated record shall have the force of the original.
C. Each state agency and political subdivision of this Commonwealth shall designate as many as appropriate, but at least one, records officer to serve as a liaison to the Library of Virginia for the purposes of implementing and overseeing a records management program, and coordinating legal disposition, including destruction, of obsolete records. Designation of state agency records officers shall be by the respective agency head. Designation of a records officer for political subdivisions shall

be by the governing body or chief administrative official of the political subdivision. Each entity responsible for designating a records officer shall provide the Library of Virginia with the name and contact information of the designated records officer, and shall ensure that such information is updated in a timely manner in the event of any changes.

D. The Library of Virginia shall develop and make available training and education opportunities concerning the requirements of and compliance with this chapter for records officers in the Commonwealth.

(1976, c. 746; 1990, c. 778; 1994, c. 64; 1998, c. 427; 2006, c. 60.)

§ 42.1-86. *Essential public records; security recovery copies; disaster plans.*

A. In cooperation with the head of each agency, the Library of Virginia shall establish and maintain a program for the selection and preservation of essential public records. The program shall provide for preserving, classifying, arranging, and indexing essential public records so that such records are made available to the public. The program shall provide for making recovery copies or designate as recovery copies existing copies of such essential public records.

B. Recovery copies shall meet quality standards established by the Library of Virginia and shall be made by a process that accurately reproduces the record and forms a durable medium. A recovery copy may also be made by creating a paper or electronic copy of an original electronic record. Recovery copies shall have the same force and effect for all purposes as the original record and shall be as admissible in evidence as the original record whether the original record is in existence or not. Recovery copies shall be preserved in the place and manner prescribed by the State Library Board and the Governor.

C. The Library of Virginia shall develop a plan to ensure preservation of public records in the event of disaster or emergency as

defined in § 44-146.16. This plan shall be coordinated with the Department of Emergency Management and copies shall be distributed to all agency heads. The plan shall be reviewed and updated at least once every five years. The personnel of the Library shall be responsible for coordinating emergency recovery operations when public records are affected. Each agency shall ensure that a plan for the protection and recovery of public records is included in its comprehensive disaster plan.

(1976, c. 746; 1980, c. 365; 1990, c. 778; 1994, c. 64; 1998, c. 427; 2005, c. 787; 2006, c. 60.)

§ 42.1-86.1. *Disposition of public records.*

A. No agency shall sell or give away public records. No agency shall destroy or discard a public record unless (i) the record appears on a records retention and disposition schedule approved pursuant to § 42.1-82 and the record's retention period has expired; (ii) a certificate of records destruction, as designated by the Librarian of Virginia, has been properly completed and approved by the agency's designated records officer; and (iii) there is no litigation, audit, investigation, request for records pursuant to the Virginia Freedom of Information Act (§2.2-3700 et seq.), or renegotiation of the relevant records retention and disposition schedule pending at the expiration of the retention period for the applicable records series. After a record is destroyed or discarded, the agency shall forward the original certificate of records destruction to the Library of Virginia.

B. No agency shall destroy any public record created before 1912 without first offering it to the Library of Virginia.

C. Each agency shall ensure that records created after July 1, 2006, and authorized to be destroyed or discarded in accordance with subsection A, are destroyed or discarded in a timely manner in accordance with the provisions of this chapter; provided, however, such records that contain identifying information as defined in clauses (iii) through (ix), or clause (xii) of subsection

C of § 18.2-186.3, shall be destroyed within six months of the expiration of the records retention period.

(1990, c. 778; 1998, c. 427; 2005, c. 787; 2006, cc. 60, 909.)

§ 42.1-87. *Archival public records.*

A. Custodians of archival public records shall keep them in fire-resistant, environmentally controlled, physically secure rooms designed to ensure proper preservation and in such arrangement as to be easily accessible. Current public records should be kept in the buildings in which they are ordinarily used. It shall be the duty of each agency to consult with the Library of Virginia to determine the best manner in which to store long-term or archival electronic records. In entering into a contract with a third-party storage provider for the storage of public records, an agency shall require the third-party to cooperate with the Library of Virginia in complying with rules and regulations promulgated by the Board.
B. Public records deemed unnecessary for the transaction of the business of any state agency, yet deemed to be of archival value, may be transferred with the consent of the Librarian of Virginia to the custody of the Library of Virginia.
C. Public records deemed unnecessary for the transaction of the business of any county, city, or town, yet deemed to be of archival value, shall be stored either in the Library of Virginia or in the locality, at the decision of the local officials responsible for maintaining public records. Archival public records shall be returned to the locality upon the written request of the local officials responsible for maintaining local public records. Microfilm shall be stored in the Library of Virginia but the use thereof shall be subject to the control of the local officials responsible for maintaining local public records.
D. Record books deemed archival should be copied or repaired, renovated, or rebound if worn, mutilated, damaged, or difficult to read. Whenever the public records of any public official are in need of repair, restoration, or rebinding, a judge of the court

of record or the head of such agency or political subdivision of the Commonwealth may authorize that the records in need of repair be removed from the building or office in which such records are ordinarily kept, for the length of time necessary to repair, restore, or rebind them, provided such restoration and rebinding preserves the records without loss or damage to them. Before any restoration or repair work is initiated, a treatment proposal from the contractor shall be submitted and reviewed in consultation with the Library of Virginia. Any public official who causes a record book to be copied shall attest it and shall certify an oath that it is an accurate copy of the original book. The copy shall then have the force of the original.

E. Nothing in this chapter shall be construed to divest agency heads of the authority to determine the nature and form of the records required in the administration of their several departments or to compel the removal of records deemed necessary by them in the performance of their statutory duty.

(1976, c. 746; 1994, cc. 64, 955; 2005, c. 787; 2006, c. 60.)

§ 42.1-88. *Custodians to deliver all records at expiration of term; penalty for noncompliance.*

Any custodian of any public records shall, at the expiration of his term of office, appointment, or employment, deliver to his successor, or, if there be none, to the Library of Virginia, all books, writings, letters, documents, public records, or other information, recorded on any medium kept or received by him in the transaction of his official business; and any such person who shall refuse or neglect for a period of ten days after a request is made in writing by the successor or Librarian of Virginia to deliver the public records as herein required shall be guilty of a Class 3 misdemeanor.

(1976, c. 746; 1994, c. 64; 1998, c. 427.)

§ 42.1-89. *Petition and court order for return of public records not in authorized possession.*

The Librarian of Virginia or his designated representative such as the State Archivist or any public official who is the custodian of public records in the possession of a person or agency not authorized by the custodian or by law to possess such public records shall petition the circuit court in the city or county in which the person holding such records resides or in which the materials in issue, or any part thereof, are located for the return of such records. The court shall order such public records be delivered to the petitioner upon finding that the materials in issue are public records and that such public records are in the possession of a person not authorized by the custodian of the public records or by law to possess such public records. If the order of delivery does not receive compliance, the plaintiff shall request that the court enforce such order through its contempt power and procedures.

(1975, c. 180; 1976, c. 746; 1998, c. 427.)

§ 42.1-90. *Seizure of public records not in authorized possession.*

A. At any time after the filing of the petition set out in § 42.1-89 or contemporaneous with such filing, the person seeking the return of the public records may by ex parte petition request the judge or the court in which the action was filed to issue an order directed at the sheriff or other proper officer, as the case may be, commanding him to seize the materials which are the subject of the action and deliver the same to the court under the circumstances hereinafter set forth.
B. The judge aforesaid shall issue an order of seizure upon receipt of an affidavit from the petitioner which alleges that the material at issue may be sold, secreted, removed out of this Commonwealth, or otherwise disposed of so as not to be forthcoming to answer the final judgment of the court respecting the same; or that such property may be destroyed or materially damaged or injured if permitted to remain out of the petitioner's possession.
C. The aforementioned order of seizure shall issue without notice to the respondent and without the posting of any bond or other security by the petitioner.

(1975, c. 180; 1976, c. 746.)

§ 42.1-90.1. *Auditing.*

The Librarian may, in his discretion, conduct an audit of the records management practices of any agency. Any agency subject to the audit shall cooperate and provide the Library with any records or assistance that it requests. The Librarian shall compile a written summary of the findings of the audit and any actions necessary to bring the agency into compliance with this chapter. The summary shall be a public record, and shall be made available to the agency subject to the audit, the Governor, and the chairmen of the House and Senate Committees on General Laws and the House Appropriations and Senate Finance Committees of the General Assembly.

(2006, c. 60.)

§ 42.1-91. *Repealed by Acts 2006, c. 60, cl. 2.*

FOR FURTHER INFORMATION

Code of Virginia, Title 2.2 Administration of Government, Chapter 37, Virginia Freedom of Information Act (§§ 2.2-3700 through 2.2-3714)

Code of Virginia, Title 2.2 Administration of Government, Chapter 38, Government Data Collection and Dissemination Practices Act (§§ 2.2-3800 through 2.2-3809), formerly the Virginia Privacy Protection Act of 1976 (§§ 2.1-377 through 2.1-386)

Code of Virginia, Title 8.01 Civil Remedies and Procedure, Chapter 14, Evidence (§§ 8.01-385 through 8.01-420.6), § 8.01-391 Copies of originals as evidence

Code of Virginia, Title 59.1 Trade and Commerce, Chapter 43, Uniform Computer Information Transactions Act (§§ 59.1-501 through 59.1-509.2)

CAPTIONS/CREDITS FOR A GUIDE TO THE VIRGINIA PUBLIC RECORDS ACT

ON THE COVER: South elevation drawing of the Public Records Office, Williamsburg, Va., ca. 1747–1748. Built after the 1747 fire that destroyed the Capitol, the Public Records Office was constructed of brick and stone in order to minimize fire risks. Courtesy of the Colonial Williamsburg Foundation.

TITLE PAGE: The Public Records Office building, Williamsburg, Va., had many incarnations between its original construction and Colonial Williamsburg's preservation and reconstruction. This photograph was taken after the building was restored from a private residence to its original configuration as the Public Records Office. Courtesy of the Colonial Williamsburg Foundation.

Contact Information

Records Management Section
Government Records Services Division
Library of Virginia
800 East Broad Street
Richmond, VA 23219-8000
804.692.3600
www.lva.virginia.gov/agencies/records

State Records Center (SRC)
The SRC provides secure and economical storage for nonpermanent, inactive public records.
804.236.3705
804.236.3722 Fax

LIBRARY OF VIRGINIA

800 East Broad Street • Richmond, Virginia 23219-8000
www.lva.virginia.gov

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN RE: VSB DOCKET Choose an item. Click here to enter text.

Click here to enter text.

PRE-HEARING ORDER

In accordance with procedures adopted by the Board to facilitate presentation of evidence in matters before the Board, it is hereby

ORDERED that this matter shall be heard on Click here to enter a date. at Click here to enter text. a.m. in the Click here to enter text., at the Click here to enter text., Richmond, Virginia 23219.

It is further ORDERED that by Click here to enter a date., Counsel for the parties (and/or any pro se parties) shall file with the Clerk of the Disciplinary System ("Clerk") a list and all exhibits proposed to be introduced at the misconduct stage of the hearing. (This filing need not include exhibits which may be used for rebuttal or for impeachment.) Failure to comply with this paragraph in a timely fashion may be grounds, absent good cause shown, to bar introduction of the exhibits at the hearing of this matter.

It is further ORDERED that by Click here to enter a date., Counsel for the parties (and/or any pro se parties) shall file with the Clerk witness lists setting forth the name of each witness the party intends to call. This includes fact witnesses, character witnesses, expert witnesses and witnesses who may be called for the sanctions phase of the hearing if necessary. This includes witnesses who will be called in person as well as those whose testimony will be presented by affidavit, letter, deposition or report. Bear in mind that alternatives to live testimony may or may not be accepted by the Board. Failure to identify any witness in a timely fashion

may be grounds, absent good cause shown, to bar any such witness.

The parties are reminded that, in proceedings before this Board, the rules of evidence are not strictly applied. As a result, the Board may entertain evidence by letter, affidavit or via other documents containing hearsay, where the declarant is not subject to cross-examination, the evidence is offered on matters which are collateral to the central issues or cumulative, or the witness is beyond the Board's subpoena power. The parties should carefully consider and balance the need for live testimony versus the burden on the witness and the collateral nature of his or her testimony. At times, the parties may choose, and the Board has accepted, depositions and other forms of testimony taken and preserved in other proceedings even when that testimony does address central issues. Submitting any such alternative forms of evidence to the opposing party in advance of trial will minimize the chance of any claim of surprise and maximize the admissibility of the evidence. This type of evidence is given such weight as the Board determines is appropriate. Finally, notwithstanding the absence of discovery, the parties may agree to take depositions de bene esse of witnesses who are not available or for whom appearance at the hearing would be an undue burden when considering the nature of their testimony.

It is further ORDERED that by Click here to enter a date., Counsel for the parties (and/or any pro se parties) shall file with the Clerk any objections to exhibits filed hereunder. Exhibits not objected to in writing will be deemed admitted at the hearing. Objections shall be to particular numbers and must state the reason for the objection.

It is further ORDERED that the parties are strongly encouraged to meet and enter into stipulations of fact and/or disciplinary violations. Accordingly, the parties are directed to communicate regarding the proposed stipulations and file any agreed stipulations on or before Click here to enter a date.. In the event the parties are unable to enter into any

stipulations, each party or his counsel shall file with the Clerk a certification that they have exercised due diligence and made a good faith effort to enter into stipulations, but have been unable to do so. This certification shall be filed with the Clerk by the date set out above for the filing of stipulations.

It is further ORDERED that a Pre Hearing Conference call shall be held on this matter on Click here to enter a date., at Click here to enter text. a.m., with the participation of all parties and/or their counsel and the officer of the Board who will preside at the hearing. The purpose of this Pre Hearing Conference is to consider the extent to which the parties have complied with this order and the rules of the Supreme Court of Virginia and to consider any other motions either party wishes to make prior to the hearing. Any such pretrial motions shall be filed with the Clerk 3 days prior to the conference call.

Motions for continuances of any of the dates in this Order are strongly discouraged and are only granted under the most dire of circumstances. Any such motion shall be made promptly following first notice of the hearing date or the discovery of the circumstances giving rise to the motion or the motion will be denied. Motions heard less than 10 days prior to the hearing date are rarely granted.

Should additional days be needed to hear this matter, then those dates shall be set at the initial hearing. No party shall be precluded from offering probative, non-cumulative evidence should the hearing not be completed in one day. The parties, however, are urged to consider seriously pre-trial stipulations which will minimize hearing delays, help keep the hearing focused on the issues and minimize the inconvenience of the witnesses.

Any proposed agreed disposition reached by Counsel (and/or any pro se parties) shall be presented to the Board not later than the Friday next preceding the hearing; otherwise, the Board

will treat the agreed disposition as a stipulation of facts and misconduct.

For the purposes of this Order and any filings in this matter, filing with the Clerk shall be accomplished by filing electronically via email to clerk@vsb.org, hand delivery or first class mail. Electronic filings must be PDF files and shall be bookmarked according to each exhibit number in the exhibit list. The filer has the responsibility of ensuring that electronic filings have been received by the Clerk. When this Order specifies that an item be filed with the Clerk of the Disciplinary System by a certain date, that means that the item must be received by the Clerk by 4:45 p.m. on that date. All filings in this matter shall include a certification that Counsel for the parties (and/or any pro se parties) has served a full and accurate copy of the filing upon opposing counsel or pro se parties via hand delivery or first class mail.

It is further ORDERED that an attested copy of this Order be mailed to the Respondent by certified mail to Choose an item. Virginia State Bar address of record, at Click here to enter text., and a copy by regular mail to Click here to enter text., his counsel, at Click here to enter text., and a copy hand-delivered to Click here to enter text., Choose an item., Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219.

ENTERED this Click here to enter text. day of Click here to enter text., 20Click here to enter text.

Virginia State Bar Disciplinary Board

Click here to enter text., Choose an item.

Respondent: _____

Respondent's Counsel: _____

Bar Counsel: _____

Court Reporter: _____

VSB Docket No(s): _____

Date: _____

AGENDA FOR PRE-HEARING CONFERENCE

I. Convene pre-hearing conference In re _____

VSB Docket No. _____

A. Swear court reporter [1], or, if none, announce the hearing is being recorded.

B. Identification of participants:

Bar Counsel _____

Respondent/Counsel _____

Clerk's Office _____

C. Identify presiding officer and affirm that he/she does not have any personal or financial interest that would impair, or reasonably could be perceived to impair, his/her ability to be impartial.

II. Checklist.

A. Are all parties aware of the date, time, and location of the hearing?

B. Has a timely answer been filed?

C. [If the Subcommittee considered an Investigative Report when it set the Complaint for hearing before the District Committee or to certify the Complaint to the Board] Has Bar Counsel furnished a copy of the Investigative Report to the Respondent? [Pt. 6, § IV, Para. 13D] [2]

D. Have the witness lists and exhibits been timely filed under the Pre-Hearing Order?

---

1 Do you swear or affirm that you will well and truly record the incidents of this pre-hearing conference call?

2 Unless attached to or referenced in the Investigative Report, Bar Counsel is not required to produce any information/document obtained in confidence from any law enforcement or disciplinary agency or document protected by attorney-client privilege or work product doctrine.

E. Are there any objections to the witnesses or exhibits and if so, have the objections been timely filed?

(1) Unless the Respondent has filed an objection to the Bar's pre-filed exhibits, they will be admitted into evidence at the hearing.

(2) If the Respondent has not pre-filed exhibits and a witness list, exhibits and witnesses will not be received at the hearing except for good cause shown.

F. What is the status of proposed stipulations and what can be done to facilitate same?

G. Are there any prehearing motions to be heard?

H. Is there any reason the matter can't go forward to hearing on the date scheduled?

I. What is the status of any proposed agreed disposition?

J. Can the matter be heard in one day and do any special arrangements need to be made for the presentment of the case?

K. Opening statements shall be brief and confined to the parties expectation of evidence to be presented and shall not be used for purposes of argument or testimony.

Aggravating or Mitigating Factors

The factors can be found below or in §9 of the ABA Standards.

1. **Aggravating** factors are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Aggravating factors include:
   - prior disciplinary offenses;
   - dishonest or selfish motive;
   - a pattern of misconduct;
   - multiple offenses;
   - bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
   - submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
   - refusal to acknowledge wrongful nature of conduct;
   - vulnerability of victim;
   - substantial experience in the practice of law;
   - indifference to making restitution;
   - illegal conduct, including that involving the use of controlled substances.

2. **Mitigating** factors are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating factors include:

   - absence of a prior disciplinary record;
   - absence of a dishonest or selfish motive;
   - personal or emotional problems;
   - timely good faith effort to make restitution or to rectify consequences of misconduct;
   - full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
   - inexperience in the practice of law;
   - character or reputation;
   - physical disability;
   - mental disability or chemical dependency including alcoholism or drug abuse when:
     - there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
     - the chemical dependency or mental disability caused the misconduct;
     - the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
     - the recovery arrested the misconduct and recurrence of that misconduct us unlikely.

   [Medical evidence must be introduced to support a finding of mental impairment. *In re Marinoff*, 2001-2584 (La. 6/7/02), 819 So.2d 305; *In re Rudman*, 2001-1644

(La. 6/29/01), 791 So.2d 1280; *In re Rudman*, 1999-1037 (La. 6/25/99), 738 So.2d 537; *In re Stoller*, 2004-2758 (La. 5/24/05), 902 So.2d 981.]

- delay in disciplinary proceedings;
- imposition of other penalties or sanctions;
- remorse;
- remoteness of prior offenses.

- Factors which are neither aggravating nor mitigating:
  - forced or compelled restitution;
  - agreeing to the client's demand for certain improper behavior or result;
  - withdrawal of complaint against the lawyer;
  - resignation prior to completion of disciplinary proceedings;
  - complainant's recommendation as to sanction;
  - failure of injured client to complain.

Virginia State Bar
Most Frequently Alleged & Violated Rules
(eff 4/2018)

Top 5 Most Frequent Allegations

Rule	Description
1.3(a)	Act w/ reasonable diligence, promptness in representing client
1.4(a)	Keep client informed; promptly comply with info request
8.4(c)	Conduct involving dishonesty/fraud/deceit/misrepresentation
8.4(b)	Crime, deliberately wrongful act; refl. adversely on honesty
1.15(b)(4)	Pay or deliver property to client or other such person entitled

Top 5 Most Frequent Violations

Rule	Description
1.4(a)	Keep client informed; promptly comply with info request
1.3(a)	Act w/ reasonable diligence, promptness in representing client
1.16(d)	Protect client's interest upon termination of representation
1.4(b)	Explain matter to client to permit informed decision
1.15(b)(5)	No disbursement without consent or court order

VIRGINIA STATE BAR DISCIPLINARY BOARD

TYPES OF HEARING

I. Misconduct [Public]

Presented on a certification of charges from a District Committee/Subcommittee of misconduct:

a. unlawful conduct described in Va. Code § 54.1-3935;

b. violation of the Disciplinary Rules.

II. Reinstatement of Law License [Public]

Presented on a referral by the Supreme Court of a revoked lawyer's petition for reinstatement of his/her law license.

III. Reciprocal Discipline [Public]

A show cause proceeding to determine whether a suspension/revocation in a foreign jurisdiction should also be imposed in Virginia.

IV. Criminal [Public]

Presented on a certification of a conviction or guilty plea to a crime, which is defined as:

a. any offense declared to be a felony by federal or state law;

b. any other offense, whether federal or state, involving theft, fraud, forgery, extortion, bribery, or perjury; or

c. an attempt, solicitation or conspiracy to commit any of the foregoing.

Proceeding is to show cause why interim suspension should not be further suspended up to 5 years or revocation.

V. Appeal from District Committee [Public]

Presented on the record made in the District Committee, plus an obligatory opening brief from the respondent.

VI. Expedited Petition [Public]

A hearing held not less than fourteen days nor more than thirty days after an order from the Board requiring appearance based on a petition from Bar Counsel or a District Committee chair representing that the respondent is engaging in misconduct likely to result in injury to, or loss of property of, one or more clients, or any other person, and there is imminent danger to the public.

VII. Impairment [Private]

Presented on Bar Counsel's petition alleging impairment of respondent, which is defined as:

[a]ny physical or mental condition that materially impairs the fitness of a lawyer to practice law.

Hearing on impairment may be preceded by hearing on Bar Counsel's petition to require respondent to undergo psychiatric or other medical examination or to provide releases to healthcare providers.

Also may be presented on suspended respondent's petition that impairment no longer exists.

VIII. RESA [Public]

Presented on certification of violation(s) of RESA or regulations thereunder.

IX. Interim Suspensions [Public]

Presented on certification of failure to comply with Order of Board, summons or subpoena, or response to Board's initial letter to respondent enclosing complaint.

X. Sanction Determination [Public]

Presented on certification for sanctions from District Committees for violation of public reprimand with terms, plus transcript of District Committee show cause hearing. Only evidence in mitigation and aggravation is permitted.

XI. Show Cause (13-29) [Public]

Presented on show cause for failure to comply with notice deadlines by suspended/revoked respondents.

XII. Reconsideration

A. On motion filed within ten days after a hearing, the panel may grant such motion.

B. Grounds are absence of respondent or a witness due to injury, illness or accident, or after discovered evidence that would have clearly produced a different result.

XIII. Agreed Disposition

Bar counsel and respondent stipulate the facts and an agreed sanction and present it to the Board for approval.

XIV. Salient Aspects of Hearings

A. A certification of misconduct may not be amended by the Board.

B. VSB must prove lawyer misconduct by clear and convincing evidence.

C. No statute of limitations or laches applies to disciplinary proceedings.

D. Ignorance is not a defense.

E. The rules of evidence are relaxed.

F. The Chair of the panel rules on motions/objections subject to being overruled by a majority of the remaining panel members.

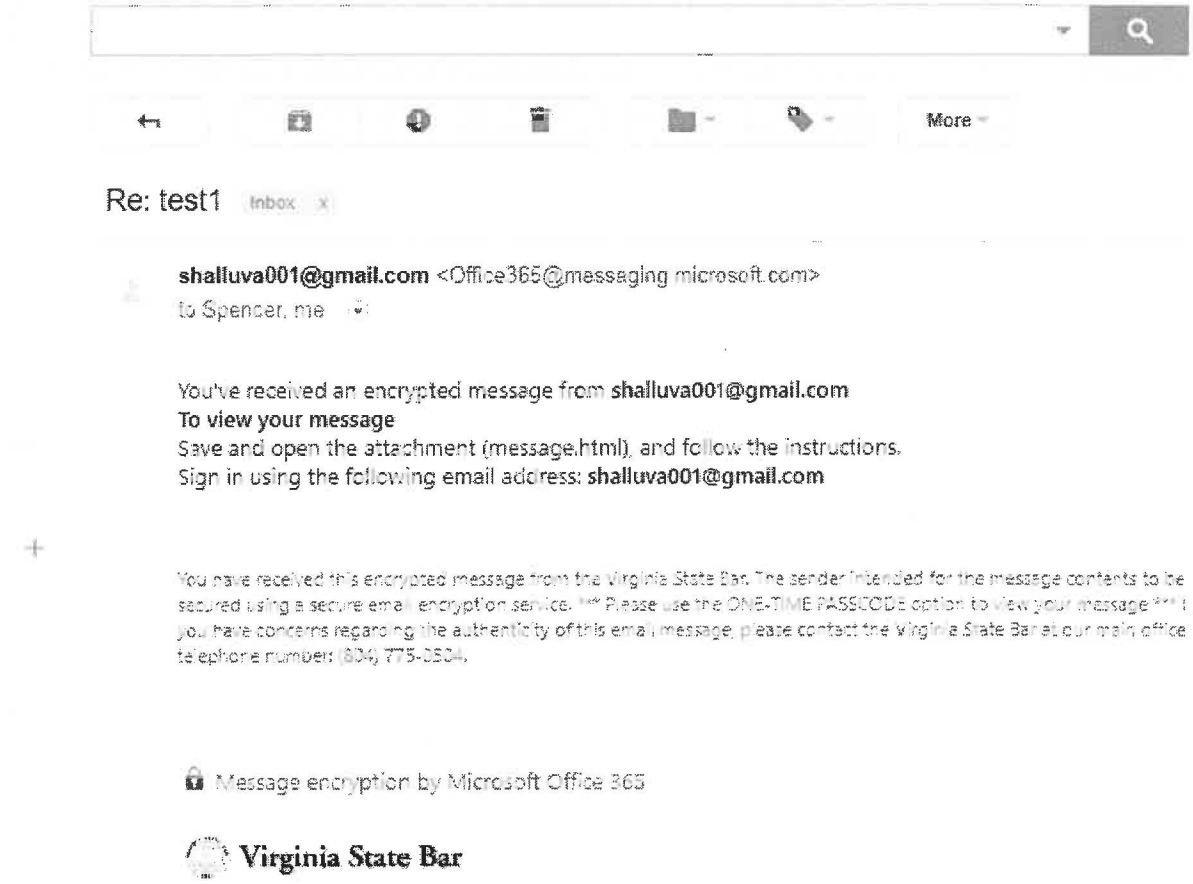
G. Standard for Respondent's motion to strike VSB's evidence: Whether it is conclusively apparent that VSB's evidence and inferences fairly drawn, viewed in the light most favorable to VSB, are not sufficient under any set of circumstances to establish the allegations of misconduct.

H. If the Board during the hearing believes that the Respondent may then have an impairment, the Board may postpone the hearing and initiate an impairment proceeding. Rules PT 6, § IV, Para. 13(6)(b).

I. A Respondent who intends to rely upon evidence of an impairment in mitigation of misconduct shall, absent good cause shown, give notice to Bar Counsel and the Board not less than 14 days before the hearing of his/her intention to do so. Rules PT 6, § IV, Para. 13(6)(a).

Encrypted email goes to recepient

Recipient opens encrypted email



Recipient clicks on attachment to open or save

Encrypted message

From
shall@vsb.org

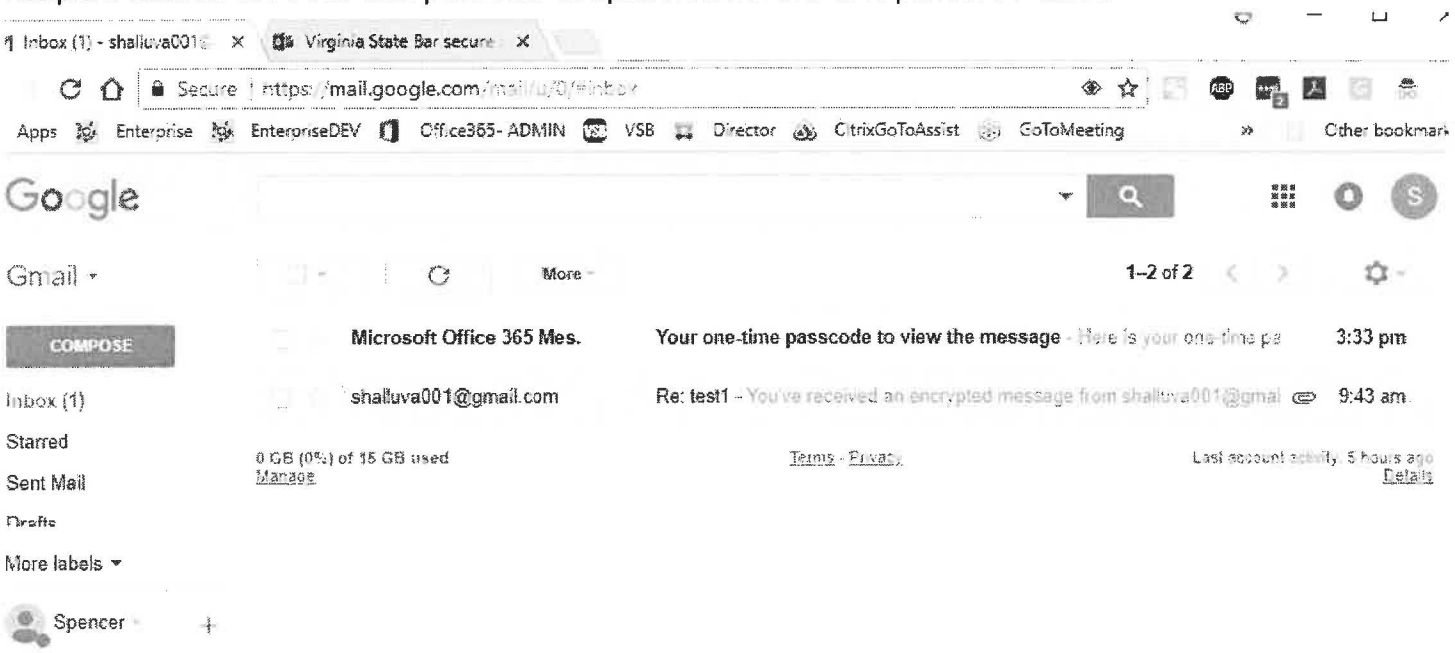
To
shalluva001@gmail.com

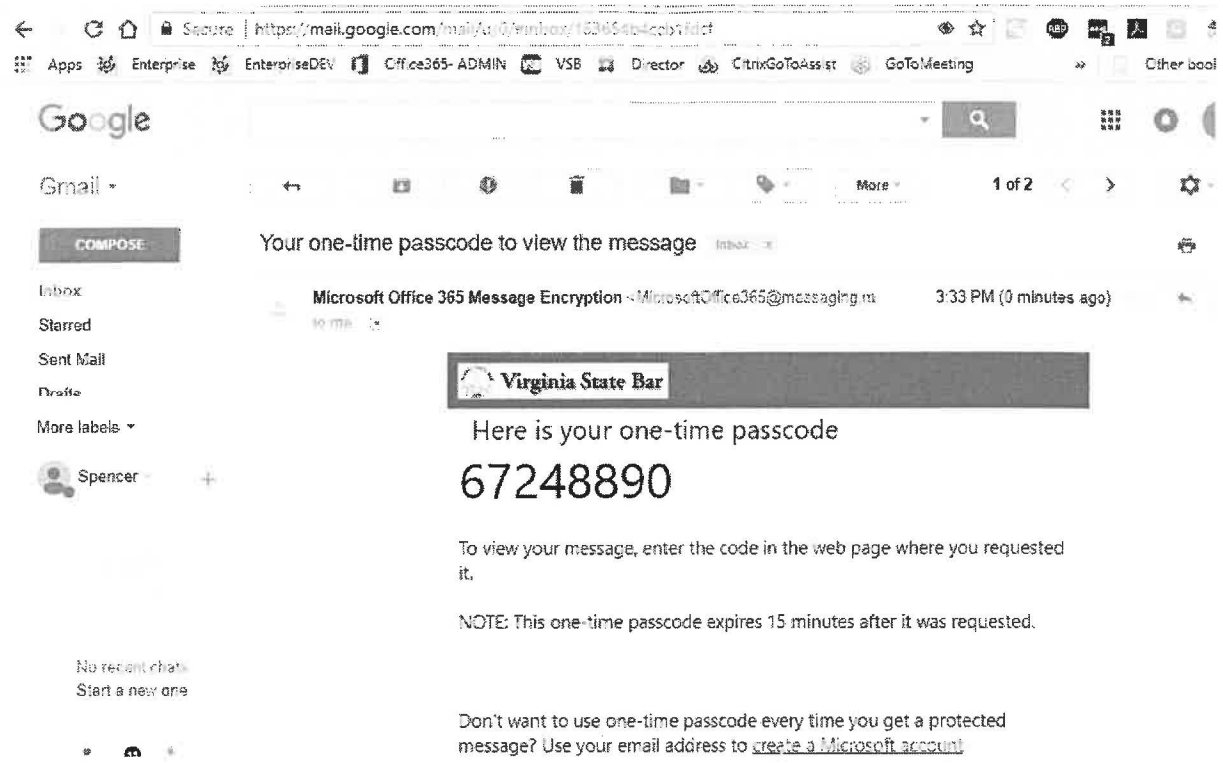
To view the message, sign in with a Microsoft account, your work or school account, or use a one-time passcode.

Sign in

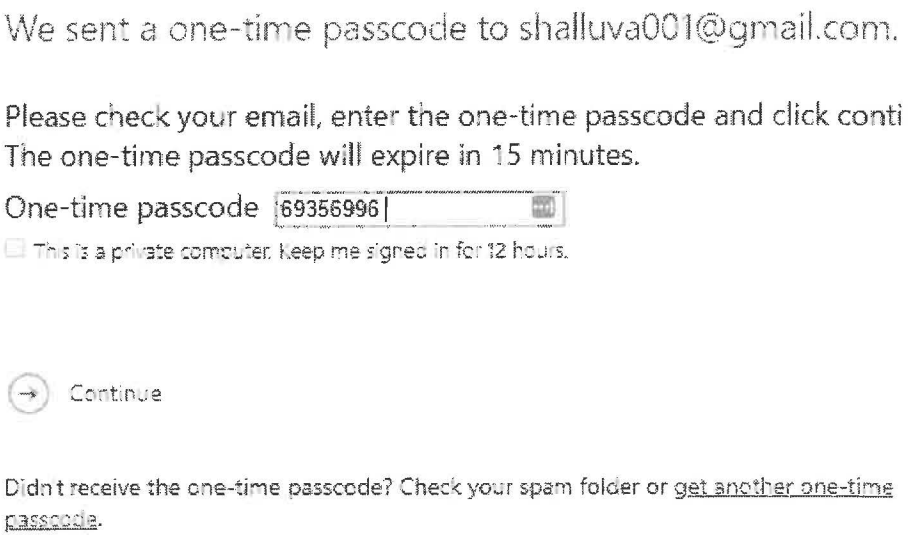
Use a one-time passcode

Recipient Clicks on Use a one-time passcode. Recipient receives one-time passcode in Inbox

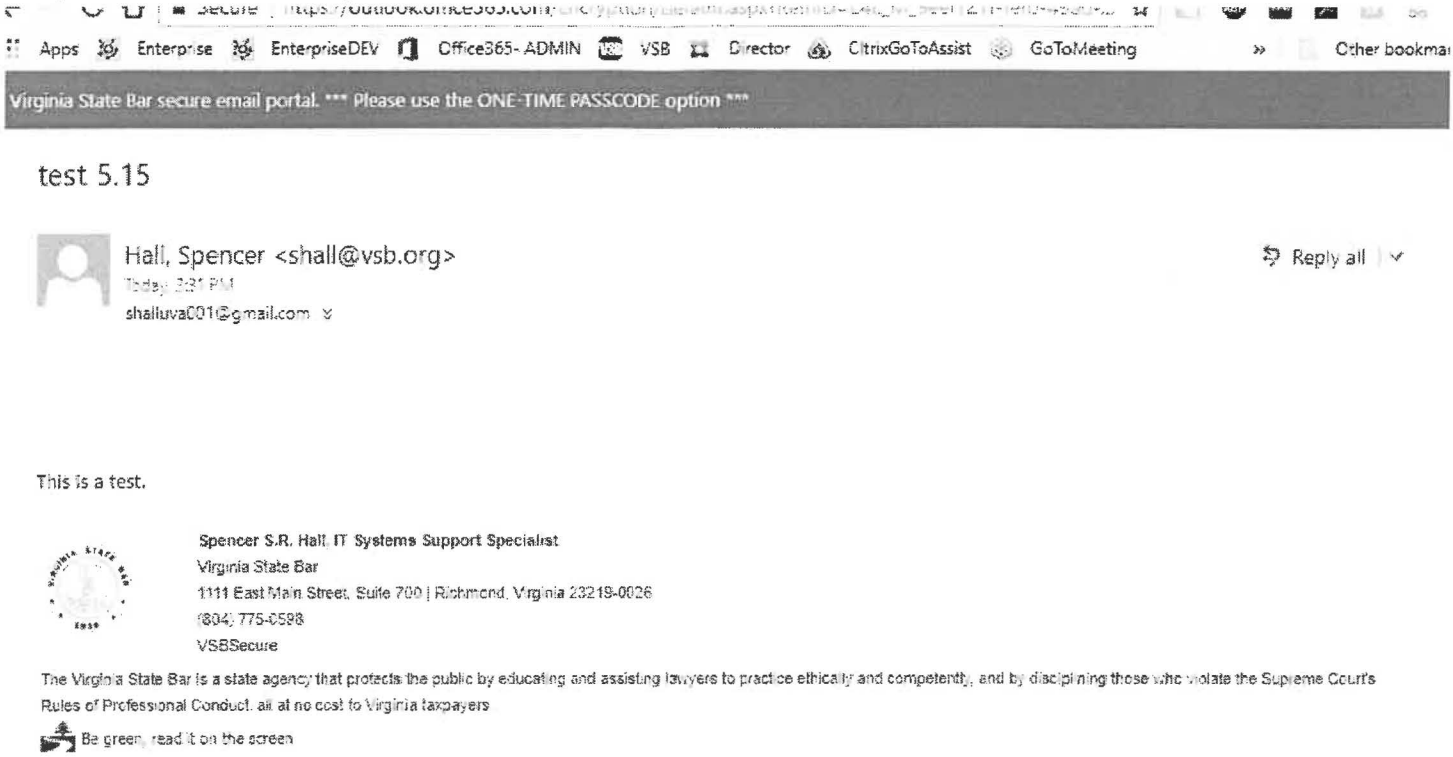




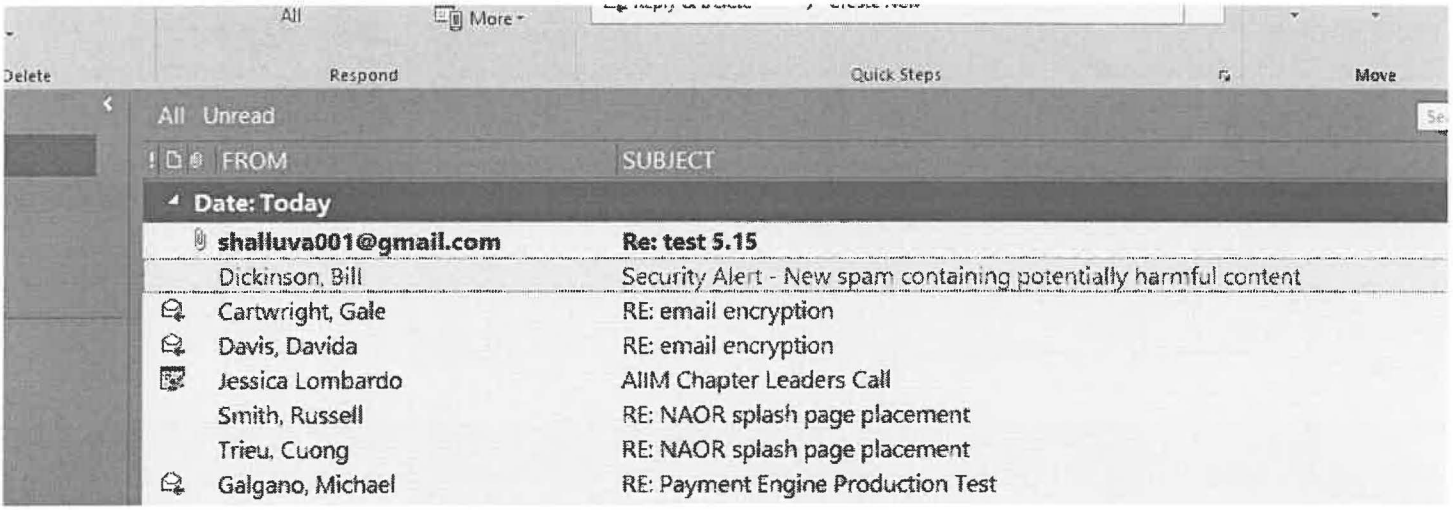
Recipient copies and pastes passcode into other window that asks for passcode (I know they are different... lots of tests)



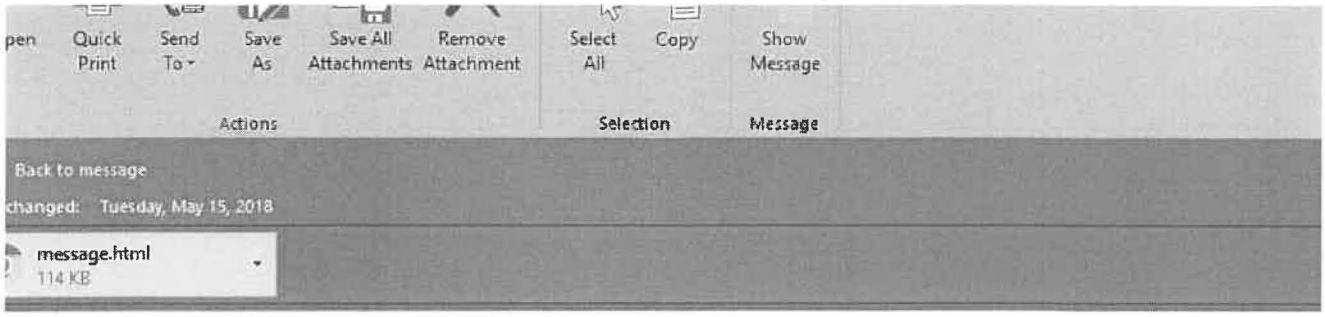
Recipient sees email and responds



Email comes back to VSB Staff



VSB Staff saves or opens attachment (Outlook allows to open directly into browser without having to save)



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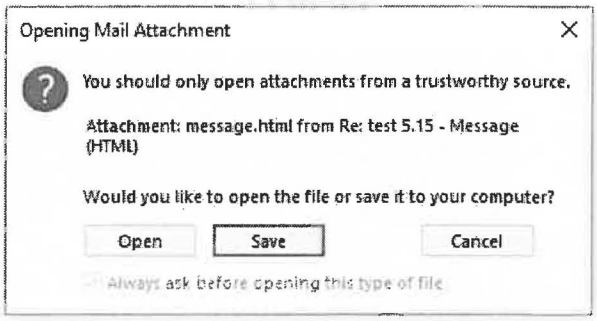
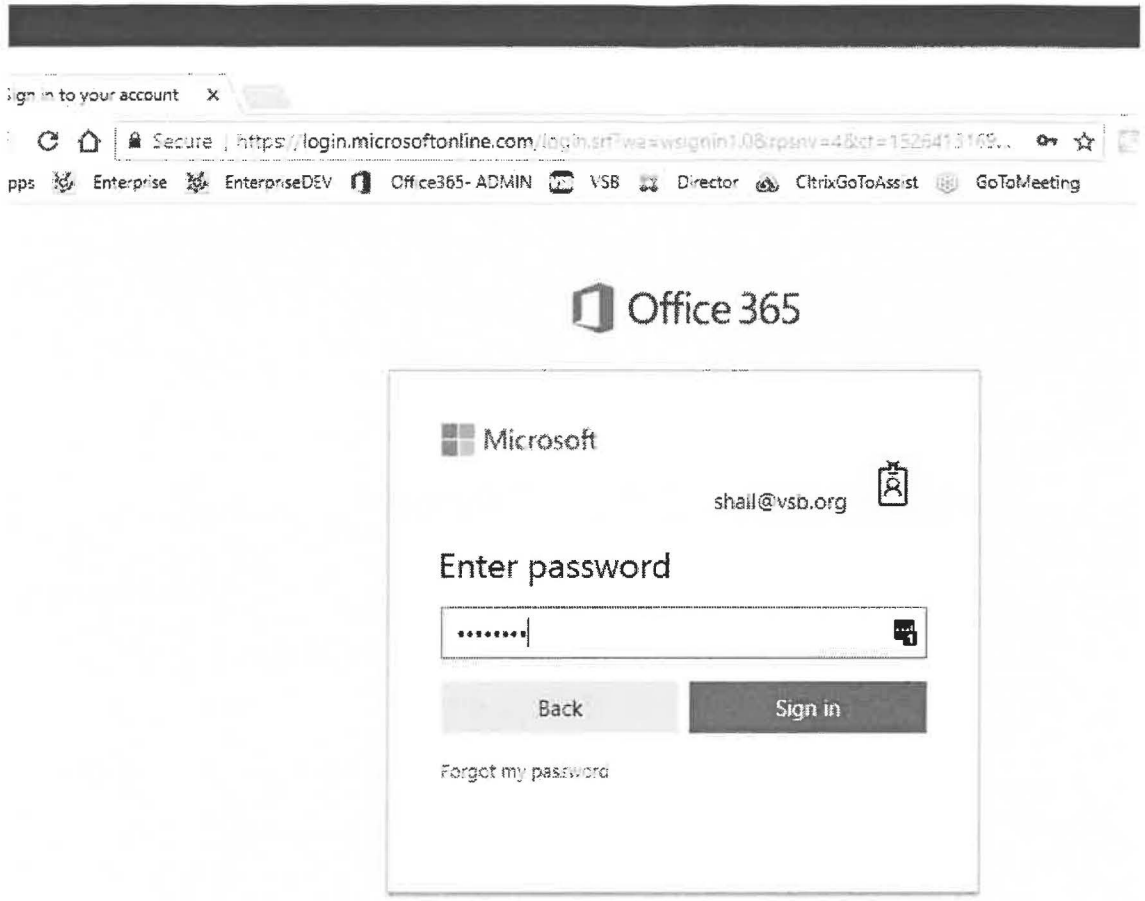
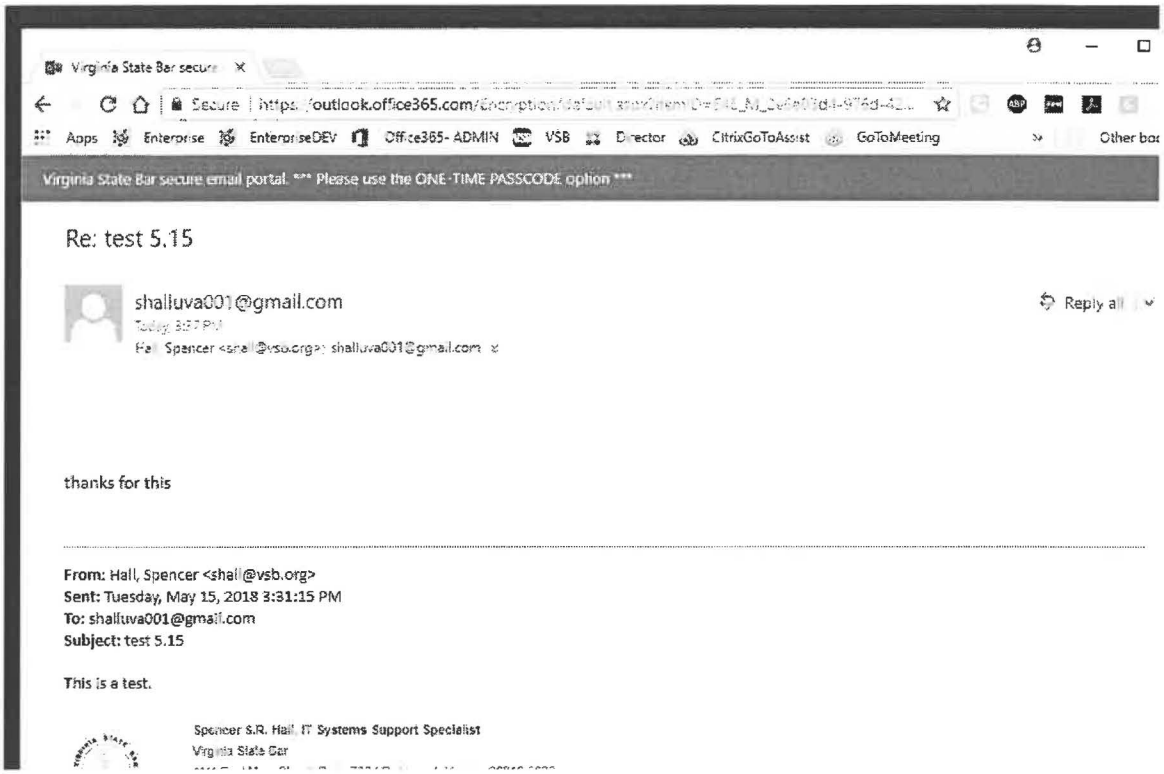


Staff uses Microsoft Work or school Account to log in to view email (VSB Network Credentials)


Sign in to your account
Secure | https://login.microsoftonline.com/
Enterprise
EnterpriseDEV
Office365- ADMIN
VSB
Director
CitrixGoToAssist
GoToMeeting
Office 365
Microsoft
shall@vsb.org
Enter password
Back
Sign in
Forgot my password


Virginia State Bar secure
Secure | https://outlook.office365.com/
Apps
Enterprise
EnterpriseDEV
Office365- ADMIN
VSB
Director
CitrixGoToAssist
GoToMeeting
Other bo
Virginia State Bar secure email portal. *** Please use the ONE-TIME PASSCODE option ***
Re: test 5.15
shalluva001@gmail.com
Reply all
thanks for this
From: Hall, Spencer <shall@vsb.org>
Sent: Tuesday, May 15, 2018 3:31:15 PM
To: shalluva001@gmail.com
Subject: test 5.15
This is a test.
Spencer S.R. Hall, IT Systems Support Specialist
Virginia State Bar

SUMMARY OF THE
ABA *STANDARDS FOR IMPOSING LAWYER SANCTIONS*

Office of Bar Counsel
Virginia State Bar
September 2011

I. ABA Standards for Imposing Lawyer Discipline: Purposes of Discipline and Standards

A. The Purpose of Lawyer Discipline Proceedings

To protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system and the legal profession.

B. The Purposes of the Standards

1. To provide a model system for determining sanctions while permitting flexibility and creativity in assigning sanctions to particular cases.

2. To promote:

a. Consideration of all factors relevant to imposing the appropriate level of sanction in a case.

b. Consideration of the appropriate weight of such factors in light of the stated goal of attorney discipline.

c. Consistency of sanctions for the same or similar offenses within and among jurisdictions.

II. ABA Standards for Imposing Lawyer Discipline: The Four Questions

A. No. 1: What ethical duty did the lawyer violate?

1. A duty to a client?
2. A duty to the public?
3. A duty to the legal system?

4. A duty to the profession?

B. No. 2: What was the lawyer's mental state?

1. Did the lawyer act intentionally?
2. Did the lawyer act knowingly?
3. Did the lawyer act negligently?

C. No. 3: What was the extent of actual or potential injury caused by the lawyer's misconduct?

1. Was there a serious injury?
2. Was there potentially serious injury?

[Note: In Virginia no showing of harm is required. The fact that a client did not suffer any prejudice to his legal rights is not sufficient to exonerate an attorney. *Maddy v. District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964)].

D. No. 4: Are there any aggravating or mitigating circumstances?

III. ABA Standards for Imposing Lawyer Discipline: Duties to Clients

A. The standards assume that these are the most important duties.

B. The duty of loyalty to a client.

1. The duty to preserve the property of a client.

2. The duty to preserve the client's confidences.

3. The duty to avoid conflicts of interest.

C. The duty of diligence.

D. The duty of competence.

E. The duty of candor.

IV. ABA Standards for Imposing Lawyer Discipline: Duties to the General Public

A. The public must be able to trust lawyers to preserve their property, liberty and lives.

B. The public expects lawyers to exhibit the highest standards of honesty, integrity; and not to engage in dishonesty, fraud, deceit, misrepresentation; or interfere with the administration of justice.

V. ABA Standards for Imposing Lawyer Discipline: Duties to the Legal System

A. As officers of the court, lawyers must abide by the substantive law as well as rules of procedure,

B. Operate within the law, and

C. Cannot create or use false evidence or engage in any other illegal or improper conduct.

VI. ABA Standards for Imposing Lawyer Discipline: Duties to the Legal Profession

A. These duties are not part of the relationship of the lawyer to his community and do not relate to a lawyer's basic duties to his clients, his service as an officer of the court or maintaining the public trust.

B. These include rules regarding:

1. Restrictions on advertising and recommending employment.

2. Fees.

3. Assisting the unauthorized practice of law.

4. Accepting, declining or terminating representation.

5. Maintaining the integrity of the profession, i.e., bar admission, disciplinary investigations, reporting misconduct.

VII. ABA Standards for Imposing Lawyer Discipline: the Lawyer's Mental State

A. Intentional action [the most culpable mental state]

-When the lawyer acts with the conscious objective or purpose to accomplish a particular result.

B. Knowing action [the next most culpable mental state]

When the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result.

C. Negligent action [the least culpable mental state]

When a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

VIII. ABA Standards for Imposing Lawyer Discipline: Injury

A. The extent of injury is defined by the duty violated and the extent of actual or potential harm.

B. "Injury" is defined as harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct.

C. "Potential injury" is defined as the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

D. Levels of injury

1. Serious injury.

2. Injury.

3. Little or no injury.

[Note: In Virginia no showing of harm is required. The fact that a client did not suffer any prejudice to his legal rights is not sufficient to exonerate an attorney. *Maddy v. District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964)].

IX. ABA Standards for Imposing Lawyer Discipline: Aggravating Factors

Definition: Any considerations or factors which may justify an increase in the degree of discipline imposed. They include the following:

A. Prior disciplinary offenses.

B. A dishonest or selfish motive.

C. A pattern of misconduct.

D. Multiple offenses.

E. Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority.

F. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process.

G. Refusal to acknowledge the wrongful nature of conduct.

H. Vulnerability of victim.

I. Indifference to making restitution.

X. ABA Standards for Imposing Lawyer Sanctions: Mitigating Factors

Definition: Any considerations or factors that may justify a reduction in the degree of discipline to be imposed. They include the following:

A. Absence of a prior disciplinary record.

B. Absence of a dishonest or selfish motive.

C. Personal or emotional problems.

D. Timely good faith effort to make restitution or to rectify consequences of misconduct.

E. Full and free disclosure to disciplinary committee or board, or cooperative attitude toward proceedings.

F. Inexperience in the practice of law.

G. Character or reputation

H. Physical or mental disability or impairment.

I. Interim rehabilitation.

J. Imposition of other penalties or sanctions.

K. Remorse.

L. Remoteness of prior offenses.

XI. ABA Standards for Imposing Lawyer Sanctions: Factors Which Are Neither Aggravating nor Mitigating

A. Forced or compelled restitution.

B. Agreeing to the client's demand for certain improper behavior or result.

C. Withdrawal of bar complaint against the lawyer.

D. Resignation prior to completion of disciplinary proceedings.

E. Complainant's recommendation as to sanction.

F. Failure of injured client to complain.

XII. ABA Standards for Imposing Lawyer Sanctions: Sanctions Definitions

A. Disbarment[1] - Termination of the individual's status as a lawyer.

B. Suspension[2] - The removal of a lawyer from the practice of law for a specified minimum period of time.

C. Reprimand[3] - Public censure, which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

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[1] **VSB definition: "Disbarment"** has the same meaning as revocation. "Revocation" means any revocation of an attorney's license to practice law and includes a revocation of such license as the result of a voluntary surrender by an attorney of the attorney's license to practice law as provided in Paragraph 13. Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13-1.

[2] **VSB definition: "Suspension"** means the temporary suspension of an attorney's license to practice law for either a fixed or indefinite period of time. Paragraph 13-1.

[3] **VSB definition:** Public reprimand and private reprimand are defined separately. **"Public Reprimand"** means a form of public discipline that declares publicly the conduct of the respondent improper, but does not limit the respondent's right to practice law. **"Private reprimand"** means a form of non-public discipline that declares privately the conduct of the respondent improper but does not limit the respondent's right to practice law. Paragraph 13-1.

D. Admonition[4] - Private reprimand, which declares the conduct of the lawyer improper but does not limit the lawyer's right to practice.

[Also see Virginia dismissals which create a disciplinary record.[5]]

[4] **VSB definition: "Admonition"** means a private sanction imposed by a subcommittee, *sua sponte*, a private or public sanction based upon an agreed disposition approved by a subcommittee; or a public sanction imposed by a district committee or the board (or a three-judge court) upon a finding that misconduct has been established, but that no substantial harm to the complainant or the public has occurred, and that no further disciplinary action is necessary. Paragraph 13-1.

[5] Dismissals that create a disciplinary record:

Dismissal *de minimus* – a finding that the respondent has engaged in misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and respondent has taken reasonable precautions against a recurrence of same. Paragraph 13-1.

Dismissal for exceptional circumstances – a finding that the respondent has engaged in misconduct but there exist exceptional circumstances mitigating against further proceedings, which circumstances shall be set forth in writing. Paragraph 13-1.

DISCIPLINARY CASE LAW

[updated May 8, 2019]

Contents

I. PROCEDURE

Agreed Dispositions

Respondent signed the agreed disposition and had raised no objections to the terms of the agreed disposition. The Supreme Court affirmed the imposition of the sanction finding that execution of the Agreed Disposition and failure to object to its terms during the telephonic conference precluded his challenge to the imposition of the sanction. The Court also found that premature publication of the sanction was not a basis for dismissal of the charges. *Curtis Tyrone Brown v. Virginia State Bar, ex rel. Second District Committee*, No. 070162 (Va. S. Ct. Oct. 19, 2007).

Amendments to Certification at Board Hearing Not Permitted

The Board's decision to permit an amendment to a Certification issued by a District Committee was improper where the amendment was tantamount to a new charge against the Respondent. *Pappas v. Virginia State Bar*, 271 Va. 580, 628 S.E.2d 534 (2006).

Appeals, Late Notice of Appeal

Appeal dismissed due to Respondent's failure to timely file notice of appeal with trial court. Confirms applicability of Part 5 of the Rules in appeals of three-judge court determinations, specifically Rule 5:9(a) requiring notice of appeal to be filed within 30 days after entry of judgment. Requirement now explicitly codified in 5:21(b). *Curtis T. Brown v. Virginia State Bar*, No. 100491 (Va. S. Ct. May 10, 2010).

Appeals, Late Transcript, Dismissal Appropriate

Where a Respondent appealed from a District Committee Determination and failed to timely file a transcript, under the language of the Rules the Board had no choice but to dismiss the appeal. *Pilli v. Virginia State Bar*, No. 001990 (Va. S. Ct. Feb. 16, 2001).

Board Members—Substitution of New Members

Respondent objected to substitution of new board members who were not sitting at prior hearing. The bar fulfilled the requirements of Part 6, § IV, ¶ 13-18(Q) by providing the substituted Board members with a transcript of the prior hearing and the Board was not required

to note or document the reason for the inability of members to be present. *Green v. Virginia State Bar*, 278 Va. 162, 677 S.E.2d 227 (2009).

Burden of Proof, Clear and Convincing

The Bar is required to prove attorney misconduct by "clear proof," which is interchangeable with "clear and convincing evidence." *Norfolk and Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934); *Blue v. Seventh District Committee*, 220 Va. 1056, 265 S.E.2d 753 (1980); *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Certification—Amendment of Charges

In a discipline proceeding in which the Virginia State Bar Disciplinary Board suspended an attorney's license to practice law for a period of six months, the Board's decision to permit amendment of the subcommittee's certification of charges and to admit certain deposition testimony by a former client were improper. *Pappas v. Virginia State Bar*, 271 Va. 580, 628 S.E.2d 534 (2006).

Certification—Delay in Issuing Notice of Certification

To secure a dismissal of the charges, Respondent must show that he was prejudiced by Bar Counsel's delay in serving the Notice of Certification more than one year after the Subcommittee voted to certify the charges. Here Respondent made no such showing and therefore is not entitled to dismissal of the charges. *Green v. Virginia State Bar*, 278 Va. 162, 677 S.E.2d 227 (2009).

Circuit Court, Power to Discipline Attorney

A circuit court was acting within its authority when it revoked Respondent's privilege to practice before the circuit courts of the 17th judicial circuit, and the statutory mechanism for revocation of an attorney's license throughout the Commonwealth was not applicable. Conversely, the attorney's license to practice law in Virginia was not affected by the circuit court's order in this case. Licensure of an attorney, and revocation of that license, are matters governed by statute, and it is not within the jurisdiction of a circuit court to adjudicate the revocation of a license to practice law except in compliance with the statutory authority. *In the Matter of Jonathan A. Moseley*, 273 Va. 688, 643 S.E.2d 190 (2007).

Client Complaint Not Required

There is no provision in the statutes or rules which requires a complaint by a client before lawyer misconduct may be investigated, and a District Committee may instigate a disciplinary proceeding on its own. *Delk v. Virginia State Bar*, 233 Va. 187, 355 S.E.2d 558 (1987).

Client Protection Fund: Obligation Non-Dischargeable in Bankruptcy

Sums ordered in repayment to the Client Protection Fund were not dischargeable in bankruptcy. *In re: Rickey Gene Young*, Case No. 6-60353, United State Bankruptcy Court for the Western District of Virginia. *In the Matter of Rickey Gene Young*, VSB Docket No. 13-000-093093.

Confrontation of Witnesses, Right Inapplicable

Where a complaint (or, presumably, a certification) does not allege any wrongdoing which would constitute a crime, the federal and state rights affording the accused the right to confront witnesses against him are inapplicable. *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987) (Bar and Respondent had agreed to elicit facts surrounding one complaint from the Respondent rather than calling the complainant as a witness in that matter).

Continuances

Whether a continuance should be granted is a matter of discretion on the part of the Board, and will be reviewed under an abuse of discretion standard. *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Continuances: Compentency

At a special private hearing on June 9, 2009, a petition in the impairment case concerning Respondent was heard. At the same hearing, Respondent's counsel renewed his motion that the misconduct case be continued generally. The Board Chair had already denied the motion during a conference call, but had given Respondent's counsel the option of bringing it before a full panel at this hearing. The continuance motion was filed on the basis of Respondent's alleged incompetency to participate in a hearing on his disciplinary charges. While the only inference that can be drawn from the denial of the continuance is that the Board panel found that there is no competency requirement in bar disciplinary cases, only a summary order was issued regarding the decision. *Alfred M. Tripp*, VSB Docket No. 08-021-073929.

Corporate Counsel

The VSB approved Respondent's corporate counsel application. Respondent acknowledged that under his corporate counsel status, his practice in Virginia was limited to providing legal services to his employer. Respondent's employer ceased doing business in 2009; however, Respondent did not report this change in employment as required. In 2016, Respondent opened his own law practice in Virginia, identified as the "Billups Law Firm," and identified himself as an attorney at law in his correspondence. Respondent handled several civil matters for paying clients, and qualified for court-appointed defense work, eventually handling nine criminal matters although he was never admitted to full, active VSB membership. Respondent failed to appear at his hearing before the Disciplinary Board, which revoked his privilege to practice law in Virginia. RPCs 5.5 (c-d), 8.5 (a). *In the Matter of B. Walter Billups*, VSB Docket No. 17-10-2-108947.

Criminal Convictions

When a disciplinary proceeding is based upon a conviction, the Board is bound by that conviction. It may not look behind the finding of guilt. *In Re Carl McAfee*, VSB Docket No. 87-000-0954.

The Supreme Court of Virginia affirmed Respondent's revocation, finding that Respondent's plea, pursuant to *North Carolina v. Alford*, constituted an admission that the facts presented by the Commonwealth at the hearing on the felony charge would justify a finding of guilt. *Lee v. Virginia State Bar*, No. 071464 (Va. S. Ct. Dec. 7, 2007).

Dismissals

The three-judge court acknowledged that pursuant to Part 6, Section IV, Paragraph 13.B.7 a (1), *Rules of the Supreme Court*, "Bar Counsel is given the authority to 'initiate, investigate, present or prosecute Complaints' and to act independently and exercise prosecutorial autonomy and discretion." In granting Bar Counsel's motion to dismiss, the three-judge court found that "[i]nherent within …[the Bar's] authority is the authority to move the court to dismiss a complaint with prejudice." *Virginia State Bar ex rel. Third District Committee, Section III v. Debra Desmore Corcoran*, CL07-2749-3 (Circuit Court of the City of Richmond, August 2, 2007).

Discovery, No Right To

Respondent has no procedural due process right to discovery in a disciplinary proceeding. *Gunter v. Virginia State Bar*, 241 Va. 186, 399 S.E. 2d 820 (1991).

Double Jeopardy, Prior Record

The Board's consideration of prior discipline does not constitute double jeopardy or multiplicity of charges. *Wright v. Virginia State Bar*, 233 Va. 491, 357 S.E. 2d 518 (1987).

Due Process, Notice of Charges

During a disciplinary proceeding, Ohio's Board of Commissioners on Grievances and Discipline heard testimony from an attorney and his investigator and, based on their testimony, added a new charge against the attorney. The attorney was ultimately suspended based on the new charge. The United States Supreme Court held that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *In re Ruffalo*, 390 U.S. 544 (1968).

Respondent was charged with violating Rule 4.2 based on a conversation he had with a represented person regarding a civil matter. The District Committee found that Respondent violated 4.2, but based the finding on Respondent's discussion of a pending criminal matter with the same person. Respondent appealed to the Disciplinary Board, which affirmed the finding of a violation of Rule 4.2, finding that the charge of misconduct gave adequate notice for Respondent to develop his defense. The Supreme Court of Virginia reversed because the charge of misconduct "neither included the factual allegation that Spencer had discussed the pending criminal offense with the defendant, nor accused him of misconduct in that regard." *Spencer v. Virginia State Bar*, No. 111489 (Va. S. Ct. Feb. 24, 2012).

Due Process, Argument Must be Raised at Hearing

Respondent argued that the Disciplinary Board proceedings denied him due process and equal protection of the law, but he never raised that argument during the Board proceedings. Pursuant to Rule 5:25 of the Rules of Supreme Court of Virginia, the court refused to consider objections not raised at the trial level. *Earls v. Virginia State Bar,* No. 002230 (Va. S. Ct. Mar. 2, 2001).

Expansion of Investigation

The fact an investigation expanded from an isolated incident regarding Respondent's trust account into a broader review of the account does not support a claim of a violation of due process or equal protection. As disciplinary proceedings are civil and disciplinary in nature and summary in character, they are informal proceedings and it is only necessary that the attorney be advised of the nature of the charge against him and be given an opportunity to answer. *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Federal Intervention in Pending Disciplinary Proceeding—*Younger Abstention Doctrine*

Even though Respondent has asserted a First Amendment claim against the VSB in federal court, a federal court will not enjoin the state proceeding and will abstain from asserting jurisdiction over the claim if Respondent has a full and fair opportunity to litigate his claim in the state disciplinary proceeding. The Fourth Circuit has not confronted this precise issue, but other courts of appeals have affirmed dismissal under *Younger* where an attorney filed suit in federal court seeking to enjoin state disciplinary proceedings. *See, e.g., Gillette v. N.D. Disciplinary Bd. Counsel*, 610 F.3d 1045 (8th Cir. 2010); *Am. Family Prepaid Legal Corp. v. Columbus Bar Ass'n*, 498 F.3d 328 (6th Cir. 2007); *Sekerez v. Supreme Court of lnd*., 685 F.2d 202 (7th Cir. 1982). *Horace Hunter v. Virginia State Bar*, 786 F. Supp. 2d 1107 (E.D. Va. May 9, 2011).

Filing Achieved Only upon Receipt by Clerk's Office

The timeliness of a demand for a three-judge panel is determined by the date the demand is received by Clerk's Office, rather than date of mailing. Part One of the Rules of Court, including Rule 1.7, does not apply to disciplinary proceedings and thus three days cannot be added to jurisdictional timeframe. *In the Matter of Denny Pat Dobbins*, VSB Docket No. 04-010-1580; *see also Robinson v. VSB*, No. 052638 (Va. S. Ct. May 19, 2006) (certified mailing sent on 21st day insufficient). The Bar, however, should object to an untimely demand and may waive the requirement by stipulating that the demand was timely. *Brown v. Virginia State Bar*, 270 Va. 409, 621 S.E.2d 106 (2005).

Foreign Lawyer—Disciplinary Suspension—Unauthorized Practice of Law

North Carolina lawyer whose license was under administrative suspension by NC State Bar practiced "continuously and systematically" in Virginia in violation of Rule 5.5; failed to maintain trust account records; failed to deposit client funds into trust account suspended with terms for two years. *Virginia State Bar v. Walters*, VSB Docket No. 10-060-082176.

Immunity

Qualified immunity exists pursuant to statute for written or spoken words made in Bar complaint matters. The immunity is lost if the statements are false and were made willfully and maliciously. Va. Code. § 54.1-3908.

Assistant Bar Counsel has absolute prosecutorial immunity under the 11th amendment to

the U.S. constitution. "In each case where a prosecutor is involved in the charging process, under Virginia law, that action is intimately connected with the prosecutor's rule in judicial proceedings and the prosecutor is entitled to absolute immunity from suit for such actions." *Andrews v. Ring*, 266 Va. 311, 321, 585 S.E.2d 780, 785 (2003). The same rule applies under federal law. *Imbler v.Pachtman*, 424 U.S. 409, 422-29 (1976) (incorporating common law principle of prosecutorial immunity). *Horace Hunter v. Virginia State Bar*, 786 F.Supp. 2d 1107 (E.D. Va. 2011).

Impairment Investigation: Suspension of law license after adjudication by a court of competent jurisdiction to have an impairment

An out-of-state licensing authority placed Respondent on inactive status by consent pending further order of its court following multiple findings of professional misconduct against Respondent. Respondent voluntarily ceased practicing law. The other jurisdiction also enjoined Respondent from practicing law based upon five years of treatment for depression and a psychiatric commitment indicating that Respondent's condition materially affected his ability to practice law. Respondent explained that he did not notify VSB of the suspension because it was related to his illness. Disciplinary Board suspended Respondent's law license in accordance with Rule of Court requiring such action upon notice with supporting documentary evidence that an attorney has been adjudicated by a court of competent jurisdiction to have an impairment. VSB Docket No. 18-000-____. (Complete cite withheld for confidentiality).

Judges May Testify

It was not prejudicial error to consider the testimony of a Circuit Judge, even though the testimony contained hearsay evidence. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964).

Laches, Does Not Apply

Laches does not apply to state or local governments when acting in a governmental capacity. The Bar, which is an administrative arm of the Supreme Court, is a state agency, and therefore laches does not apply to disciplinary proceedings. *Virginia State Bar v. El-Amin*, Case No. MC4992 (Three-Judge Panel, 1998).

Mitigation Evidence Need Not Be Discussed In Opinion

The Board is not required to mention mitigating evidence in its written or oral opinion, and the failure to state that mitigating evidence was considered does not mean it was not

considered. *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Mitigation Evidence—Exclusion Improper

Respondent sought to introduce documents and witness testimony from his office staff to substantiate the adverse economic impact on his legal practice caused by an allegedly untimely press release by the Virginia State Bar announcing that his license to practice law had been suspended and detailing the reasons underlying the suspension. The Board ruled that it would only hear argument on the appropriate sanction and would not allow admission of Respondent's mitigation evidence. The Supreme Court held that Respondent was entitled to present evidence tending to mitigate the sanction to be imposed by showing to what extent he had already suffered adverse consequences because of the public dissemination of the Disciplinary Board's findings that he had violated the Disciplinary Rules and the suspension of his license to practice law. *Green v. Virginia State Bar*, 272 Va. 612, 636 S.E.2d 412 (2006).

Nature Of The Proceedings

A disciplinary proceeding is civil, and not criminal in nature. They are special proceedings, peculiar to themselves, sui generis, disciplinary in nature and of a summary character. Such a proceeding is not a lawsuit between the parties litigant, but is rather in the nature of an inquest or inquiry as to the conduct of the Respondent. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964).

We have previously stated that the proceeding to discipline an attorney is a civil proceeding. *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 837, 172 S.E. 282, 284 (1934).

Notice Proceedings Only

Disciplinary proceedings are informal proceedings and it is only necessary that the defendant be informed of the nature of the charge and be given an opportunity to answer. *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833 (1934); *Maddy v. District Committee*, 205 Va. 652 (1964); As disciplinary proceedings are civil and disciplinary in nature and summary in character, they are informal proceedings and it is only necessary that the attorney be advised of the nature of the charge against him and be given an opportunity to answer. *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Courts are not required to list with specificity the factual basis for issuing a rule to show cause why such privilege should not be revoked. The record shows that the attorney received adequate notice of the conduct that the circuit court would consider in deciding whether to

revoke his privilege to practice before that court. *In the Matter of Jonathan A. Moseley*, 273 Va. 688, 643 S.E.2d 190 (2007).

Respondent contends that his due process rights were violated. Moseley argues that the disciplinary proceedings are quasi-criminal; therefore, he asserts that the original complaint was not valid because it was not verified by an affidavit that included detailed allegations which could not be amended during the proceedings. Moseley also argues that the panel erred in failing to dismiss as invalid various allegations that never identified the precise conduct violating the rules. We have previously stated that the proceeding to discipline an attorney is a civil proceeding. *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 837, 172 S.E. 282, 284 (1934). The primary purpose of such disciplinary proceedings is to protect the public, not punish the attorney. *Virginia State Bar v. Gunter*, 212 Va. 278, 284, 183 S.E.2d 713, 717 (1971). To that end, "it is only necessary that the attorney be informed of the nature of the charge preferred against him and be given an opportunity to answer." *Id.* The record reflects that Moseley had adequate notice and opportunity to answer, as he was present for the proceedings and responded not only to the charges of misconduct pending against him, but disputed the underlying facts as well. Further, the Virginia State Bar complied with the statutory requirements of Code § 54.1-3935 by verifying the district committee complaint by affidavit. Therefore, we reject Moseley's contention that his due process rights were violated by the proceedings before the panel. *Moseley v. Virginia State Bar*, 280 Va. 1, 694 S.E.2d 586 (2010).

Privilege—Waiver—Inadvertent Disclosure

The Supreme Court of Virginia adopts a five-part test for determining whether an inadvertent disclosure of a document covered by the attorney-client privilege waives the privilege. The Court held that the ACP had been waived and reversed the trial court, applying these five factors: "(1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances." *Walton v. Mid-Atlantic Spine Specialists PC*, 280 Va. 113, 694 S.E.2d 545 (2010).

Procedural Compliance

Dismissal of a complaint for failure of the Bar to comply with a procedural requirement of the Rules of Supreme Court of Virginia is inappropriate, absent some showing of prejudice to the Respondent because for the failure. *Motley v. Virginia State Bar*, 260 Va. 251 (2000) (Bar sent certification to Respondent 11 months after Subcommittee made the decision to certify, although Rule at that time required such mailing "promptly"); *accord Green v. Virginia State Bar*, 278 Va. 162, 677 S.E.2d 227 (2009) (more than one year delay in issuance of certification not a basis for dismissal absent showing that respondent was prejudiced by the delay).

Reciprocal Discipline

Reciprocal discipline should result from a suspension or revocation in federal court. See *In re Bridgette M. Harris*, No. 01-000-3232 (2001) (indefinite suspension by Maryland Bankruptcy Court resulted in indefinite suspension by the Board); *In re Bridgette M. Harris*, VSB Docket No. 02-000-1316 (permanent disbarment by Virginia Bankruptcy Court resulted in disbarment by the Board); *In re James D. Kilgore*, VSB Docket No. 02-000-2781 (disbarment by Virginia Bankruptcy Court resulted in disbarment by Board).

Reciprocal discipline should result from a suspension by the Patent and Trademark Office. *In re Martin G. Mullen*, VSB Docket No. 02-000-1877 (Board Opinion, 2002) (one dissent).

But see In the Matter of Sandy Yeh Chang, VSB Docket No. 13-000-094679. Respondent received a one-year suspension of right to practice in a Maryland Federal District Court based on misconduct before that court. The Maryland federal court conducted a three-judge disciplinary hearing under the FRDE. The Disciplinary Borad held that a Maryland federal district court was not "another jurisdiction" within the meaning of ¶ 13-24 for purposes of reciprocal discipline, and therefore dismissed the rule to show cause.

In order to attempt to prove that "imposition of the same discipline upon the same proof would result in a grave injustice," a respondent is permitted to introduce evidence of extenuating circumstances that might mitigate the sanction to be imposed in Virginia. The Board's refusal to allow this evidence resulted in a reversal by the Supreme Court of Virginia. *Cummings v. Virginia State Bar*, 233 Va. 363, 355 S.E.2d 588 (1987).

Recusal

Whether a Board member should recuse himself in response to a recusal motion is a matter of discretion and is reviewed for abuse of discretion. The fact that two Board members previously sat on cases involving the current Respondent does not require recusal, and the fact a judge is familiar with a party and his legal difficulties through prior judicial hearings does not automatically or inferentially raise the issue of bias. *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Reconsideration, Lack of Jurisdiction

Following the Supreme Court's adoption of new Paragraph 13, which does not provide for a Motion for Reconsideration after a full hearing, the Board has no jurisdiction to consider such a Motion. One should note that the Board alternatively considered and denied the Motion, and two other panels have denied such motions without discussing the jurisdiction issue. *In the Matters of Robert Dean Eisen*, VSB Docket No. 01-022-0845.

Self-Incrimination Rights Inapplicable

Where a complaint (or, presumably, a certification) does not allege any wrongdoing which would constitute a crime, the federal and state rights against self-incrimination are inapplicable. *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987).

Show Cause Hearing, Burden on Respondent

At a show cause hearing, the burden is on the Respondent to show by clear and convincing evidence that he complied with the terms imposed. *Williams v. Virginia State Bar*, 261 Va. 258, 542 S.E.2d 385 (2001).

Show Cause Hearing, While Respondent is Under Impairment Suspension, and Appointment of Guardian Ad Litem

The Virginia State Bar may pursue a criminal show cause and discipline against a lawyer who is under an impairment suspension. A Guardian Ad Litem will be appointed if the impaired respondent does not have counsel. *In the Matter of Shelly Renee Collette*, VSB Docket No. 18-000-111181.

Statute of Limitations, None

Proceedings to discipline lawyers are not set on foot to punish them, but to protect the public. It is want of character which is important and not the place where that is manifest. The public is not interested in the situs of their misdeeds and we know of no statute of limitations which can be invoked. *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934); *see also Moseley v. Virginia State Bar*, 280 Va. 1, 694 S.E.2d 586 (2010).

Suspended Lawyers Are Subject to Discipline under the Rules of Professional Conduct

Suspended lawyers retain their status as a lawyer, even though their privileges of practice are withdrawn during their suspension. Accordingly, the Rules of Professional Conduct apply to them. Equal protection was afford Respondent as he was treated similarly to other suspended lawyers as suspended lawyers are a class unto themselves.

Barrett v. Virginia State Bar, 277 Va. 412, 675 S.E.2d 827 (2009).

Suspension, Failure to Give Notice, Paragraph 13-29

Respondent continued to negotiate personal injury case after license suspension. By a 3 to 2 vote, the Disciplinary Board found that Respondent had not violated Para. 13 (M). Alleging violation of Para. 13 (M) may not be the correct enforcement procedure when a suspended lawyer continues to practice after their license has been suspended. *In the Matter of Steven Scott Biss*, VSB Docket No. 09-000-079001.

But see In the Matter of Tracey Suzann Foughty –Deavers, VSB Docket No. 11-000-088251. Respondent was revoked in this ¶ 13-29 case. Paragraph 13-29 requires that upon license suspension, an attorney give notice to clients and opposing counsel and make arrangements with clients for the handling of all matters during said suspension, and provide proof of both to the bar. Respondent was serving an interim suspension for failure to respond to a VSB subpoena *duces tecum* issued in the course of an investigation. Board heard evidence of actual harm to two clients caused by delay of their matters.

Suspension, Discipline of Lawyer While Lawyer is Suspended

A lawyer whose license is suspended is still an active member of the bar and, although not in good standing, is subject to discipline for violating the Rules of Professional Conduct. *Barrett v. Virginia State Bar*, 277 Va. 412, 675 S.E.2d 827 (2009).

Suspension, Pleadings Filed by Suspended Lawyer are a Nullity

Notice of appeal was signed and filed by attorney whose license was under an administrative suspension at the time. The lawyer said he did not know about the suspension and therefore his client should not be penalized as a result of it. The Court held that pleadings signed by a suspended lawyer are a nullity, regardless of whether the suspension is administrative and regardless of whether the lawyer had actual knowledge of the suspension. Accordingly, the notice of appeal was not properly filed and the Court did not have jurisdiction to hear the appeal. *Jones v. Jones*, 635 S.E.2d 594 (Va. App. 2006).

Teleconference, Hearing Conducted by

Disciplinary Board did not err in conducting the proceedings via telephonic conference call. *Green v. Virginia State Bar*, 272 Va. 612, 636 S.E.2d 412 (2006).

Terms, Authority to Impose

A District Committee imposed a public reprimand with terms, which included a requirement that Respondent engage a consultant to review and make recommendations regarding his "methods and timeliness of client communication, fee agreements and billing practices." Respondent appealed to the Disciplinary Board and then to the Supreme Court of Virginia, arguing that the terms exceeded the District Committee's authority and were otherwise unjustified. The Court held that the District Committee had authority to impose a public reprimand with terms, and that "[w]hile the Rules do not explicitly provide for the [law practice consultant], they do not forbid it, and Robinson provides no authority for his position that such a sanction is beyond the Committee's authority." Moreover, "[g]iven that the VSB has the power to suspend or revoke an attorney's license for misconduct, it follows that the VSB also possesses the lesser power to require an attorney with a history of problematic billing practices to engage a consultant to review and improve those practices to conform to the minimum level of professional competency." *Ronald Albert Robinson, Jr. v. Virginia State Bar*, No. 151501 (Va. S. Ct. Apr. 14, 2016).

Terms Compliance, Rule to Show Cause

In a show cause proceeding before the Board, the burden of proof is on the respondent to show by clear and convincing evidence that he complied with the terms imposed under an agreed disposition order. In this case, the agreed disposition order suspended the six-month suspension of the attorney's license to practice law for a period of one year, subject to certain terms. The Board found that the attorney failed to comply with the order because he did not submit the required certifications during that year, and because he failed to demonstrate by clear and convincing evidence sufficient cause to explain his failure to comply with that condition. The record in this case supports the Board's findings. *Williams v. Virginia State Bar,* 261 Va. 258, 542 S.E.2d 385 (2001).

Three-Judge Panel, Timely Election Required

Rule requiring demand for a Three-Judge panel to be filed within 21 days of service of charge of Misconduct is fully consistent with Code Sections 54.1-3935 and 3915; right to a Three-Judge panel may be waived by failure to timely make such a demand; Section 54.1-3915 is akin to "territorial jurisdiction" or venue, as opposed to subject matter jurisdiction. *Fails v. Virginia State Bar*, 265 Va. 3, 574 S.E.2d 530 (2003), *reaffirming Wright v. VSB*, 233 Va. 491, 357 S.E. 2d 518 (1987).

A failure to make a timely demand for a three-judge court constitutes a conclusive waiver of the right to subsequently file such a demand. *Wright v. Virginia State Bar*, 233 Va. 491 (1987).

Mailing a demand for a Three-Judge panel on the 21st day by certified mail is untimely; Rule 5:5(b), which deems a pleading timely filed when it is mailed by certified mail, applies only to the Clerk of the Supreme Court and not to the Clerk of the Disciplinary System. *Robinson v.*

VSB, No. 052638 (Va. S. Ct. May 19, 2006).

Respondent did not file his Answer and Demand for a Three-Judge Panel until two days after the deadline for filing the same. This requirement is jurisdictional and Respondent is deemed to have consented to the jurisdiction of the Disciplinary Board. *In the Matters of David Redden*, VSB Docket Nos. 11-021-085200 and 11-021-086547; *citing In the Matter of Stephen Alan Bamberger*, VSB Docket No. 08-052-073229.

Three-Judge Panel, Expedited Hearing

Respondent timely filed a request for a three-judge panel, but Respondent failed to provide dates between 30 and 120 days from the date of the Board's Order requiring him to appear. Respondent also failed to produce credible evidence demonstrating that he was unavailable during the required timeframe. Respondent's request for a three-judge panel was denied and the hearing took place before the Disciplinary Board. *In the Matter of Jean Jerome Dandy Ngando Ekwalla*, VSB Docket Nos. 15-053-101414 et al., appeal pending.

Three-Judge Panel, Withdrawal of Objection to Timeliness of Respondent's Election

When the Bar withdrew its objection to the attorney's demand for a three-judge panel and stipulated that the demand was timely filed, the Bar submitted itself to the jurisdiction of the three-judge panel. At that point the Board's jurisdiction over the attorney and the Virginia State Bar terminated. Therefore, the Board did not have jurisdiction to enter an order suspending the attorney's license to practice law. The order is reversed, and the matter is remanded with directions to Bar Counsel to file the Complaint required by Code § 54.1-3935. *Brown v. Virginia State Bar*, 270 Va. 409, 621 S.E.2d 106 (2005).

Three-Judge Court, Right to Elect for Hearing on Compliance With Paragraph 13 (M)1(Notice to Clients of Suspension)

An attorney charged with failure to provide required notice to clients that his license to practice law was suspended made a timely demand that the alleged violations be tried before a three-judge court, and from that point the Virginia State Bar Disciplinary Board had no authority to adjudicate the adequacy of the attorney's compliance with the notice requirement. *Cilman v. Virginia State Bar*, 266 Va. 66, 580 S.E.2d 830 (2003).

1 Paragraph 13(M) is now Paragraph 13-29.

Three-Judge Panel, Jurisdiction On Remand from VA Supreme Court

Respondent appealed a District Committee's decision and invoked the jurisdiction of a three-judge panel. He then appealed the three-judge panel's decision to the Virginia Supreme Court. The Supreme Court affirmed two of the Rule violations found by the three-judge panel and remanded the case to the three-judge panel to consider the appropriate sanction. Respondent argued that the three-judge panel did not have jurisdiction to "hear evidence and determine a sanction on remand." The Court disagreed, holding that the three-judge panel retained the jurisdiction Respondent had previously invoked by requesting it. *Kuchinsky v. Virginia State Bar*, No. 150878 (Va. S. Ct. Oct. 29, 2015).

Three-Judge Panel, Untimely Demand

No conflict is found between Rule 13(C)(6) and Code § 54.1-3915. The rule and the statute complement each other. The message of Rule 13(C)(6) is clear: if an attorney does not wish to be tried by the Disciplinary Board, he or she should not file an answer to a certification of misconduct within twenty-one days. Instead, the attorney should file within that time a demand for trial by a three-judge court. This simple procedural step neither eliminates the jurisdiction of the courts to deal with the discipline of attorneys nor denies the right of an attorney to trial by a three-judge court. The failure of an attorney charged with misconduct to make a timely demand for a three-judge court constitutes a conclusive waiver of the right to subsequently file such demand. *Fails v. Virginia State Bar*, 265 Va. 3, 574 S.E.2d 530 (2003).

Respondent's license was suspended for three years by the Virginia State Bar Disciplinary Board. Respondent argued on appeal that the Board erred in denying the appellant's request for a three-judge panel. The Supreme Court of Virginia held that the Board did not err in concluding that the appellant's request for a three-judge panel was untimely. Respondent's letter, sent by certified mail on the 21st day after service of the Certification, was not received until the 22nd day after service of the Certification. Moreover, Rule 5:5(b) does not apply to pleadings filed with the Board. The Court also found that Respondent's unsigned request for a three-judge panel that was sent by facsimile on the 21st day after service of the Certification was without effect. *Robinson v. VSB*, No. 052638 (Va. S. Ct. May 19, 2006).

Three-Judge Court, Request Not Signed by Respondent

Although the Respondent's Answer to a Certification and Demand for Three-Judge Panel was filed within 21 days of service of the bar's Certification, it was not signed by the Respondent as required by Rule 13-13(B), but only by Respondent's counsel. Respondent's request for a three-judge court was therefore not timely made and the Board retained jurisdiction over the

matter. *In the Matter of Stephen Alan Bamberger*, VSB Docket No. 08-052-073229 (Disc. Bd. Jan. 28, 2011); *see also In the Matter of Michelle Warner Waller*, VSB Docket No. 14-033-098480 (Disc. Bd. 2015); *In the Matter of James Amery Thurman*, VSB Docket No. 14-022-099259 (Disc. Bd. 2015).

Venue, District Committee

A District Committee has a duty to investigate misconduct if the misconduct occurs in its district or if the attorney resides in its district. This is a venue requirement, which is waived if not timely made. Failure to object to venue either in person or in writing before one's first appearance before the District Committee constitutes waiver of any objection to venue. *Stith v. Virginia State Bar*, 233 Va. 222, 355 S.E.2d 310 (1987).

Virginia Supreme Court—Standard of Review

We conduct an independent examination of the entire record. We consider the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Bar, the prevailing party in the trial court. We accord the trial court's factual findings substantial weight and view those findings as prima facie correct. Although we do not give the trial court's conclusions the weight of a jury verdict, we will sustain those conclusions unless it appears that they are not justified by a reasonable view of the evidence or are contrary to law. *Zaug v. Virginia State Bar*, 285 Va. 457, 737 S.E.2d 914 (2013).

Virginia Supreme Court—Standard of Review—Findings of Fact Necessary to Support Charges

While the Board could have concluded in its findings of fact that Northam had actual knowledge of Lewis's disqualification, or that such actual knowledge was inferred from the circumstances, that finding was not made. Had the Board made this determination, we would have reviewed the entire record for reasonable inferences in support of its determination, and viewed conflicts in the evidence in the light most favorable to the Bar as the prevailing party. But lacking <u>any</u> factual determination by the Board as to Northam's knowledge of disqualification, we will not inspect the record to determine facts required to establish a violation of the rule. *Northam v. Va. State Bar* 285 Va. 429, 737 S.E.2d 905 (2013).

The district committee's determination complied with Part 6, § IV, ¶ 13-16(Y). Brief findings of fact, nature of the misconduct explained based on the facts, and the sanctions imposed are all that is necessary. The rules do not require that a District Committee list the specific facts relied upon in finding individual rule violations. Therefore, the District Committee did not err by failing to include an exhaustive list for each violation. The rules do not require that

a District Committee list the specific facts relied upon in finding individual rule violations. Therefore, the District Committee did not err by failing to include an exhaustive list for each violation. *Kuchinsky v. Virginia State Bar*, 287 Va. 491, 756 S.E.2d 475 (2014).

Waiver of Assignment of Error Due to Failure to Make Timely Objection

Respondent failed to make timely objections to introduction of his prior disciplinary record at subcommittee hearings and failed to timely object to participation of a subcommittee member Respondent asserted had a conflict of interest. The Disciplinary Board properly overruled Respondent's motion to dismiss the Certification on those bases due to Respondent's failure to make a timely objection to these alleged procedural irregularities. *Green v. Virginia State Bar*, 278 Va. 162, 677 S.E.2d 227 (2009).

Witnesses, Inmates, No Subpoena Power

The Bar's power to summon and compel the attendance of witnesses at hearings does not include the power to require the Department of Corrections to transport imprisoned witnesses to hearings. *In the Matter of John Doe*, Richmond Circuit Court, Chancery No. HN-1759-4 (Nov. 30, 2000). This case addressed only witnesses at a District Committee hearing, but the same analysis would apply to a Board hearing. The Circuit Court relied on the recent Supreme Court case of *Commonwealth ex rel. Virginia Department of Corrections v. Demetrious Eric Brown*, 259 Va. 697, 529 S.E.2d 96 (2000), which addressed the lack of statutory authority for a General District Court to issue a transportation order for an inmate to appear in a civil proceeding.

II. SUBSTANCE

Address of Record, Duty to Update

The Rules require an attorney to inform the Bar of any change in the attorney's membership mailing address, and a failure to do so will not support a due process objection based on lack of receipt of materials mailed to the then current address of record. *Meade v. Virginia State Bar*, No. 022051 (Va. S. Ct. Feb. 7, 2003).

Advertising—Specific Case Results

Hunter's blog posts, while containing some political commentary, are commercial speech. The VSB's Rules 7.1 and 7.2 do not violate the First Amendment. As applied to Hunter's blog posts, they are constitutional and the panel did not err. *Hunter v. Va. State Bar ex rel. Third Dist. Comm.* 285 Va. 485, 744 S.E.2d 611 (2013).

Business Transaction with a Client—Rule 1.8(a)—acquiring an interest in client's property

Respondent knowingly acquired an interest in his client's property, while representing client in a partition suit, when Respondent directed the Special Commissioner to issue a quitclaim deed to Respondent in which Respondent was given a 25% ownership interest in the client's property. The common law exception to champerty and maintenance, allowing a lawyer to take an interest in the client's property as a fee, does not apply here because Rule 1.8(j)(prohibiting a lawyer from obtaining a proprietary interest in the subject of litigation) was not charged in this proceeding, but had been adjudicated at an earlier proceeding that is not a part of Respondent's appeal. There is no common law doctrine which permits an attorney to "knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" in violation of Rule 1.8(a) simply because the client is indigent. Finally, although Respondent claimed he had discontinued representing his client after the partition suit was filed he admitted there were uncollected rents to be divided; and a final order had not been entered in the case and Respondent had taken no steps to withdraw as counsel in the suit. Finally, the prior admonition without terms did not require that Kuchinsky divest himself of his interest in the client's real estate. Therefore the three-judge court erred in finding that Kuchinsky had violated Rule 3.4(d). *Kuchinsky v. Virginia State Bar*, 287 Va. 491, 756 S.E.2d 475 (2014).

Competence—Rule 1.1

Even if an attorney has the necessary legal knowledge and skill, "thoroughness and preparation" require the "[c]ompetent handling of a particular matter," which includes "inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners." Va. Sup. Ct. R., Part 6, § II, R. 1.1, cmt. 5 (emphasis added). Livingston obtained three indictments against Collins. Each was based on factual and/or legal errors due not to mere negligence, but to his failure to analyze the evidence and the elements of the charges he brought against Collins. And, without checking the accuracy of the charge in the third indictment, which contained the wrong criminal offense, he presented the indictment to a grand jury and pursued it in the trial court and also on appeal when he filed the untimely petition for appeal. It is not necessary to determine whether any one of these acts of misconduct alone would violate Rule 1.1. In this case, viewing the record in its entirety, there is clear and convincing evidence that Livingston failed to provide competent representation to his client in the prosecution of Collins. Note: Violations of Rules 3.1 and 8.4(a) not supported by the record and dismissed. *Livingston v. Va. State Bar*, 286 Va. 1, 744

S.E.2d 220 (2013). On remand, Respondent was issued a Public Reprimand with terms to complete two hours of additional CLE in Ethics. *In the Matter of Eric Joseph Livingston*, Docket No. 10-031-084027 (VSB Disc. Bd., December 13, 2013). Respondent's appeal to the Supreme Court of Virginia was dismissed.

Virginia State Bar ex rel. Second District Comm. v. John Wesley Bonney, CL 13-3441 (Three Judge Court, Norfolk Circuit Court, March 25, 2014). Respondent was incompetent in representing a criminal defendant in federal court charged with 10 counts of receiving child pornography. Respondent, who had never handled a child pornography case, misadvised client, failed to object to the government's sentencing guidelines enhancement and failed to research the guidelines regarding the propriety of the enhancement; misapplied federal sentencing guidelines and incorrectly advised client regarding the time he would receive under a plea agreement. Client filed habeas alleging Respondent was ineffective. Federal court found that client did not have competent counsel. Plea agreement and conviction were vacated due to Respondent's ineffective assistance and new proceedings were brought. In addition, Respondent took his whole fee of $35K before matter was concluded, and made misrepresentations to the court in the habeas proceeding regarding what he told his client regarding the maximum sentence he would receive. The three-judge court found violations of Rules 1.1, 1.15(a), 3.3 and 8.4(c) and revoked Respondent's license based on this case and a bankruptcy case in which Respondent failed to disclose client's transfer of property in the Statement of Financial Affairs, resulting in dismissal of the client's Chapter 7 petition.

Confidentiality Attaches to Initial Meeting

The duty of confidentiality under Rule 1.6(a) attaches to information gathered by an attorney in the initial meeting with the potential client, even if an attorney/client relationship is not ultimately established. LEO 1794 [responding to an inquiry from the Roanoke Circuit Court in *Joslyn v. Joslyn,* 23 Cir. CH03596 (2003)]. *See also* Rule 1.18 of Va. Rules of Professional Conduct.

Confidentiality—Rule 1.6—Disclosure of information in the "public record"

To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment. *Hunter v. Va. State Bar ex rel. Third Dist. Comm.* 285 Va. 485, 744 S.E.2d 611 (2013); *Compare Turner v. Commonwealth,* 726 S.E.2d 325 (Va. 2012)(J. Lemons, concurring):

Keeley violated Rule 1.9 by testifying against Turner, his former client, about information gained

in the course of the representation that was to Turner's disadvantage when such information was not "generally known." The trial judge abused his discretion by permitting this testimony.

ABA Model "Rule 1.9(c) extends to the revelation of information obtained through the attorney client relationship to any third party to the detriment of the former client, regardless of the former attorney's relationship with that third party." *Pallon v. Roggio*, Civ. Nos. 04–3625(JAP), 06–§1068(FLW), 2006 WL 2466854, at *8, 2006 U.S. Dist. LEXIS 59881, at *25 (D.N.J. Aug. 24, 2006). Moreover, ABA Model "Rule 1.9(c) is broader than the protection afforded by the duty of confidentiality and is not limited to confidential information. However, [ABA Model] Rule 1.9(c) does not apply to information that is 'generally known.' " Id. at *7, 2006 U.S. Dist. LEXIS 59881, at *23 (internal citation omitted). In discussing what constitutes information that is "generally known," the court in Pallon stated:

> "Generally known" does not only mean that the information is of public record. The information must be within the basic understanding and knowledge of the public. The content of form pleadings, interrogatories and other discovery materials, as well as general litigation techniques that were widely available to the public through the internet or another source, such as continuing legal education classes, does not make that information "generally known" within the meaning of Rule 1.9(c).

Id. at *7, 2006 U.S. Dist. LEXIS 59881, at *23–24 (internal citation omitted).

CRESPA

Clear and convincing evidence is required to prove a CRESPA violation. *In the Matter of David Thomas Steckler,* VSB Docket No. 00-000-3308.

The Board may suspend or revoke an attorney's law license, as well as his registration as a settlement agent, once a CRESPA violation is found. *In the Matter of David Thomas Steckler,* VSB Docket No. 00-000-3308.

Attorney may not rely on staff to insure CRESPA registration completed and filed; duty to properly register is a personal responsibility of attorney. *In the Matter of Roy Reid Young, III,* VSB Docket No. 99-000-2831.

Recodified under Va. Code §§55-525.8-525.15.

Communications With Represented Persons—Rule 4.2

VSB must prove three separate facts to establish a violation of the Rule: (1) that the attorney knew that he or she was communicating with a person represented by another lawyer;

(2) that the communication was about the subject of the representation; and (3) that the attorney (a) did not have the consent of the lawyer representing the person and (b) was not otherwise authorized by law to engage in the communication. *Zaug v. Va. State Bar ex rel. Fifth Dist.-Section III Comm.* 285 Va. 457, 737 S.E.2d 914 (2013).

Rule 4.2 requires an attorney to disengage from such communications when they are initiated by a person the lawyer knows is represented. But the Rule does not require attorneys to be discourteous or impolite when they do so. *Id.*

Communications With Unrepresented Persons

Rule 4.3(b)'s prohibition against giving legal advice to an unrepresented party does not apply when the lawyer is representing himself in a divorce from his wife. The attorney expressed only his opinion that he held a superior legal position on certain issues in controversy between himself and his wife. His statements may have been intimidating, but he did not purport to give legal advice. The wife knew that her husband was a lawyer and that he had interests opposed to hers. The concern articulated as underlying this Rule is not borne out in this case. *Barrett v. Virginia State Bar*, 269 Va. 583, 611 S.E.2d 375 (2005).

Conflicts of Interest—Imputation—Rule 1.10

Rule 1.10 is not a rule of strict liability. The bar must prove that Respondent actually knew his law partner was disqualified in order to establish a violation of Rule 1.10. *Northam v. Va. State Bar*, 285 Va. 429, 737 S.E.2d 905 (2013).

Criminal Appeals

Appointed counsel may not simply refuse to file an appeal he deems frivolous. Instead, the attorney must follow the procedure outlined in *Anders v. California*, 386 U.S. 738 (1967), which requires a Motion to Withdraw accompanied by a brief referring to anything in the record that might arguably support an appeal. *Akbar v. Commonwealth*, 7 Va. App. 611, 376 S.E.2d 545 (1989).

Defendants facing probation revocation are entitled to counsel, and presumably, to the same type of compliance with *Anders* and *Akbar* regarding their appeal requests. Code of Virginia Sections 19.2-157 and 19.2-326; *Dodson v. Director, Dept. of Corrections*, 233 Va. 303, 355 S.E.2d 573 (1987).

Failure to file motion for delayed appeal after missing the deadline for filing a criminal appeal is disciplinary neglect in violation of Rule 1.3. The Virginia State Bar Second District

Committee, Section II, imposed an admonition on Alana Sherrise Powers for defaulting on a criminal appeal. Ms. Powers missed a deadline, which caused the appeal to be dismissed before it could be considered on its merits. She then failed to take steps to obtain a delayed appeal, which would have remedied the default. *Alana Sherrise Powers*, VSB Docket No. 07-022-0958.

Failure to appear for oral argument in two criminal appeals before the Court of Appeals justified holding Respondent in contempt, and, based on two prior public reprimands for failure to perfect and prosecute criminal appeals, the Court of Appeals suspended Respondent's privilege to practice before this court for two years. *In re Davey,* 54 Va. App. 228, 677 S.E.2d 66 (2009).

Criminal or Wrongful Acts; Conviction Not Required

Acquittal in a criminal proceeding does not bar a disciplinary proceeding arising out of the same set of facts. *Smolka v. Second District Committee*, 224 Va. 161, 295 S.E.2d 267 (1982).

The fact that federal or state authorities decline to prosecute a criminal charge does not preclude a finding the attorney violated a disciplinary rule prohibiting criminal or deliberately wrongful acts. *In the Matter of Sam Garrison*, VSB Docket No. 02-080-3027.

While the effect of a suspended imposition of sentence followed by dismissal of the original criminal charge can be argued, a conviction is not a prerequisite to a finding the attorney violated a disciplinary rule prohibiting criminal or deliberately wrongful acts. *In the Matter of Elliot M. Schlosser*, VSB Docket No. 01-010-2990.

Criminal Conduct, Obscene Phone Call to Clerk's Office

Respondent was convicted of a misdemeanor for making an obscene phone call to the clerk of the Combined District Court for Rappahannock County. The committee found that he committed a crime that reflected adversely on his honesty, trustworthiness or fitness to practice law, and approved an Agreed Disposition for Public Reprimand. *David Louis Konick, Rock Mills***,** VSB Docket Nos. 06-070-0783 & 06-070-2264.

Criticism of Judges

A derogatory statement concerning the qualifications or integrity of a judge, made by a lawyer with knowing falsity or with reckless disregard of its truth or falsity, violates Rule 8.2 of the Rules of Professional Conduct and does not qualify as constitutionally protected speech. An appropriate test for balancing a lawyer's free speech rights against the restrictions imposed by the Rules of Professional Conduct is whether the conduct in question creates a substantial likelihood

of material prejudice to the administration of justice. *Anthony v. Virginia State Bar*, 270 Va. 601, 621 S.E.2d 121 (2005).

In reviewing the Board's determination that Respondent violated Rule 8.2, two separate elements must be established to prove a violation of that Rule. First, the Bar must establish that a lawyer made a statement about a judge or other judicial officer involving his or her qualifications or integrity. Second, the Bar must prove that the statement was made with reckless disregard of its truth or falsity or with knowledge that the statement was false. *Pilli v. Virginia State Bar*, 269 Va. 391, 611 S.E.2d 389 (2005).

After an evidentiary hearing in which Respondent and his client were sanctioned, Moseley also wrote a letter to the AAA, stating that the circuit court judge who had adjudicated the evidentiary hearing "was caught engaging in serious misconduct" and that the circuit court judge was the subject of an investigation by JIRC. Moseley sent an email to colleagues in which he stated that the monetary sanctions award entered by the circuit court judge was "an absurd decision from a whacko judge, whom I believe was bribed," and that he believed that opposing counsel was demonically empowered. A three-judge court found that Moseley had violated Rules 3.3(a)(1), 3.4(e), 3.4(j), 4.1(a), 8.2 and 8.4(a), (b), and (c). The panel suspended Moseley's license to practice law for six months. The Supreme Court of Virginia affirmed. *Moseley v. Virginia State Bar*, 280 Va. 1, 694 S.E.2d 586 (2010).

Attempting to have a circuit judge disqualified, Respondent made several remarks that were found to have violated Rule 8.2:

- "I don't feel that you're appropriate to hear any cases that I might be. . .defending."
- "It makes me feel comfortable for you not to hear any jury trial that I got against any of my clients."
- Respondent accused the judge of harboring animosity toward Respondent and implied it would cause the judge to treat the defendant unfairly.
- Respondent suggested that the judge was biased for the Commonwealth in criminal cases.

A three-judge court found Respondent violated Rules 3.5(f)(conduct intended to disrupt a tribunal) and Rule 8.2 (attacking qualifications or integrity of a judge). *Virginia State Bar v. Curtis Tyrone Brown*, No. CL09-5166 (Dec. 15, 2009). Respondent defaulted on his appeal by failing to timely file the notice of appeal with the trial court. *Curtis Tyrone Brown v. Virginia State Bar*, Record No. 100491 (Va. S. Ct. May 10, 2010).

Damage To Client Not Required

The fact the client did not suffer any prejudice to his legal rights is not sufficient to exonerate an attorney. In disbarment proceedings it is not necessary to show an attorney's actions prejudiced his client's legal rights. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964).

Direct Connection To Practice Of Law Not Necessary

It is not necessary that the offense charged be committed in court or even in the discharge of any professional duty. It is want of character which is important and not the place where that is manifest. The public is not interested in the situs of their misdeeds and we know of no statute of limitations which can be invoked. *Norfolk and Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934) (citing numerous out-of-state cases).

Discovery Rules; finding of failure to comply cannot be collaterally attacked

Once an attorney's failure to comply with discovery rules is established by a trial court, the attorney may not collaterally attack those findings in a subsequent Bar proceeding; however, the Board should make specific factual findings with respect to how such failure to comply violate the applicable ethics rules. *Bean v. Va. State Bar*, No. 050508 (Va. S. Ct. Jul, 8 2005).

False Statements in Connection With Application for Admission to the Bar

A three-judge panel found that Respondent violated Rule 8.1 prohibiting an applicant for admission to the bar from "knowingly mak[ing] a false statement of material fact" in connection with a bar admission application. As part of the application process, Respondent indicated that he had never been "a party to or otherwise involved" in "any civil or administrative action or legal proceeding;" or "any criminal or quasi-criminal action or legal proceeding (whether involving a felony, misdemeanor, minor misdemeanor, or any traffic offense. . . . " Respondent, however, had been convicted in 1997 of manslaughter in Jamaica and served a prison sentence of 16 months. He had also been the subject of a United States Marine Corps administrative action and a Board of Inquiry proceeding to determine whether he should be separated from the Marine Corps for misconduct. Respondent also had been charged and convicted of four traffic offenses in the continental United States. On appeal, Respondent argued he did not "knowingly make false statements on the application" because an employee of the Pennsylvania Disciplinary Committee told him that he was not required to report the conviction because it occurred outside the United States and that he did not report the Marine Court proceedings because they too were based on the Jamaica incident and because he was not dishonorably discharged. Respondent also relied on *Small v. United States*, 544 U.S. 385 (2005) for the proposition that foreign convictions cannot provide the basis for disciplinary action. Respondent also contended that his false answers did not involve matters of "material fact." The Supreme Court of Virginia rejected the Respondent's reliance on advice from another jurisdiction and his reliance on *Small*. The Court also held that "[i]t strains logic to suggest that participation in criminal and military disciplinary proceedings, as well as repeated traffic violations, *while not dispositive* to the admission

decision, *would not be material* to that decision." (Emphasis added). *Patrick Earl Bailey v. Virginia State Bar, ex rel First District Committee***,** No. 060098 (Va. S. Ct. Jun. 23, 2006).

Fee Agreements

Respondent's agreement with Client stipulated that Respondent's unpaid legal fees could not be discharged in bankruptcy and permitted Respondent to charge client for time spent defending and responding to bar investigation. The Disciplinary Board found that Respondent violated Rules 1.5, 1.7(a)(3) and 8.4. *In the Matter of Brian Gay,* VSB Docket No. 08-222-073165.

Fees

Non-refundable advanced legal fees are improper (because they potentially violate the rule requiring an attorney to refund any advanced legal fee that has not been earned, and a fee that is not earned is per se an unreasonable fee). *LEO 1606* (1994). *See also In the Matter of Richard James Oulton,* VSB Docket No. 05-032-3243 (public reprimand with terms for using non-refundable fee provisions in contracts with clients, violating Rules 1.5 and 8.4 (a)).

Respondent violated Rule 1.5 by charging Client for time spent preparing and appearing on motion to withdraw from Client's case. *In the Matter of Brian Gay,* VSB Docket No. 08-222-073165.

Industrial Commission entered an order awarding attorney a $2,500 fee out of a $15,000 settlement. Pursuant to his fee agreement with the client, the attorney charged the client an additional $2,500 fee, for a total of $5,000. Because the applicable statute entitled the Commission to approve and award attorney's fees, the charge of the additional $2,500 constituted an "illegal fee" and was subject to discipline. *Hudock v. Virginia State Bar,* 233 Va. 390, 355 S.E.2d 601 (1987).

Fraud and Misrepresentation

The Supreme Court of Virginia assumed (without deciding) that scienter or actual knowledge is an essential element in proving misrepresentation under former DR 1-102(A)(4). *Pickus v. Virginia State Bar,* 232 Va. 5, 348 S.E.2d 202 (1986); *Gibbs v. Virginia State Bar,* 232 Va. 39, 348 S.E.2d 209 (1986).

- Note, however, it is the attorney's knowledge and intentional misrepresentation, and not

a wrongful intent to defraud, which is required. *Gay v. Virginia State Bar*, 239 Va. 401, 389 S.E.2d 470 (1990); *Delk v. Virginia State Bar*, 233 Va. 187, 355 S.E.2d 558 (1987).

Frivolous Motions or Pleadings

The attorney filed a motion to strike the pleadings asserting that he did not know and was not married to the plaintiff, his wife. The motion was denied. He later testified before the Board that he filed the motion because "Valerie Jill Barrett is Jill's legal name, not Valerie Jill Rudy [sic] Barrett." Although the Board's Order does not directly tie the Rule 3.1 violation to the motion to strike the pleadings, the record clearly supports a finding that the attorney violated Rule 3.1. *Barrett v. Virginia State Bar*, 269 Va. 583, 611 S.E.2d 375 (2005).

A trial court's order awarding sanctions under Va. Code § 8.01-271.1, by itself, does not make out a prima facie showing that Respondent violated Rule 3.1. The three-judge court erred not permitting Respondent to challenge or mitigate the factual matters at the disciplinary hearing or introduce evidence to explain his actions. Bar confessed error on appeal. *John W. Toothman v. Virginia State Bar, ex rel., Fourth District Committee*, No. 062630 (Va. S. Ct. Sept. 11, 2007).

In Virginia State Bar disciplinary proceedings, there was no error in an order revoking the license to practice law of an attorney who, while under a prior suspension of his license to practice law, represented himself in domestic relations proceedings during which he asserted persistently and repeatedly before the circuit court and the Court of Appeals of Virginia that he is no longer required to support his children. In light of the facts and applicable law, his position was completely frivolous and in violation of Rule 3.1 of the Virginia Rules of Professional Conduct. A lawyer whose license is suspended is still an active member of the bar and, although not in good standing, is subject to the Rules, and there is no merit to the lawyer's constitutional challenge to the application of the Rules in this case. Respondent is subject to Rule 3.1 when representing himself. *Barrett v. Virginia State Bar*, 277 Va. 412, 675 S.E.2d 827 (2009).

Respondent filed a civil action for medical malpractice on behalf of woman who was operated on at Warren County Hospital. The doctor against whom Respondent filed suit did not operate on the plaintiff and she was not his patient. Before filing suit, Respondent did not contact the defendant doctor nor request any medical records that would have established that plaintiff was not his patient. Nor did Respondent check with the hospital to learn that Defendant doctor did not have privileges at Warren County Hospital. There were several simple actions Respondent could have taken that would have shown that the defendant had no involvement with the plaintiff whatsoever. The Three-Judge Court did not err when it found that Respondent's actions were frivolous in violation of Rule 3.1. *Weatherbee v. Virginia State Bar*, 279 Va. 303, 689 S.E.2d 753 (2010)(public reprimand aff'd).

A circuit court sanctioned Moseley and Ammons because they proceeded with their decision to have an evidentiary hearing regarding the existence of an agreement to arbitrate, knowing that the alleged employment contract containing an arbitration clause existed. The

circuit court also reprimanded Ammons and Moseley, who filed in excess of eighty pleadings and motions in the case, for using abusive discovery tactics and filing frivolous pleadings. The circuit court stated that Ammons and Moseley conducted the proceeding without any basis and with the goal "to specifically harm, deter, and harass the Defendant through vexatious litigation." Moseley and Ammons were sanctioned and ordered to pay attorney's fees and costs. The circuit court revoked Moseley's right to practice before that court, Moseley appealed and the Virginia Supreme Court affirmed. *In re Moseley*, 273 Va. 688, 643 S.E.2d 190 (2007). In this proceeding, a three-judge court found that Moseley had violated Rules 3.3(a)(1), 3.4(e), 3.4(j), 4.1(a), 8.2 and 8.4(a), (b), and (c). The panel suspended Moseley's license to practice law for six months. The Va. S. Ct. affirmed. *Moseley v. Virginia State Bar*, 280 Va. 1, 694 S.E.2d 586 (2010).

Harassment of Opposing Counsel

Harassing ad hominem attacks on opposing counsel are prohibited under Rule 3.4 (j). Attorney's comments to opposing counsel were "other action" under Rule 3.4(j) meant to harass her in her capacity as his wife's attorney *Barrett v. Virginia State Bar*, 269 Va. 583, 611 S.E.2d 375 (2005).

Ignorance No Excuse

All Virginia lawyers are expected to be fully aware of each and every disciplinary rule, and no lawyer can escape a finding of a violation or an appropriate sanction by pleading ignorance or the rules. Nor can an attorney avoid discipline by claiming other lawyers also engage in the unethical conduct ("everyone is doing it"). *Shea v. Virginia State Bar*, 236 Va. 442, 374 S.E.2d 63 (1988).

Lawful Requests, Failure to Respond as a Rule 8.1 Violation

Attorney's repeated failure to communicate with the Bar's representatives or to supply requested information and records relevant to an investigation constitutes a willful violation of Rule 8.1, requiring attorneys to cooperate with the Bar in disciplinary proceedings by responding to all lawful requests for information and by not obstructing such proceedings. *Meade v. Virginia State Bar*, No. 022051 (Va. S. Ct. Feb. 7, 2003).

Failure to respond to the Bar's initial letter enclosing the complaint and requesting a response is a violation of Rule 8.1(c). *In the Matter of John Michael DiJoseph*, VSB Docket Nos. 02-041-2657.

A failure of the Respondent to appear at the hearing pursuant to a summons is not grounds for finding a violation of Rule 8.1(c) unless the hearing panel finds it was unable to gather

information from the Respondent as a result of his or her failure to appear. *Rice v. Virginia State Bar*, 267 Va. 299, 592 S.E.2d 643 (2004).

Lawyers as their own Clients

An attorney who represents himself in a proceeding acts as both lawyer and client. He takes some actions as an attorney, such as filing pleadings, making motions, and examining witnesses, and undertakes others as a client, such as providing testimonial or documentary evidence. Rules 1.1, 3.4(j) and 4.4 apply when an attorney is representing himself. *Barrett v. Virginia State Bar*, 272 Va. 260, 634 S.E.2d 341 (2006). *But see Barrett v. Virginia State Bar*, 269 Va. 583, 611 S.E.2d 375 (2005) (holding that Rule 4.3 (b)'s prohibition against giving legal advice does not apply to *pro se* lawyer in divorce proceedings against his unrepresented wife).

Several well-reasoned out-of-state decisions hold an attorney representing himself is subject to ethics rules referring to representation of a client. *Attorney Grievance Commission v. Allison*, 317 Md. 523, 565 A.2d 660, 668 (Md. Ct. App. 1988) (violation of Rule 4.4); *In re Segall*, 117 Ill.2d1, 509 N.E.2d 988 (Ill. 1987) [violation of DR 7-104(a)(1)]; *Montgomery County Bar Association v. Hecht*, 456 Pa. 13, 317 A.2d 597 (1974) (lying under oath in own deposition). The most compelling statement comes from *In re Glass*, 784 P.2d 1094 (Oregon 1989) [violation of DR 7-102(A)(1)], where the court stated the reference in the rules to representation of a client was not intended to grant a license to lawyers to abuse procedures for their own personal advantage, but instead is to specify that such conduct by a lawyer will not be excused simply because the lawyer's improper conduct was ostensibly in the service of a client.

Layperson signing pleadings with attorney authorization

A lawyer violates several ethics rules when he authorizes a non-lawyer to sign pleadings or endorse orders. *VSB v. Iweanoge*, Arlington Circuit Chancery No. 05-145, VSB Docket Nos. 04-041-1312 and 04-041-2657 (Three-Judge Panel 8/19/05). Rules found to be violated included 1.1, 3.4(d), 5.3(a), (b) and (c), 5.5(a) and 8.4(a).

Lying to Clients About Status of Cases

Respondent made false representations to clients concerning the status of their legal matters. Among other misrepresentations, Mr. Pasierb informed clients that he had filed suits which he had not filed and that he had obtained settlements which he had not, in fact, obtained. Consent to Revocation. *John Christopher Pasierb*, VSB Docket Nos. 05-041-1925, 05-041-4368, 07-041-1405, and 07-041-1862.

Medical Bills and Liens

Lawyer violates Rule 1.15 (c)(4) when refusing to honor chiropractor's consensual lien with Client, directing Client's lawyer to pay total amount owed to chiropractor out of settlement of Client's personal injury case. Although Lawyer was not a party to the assignment of benefits, Lawyer knew that Client had contracted with chiropractor to pay the medical bill out of settlement. When chiropractor refused to reduce his bill, Lawyer unilaterally arbitrated the dispute by disbursing to chiropractor an amount less than what was owed. Lawyer owed a duty to either pay the full amount owed to chiropractor or hold the amount in dispute in trust until Client and chiropractor could resolve their dispute, or interplead the disputed funds into court. This was an appeal from a District Committee determination. The court cited with approval LEO 1747 and comment [4] to Rule 1.15 and affirmed the District Committee's finding of misconduct. *Virginia State Bar v. Timothy O'Connor Johnson*, Case No. CL09-2034 (Richmond Cir. Ct. August 11. 2009).

An attorney must honor a valid lien on a case for medical bills, or a contract signed by the client agreeing to pay such obligations out of settlement proceeds. If there is a dispute, the attorney should escrow or interplead the funds. *LEO 1747* (2000) (overruling LEO 1413), relying on Rule 1.15(c)(4). *See also* Comment [4] to Rule 1.15.

Virginia's unique Comment 4 to Rule 1.15 describes a lawyer's duties in dealing with trust funds to which a third party might claim some entitlement. In the case of such formal indicia of entitlement as "a statutory lien, a judgment lien and a court order or judgment," lawyers have the same duty to such third parties as they do to clients -- even though the lawyer is not a party to such agreement and has not signed any document. Lawyers need not determine if the client or such a third party is entitled to the trust funds, but instead "should hold the disputed funds in trust for a reasonable period of time or interplead the funds into court." Lawyers should indicate in retainer letters that "medical liens will be protected and paid out of the settlement proceeds or recovery." Although in most situations lawyers' duties arise only if they have "actual knowledge" of a third party's lawful claim to trust funds, "in some situations under federal or state law the lawyer need only be aware that the client received medical treatment from a particular provider or pursuant to a health care Plan." If a third party "has not taken the steps necessary in order to perfect its lien or claim" to trust funds, and cannot point to a "contract, order or statute establishing entitlement to the funds," lawyers may safely distribute the trust funds to the client -- but should warn the client of the risks the client faces in disregarding a third party's claim. Addressing three hypotheticals, concluding that: (1) a lawyer who knows that a client had medical bills paid by a health plan, but who has insufficient information to know whether a valid lien for that claim even exists, may not investigate the plan's claim against the settlement amount without the client's informed consent -- because the lawyer's inquiries might "remind or encourage the plan to perfect a lien."; the lawyer may thus disburse the settlement funds to the client without violating the ethics rules, but should warn the client in writing of the risk of the client then disbursing the funds; the lawyer and the client may "also suffer civil liability under federal law."; (2) a lawyer who receives a letter from a health plan asserting subrogation rights, and who has twice requested documentation from the plan supporting its

claims without receiving a response, may safely disburse the trust funds to the client, because the lawyers has "exercised reasonable diligence" to determine the plan's subrogation claims or a lien; (3) a lawyer representing a client who has settled a claim against a hospital, and who has received a health plan's response asserting subrogation rights and citing federal regulations, but who has not heard back from the plan after three emails and a voice mail message seeking more information about the plan's subrogation rights, may safely disburse funds to the client without violating any ethics rules. A third party's "mere assertion" of a claim to trust funds does not entitle the third party to the funds. Lawyers must exercise "competence and reasonable diligence" to determine whether a "substantial basis exists for a claim asserted by a third party," but in the absence of such a basis and the absence of the third party's steps perfecting its entitlement to funds, a lawyer may disburse funds to the client after warning the client about "the consequences of disregarding the third party's claim." If a lawyer "reasonably believes" that a third party has an interest in trust funds (or the client "has a non-frivolous dispute" over a third party's entitlement to funds), the lawyer cannot disburse the funds -- but must hold them in trust until the dispute is resolved, or interplead the funds into court. Legal Ethics Opinion 1865 (11/16/2012).

Neglect Requires a Pattern of Conduct

Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith. *Pickus v. Virginia State Bar,* 232 Va. 5, 348 S.E.2d 202 (1986), quoting from ABA Informal Opinion 1273 (1973).

Neglect, Withholding Services Due to Client Failing to Pay

Respondent violated Rules 1.16, 1.3, 1.7 and 8.4(a) and (b) by withholding services because Client was not paying Respondent's fees. Respondent withheld legal services of submitting sketch final decree of divorce to the court for entry and failed to withdraw for a period of 14 ½ months for Client's failure to pay outstanding legal fees. The divorce would have been completed in Respondent's own estimation in "one billable hour." Respondent refused to proceed until he was paid in full. Client proposed to pay her obligation from the proceeds she anticipated receiving from her ex-husband's military pension upon entry of the final decree. *In the Matter of Brian Gay*, VSB Docket No. 08-222-073165. Notice of Appeal dismissed by Va. S. Ct. on 4/20/10.

Notary Misconduct, Lawyer Serving as Notary, False

Acknowledgment

Respondent, acting as a notary, falsely certified that persons who had signed a "deed of dedication and easement" had appeared before him to acknowledge their signatures. Three-Judge court approved agreed disposition for public reprimand. *In the Matter of Claude T. Compton*, VSB Docket No. 05-053-3671.

Prosecutors, Disclosure of Exculpatory Evidence

The day before an arson trial was set to begin, an eyewitness identified the defendant as the person he saw at the scene of an arson. This identification occurred at a lineup where both parties were present. That same night, the eyewitness told a clerk in the Commonwealth's Attorney's office, and then the prosecutor, that he was doubtful about his identification. After the first day of trial, the eyewitness told the prosecutor that he was certain the defendant was NOT the man he saw at the scene of the fire. The prosecutor did not call the eyewitness in his own case, and rested. Meanwhile, the eyewitness had already spoken with defense counsel and defense counsel made plans to call him in his case.

As defense counsel prepared to call his first witness, the prosecutor claimed that he tried to pass defense counsel a note disclosing that the eyewitness has retracted his identification. The prosecutor said that defense counsel refused to accept it. At any rate, defense counsel called the eyewitness and the defendant ultimately prevailed in the case.

The District Committee recommended a private reprimand, and the prosecutor appealed that decision. On appeal, the Board revoked the prosecutor. The Supreme Court of Virginia reversed the Board's order and dismissed the case. It held that there was no violation of Brady because the eyewitness's retraction was actually made available to the defendant during trial, such that he was able to use it effectively. *Read v. Virginia State Bar*, 233 Va. 560, 357 S.E.2d 544 (1987).

Real Estate Closings

When a lawyer acts as a closing or settlement attorney and no other lawyer is involved, the closing or settlement attorney represents all the parties and, in this limited sense, all the parties are his clients. In this case, that included the lenders to the transaction. *Pickus v. Virginia State Bar*, 232 Va. 5 (1986).

Safekeeping Property - Collection of Quantum Meruit Fee

In an attempt to collect a quantum meruit fee after his representation was terminated,

Respondent violated Disciplinary Rule 1.15(a)(3)(ii) by unilaterally transferring $143.30 from the trust fund to his firm's operating account in partial payment of his fees. At the time that Respondent transferred the funds, the client disputed his entitlement to the balance of the funds and did so in good faith. *Roberts v. Virginia State Bar*, Record No. 180122, (September 6, 2018).

Tape Recording

Attorney suggested that his domestic relations client install a recording device on the family telephone. The attorney's investigator installed the device and reviewed the tapes of all of the conversations, reporting the substance of the conversations to the attorney. Through these recordings, the attorney learned that the wife was consulting attorneys and receiving advice from them. The District Committee and the three-judge court found that the attorney had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on his fitness to practice law. The Supreme Court of Virginia affirmed, holding that even if the recording was not illegal, attorneys are held to a heightened standard and the recording did involve dishonesty, fraud or deceit. *Gunter v. Virginia State Bar*, 238 Va. 617, 385 S.E.2d 597 (1989); *but see* LEO 1765, summarized below, which was approved by the Supreme Court of Virginia and therefore carries the force of law.

LEO #1738 (1999): The Committee relaxed the bright line prohibition against lawful but undisclosed tape recording expressed in earlier LEO's to permit law enforcement and housing discrimination counsel to engage in investigative or fact-finding action involving recording of conversations with consent of a party (the recorder) to the conversation. The Committee concluded that the Gunter Rule as relied on in LEO's 1324, 1448, and 1635 was overly-restrictive (they "sweep too broadly") and that those opinions were overruled to the extent they prohibited legitimate law enforcement actions, civil investigations such as housing discrimination investigations, or situations involving threatened or actual criminal activity.

LEO 1765 (2003): The Committee held that legitimate covert intelligence activity did not consist of conduct involving fraud, dishonesty, deceit or misrepresentation reflecting, adversely on an attorney's fitness to practice law. The Committee upheld the general prohibition against secret recording, which though lawful is still unethical; but reiterated the narrow exceptions permitted in LEO #1738. LEO 1765 was approved by the Supreme Court of Virginia and is therefore a binding opinion.

LEO 1802 (2010): A lawyer representing the victim of childhood abuse who is considering a civil claim against her abuser may advise his client to record a conversation with the abuser without the abuser's knowledge; an in-house lawyer for a corporation may advise management to equip an employee complaining of sexual harassment with a hidden recording device.

LEO 1814 (2011): A lawyer representing a criminal defendant, or the lawyer's agent,

may ethically use undisclosed recording during an interview with an unrepresented witness, provided the recording is lawful and the witness is informed of the lawyer's or agent's identity and role in the matter.

Threatening Disciplinary or Criminal Charges

The evidence was sufficient to support the Board's finding that Respondent threatened his wife's counsel with disciplinary complaints in order to obtain an advantage in the divorce and custody proceedings in violation of Rule 3.4(i). *Barrett v. Virginia State Bar*, 269 Va. 583, 611 S.E.2d 375 (2005).

Tracing is Appropriate

Clients retain an equitable or beneficial ownership interest in funds held in trust by an attorney, and to the extent those funds can be traced, distribution of such funds should be made to the specific client. Only where ownership cannot be traced is a *pro rata* distribution appropriate. *Virginia State Bar v. Goggin*, 260 Va. 31, 530 S.E.2d 415 (2000) (decided in the context of a receivership).

Trust Funds, Loss Not Required

A client's loss of funds is not a prerequisite for an attorney's suspension due to mishandling funds; it is enough if the lawyer knew or should have known he was misusing client funds. *Gay v. Virginia State Bar*, 239 Va. 401, 389 S.E.2d 470 (1990); *Delk v. Virginia State Bar*, 233 Va. 187, 355 S.E.2d 558 (1987).

III. SANCTIONS

Consecutive Sanctions

The Board may run a new sanction consecutively with a prior sanction (revocation to begin at the end of a current suspension). *In the Matter of Vincent Napoleon Godwin*, VSB Docket No. 02-000-2789.

Effective Date of Sanction

The Board has discretion to set the effective date of a sanction, including the effective date of a revocation. *Fugate v. Virginia State Bar*, No. 022259 (Va. S. Ct. Feb. 21, 2003).

Loss of Funds not required for Suspension

The loss of money is not a prerequisite to the suspension of an attorney's license for mishandling funds. *Delk v. Virginia State Bar*, 233 Va. 187, 355 S.E.2d 558 (1987).

Precedents of Little Aid

In arriving at the punishment to be imposed, precedents are of little aid, and each case must be largely governed by its particular facts, and the matter rests within the sound discretion of the court. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964), quoting Corpus Juris Secundum, Attorney and Client, Section 38.

Prior Record Properly Considered

The Board has a perfect right to consider an attorney's prior disciplinary record when determining an appropriate sanction. *Shea v. Virginia State Bar*, 236 Va. 442, 374 S.E.2d 63 (1988).

While misconduct proved at a hearing, considered in isolation, might warrant a lesser penalty, final sanction is properly based upon consideration of an attorney's entire disciplinary history. *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987).

Purpose

When a delinquent is disciplined the purpose of the proceeding is not to punish him, but to protect the public. The proceeding is not to punish, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them. *Norfolk and Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934).

The question is not what punishment may the offense warrant, but what does it require as a penalty to the offender, as a deterrent to others and as an indication to laymen that the courts will maintain the ethics of the profession. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964), quoting Corpus Juris Secundum, Attorney and Client, Section 38.

Reputation of the Attorney not Major Factor

A good reputation in the community is not controlling or entitled to great weight in a disciplinary proceeding, but may be considered by the court. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964)

Sanctions Within Discretion of Board

The determination of a proper sanction is a matter within the discretion of the Board. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986), *citing Gibbs v. Virginia State Bar*, 232 Va. 39, 348 S.E.2d 209 (1986) and *Blue v. Seventh District Committee*, 220 Va. 1056, 265 S.E.2d 753 (1980). The sanction must be within the limits of Paragraph 13. *Gibbs, supra*.; *see also Delk v. Virginia State Bar*, 233 Va. 187, 355 S.E.2d 558 (1987).

On appeal, the penalty imposed by the Board will be viewed as *prima facie* correct and will not be changed unless, upon independent review of the record, the Court determines the penalty was not justified by the evidence or was contrary to law. *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987); *Gay v. Virginia State Bar*, 239 Va. 401, 389 S.E.2d 470 (1990).

Respondent: _____ Bar Counsel: _____

Docket #s: _____ Hearing: _____
_____

Counsel: _____ Panel Chair: _____

TERMS OF ALTERNATIVE DISCIPLINE

[ ] RETURN OF FILE/APOLOGY

On or before _____, the Respondent shall return the file of _____ to _____ in accordance with Rule 1.16(e) [with a letter of apology] and shall provide proof of compliance to Bar Counsel, not later than _____.

[ ] NO FURTHER MISCONDUCT

For a period of _____ year(s) following the entry of this Order, the Respondent shall not engage in any conduct that violates the following provisions of the Virginia Rules of Professional Conduct, including any amendments thereto, and/or which violates any analogous provisions, and any amendments thereto, of the disciplinary rules of another jurisdiction in which the Respondent may be admitted to practice law. The terms contained in this paragraph shall be deemed to have been violated when any ruling, determination, judgment, order, or decree has been issued against the Respondent by a disciplinary tribunal in Virginia or elsewhere, containing a finding that Respondent has violated one or more provisions of the Rules of Professional Conduct referred to above, *provided, however*, that the conduct upon which such finding was based occurred within the period referred to above, and provided, further, that such ruling has become final.

[ ] MCLE

On or before _____, the Respondent shall complete _____ hours of continuing legal education credits by attending courses approved by the Virginia State Bar in the subject matter of legal ethics. The Respondent's Continuing Legal Education attendance obligation set forth in this paragraph shall not be applied toward his Mandatory Continuing Legal Education requirement in Virginia or any other jurisdictions in which the Respondent may be licensed to practice law. The Respondent shall certify his compliance with the terms set forth in this paragraph by delivering a fully and properly executed Virginia MCLE Board Certification of Attendance form (Form 2) to Bar Counsel, promptly following his attendance of each such CLE program(s).

[ ] ASSIGNED READING AND CERTIFICATION

The Respondent shall read in its entirety *Lawyers and Other People's Money* and Legal Ethics Opinion 1606 and shall certify compliance in writing to Bar Counsel not later than _____ days following the date of entry of this order,.

[ ] TRUST AUDIT

For a period of ____ years following entry of this Order, the Respondent hereby authorizes a Virginia State Bar Investigator to conduct unannounced personal inspections of his trust account books, records, and bank records to ensure his compliance with all of the provisions of Rule 1.15 of the Rules of Professional Conduct, and shall fully cooperate with the Virginia State Bar investigator.

[ ] ENGAGING CPA

1. Within fifteen days of the date of the effective date of this order, the Respondent shall confirm in writing his review of Rule 1.15 of the Rules of Professional Conduct to Bar Counsel.

2. Within thirty days from the effective date of this order, the Respondent shall engage the services of a CPA (Certified Public Accountant) (a) who will certify familiarity with the requirements of Rule 1.15 of the Rules of Professional Conduct, and (b) who has been pre-approved by Bar Counsel to review Respondent's attorney trust account record-keeping, accounting, and reconciliation methods and procedures to ensure compliance with Rule 1.15 of the Rules of Professional Conduct. In the event the CPA determines that the Respondent is in compliance with Rule 1.15, the CPA shall so certify in writing to the Respondent and Bar Counsel. In the event the CPA determines Respondent is NOT in compliance with Rule 1.15, the CPA shall notify Respondent and Bar Counsel, in writing, of the measures Respondent must take to bring himself into compliance with Rule 1.15. Respondent shall provide the CPA with a copy of this order at the outset of his engagement of the CPA.

3. The Respondent shall be obligated to pay when due the CPA's fees and costs for services, including provision to the Bar and to the Respondent of information concerning this matter.

4. In the event the CPA determines the Respondent is NOT in compliance with Rule 1.15, Respondent shall have forty-five (45) days following the date the CPA issues a written statement of the measures Respondent must take to comply with Rule 1.15 within which to bring himself into compliance. The CPA shall then be granted access to Respondent's office, books, and records, following the passage of the forty-five (45) day period, to determine whether Respondent has brought

himself into compliance as required. The CPA shall thereafter certify in writing to Bar Counsel and to the Respondent either that the Respondent has brought himself into compliance with Rule 1.15 within the forty-five (45) day period, or that he has failed to do so. Respondent's failure to bring himself into compliance with Rule 1.15 as of the conclusion of the forty-five (45) day period shall be considered a violation of the terms set forth herein.

5. Unless an extension is granted by Bar Counsel for good cause to accommodate the CPA's schedule, the terms specified in paragraphs 2, 3, and 4, shall be completed no later than _____.

6. On or about _____, the CPA engaged pursuant to paragraph 2 shall reassess Respondent's attorney's trust account record-keeping, accounting, and reconciliation methods and procedures to ensure continued compliance with Rule 1.15 of the Rules of Professional Conduct. In the event the CPA determines that Respondent has NOT remained in compliance with this Rule, such non-compliance will be considered a violation of the terms set forth herein.

[ ] LAW OFFICE MANAGEMENT CONSULTANT

1. Not later than _____, the Respondent shall engage the services of a law office management consultant approved by the Virginia State Bar to review and make written recommendations concerning the Respondent's law practice policies, methods, systems, trust account, and procedures. The Respondent shall institute and thereafter follow with consistency any and all recommendations made to him by the law office management consultant following the law office management consultant's evaluation of the practice. The Respondent shall grant the law office management consultant access to his law practice from time to time, at the consultant's request, for purposes of ensuring that the Respondent has instituted and is complying with the law office management consultant's recommendations. Bar Counsel shall have access, by telephone conferences and/or written reports, to the law office management consultant's findings and recommendations, as well as the consultant's assessment of the Respondent's level of compliance with said recommendations. The Respondent shall be obligated to pay when due the consultant's fees and costs, including, but not limited to, the provision to Bar Counsel of information concerning this matter.

2. Not later than _____, the Respondent shall be responsible for:

    a. Ensuring that the law office management consultant has previously reported to Bar Counsel his or her findings and recommendations regarding the Respondent's law practice.

    b. Certifying to Bar Counsel that the Respondent has fully complied with the law office management consultant's findings and recommendations and

provide written confirmation of same from the law office management consultant.

[ ] RESTITUTION

The Respondent shall pay, by certified, cashier's, or treasurer's check made payable to the order of _____, the principal sum of $_____, with interest thereon at the rate of nine percent per annum, from _____, until paid. The payment due hereunder, inclusive of principal and all interest, shall be made by delivery of a check to Bar Counsel, at Virginia State Bar, Eighth and Main Building, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800 no later than _____.

[ ] SUPERVISION

1. In the event the Respondent elects to return to the active practice of law and activates his status with the Virginia State Bar from Associate to Active, within ____ days of such activation he shall certify in writing to the Office of Bar Counsel that he is working under the supervision of a named lawyer, and shall provide a letter from such lawyer confirming his/her supervision of the Respondent.

2. Respondent shall remain under the active supervision of such lawyer for a period of not less than one year. Within thirty (30) days after the expiration of the period of active supervision, the Respondent shall furnish the office of Bar Counsel a letter from the supervising lawyer confirming his/her active supervision of the Respondent.

[ ] CLIENT COMMUNICATION

Within thirty (30) days after the effective date of this Order, the Respondent shall satisfy Bar Counsel, that the Respondent has installed adequate docketing procedure for (1) the prompt return of clients' telephone calls, and (2) if he is unable to reach them by telephone, a letter following up on their telephone call.

[ ] **MENTAL HEALTHCARE PROVIDER**

1. The Respondent shall remain under the care of _____ (or if _____ becomes unavailable, such other mental health care provider as agreed upon by Respondent and the Virginia State Bar), and such other health care providers to whom Respondent might be referred by _____, until at least _____, or such earlier time as the Respondent is discharged from _____'s care with the concurrence of Bar Counsel. Respondent shall

cooperate fully and comply with all treatment recommendations made by _____ and such other health care providers during the said period. Such compliance shall include, but not be limited to, attending all further therapy, counseling, and evaluation sessions with _____ and/or other health care providers to whom Respondent has been referred by _____, and submitting to such further testing, evaluation, and clinical assessments as may be required by _____ and any health care providers to whom Respondent has been referred by _____.

2. The Respondent shall immediately provide _____ and all health care providers to whom Respondent has been referred by _____ with a copy of this Order of the Disciplinary Board and a release which authorizes and directs _____ and such other health care providers to furnish to the Virginia State Bar, c/o _____, Assistant Bar Counsel _____ _____, written reports which state whether, in the professional opinion of the health care provider writing the report, the Respondent's physical or mental condition materially impairs the Respondent's ability to represent clients in the full time private practice of law. Such reports shall detail the basis for such opinions rendered, and shall further state whether, to the best of the health care provider's knowledge, the Respondent is in compliance with the terms enumerated herein. In the event a health care provider does not state that Respondent is in compliance with the terms hereof, such health care provider shall nonetheless present written facts (e.g., missed appointments, failure to take medication, failure to provide information required for continued treatment/assessments, and failure to pay a provider's bills) to the Virginia State Bar sufficient to permit Bar Counsel's assessment of whether Respondent is in compliance with the terms hereof. At a minimum, during the period that those terms remain in effect, _____ (or approved successors) shall furnish the Bar with such reports at quarterly intervals, commencing _____. Notwithstanding the reporting schedule set forth above _____ (or approved successors) shall notify the Bar immediately upon his or her assessment that the Respondent's physical or mental condition materially impairs the Respondent' ability to represent clients in the full time private practice of law.

3. The Respondent shall bear the cost and expense of compliance with the terms set forth herein, including, but not limited to, the cost of the assessments, therapy, counseling, medication, and all health care contemplated by the terms hereof, and the costs imposed, if any, by _____ (or approved successors) and all other health care providers in preparing and furnishing any and all reports submitted to the Virginia State Bar pursuant to the terms hereof.

[ ] LAWYERS HELPING LAWYERS

Not later than _____, the Respondent shall participate in an evaluation conducted by Lawyers Helping Lawyers ("LHL") and shall implement all of LHL's recommendations. The Respondent shall enter into a written contract with LHL

for a minimum period of one (1) year and shall comply with the terms of such contract, including, *inter alia*, personally meeting with LHL and its professionals, as directed. The Respondent shall authorize LHL (i) to provide periodic reports to the Office of Bar Counsel stating whether the Respondent is in compliance with LHL's contract with the Respondent, and (ii) to notify the Office of Bar Counsel promptly if the Respondent fails to follow the LHL-prescribed program, or ends participation in the LHL-prescribed program sooner than the expiration of the LHL contract.

[ ] ALTERNATIVE DISPOSITION

The alternative disposition hereby adopted is (revocation of the Respondent's license to practice law in the Commonwealth of Virginia) (suspension of the Respondent's license to practice law in the Commonwealth of Virginia for a period of _____ (days) (years)) upon the Respondent's failure to comply with the foregoing terms in the manner and at the time that compliance is required.

In the event of alleged noncompliance with the foregoing terms, a hearing will be convened upon an order for the Respondent to show cause why the alternative disposition should not be imposed. At such hearing the Respondent shall have the burden of proving compliance or good cause for the alleged noncompliance by clear and convincing evidence.

VIRGINIA STATE BAR DISCIPLINARY BOARD

HANDBOOK

2019-2020

This handbook is intended to be a resource for the Disciplinary Board members in their understanding and application of the procedures in disciplinary proceedings and to promote consistency in the process. In the event of an inconsistency between this Handbook and Paragraph 13 of the *Rules of Professional Conduct* the Rules shall govern. This Handbook is not binding on the Disciplinary Board.

VIRGINIA FREEDOM OF INFORMATION ACT & VIRGINIA PUBLIC RECORDS ACT

I. INTRODUCTION

The VSB and its boards, committees, conferences, employees, and volunteers are subject to both the:

- Virginia Freedom of Information Act (VFOIA), Va. Code § 2.2-3700, *et seq.*, and
- Virginia Public Records Act (PRA), Va. Code §§ 42.1-76-42.1-91.

- VFOIA ensures Virginians access to both:
  a. **public records** in the custody of a public body, its officers, and employees, and
  b. **meetings** of public bodies, wherein public business is conducted.
- PRA governs how long a government entity must **retain** certain records.

II. RECORDS

Records are broadly defined under both VFOIA and the PRA to include all recorded information, whatever the form, **prepared for or used in the transaction of public business**.

a) VFOIA - all writings and recordings prepared or owned by, or in the possession of, a public body or its officers, employees, or agents in the transaction of public business. Va. Code § 2.2-3701.

1. Examples include but are not limited to:

- e-mails,
- text messages,
- handwritten notes,
- typewritten documents,
- electronic files,
- audio, or video recordings,
- CDs,
- emails,
- photographs, or
- any other written or recorded media; and
- Minutes of meetings of public bodies.

Records include **all drafts** and final versions.

b) PRA - recorded information, regardless of physical form, that documents a transaction or activity by or with any public officer, agency, or employee of an agency.

The recorded information is a public record **if it is produced, collected, received, or retained in pursuance of law or in connection with the transaction of public business**.

The medium upon which such information is recorded has no bearing on the determination of whether the recording is a public record.

c) VFOAI Exemptions - under VFOIA, all public records are **open to the public**, unless a specific exemption in law allows the record to be withheld.

The Rules of Court, Part Six, Section IV, Paragraph 13-30 is treated as an exemption to FOIA.

1. Rules of Court, Part Six, Section IV, Paragraph 13-30.A. Confidential Matters.
   - Bar complaints, unless introduced at a public hearing or incorporated in a Charge of Misconduct, when the matter is placed on the public docket, or a Certification.
   - Bar investigations, except Reports of Investigation admitted as exhibits at a public hearing.
   - Impairment proceedings.
   - Notes, memoranda, work product, research of Bar Counsel.
   - Records protected by RPC 1.6.
   - Subcommittee records and proceedings, except determinations imposing public discipline.
   - Deliberations and working papers of the District Committees, Disciplinary Board, and three-judge Circuit Courts.
2. Rules of Court, Part Six, Section IV, Paragraph 13-30. K. Records of the Disciplinary System. In no case shall confidential records of the attorney disciplinary system be subject to subpoena

d) Requests for Information/Records - if you receive any request for information or records in connection with your work with the VSB Disciplinary Board, please contact the Clerk.

1. Much of the work and records generated in the VSB disciplinary system are exempt from production pursuant to the Rules of Court, Part Six,

Section IV, Paragraph 13. This includes all work done regarding disciplinary matters pending before the Board.

2. Documents or meetings which are administrative in nature (annual disciplinary board meeting, board chairs meeting, and new member training, or project work such as the disciplinary board handbook) are not exempt from FOIA.
3. Whether subject to an exemption or not, the VSB must timely, within five business days, respond to any request for production, including citing any appropriate exemption and/or producing the non-exempt records. Accordingly, please contact the Clerk as soon as possible if you receive any request for records.

e) Retention of Records - the Clerk's Office provides the disciplinary records to the Disciplinary Board members and is the official keeper of the record. Your records are duplicates unless you have taken substantive notes and have documents that should be included as part of the work product of the file.

1. If you create a record outside of what is provided to you by the Clerk's Office, please scan or copy it and send it the Clerk's Office so that it can be included in the case file and become part of the official record. (This includes any notes, etc. that you create or records you obtain in your review of a case.)
2. Once you are confident that the Clerk is in possession of any records you have created or obtained outside of what they provided to you, you may destroy your case file.
3. Try not to commingle personal and official e-mails. Private e-mails do not need to be retained; emails relating to the transaction of public business do. When sending e--mails or otherwise acting on behalf of VSB, please be mindful of the fact that you are creating a public record.
4. If you have any questions, please do not hesitate to call the Clerk.

III. MEETINGS

A meeting is defined as **three or more members of the public body**, or a quorum if the public body is less than three members, **where public business is transacted or discussed**, whether or not minutes or votes or taken. To avoid an accidental electronic meeting, please do not e-mail more than one other member about VSB business, and please do not hit reply all if other members of the committee are copied on the e-mail. Please use the "bcc" (blind carbon copy) option when emailing a group.

a) Meetings requirements - VFOIA imposes various requirements for meetings applicable to all public bodies; these include:

1. post notice of meetings at least three working days in advance of the meeting;
2. ensure the meeting is open to the public; and
3. take and preserve minutes.

b) Reminder - be aware there is a distinction between Disciplinary Board hearings and meetings, or e-mail exchanges regarding disciplinary matters as opposed to administrative matters. Hearings and related communications are exempt under Paragraph 13. The annual administrative meeting, Board chairs meeting, Board training, and any administrative meetings, such as communications related to the Disciplinary Board Handbook, are subject to FOIA.

IV. CONCLUSION

For a helpful discussion about this topic and other FOIA questions, please see the attached publications by the Virginia FOIA Council:

- *A Guide to the Virginia Freedom of Information Act for Members of Boards, Councils, Commissions, and other Deliberative Public Bodies*
- *A Guide to the Virginia Public Records Act, E-Mail: Use, Access & Retention*
- *Access to Public Meetings under the Virginia Freedom of Information Act*

Table of Contents

ADMINISTRATION

Appointment of Members (Paragraph 13-6)

The Disciplinary Board consists of 20 members including 16 attorney members and 4 lay members. A prospective member must have served on a District Committee to qualify as a nominee to the Board. The Supreme Court of Virginia appoints members from a list of eligible candidates submitted by the Virginia State Bar Nominating Committee. Members can serve 2 consecutive 3 year terms and are eligible for reappointment one year after the first three-year term expires.

Meetings and Quorum (Paragraph 13-6)

Board members sit for hearings in panels of 5 consisting of four attorney members and one lay member. Participation by a lay member is not required if the lay member is unable to attend and reasonable efforts to find a replacement are unsuccessful. Former Board members may sit on a panel or participate in Board matters when needed. The Clerk maintains a roster of all Board members and their available dates to sit and prepares panels for the Disciplinary Board Hearing Schedule in accordance with the Board's approved hearing dates.

Election of Board Officers (Paragraph 13-6)

To facilitate an orderly progression of experienced individuals in leadership positions, Board members elect a 2nd vice chair each year who will be appointed as Chair the following year. The Clerk assembles a ballot of eligible members (lay members are not eligible to serve as Chair), and Board officers contact the candidates to insure their understanding of the duties involved and their willingness to serve. The Clerk forwards a ballot of nominees to Board members for consideration. The member receiving the highest number of votes will become the 2nd vice chair. In the event of a tie, a new ballot will be prepared and a second vote taken.

Recusal or Disqualification (Paragraph 13-14)

Board members should recuse themselves from any proceeding when there is a personal or financial interest that could be perceived to affect a member's ability to be impartial. During a hearing, the Chair will rule on the issue subject to being overruled by the panel. Board members are recused from service when a complaint against the member is referred to the District Committee for investigation. The member can resume service upon the dismissal of the complaint, but will be automatically terminated from service upon the final imposition of an Admonition, Private Reprimand, Public Reprimand, Suspension or Revocation. COLD has sole discretion to determine whether a member should be terminated from service for any lesser sanction.

Board members are ineligible to serve in a proceeding in which 1) the member previously represented the respondent in any matter; 2) the member or any attorney employed with the member's firm was serving on the District Committee that certified the matter to the Board; 3) the member or the member's firm was involved in the matter in any significant way; or 4) the member disqualifies himself or herself from participating because he believes he could not be objective.

Role of the Clerk's Office (Paragraph 13-9)

The Clerk's Office supports the Board by scheduling all Board hearings and conference calls, issuing Notices of Hearing and preparing Prehearing Orders and other orders for signature by the Chair. The office provides a clerk to serve as bailiff at hearings and to facilitate the Prehearing and Motions conference calls. The clerk provides the hearing agenda to the chair and prepares the summary order to be signed by the chair following the hearing. The day of the hearing the clerk prepares the courtroom, takes notes, calls the witnesses and records the exhibits. The Clerk's Office distributes orders, sends a press release and posts the Board's decision on the Bar's web site. The Clerk's Office monitors compliance with Paragraph 13-29, assesses and collects costs and prepares the record for the Supreme Court of Virginia if the case is appealed. The Clerk's Office schedules and handles preparations for the Disciplinary Board's annual Administrative Meeting and new member training.

DISCIPLINARY BOARD HEARINGS

Ethical Rules Enforced in Disciplinary Proceedings

The Virginia Rules of Professional Conduct found in the Rules of Court, Part Six, Section II, Vol. 11, Code of Virginia 1950, or at www.vsb.org, apply to conduct that occurred on or after January 1, 2000. The Virginia Code of Professional Responsibility, Rules of Court, Part Six, Section II, 1999 Vol. 11 at page 319, *et seq*., Code of Virginia 1950; and at www.vsb.org, applies to conduct that occurred prior to January 1, 2000.

Conduct that occurred before January 1, 2000 and continued on or after January 1, 2000, may implicate both the Code of Professional Responsibility and the Rules of Professional Conduct.

Types of Hearings

Misconduct (Paragraph 13-18)

Misconduct means any: Paragraph 13-1

1. Unlawful conduct described in Va. Code § 54.1-3935;
2. Violation of the Disciplinary Rules;
3. Conviction of a Crime;
4. Conviction of any other criminal offense or commission of a deliberately wrongful act that reflects adversely on the Attorney's honesty, trustworthiness, or fitness as an Attorney; or
5. Violation of RESA or any regulations adopted pursuant thereto.

Bifurcation. The disciplinary hearing is a public adversarial proceeding conducted on the record. The Respondent and the Complainant are entitled to be present during all phases of the Proceeding. Paragraph 13-18.H. The hearing is bifurcated into a Misconduct phase and a sanctions phase. Paragraph 13-18.K.

If multiple cases are presented in one attorney Misconduct hearing, the sanction phase for all the cases is generally conducted simultaneously. "The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct. Either a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors." *ABA Standards for Imposing Lawyer Sanctions,* 1992 edition, at p. 7. For purposes of the Respondent's future Disciplinary Record, the sanction will apply to each of the multiple cases.

Misconduct Phase. At the commencement of a disciplinary hearing, the Chair states, in the presence of the Respondent, a summary of the alleged Misconduct, the nature and purpose of the hearing, the procedures to be followed during the hearing, and the dispositions available to the Board following the hearing. Each member of the Board must then affirm that he or she has no personal or financial interest that may affect, or reasonably be perceived to affect, his or her ability to be impartial. Paragraph 13-18.G.

The parties may present opening statements. Respondent may defer his or her opening statement to the start of Respondent's case.

The Bar has the burden of proof and must present clear and convincing evidence of the violation and proceeds first in the Misconduct phase of the hearing. The Respondent may cross-examine each witness. Paragraph 13-18.I.2. The Board panel may question each witness following questioning by the Bar and the Respondent.

Upon the conclusion of the Bar's evidence, the Respondent may move to strike the Bar's evidence as to one or more allegations of Misconduct. The Respondent may renew the motion to strike at the end of the Respondent's case. A motion to strike an allegation of Misconduct shall be sustained if the Bar has failed to introduce sufficient evidence that would under any set of circumstances support the conclusion that the Respondent engaged in the alleged Misconduct that is the subject of the motion to strike. Paragraph 13-18.J.

Upon the conclusion of the Bar's evidence and the resolution of any motions to strike, the Respondent may present evidence. The Bar has the opportunity to cross-examine each witness. After the Respondent and the Bar have questioned each witness, the Board panel may question the witness. Paragraph 13-18.I.3. At the conclusion of the Respondent's evidence, the Bar may present rebuttal evidence. Paragraph 13-18.I.4.

To conclude the Misconduct phase, the Bar may present a closing argument, followed by the Respondent's closing argument. Paragraph 13-18.I.5 and 6. The Bar may make a rebuttal argument. Paragraph 13-18.I.7.

The Board panel then retires to determine whether the Bar has proven the charged violations of the Virginia Rules of Professional Conduct or the Virginia Code of Professional Responsibility. Paragraph 13-18.K. If the Board is unable to reach a decision by majority vote, the Certification or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonably support the Certification, or one or more of the allegations thereof, under the clear and convincing evidentiary standard. Paragraph 13-18.N. The Board may not find a violation of any rules other than those identified in the Certification. *Pappas v. Virginia State Bar, 271 Va. 580,*

628 S.E.2d 534 (2006). After making a finding regarding violations, the Board panel returns to the bench and announces the decision, specifying the disciplinary rule violations found and dismissed.

Sanction Phase. In the sanction phase, the Bar presents evidence in support the Bar's recommended sanction based on the announced violations. Paragraph 13-18.K. The evidence presented by the Bar may include the prior Disciplinary Record of the Respondent. Paragraph 13-30.B. The Board's consideration of prior discipline does not constitute double jeopardy. *Wright v. Virginia State Bar*, 233 Va. 491, 357 S.E.2d 518 (1987).

The Respondent may also present evidence on the appropriate sanction. Such evidence may include character witnesses. A good reputation in the community is not controlling or entitled to great weight in a Disciplinary Proceeding, but may be considered by the Board. *Maddy v. District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964). The Bar may present rebuttal evidence. The parties may cite as authority the American Bar Association's *Standards for Imposing Lawyer Sanctions*. *See* Appendix 4. Following arguments, the Board retires to determine the appropriate sanction. After making a decision on sanctions, the Board returns to the bench to announce its decision and issue a summary order. Paragraph 13-18.K.

Expedited Petition (Paragraph 13-18.D)

Expedited hearings allow matters to be brought before the Disciplinary Board in an expedited fashion without the need for the case to proceed through investigation and review by subcommittee. Expedited hearings are appropriate only for those matters which give Bar Counsel or a District Committee Chair reasonable cause to believe that an attorney is engaging in misconduct which is likely to result in injury to, or loss of property of, one or more of the attorney's clients or any other person, and that the continued practice of law by the attorney poses imminent danger to the public.[1]

Criteria for Expedited Hearings. The criteria for holding expedited hearings are similar to those for a receivership pursuant to Virginia Code sections 54.1-3900.01 and 54.1-3936 but do not require that the attorney be absent, deceased, impaired, or that his or her law practice should be terminated and liquidated due to misconduct.

To review Expedited Hearing pleadings and Disciplinary Board Orders imposing sanctions following Expedited Hearings, see *In the matter of Kenneth Wayne Paciocco,* VSB Docket No. 14-032-097791, filed May 16, 2014 [engaging in misconduct which is likely to result in injury to, or loss of property of, on or more of Respondent's clients or other persons]. The opinion may be found at VSB.org by clicking on the "Professional Regulation" link and then choosing "Disciplinary System Actions."

Filing of Petition for Expedited Hearings. In order to bring an expedited hearing, Bar Counsel or the District Committee Chair must petition the Disciplinary Board for an Order requiring the Respondent to appear before the Board for a hearing on the matter(s) included in the petition.

Content of Petition. The petition should be under oath and should set forth:

[1] The expedited hearing proceedings available under Paragraph 13-18.D may also be utilized for Impairment proceedings pursuant to Paragraph 13-23.F.

a. The nature of the alleged misconduct;

b. The factual basis for the belief that immediate action by the Board is reasonable and necessary;

c. Whether a receiver has been appointed so that the Summary Suspension of the Respondent's license can be included in the Board's Order; and

d. Any other relevant facts, including the Respondent's prior disciplinary record.

Responsibilities of the Disciplinary Board. If a matter is deemed appropriate for an expedited hearing, the Disciplinary Board is required to take certain actions.

Order. Upon receipt of an appropriate Petition the Chair or Vice-Chair of the Board shall issue an Order requiring the Respondent to appear before the Board to determine whether the alleged misconduct has occurred and what imposition of sanction is appropriate. The Disciplinary Board Chair will determine whether or not a case has been made for imminent danger to the public. The Chair may request additional information since expedited cases bypass the District Committee review and certification to the Board. The Chair makes the decision to allow the Petition to go forward.

Notice to Respondent. The Board's Order requiring the Respondent to appear shall be served on the Respondent no fewer than 10 days prior to the hearing. The Board's policy is for the Clerk's Office to use every means to send the Notice to the Respondent. In addition to the certified mailing of the Notice of Hearing, it is sent by regular mail, email and fax to any addresses on file with the Bar or known to Bar Counsel.

Scheduling of the Hearing. The need for an expedited hearing represents an extreme circumstance requiring immediate remedial action. In order to give the Respondent appropriate notice yet handle the matter(s) expeditiously, the hearing shall take place not less than 14 days nor more than 30 days from the date of the Disciplinary Board's Order for a hearing. The Board Chair will make the determination on whether the Clerk should make arrangements for a courtroom for a special setting of a Board panel to hear the case rather than wait until a courtroom is available on the Board's docket.

Responsibilities of the Respondent. At least 5 days prior to the hearing date, the Respondent shall either:

a. File an answer to the Petition with the Clerk of the Disciplinary System; or

b. File an answer and demand with the Clerk of the Disciplinary System that the proceedings before the Board be terminated and that the hearing be conducted before a Circuit Court pursuant to Virginia Code § 54.1-3935.

Filing an Answer. If the Respondent files an answer to the Petition with the Clerk of the Disciplinary System, the Respondent shall be deemed to have consented to the jurisdiction of the Disciplinary Board.

Signature of Respondent. Regardless of whether the Respondent has counsel and the answer and demand is filed on behalf of the Respondent by his or her counsel, the answer and demand must be signed by the Respondent. The hearing will proceed whether or not the Respondent is present. Paragraph 13-13.B.

Failure to Respond. If the Respondent fails to file either an answer to the Petition with the Clerk of the Disciplinary System or an answer and demand, including available dates, requesting that the proceedings before

the Board be terminated and that the hearing be conducted before a Circuit Court, the Respondent shall be deemed to have consented to the jurisdiction of the Disciplinary Board.

Suspension of Respondent's License to Practice Law. If a receiver has been appointed for the Respondent's law practice pursuant to Virginia Code § 54.1-3936 at the time the Petition for Expedited Hearing is received by the Disciplinary Board, the Board will also issue a Summary Suspension of the law license of the Respondent until the Board enters its Order following the Expedited Hearing. Paragraph 13-18.D.4.

If the proceedings are to be conducted before a Circuit Court, any Order of Summary Suspension shall remain in effect until the Court designated in accordance with Virginia Code § 54.1-3935 enters a final Order disposing of the matter.

District Committee Appeal (Paragraph 13-17 and Paragraph 13-19)

An appeal from a determination by a District Committee upon trial is heard by either the Disciplinary Board or a three-judge Circuit Court panel. An appeal is based solely on the record from the District Committee unless, for good cause shown, the Board permits the record to be supplemented to prevent injustice. The standard for the appeal is whether there was substantial or sufficient evidence to support the findings of the District Committee. The appeal is not a hearing de novo.

Notice of Appeal. The Respondent must note his or her appeal within 10 days of being served with the determination of the District Committee by filing a notice of appeal to the Board with the Clerk of the Disciplinary System. Alternatively, the Respondent may file a notice and written demand for a three-judge Circuit Court panel and that further proceedings be conducted pursuant to §54.1-3935 of the *Code of Virginia*. The Respondent must send copies of the notice or notice and demand to both the District Committee Chair and Bar Counsel. Paragraph 13-17.

Record on Appeal. Paragraph 13-17

The record on appeal shall consist of:

a. the charge of misconduct,
b. the complete transcript of the proceedings,
c. any exhibits received or refused by the District Committee,
d. the determination of the District Committee, and
e. all briefs, memoranda, or other papers filed with the District Committee.

The Respondent is responsible for ordering a complete transcript of the proceedings from the court reporter, and the transcript must be received in the office of the Clerk of the Disciplinary System within 40 days of the filing of the notice or written demand. Bar counsel is responsible for forwarding to the Clerk of the Disciplinary System any portions of the record that are in his or her possession. When the Clerk has received the entire record, he or she must forward it to either the Board or the appropriate Circuit Court. If the Respondent fails to order the transcript and provide it to the Clerk of the Disciplinary System, the appeal will be dismissed.

As stated above, the appeal is based solely on the record from the District Committee unless, for good cause shown, the Board permits the record to be supplemented to prevent injustice. The standard for the appeal is whether there was substantial evidence to support the findings of the District Committee.

Appeal to the Board. If the Respondent files only a notice of appeal, without timely filing a demand, he or she will be deemed to have consented to the jurisdiction of the Board. In an appeal to the Board, the parties must file briefs, and oral argument is on the record and shall be granted unless waived by the Respondent.

Disposition of the Board. After reviewing the record, briefs, and oral argument, the Board may dismiss the charge of misconduct, affirm the District Committee's determination, or reverse the decision of the District Committee and remand the charge to the Committee for further proceedings. In the event that the Board affirms the District Committee's determination, it may impose the same or any lesser sanction than that imposed by the District Committee.

Appeal to Circuit Court. Appeals to the Circuit Court of a District Committee Determination are governed by §54.1-3935 of the *Code of Virginia*. Paragraph 13-17.D.

Prohibited Appeals. If the Respondent agrees to a sanction from the District Committee, the sanction may not be appealed. Paragraph 13-17.E.

Certification for Sanction Determination (Paragraph 13-20)

In cases where a District Committee or District Subcommittee issues a Public Reprimand with Terms, the alternative disposition is always Certification for Sanction Determination. Bar Counsel monitors Respondent's compliance and reports noncompliance to the District Committee. When a Respondent fails to fully comply with the terms of the Public Reprimand, he or she is noticed by Bar Counsel to appear before the District Committee to show cause why the alternative disposition should not be imposed. Respondent bears the burden of proof to show compliance by clear and convincing evidence. If Respondent fails to meet his or her burden, the matter is certified to the Board for imposition of a sanction. (See Paragraphs 13-16.BB and CC).

Initiation of Proceedings. Proceedings before the Board are initiated when the Certification for Sanction Determination from the District Committee is received by the Clerk of the Disciplinary System. Upon receipt of the Certification for Sanction Determination, the Clerk issues a notice of hearing to the Respondent along with a copy of the Certification.

Hearing on Certification for Sanction Determination. The hearing on the Certification is limited in scope and is conducted based upon the record of the proceedings before the District Committee. That record consists of 1) the Public Reprimand with Terms issued by the District Committee or Subcommittee, 2) the transcript of the District Committee show cause hearing, and 3) the Certification for Sanction Determination. The only additional evidence permitted is evidence in aggravation or mitigation with respect to compliance or certification. Argument is conducted in the same manner as in the sanction phase of a Misconduct case. The Board may impose a sanction of either suspension or revocation of the Respondent's license to practice. Paragraph 13-15.G.

Consent to Revocation (Paragraph 13-28)

The Board has jurisdiction to hear matters where a member of the Virginia State Bar consents to revocation of the member's license to practice law in the Commonwealth.

When permitted. An Attorney subject to a disciplinary complaint, investigation or proceeding involving allegations of misconduct may consent to revocation by delivering to the Clerk an affidavit declaring the Attorney's consent to Revocation. The affidavit must state that (a) consent is free and voluntary and not the product of coercion or duress and that the Attorney is aware of the implications of consenting to Revocation; (b) the Attorney is aware that there is currently a complaint, an investigation into, or a proceeding involving, allegations of misconduct, the nature of which shall be specified in the affidavit; (c) the Attorney acknowledges that the material facts upon which the allegations of misconduct are predicated are true; and (d) the Attorney submits the consent to Revocation because the Attorney knows that if disciplinary proceedings based on the alleged misconduct were brought or prosecuted to conclusion, the Attorney could not successfully defend them.

Procedure. The Clerk submits the affidavit upon receipt to Bar Counsel, who investigates and determines whether the factual allegations appear to be true and complete based on the information available. If Bar Counsel does not file an objection, the Board must enter an order revoking the Attorney's license by consent without a hearing. If, however, Bar Counsel files a written objection to the affidavit with the Clerk, the Board must hold a hearing on whether the affidavit and consent to Revocation should be accepted. The burden of proof is on Bar Counsel to show why the affidavit and consent to Revocation should not be accepted. If the Board determines that the affidavit and consent to Revocation should be accepted, the Board must enter an order overruling Bar Counsel's objection and revoking the Attorney's license by consent without further hearing. If the Board sustains Bar Counsel's objection to the affidavit, the Board must enter an order rejecting the Attorney's affidavit and consent to Revocation. The matter then proceeds through the disciplinary system like any other disciplinary matter had there been no consent to Revocation.

Attorney Action Required Upon Revocation. Upon entry of an order of Revocation by consent, the revoked Attorney must immediately cease the practice of law and must comply with the notice requirements set out in paragraph 13-29.

Dismissal of Complaints of Allegations of Misconduct. Upon Revocation by consent, Bar Counsel, in his or her discretion, may dismiss without prejudice any and all Complaints or allegations of Misconduct then pending by notifying the Clerk and District Committee, Board or court wherein the matter(s) lie.

First Offender Plea (Paragraph 13-21)

These procedures are initiated upon receipt by the Clerk of written notification from any court of competent jurisdiction that an Attorney has entered a plea of guilty to a Crime[2] under a first offender statute, that the court has found facts that would justify a finding of guilt and ordered the Attorney be put on probation.

Notice of Hearing Issued. Upon receipt of notification of the plea and probation, the Board enters an order setting a hearing date and ordering the Attorney to appear at a hearing before the Board within 14 – 30 days after the

[2] "Crime" is defined in ¶13-1 as including: a felony or any other offense involving theft, fraud, forgery, extortion, bribery or perjury, a conspiracy to commit any of the foregoing or any of the foregoing found by a foreign jurisdiction.

Order. The written notification from the court shall be served with the Board's order. The Attorney may file a written response, but none is required.

Issues at Hearing.

a. Whether the Attorney's license should be revoked or suspended.

b. If not, whether the Attorney should be required to give notice of the plea and probation (and the terms thereof) by certified mail to clients, opposing attorneys and presiding judges in pending litigation.

Hearing Procedure. The Show Cause hearing goes forward without a Prehearing Order or Conference Call. The hearing is like a misconduct hearing except that the Respondent goes first. The burden of proof is on the Respondent to show cause by clear and convincing evidence why Respondent's license should not be suspended or revoked and why he or she should not be required to give notice of the plea and probation ordered by the court. The decision of the Board is appealable and the Clerk's Office can assess costs.

Notice Requirements. If the Board suspends or revokes the Attorney's license, the Attorney must comply with the notice requirements of Paragraph 13-29.

Demand for Three Judge Court. The Attorney may opt out of the Board proceeding and elect to have further proceedings conducted by a three judge court pursuant to Va. Code §54.1-3935.

Guilty Plea or Adjudication of a Crime (Paragraph 13-22)

These procedures are initiated upon receipt by the Clerk of the Disciplinary System of written notification from any court of competent jurisdiction that an Attorney has been found guilty or convicted of a Crime[3] or has pled guilty to a Crime whether or not sentencing has taken place.

Order of Suspension and Notice of Hearing Issued. Upon receipt of notification of the conviction or plea, a member of the Board enters an order of suspension, setting a hearing date and ordering the Respondent to appear at a hearing before the Board within 14 – 30 days after the Order to show cause why the Respondent's license to practice law should not be further suspended or revoked. The written notification from the court shall be served with the Board's order. The Respondent may file a written response, but none is required.

Continuance of Hearing; Interim Hearing.

a. Continuance. Upon the Respondent's request, the hearing ***may*** be continued (i) until probation has entered or (ii) sentencing has occurred. The hearing ***shall*** be continued at Respondent's request upon receipt of a certified copy of a notice of appeal from the conviction pending disposition of the appeal.

[3] "Crime" is defined in ¶13-1 as including: a felony or any other offense involving theft, fraud, forgery, extortion, bribery or perjury, a conspiracy to commit any of the foregoing or any of the foregoing found by a foreign jurisdiction.

b. Interim Hearing. During a continuance, the Respondent may request an interim hearing at which the Board shall terminate the suspension if it finds that if not terminated, the Suspension would be likely to exceed the discipline imposed by the Board at a hearing on the merits.

Reversal of Conviction.

a. **Reversal.** Upon receipt of a certified copy of an order reversing the conviction, any Suspension shall be automatically terminated and any Revocation shall be vacated and the Respondent's license automatically reinstated.

b. **Dismissal or Discharge of Plea; Termination of Probation.** Neither of these eventualities shall result in automatic termination of a Suspension or vacation of a Revocation.

Issues at Hearing:

a. Whether the Respondent has been found guilty or convicted of a Crime, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt.

b. If so, whether to continue the Suspension for a period not to exceed 5 years or to issue an order of Revocation.

Hearing Procedure. The Show Cause hearing goes forward without a Prehearing Order or Conference Call. The hearing is like a misconduct hearing except that the Respondent goes first. The burden of proof is on the Respondent to show cause by clear and convincing evidence why Respondent's license should not be further suspended or revoked. The decision of the Board is appealable and the Clerk's Office can assess costs.

Demand for Three Judge Court. The Attorney may opt out of the Board proceeding and elect to have further proceedings conducted by a three judge court pursuant to Va. Code §54.1-3935.

Impairment - Private Proceeding (Paragraph 13-23)

An Impairment is any physical or mental condition that materially impairs the fitness[4] of an Attorney to practice law. (¶13-1) Like a Misconduct Hearing, an Impairment Hearing involves the paramount consideration of protecting the public. Since there is no presumption of misconduct and no presumption of Impairment, the Impairment proceeding must consider the Respondent's right of privacy in issues of his physical or mental health and his right to practice as a licensed attorney in the Commonwealth of Virginia. Accordingly, all Impairment

[4] Fitness or fitness to practice law are not defined in the Rules of Professional Conduct as enacted in Virginia, nor does there appear to be a Virginia case defining the term. The phrase "fitness to practice law" is used in Rule 8.4(c) ("It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;"). The Virginia Board of Bar Examiners requires that an applicant "possess the requisite fitness to perform the obligations and responsibilities of a practicing attorney." Those obligations and responsibilities are to be performed in a competent and professional manner. The Code of Professional Responsibility extensively –though not exhaustively – addresses those obligations and responsibilities. Accordingly, a mental or physical condition that materially impairs the Respondent's ability to meet his obligations and responsibilities under the CPR falls within the definition of Impairment.

proceedings are closed to the public except for the Board, Bar Counsel, the Clerk's staff, the court reporter, the Respondent, the Respondent's Guardian ad litem, and Respondent's counsel.

Within Paragraph 13-23 there are three types of Impairment proceedings:

a. **Bar's Petition for Physical or Mental Evaluation and Release of Records**. In this proceeding the Bar has initiated an investigation to determine whether there is reason to believe that the Respondent has an Impairment. The Bar may act *sua sponte* or following a referral from either a Disciplinary Committee or the Disciplinary Board. The issue of a possible Impairment often arises during a Misconduct hearing. As part of its investigation, the Bar Counsel may petition the Board to order the Respondent:

    a. To undergo a psychiatric, physical, or other medical examination by qualified physicians or health care providers; and

        i. Without limiting who may be a qualified health care provider to whom a subpoena may be issued, the Board considers "Lawyers Helping Lawyers" to be qualified to perform substance abuse and alcohol abuse evaluations of attorneys under investigation for Impairment.

    b. To provide appropriate releases to health care providers authorizing the release of records to Bar Counsel and to the Board for purpose of the investigation.

Content of Petition: Bar Counsel's Petition should show that:

a. An Investigation of Respondent has been initiated; and

b. There is good cause shown in the interest of public protection.

Purpose of Hearing. The Hearing's sole purpose is to determine if an order in aid of the Impairment investigation is appropriate.

Notice of Hearing. Respondent is entitled to Notice of the Hearing. Respondent may be represented by counsel at the Hearing. However, if Respondent's counsel does not enter an appearance within 10 days of the date of the Notice of the Hearing the Board shall appoint a Guardian ad litem.[5] Typically, the Panel Chair will enter the appointment order or authorize its entry by the Clerk of the Disciplinary Board.

Burden of Proof. The Bar bears the burden of showing good cause for issuance of the Order. Paragraph 13-23(c) does not specify the quantum of proof for good cause shown; however, since the Hearing does not adjudicate an Impairment, the evidence need not meet the usual clear and convincing standard. The Board probably will not have expert testimony upon which to base its good cause decision, at least not from Respondent's treating health care providers, but will have to depend on anecdotal testimony about Respondent's observed behavior. Examples might include Respondent appearing in Court disheveled and with an odor of alcohol; missing several filing deadlines within a short period following an accidental injury or a known medical event such as a stroke; or an inability to testify cogently in a misconduct hearing.

[5] See the Section regarding duties of Guardian ad litem appointed pursuant to this section.

Order. The Board's Order may be enforced in the manner prescribed in Paragraph 13-23(J). However, the fact that the Board enters an order in aid of an Impairment investigation is not evidence of an Impairment and may not be received as such in a Hearing to Determine Whether Respondent has an Impairment (see next hearing type).

b. **Hearing to Determine Whether Respondent has an Impairment.** In this proceeding, Bar Counsel's Petition alleges that there is "reason to believe that the [Respondent] has an Impairment." There usually – but not always – is a several month interval between initiation of the Impairment Investigation and filing of the Impairment Petition.

Content of Petition: Bar Counsel's Petition should allege:

a. The existence of a physical or mental condition that

b. Materially impairs the fitness of the Respondent to practice law.

Notice to Respondent. Respondent is entitled to Notice and to be represented by counsel. If Respondent's counsel does not enter an appearance within 10 days of the date of the Notice, then the Board **shall** appoint a Guardian ad litem to represent the Respondent at the Hearing.

Setting the Hearing. The Hearing is to be held promptly following the filing of the Petition (as distinct from initiation of the Impairment investigation). Ordinarily, the Board's usual monthly hearing date schedule can be used.

Expedited Hearing. Bar Counsel may petition for an expedited Impairment Hearing pursuant to Paragraph 13-18.D. In addition to showing that Respondent has an Impairment, the Bar must also allege that Respondent is engaged in Misconduct and that his continued practice of law poses an imminent danger to the public. The expedited hearing cannot be set sooner than fourteen days nor more than thirty days after the date the Notice of Hearing has been issued. Typically, the Bar's Petition for Expedited Hearing will show that an Impairment Investigation has already been initiated, including perhaps the appointment of a Guardian *ad litem* and the entry of an order regarding medical record releases and for an Impairment Examination, but the Respondent has subsequently engaged in Misconduct, and thus satisfies the "imminent danger' standard. Whether to allow an expedited Hearing is committed to the sound discretion of the Board Chair or the Vice-Chairs. If the request is denied, then the Petition shall be treated as an ordinary Petition for determination of Impairment.

Burden of Proof. The Bar or party alleging the existence of an Impairment bears the burden of proving by clear and convincing evidence the existence of an Impairment. The existence of the particular physical or mental condition and whether that condition "materially impairs the fitness of [Respondent] to practice law" is a mixed question of fact and law to be determined by the Board. The Bar may offer expert testimony at the Hearing from a qualified physician or health care provider about the particular mental or physical condition and the witness shall state his opinions to a reasonable degree of certainty. A videotaped deposition may be an adequate substitute for live testimony, especially if Respondent's counsel or Guardian ad litem participated in the deposition. The Bar's evidence may also include the written report of the testifying expert. The report should state that it was prepared for purposes of the Hearing and the opinions therein shall be expressed to a reasonable degree of certainty. Ordinarily, the Bar cannot meet its burden if it fails to provide testimonial evidence from a qualified physician or health care provider accompanied by the provider's written report.

Evidence Relating to Practice of Law. The Board should expect evidence as to how the particular mental or physical condition actually impairs Respondent's present fitness to practice law. A Respondent should not be determined to have an Impairment if he is in the early stages of a diagnosed illness or disease that will progress slowly and observably leading to intellectual disability, but who is otherwise presently functioning adequately as an attorney.

Respondent's Testimony. Ordinarily, the Respondent will testify, either during the Bar's case-in-chief or during Respondent's defense case, and the failure or refusal to do so may be treated by the Board as a concession to the Bar's allegations of an Impairment.

Other Evidence. The Board may also consider written reports proffered by the Bar or by Respondent from other, non-testifying physicians or health care providers who have examined the Respondent. Non-testifying provider reports should be evaluated with care. Considerations may include temporal proximity of the examination to the Impairment proceeding; whether the report refers to the Impairment proceeding or otherwise shows the provider's awareness of the Impairment proceeding and the potential use of the provider's report; whether the report and its diagnoses concern the Impairment alleged in the Petition or otherwise address limitations from which the Board can properly infer material impairment; and whether Respondent's counsel or guardian *ad litem* had a meaningful opportunity to communicate with the provider about the report before the hearing. In general the Board will prefer a testimonial appearance by the Bar's expert witnesses since the Bar bears the burden of proof.

Filing of Reports. All reports or opinions by experts who have examined the Respondent that either party intends to rely on shall be filed absent good cause shown, with the Clerk not later than ten days from the hearing date.

Conduct of Hearing. The conduct of the Impairment Hearing, whether or not specially set, shall be in accordance with the procedures as established for Misconduct hearings.

Order. If the Board determines that Respondent has an Impairment then it shall enter an order, the effect of which is to suspend administratively and indefinitely Respondent's license. The suspension creates a disciplinary history but not a disciplinary record since no finding of misconduct has been made.

Summary Suspension: Paragraph 13-23(D) provides for the entry of an order by any board member summarily suspending the license of the Respondent in two circumstances:

a. Where a court of competent jurisdiction has adjudicated Respondent to have an Impairment and the Clerk of the Disciplinary System gives notice [to a member of the Board] of that adjudication together with "supporting documentary evidence;" **or**

   i. "Court of competent jurisdiction" is not defined but it is a narrower concept than "another jurisdiction" as used in reciprocal discipline matters. A Virginia circuit court is clearly competent. A court of record in another State that exercised personal jurisdiction over Respondent probably is competent.

   ii. Further, the adjudication must have been that the Respondent has an Impairment, a defined term. As a practical matter, even if the Court does not specifically use the term Impairment in its adjudication, a Board member should be able to determine if the order of adjudication involves a physical or mental condition of Respondent that materially impairs his fitness to practice law.

b. Where Respondent has been involuntarily admitted to a hospital for treatment of an addiction, inebriety, insanity, or mental illness.[6]

i. While the rule does not specify what notice or supporting documentation is to be given to the Board it is reasonable to assume a Board member would enter a summary suspension order only upon presentation of an authenticated involuntary admission order (Section 37.2-817) since that order contemplates treatment. By contrast, a temporary detention order (Section 37.2-809) is typically not treatment oriented and is entered upon significantly less evidence than a commitment hearing. Thus, a temporary detention order should ordinarily be an insufficient ground to enter a summary suspension.

Service of Summary Suspension Order on Respondent. The Order is to be served on Respondent via certified mail – at Respondent's official address of record.

Duration of Summary Suspension Order. Suspension based on either an adjudication of Impairment or an involuntary admission (even if Respondent is no longer hospitalized) is ordinarily indefinite, and it is Respondent's responsibility to petition the Board for entry of an order that an Impairment does not exist. Alternatively, Respondent could return to the adjudicating court to petition for an adjudication that the Impairment does not exist. In either event, the burden of proof rests with Respondent.

3. **Hearing to Lift an Impairment Suspension**. In this proceeding, Respondent's Petition alleges that the Impairment no longer exists. To allow the Bar to investigate Respondent's Petition, there generally will have been a long period between the filing of the Petition and the Hearing. Respondent would typically be expected to cooperate fully with Bar Counsel's investigation.

Content of Petition. Respondent's Petition should allege facts showing that the physical or mental condition that materially affected his fitness to practice law no longer exists.

Hearing. A Hearing must be held and cannot be waived even if Bar Counsel does not object.

Burden of Proof. Respondent bears the burden of proving by clear and convincing evidence that the Impairment does not exist. This is a mixed question of law and fact to be determined by the Board. Even if the Bar Counsel does not oppose the Petition after concluding its investigation, it would be unusual for the Board to find that Respondent had met his burden of proof without testimony both from Respondent and from his qualified health care provider. While the fact that Respondent is no longer hospitalized by reason of his mental or physical condition is probative, it shall not be considered conclusive to the Board's determination that an Impairment does not exist.

The provider's testimony should address specifically the medical or physical condition that was the basis for the existence of the Impairment, and it should be to a reasonable degree of certainty. In general the Board will prefer a testimonial appearance by the Respondent's expert witnesses since the Respondent bears the burden of

[6] Paragraph 13-23(D) refers to Va. Code §37.1-1. Title 37.1 was repealed in October 2005. Title 37.2-100, *et seq*. was enacted. Involuntary admission is treated in Chapter 8 (37.2-800 through 37.2-847).

proof. A videotaped deposition may be an adequate substitute for live testimony, especially if Bar Counsel participated in the deposition and does not oppose the Petition.

Non-testifying Health Providers. The Board may also consider as evidence written reports proffered by the Bar or by Respondent from other, non-testifying physicians or health care providers who have examined the Respondent. The same considerations attending their use in an Impairment Proceeding apply here.

Filing of Reports. All such reports shall be filed with the Clerk of the Disciplinary System.

Order. If Respondent meets his burden of proof, the Board enters an order lifting the Impairment Suspension effective immediately.

Role of the Guardian ad Litem in an Impairment Proceeding

Nature of GAL's Role. Paragraph 13-23.G states that the Guardian ad litem's ("GAL") role is to "represent [the] Respondent in an Impairment Proceeding" (a defined term in ¶ 13-1). Paragraph 13-23 does not elaborate further on the role. On July 27, 2017 the Board adopted a form Order relating to the appointment and role of an appointed GAL.[7] It is a good roadmap for the Board and for the GAL. The Order explains that the GAL is "an attorney who represents the best interest of the Respondent as it pertains to Respondent's fitness to practice law." In an Impairment Proceeding the identifiable interest is the Respondent's law license. Implicit in the law license is a duty to protect the public, and the Respondent must be deemed to desire the public's protection even if contrary to his personal and pecuniary interest.[8]

GAL's Investigation and Opinion. The GAL should independently investigate the facts alleged in the Complaint with sufficient thoroughness to form an opinion as to the Respondent's best interest as it pertains to fitness to practice law. The investigation should include at a minimum meeting with Respondent, ascertaining the Respondent's wishes with regard to the hearing, and reviewing Respondent's medical and health care records[9]. Although the GAL is not expected to file a written report or make a formal recommendation, he or she will be expected to offer a "best interest" opinion to the Board and, if asked, to answer the Board's questions about his or her knowledge of the facts of the case. That "best interest" opinion may be to recommend placing the law license under an impairment suspension. However, such opinion shall not substitute for medical evidence or for other probative evidence of Respondent's fitness to practice law. Indeed, a "best interest" opinion not based on such evidence would ordinarily be entitled to little weight. In those instances where the GAL's "best interest" opinion differs from the Respondent's wishes, the GAL should make those differences known to the Board, preferably in advance of the Impairment hearing. Ordinarily, as an officer of the court the GAL will not be required to testify before the Board and will not be subject to examination under oath by the Bar or by Respondent (or his counsel).as it pertains to Respondent's fitness to practice law.

When a Guardian ad litem must be Appointed. If no counsel for Respondent enters an appearance within ten days of the Notice date, the Board must appoint a GAL. The rules do not prohibit appointment of a GAL even if Respondent retains counsel, nor does the Rule require discharging an appointed GAL where

[7] See Appendix 7

[8] The public's interest is also explicitly recognized in the appointment of a receiver for an attorney who has become disabled or impaired. Va. Code §54.1-3900.01.F.

[9] See paragraph Right to Review Medical Records starting on page24.

Respondent's counsel enters an appearance more than 10 days after the Notice. Occasionally, Bar Counsel will request appointment of a GAL before expiration of the 10 day period, typically to facilitate communication with a Respondent who has been unresponsive to Bar Counsel's efforts at direct communications with Respondent. An appointed GAL is not a substitute for Respondent's own counsel at the hearing, and Respondent should be urged to retain counsel even if a GAL has been appointed. The Board may in its discretion later discharge a GAL if Respondent hires counsel.

Identity of the GAL. Although Paragraph 13-23 is silent as to whether the appointed GAL be a Virginia licensed attorney, the form Order of appointment requires the GAL to be a Virginia licensed attorney in good standing and to maintain professional liability coverage. The attorney is bound by the Virginia Rules of Professional Conduct except where inconsistent with his duties as GAL. To minimize budgetary impacts the Bar has urged members of the Bar, particularly past members of the Board, to offer their services *pro bono* as GALs. The Clerk's Office maintains a current list of Virginia licensed attorneys who have agreed to act as Guardian ad litem.

Difference in function between Respondent's Guardian ad litem and Respondent's counsel. A key distinction between Respondent's GAL and Respondent's counsel lies in the duty of confidentiality. While Respondent's counsel has a nearly absolute duty of confidentiality, the GAL ordinarily does not have a duty of confidentiality to the Respondent or to Respondent's counsel as to information relevant to the Impairment proceeding. The GAL ultimately owes a duty of disclosure to the Board about matters relating to the allegations of Impairment even if the Respondent has specifically requested that Impairment related information be held confidential. The Board's entitlement to all Impairment related information arises from Respondent being subject to the Board's disciplinary authority. In that regard, he has affirmative obligations under Rule 8.1 (c) and (d) of the Rules of Professional Conduct to respond to a lawful demand for information and not to obstruct a lawful investigation, including into allegations of impairment. Bar Counsel is entitled to call and to examine Respondent at the hearing with regard to any matter relevant to the Impairment determination. The Board is entitled to examine the Respondent. Paragraph 13-12 (D) favors receipt of all reasonably probative evidence. The fact that an Impairment hearing is closed to the public minimizes the possibility of disclosure of Respondent's confidential information outside the hearing. Thus, permitting the Respondent to silence the GAL as to information or communications he gave the Guardian ad litem relevant to the Impairment allegations is inconsistent with his obligations, including particularly the protection of the public, and the confidential nature of the proceedings. There could of course be a circumstance where the GAL acquires information that either is not relevant to the proceeding **or pertains to client confidences or secrets** the Respondent gained through his or her attorney-client relationship. In those cases maintaining confidentiality would be expected of the GAL.

Right to Review Medical Records. The Respondent's medical or health condition is likely to be a focus of the hearing. Paragraph 13-23.C.2 can require Respondent to authorize the release of medical records to Bar Counsel and to the Board for purposes of the investigation. The Rule is silent about release to the appointed GAL. Va. Code §32.1-127.1:03(D) governs release of medical records. Although an appointed GAL under Paragraph 13-23 is not among the enumerated recipients, other provisions of VA Code §32.1-27.1:03(D) appear to provide authority.[10] As a practical matter if the Respondent refuses to authorize the release his license is subject to indefinite suspension for failure to cooperate with the Bar's investigation.

[10] Subsections D(9)[When the individual has waived his right to the privacy of the health records]; or D(10)[When examination and evaluation of an individual are undertaken pursuant to judicial or administrative law order, but only to the extent as required by such order;].

Disbarment, Revocation or Suspension in another Jurisdiction (Paragraph 13-24)

Purpose of Reciprocal Hearing: A reciprocal hearing determines whether the Respondent's License should be suspended or revoked based on a suspension or revocation by another jurisdiction of Respondent's license to practice law in that other jurisdiction.[11] As discussed below, a reciprocal hearing is limited in scope and is not intended to re-try the underlying case from the other jurisdiction. Paragraph 13-24, as amended, distinguishes between a State Jurisdiction and a Jurisdiction. The term State Jurisdiction is either a law licensing or attorney disciplinary authority authorized to impose attorney discipline effective throughout the State. It includes the highest court of any such State. The term Jurisdiction is broader, encompassing both State Jurisdiction and any United States federal court, military tribunal, or federal agency authorized to discipline attorneys.

Initiation of Proceedings: Upon the Clerk's receipt of a notice from another Jurisdiction that it has suspended or revoked the Respondent's license and that such action has become final, the Clerk requests a Board member, typically the Chair or a Vice-Chair, to enter an Order requiring the Respondent to show cause why the same or similar discipline imposed in the other Jurisdiction should not be imposed by the Board. A suspension or revocation for administrative reasons, such as failure to pay dues or failure to complete required continuing legal education, is not a basis to initiate a Proceeding. Copies of the Notice, the Order, and a notice containing date, time, and place of the Board hearing, and stating that the hearing's purpose is to provide Respondent an opportunity to show cause why same or similar discipline (suspension or revocation) imposed in the other Jurisdiction should not be imposed by the Board (collectively "Board's Show Cause Order") shall be sent via certified mail to Respondent at his or her last address of record with the Bar.

Summary Suspension of Attorney's Virginia License: If the attorney was suspended or revoked by a State Jurisdiction, then unless stayed by the State Jurisdiction, the attorney's Virginia License **shall** be summarily suspended pending final outcome of the Proceeding. The summary suspension is a part of the Board's Show Cause Order. The rule prohibits suspension in cases where the other Jurisdiction is not a State Jurisdiction.

Respondent's Opportunity for Response: Within fourteen days of the date of the Clerk's mailing of the Board's Show Cause Order to Respondent's address of record, Respondent shall file with the Clerk a written response and any communications or other materials (collectively, the "Response"). The Response shall be confined to argument and exhibits supporting one or more of the following grounds for dismissal or imposition of a lesser discipline:

a. The record of the proceeding in the other Jurisdiction would clearly show that such proceeding was so lacking in notice or opportunity to be heard as to constitute a denial of due process; or
b. The imposition by the Board of the same or similar discipline upon the same proof would result in a grave injustice; or
c. The same conduct would not be grounds for disciplinary action or for the same or equivalent discipline in Virginia; or
d. The misconduct found in the other Jurisdiction would warrant the imposition of substantially lesser discipline in Virginia.

[11] Paragraph 13-24 was amended substantively by order of the Supreme Court of Virginia effective March 1, 2017.

The Hearing:

a. **Setting of Hearing**: The hearing shall be set not less than 21 days nor more than 30 days after the date of the Board's Show Cause Order. Accordingly, there may be as few as seven days between receipt of the Response and the hearing. The panel Chair may, *sua sponte* or upon motion of either the Bar or the Respondent for good cause shown continue the hearing.. The Clerk shall provide copies to the Board panel members of the Board's Show Cause Order, Notice of Hearing, the Response, and any motion for or notice of a continuance.

b. **Conduct of Hearing**: Insofar as applicable, procedures for Misconduct Proceedings shall govern a paragraph 13-24 Hearing. *The panel Chair may, sua sponte or upon motion of Respondent or the Bar, conduct a prehearing conference as may be necessary for the orderly conduct of the hearing.* If the Respondent has not timely filed a Response but appears at the Hearing, expressing an intent to present evidence or argument supporting the existence of one or more grounds under 13-24(C), then Respondent shall make a proffer. The Board may refuse in its discretion to hear such evidence or argument as untimely. If the Board will consider the evidence or argument, then Bar Counsel may request a continuance of the Hearing. Ordinarily that motion would be granted. If the Respondent has not timely filed a Response and does not appear, then the Clerk would show on the record that the Board's Show Cause Order was mailed as required under Paragraph 13-12(C), and, if appropriate, the Hearing would proceed. If the Respondent has timely filed a Response but does not appear, the Hearing would proceed without necessity of the Clerk showing the mailing of the Board's Show Cause Order. If the Respondent appears, he shall proceed first, and then the Bar shall present its response, if any.

c. **Burden of Proof:** Respondent bears the burden of proving by clear and convincing evidence one or more of the grounds in Paragraph 13-24(C). Absent such proof the Board shall be entitled to conclude that Respondent was afforded due process by the other Jurisdiction, and the findings of the other Jurisdiction shall be conclusive of all matters for purpose of the Proceeding before the Board. If Respondent relies on the record of the other Jurisdiction's proceeding to support his contentions, then ordinarily he must produce the entire record for the Board's consideration. Whether to allow less than the entire record, perhaps for reasons of cost, relevance, or timely availability, can be dealt with in a pre-hearing conference upon Respondent's motion. The availability of the record in time for the hearing may determine whether the hearing can go forward as scheduled.

d. **Other Considerations:** The Board may consider a contention that the evidentiary standard in the other Jurisdiction for imposing discipline was less than clear and convincing (or its equivalent).

e. **Action by Board**:

i. Paragraph 13-24.H requires the Board to impose the same or equivalent discipline was imposed in the other Jurisdiction if any of the following occur:

ii. The Respondent has not filed a timely written response and does not appear, provided that proof of notice of the Hearing is shown. Whether a written response is timely would be subject to the Board's ruling on any motion by Respondent for an extension of time

to file a response. Normally, such a motion would have been taken up in a telephone conference hearing conducted by the panel Chair. The Board panel could in its discretion take up such a motion at the Hearing itself; or

iii. The Respondent has not filed a timely written response, appears at the Hearing to contest, but fails to meet his burden of proof; or

iv. The Respondent has filed a timely written response, does not appear at the Hearing, and the response does not meet the burden of proof.

b. The Board may dismiss the Proceeding or impose a lesser discipline than was imposed in the other Jurisdiction if the Board determines that Respondent has established by clear and convincing evidence one or more of the grounds in 13-24(C). A lesser discipline may include a public reprimand or admonition, with or without terms.

c. Appearance at Hearing by Respondent: An in-person appearance is strongly favored. If the Respondent desires to appear other than in person, whether telephonically or by video, he must seek leave by timely written motion. A motion could be considered at a Motions telephone conference hearing and at the discretion of the panel Chair. Factors may include the cost and inconvenience to Respondent to travel to Virginia, the ability of panel members to evaluate Respondent's credibility, and, most importantly, how the Respondent to be sworn in his or her testimony and his or her identity confirmed.

d. In the imposition of suspension or revocation the Board may establish the effective date of the suspension or revocation as early as the date of suspension in the show cause order or as late as the termination of an existing suspension. *In the Matter of Vincent Napoleon Godwin, VSB Docket No. 02-000-2789 (Disciplinary Board 6/10/04).*

e. The Board's Order shall be served upon the Respondent via certified mail, return receipt requested.

f. The Board's Order shall be final, subject only to appeal as provided in Paragraph 13-26.

Reinstatement (Paragraph 13-25)

An attorney seeking reinstatement after revocation must file a Petition for Reinstatement with the Clerk of the Disciplinary System setting out the reasons why his or her license should be reinstated. The petition cannot be filed sooner than 5 years from the effective date of the Revocation and must be filed under oath or affirmation with the penalty of perjury. The Petitioner must certify in the Petition that he or she has met the requirements outlined in Paragraph 13-25(F). The Petitioner must also post a $5,000 cash bond for payment of any costs resulting from the Reinstatement proceedings. The filing of the Petition for Reinstatement constitutes a waiver of all confidentiality relating to the petition, the complaint or complaints that resulted in the revocation or were pending at the time the Petitioner license was revoked.

Pre-Hearing. Upon receipt of the Petition for Reinstatement, the Clerk reviews it to determine whether it complies with the requirements outlined in Paragraph 13-25(F). If the petition is in compliance, it is entered on the Board's docket and referred to Bar Counsel for investigation. Bar Counsel conducts an investigation of the Petitioner and requests a Bill of Particulars setting forth the grounds for Reinstatement. The Petitioner must respond within 21 days of being served with a written request from Bar Counsel for a Bill of Particulars. The Petitioner is required to execute all forms necessary to authorize Bar Counsel to make inquiries through the Internal Revenue Service, the National Criminal Information Center, the National Criminal Information Network and any other similar information network or system. Once the investigation is completed and the Response to the Bill of Particulars is received and deemed acceptable to Bar Counsel, the matter is set for a hearing before the Board.

Notice to Bar Members, Complaining Witnesses and General Public. Notice of the Reinstatement hearing is sent by the Clerk to all members of the Bar of the circuit in the jurisdictions in which the Petitioner resided and in which he or she maintained a principal office at the time of the Revocation. Notice is also sent to the members of the District Committee and members of the Board who heard the original complaint, to members of the District Committee in the judicial district in which the Petitioner currently resides, to the complaining witness or witnesses on all complaints pending against the Petitioner before the Board, District Committee or a court at the date of the Revocation and to such others as the Clerk of the Disciplinary System deems appropriate. A synopsis of the petition is also published in the Virginia Lawyer Register and in a newspaper of general circulation in the judicial district where the Petitioner currently resides and where he or she maintained a principal office at the time of the Revocation. Notice is also posted on the Bar's website. Members are asked to respond by mail or email whether the Petitioner should be reinstated. The responses are made part of the record. The petition and all accompanying exhibits are available for inspection and copying at the Clerk's Office upon request and payment of copying costs.

Hearing. The hearing is similar in nature to a Show Cause hearing with the Petitioner having the burden of proof by clear and convincing evidence that he or she is of good character as defined in Paragraph 13-25(G)(5) and is fit to return to the practice of law. Bar Counsel may object to the Petition for Reinstatement or may take no position at the hearing. Prior to the hearing, the Clerk provides Board members with copies of the record, including transcripts, exhibits, pleadings and orders from the original disciplinary proceedings.

At the hearing, the Board hears from up to 5 character witnesses supporting and up to 5 character witnesses opposing the Petition. The Board may also consider any letters submitted regarding the Petitioner's character and fitness. In considering the matter prior to making a recommendation to the Court, the Board may consider, but is not bound by, the factors enumerated in Paragraph 13-25. The decision of the Board is memorialized in an Order of Recommendation. Within 60 days after receipt of the transcript, the Board forwards the record and its Order of Recommendation to the Supreme Court of Virginia. Copies of the Board's order are also sent to the Petitioner and Bar Counsel. In addition to stating the Board's findings of fact, the order must clearly state the Board's opinion as to the Petitioner's character and fitness to practice law. The order must also specify the amount of the costs for the reinstatement proceedings. A recommendation for approval may be conditioned upon the requirements set out in Paragraph 13-25(G)(6)(e)(i). Final action on the Petition for Reinstatement is taken by the Court.

Resignation (Paragraph 13-27)

The Board has jurisdiction to hear matters in which a member of the Virginia State Bar has applied to resign from the practice of law and Bar Counsel has raised an objection to such application.

Discussion. A member of the Virginia State Bar does not have an unrestricted right to resign from the practice of law. Paragraph 13-27.C prohibits an attorney from resigning while that attorney is the subject of a disciplinary complaint, investigation, action or proceeding involving allegations of misconduct.

Commencement. A member of the Virginia State Bar who wishes to resign from the practice of law must submit a notarized application to the Clerk to resign affirming that the application is not being offered to avoid disciplinary action and affirming that the Applicant has no knowledge of any complaint, investigation, action or proceeding involving allegations of misconduct in any jurisdiction. The application form is available at: www.vsb.org/docs/resignation.pdf

Procedure. Upon receipt by the Clerk of an application to resign, the Clerk shall forward a copy of the application to Bar Counsel who shall investigate the veracity of the allegations contained in the application. If Bar Counsel objects to the application, Bar Counsel shall file a written objection with the Clerk who shall then schedule a hearing before the Disciplinary Board. The Rule does not specify a time limit for Bar Counsel to object to the application so a rule of reasonableness will apply. If Bar Counsel does not object in a reasonable time, the Clerk shall prepare an Order for entry by a Board Chair, accepting Applicant's resignation.

Effect of Resignation. A resignation is effective immediately upon entry of the Order accepting the resignation and the attorney must immediately cease the practice of law and take appropriate steps to dispose of any matters in his or her care in accordance with the wishes the clients.

Violation of RESA (15 VAC 5-80-10 D)

The Real Estate Settlement Protection Act (RESA) authorizes licensed Virginia attorneys, title insurance companies and agents, real estate brokers and financial institutions (or a subsidiary or affiliate thereof), to serve as Settlement Agents and provide "escrow, closing or settlement services" if they register with their respective licensing authority and meet other conditions of their regulatory agencies. RESA is located at Virginia Code Sections 55-525.16 through 55-525.32. In summary, RESA:

a. Allows certain non-lawyers who are licensed title agents or real estate brokers, as well as title insurance companies and financial institutions, to conduct residential real estate closings for members of the public;

b. Requires all real estate settlement agents conducting residential closings, lawyers and non-lawyers alike, to register with their respective licensing authority;

c. Establishes certain public protection measures, which must be put into place by non-institutional settlement agents to the satisfaction of their regulatory agencies;

d. Leaves in place the Bar's unauthorized practice of law enforcement authority and makes it clear that legal advice in connection with a real estate settlement can only be provided by a licensed Virginia attorney;

e. Requires the Virginia State Bar, in consultation with the State Corporation Commission and the Virginia Real Estate Board, to develop unauthorized practice of law guidelines applicable to the real estate settlement field for the purpose of assisting real estate settlement agents in avoiding and preventing the unauthorized practice of law; and

f. Provides for significant penalties for violations of the Act.

RESA Complaint. The Bar can proceed against an attorney for a RESA violation even if he has resigned or been revoked. When the Bar receives a complaint that involves noncompliance with 15 VAC 5-80-50.D, bar counsel opens a new RESA investigation. The original misconduct case moves through the District Committee process. The RESA case can only be heard by the Board.

Investigation. The Bar must investigate violations of RESA against attorneys. The Bar can dismiss the alleged violation as unfounded. If bar counsel believes that a violation of RESA has occurred he notifies the respondent and gives him 30 days to respond. After he receives the response if bar counsel believes there is a risk to consumers (he may proceed even if the respondent does not respond). Bar Counsel can issue summonses or subpoenas to compel attendance of witnesses and production of documents.

Purpose of Hearing. The Hearing's sole purpose is to determine if the attorney settlement agent has violated Chapter 27.3 of Title 55 of the Code of Virginia and/or these regulations.

Request Hearing. Bar Counsel can request that the Board issue an order (bar counsel provides the Board with a draft order for the chair to enter) requiring the respondent to appear at a hearing on the Bar's Notice of Violations (the hearing must be held within 60 days of the Board's order and the Clerk's Office resolves all the timing issues). Since RESA cases always involve other violations of the Rules of Professional Conduct, misconduct and RESA cases are consolidated and brought together to the Board for hearing. Because both cases must be heard, RESA and misconduct hearings usually last most of the day.

Notice of Hearing. Respondent is entitled to Notice of the Hearing. Respondent may be represented by counsel at the hearing. The Clerk will issue a certified Notice of Hearing and Order requiring appearance at hearing shall be included in the Notice to Respondent via certified mail at the address of record.

Conduct of Hearing. This is a public proceeding. The conduct of the RESA hearing, shall be in accordance with the procedures established for misconduct hearings.

Burden of Proof. The standard of proof in these cases is clear and convincing evidence and the hearings are conducted like misconduct hearings.

Filing Exhibits. All exhibits shall be filed absent good cause shown, with the Clerk no later than ten days before the hearing.

Agreed Dispositions. Agreed Dispositions can be considered and approved by the Board.

Disciplinary Record. The Respondent's disciplinary record and any prior violations of Chapter 27.3 of Title 55 of the Code of Virginia are provided to the Board during the sanctions phase. The Board deliberates on a sanction for the misconduct case and a separate sanction for the RESA case.

Penalties and Sanctions. The Board can impose a penalty of up to $5000, per violation, suspend or revoke the respondent's settlement agent's registration and issue any disciplinary sanction available to the Board (including a suspension or revocation of the respondent's license).

Service of Summary and Memorandum Orders. The Clerk will mail a certified copy of the orders to Respondent via certified mail at official address of record.

Appeal to the Supreme Court of Virginia. The respondent can appeal a RESA case. It is the same as a misconduct appeal.

Assess Costs. Clerk's Office can assess costs as in any other disciplinary case.

Va. Code §§ 55-525.16 to 55-525.32
15-VAC 5-80-20 – Definitions.
15-VAC-5-80-30 – Registration, Fee.
15-VAC-5-80-40 – Unauthorized Practice of Law (UPL).
15-VAC-5-80-50 – Attorney Settlement Agent Compliance.

Lawyer must certify that attorney settlement agent has insurance and bond coverages as specified at subparts 1-3.

15-VAC-5-80-50-B – Requires that attorneys have a real estate trust account.

Show Cause for Noncompliance with Duties of Suspended Respondent (Paragraph 13-29)

Hearings on Rules to Show Cause can be convened when a Respondent has failed to meet the notice requirements of Part Six, Section IV, ¶13-29 of the Rules of the Supreme Court of Virginia.

Notices Required and Arrangements for Cases. Rule Paragraph 13-29 requires a Respondent whose license is suspended or revoked to give notice by certified mail of such suspension or revocation to all clients for whom the lawyer is handling cases and to all opposing counsel and judges presiding over pending cases. The Respondent must also make appropriate arrangements for the disposition of all cases in conformance with the wishes of the client.

Time for Notices and Arrangements. The notice must be given within 14 days of the effective date of the Revocation or Suspension; arrangements must be made within 45 days of the order's effective date.

Certification of Compliance. Within 60 days of the effective date of the Revocation or Suspension, the Respondent must provide proof to the Bar both that the notices have been given and that case arrangements have been made.

Adequacy of Compliance. The Rule states that the Board is responsible for determining the adequacy of compliance with these requirements, but as described below, in practice the Clerk's Office and Bar Counsel handle this aspect of the process.

Sanction for Failure to Comply. The Board may impose a sanction of Revocation or additional Suspension for failure to comply with these requirements.

Content of Orders and Forms for Notice to Clients. Language describing the Paragraph 13-29 requirements is included in all Orders relating to a Suspension or Revocation. This includes the Summary Order entered by the Chair immediately after the hearing as well as the Memorandum Order that is sent out later. With the Summary Order, the Clerk's Office sends the Respondent forms for the notice to clients, opposing counsel and presiding judges. This is done to help the Respondent get out the notices during the 14 day period.

Notice of Compliance and Reminder Letter. The 60-day notice of compliance consists of copies of the letters sent out and the certified mail receipts that have been received by the Respondent. If the 60-day notice is not received by the Clerk on time, a reminder letter is sent to the Respondent [as required by Board Policy] reminding him or her of the duties and the consequences for noncompliance. When a response is received, the clerks compile the information and follow up with a letter requesting any missing information.

Determination of Lack of Compliance. Once the Respondent's compliance package has been processed in the Clerk's Office, it is sent to Bar Counsel to determine if there has been substantial compliance with the Rule's requirements.

Issuance of Rule to Show Cause. If Bar Counsel determines that the Respondent has not substantially complied with the requirements of Paragraph 13-29, a new case is opened. Bar Counsel then files a petition for a rule to show cause for violation of Paragraph 13-29, and the Clerk places the new case on the Board's docket for the next available hearing. Upon receipt of the petition, the Clerk enters a Rule to Show Cause and sends a Notice of Show Cause Hearing to the Respondent advising the Respondent of the violation and the Bar's request that a sanction of a suspension or revocation be imposed.

Hearing Procedure. The Show Cause Hearing goes forward without a Prehearing Order or Conference Call. The hearing is like a misconduct hearing except that the Respondent goes first. The burden of proof is on the Respondent to show cause by clear and convincing evidence why Respondent's license should not be suspended or revoked. The Board can dismiss the case or issue a Suspension or Revocation of the Respondent's license. The decision of the Board is appealable and the Clerk's Office can assess costs.

Show Cause for Noncompliance with Terms (Paragraph 13-18.O)

Hearings on Rules to Show Cause can be convened when a Respondent has failed to comply with terms included in a Board Order in accordance with Part Six, Section IV, Paragraph 13-18 O. of the Rules of the Supreme Court of Virginia.

Requirements of Disposition with Terms:

a. Board shall specify time within which compliance shall be completed.

b. Board may require written certification to Bar Counsel of compliance within specified time period.

c. Board shall specify the alternative disposition if terms are not complied with or, if required, compliance is not certified to Bar Counsel.

Bar Counsel Monitors Compliance with Terms.

Noncompliance – new case. When a Respondent fails to comply with the terms of a Board Order, Bar Counsel opens a Terms Noncompliance case before the Board. Although originating out of the original case, this is a new matter before the Board.

Rule to Show Cause Issued. Bar Counsel files a Notice of Show Cause Hearing for Terms Failure and the Clerk places it on the board's docket. The Clerk's Office sends the Board's Notice of Hearing and Rule to Show Cause to the Respondent requiring him to appear on the hearing date and show cause why the alternative disposition should not be imposed.

Hearing Procedure. The Show Cause hearing goes forward without a Prehearing Order or a Conference Call. The hearing is like a misconduct hearing except that the Respondent goes first. The burden of proof is on Respondent to show compliance by clear and convincing evidence. The Board can dismiss the case or impose the alternative sanction. If the Board order imposing terms does not include the alternative sanction, the panel will hear from Bar Counsel and Respondent regarding the sanction. The decision of the Board is appealable and the Clerk's Office can assess costs.

Show Cause for Noncompliance with a Board Order (Paragraph 13-6.G.1)

The Board has jurisdiction to enforce its own Orders. This section does not apply to an alleged refusal or failure of a Respondent under Paragraph 13-29 to notify Respondent's current clients, opposing counsel and presiding judges in pending litigation.

Commencement. Bar Counsel will prepare a Notice of Noncompliance And Request for Interim Suspension which will place Respondent on notice of the filing of the Notice of Noncompliance, provide Respondent with the allegations of noncompliance with reasonable specificity and explicitly notify Respondent that, unless Respondent petitions the Board, through the Clerk's Office, for a hearing within 10 days of service of the Notice of Noncompliance, an interim suspension shall be imposed.

Service. The Notice of Noncompliance is served by Bar Counsel upon Respondent by certified mail, to Respondent's last address of record with the Bar (Paragraph 13-12.C). Service is complete upon mailing, not receipt, and the 10 day deadline is jurisdictional. (Paragraph 13-12.B).

Default. If Respondent does not submit a timely petition in response to the Notice of the Board, the Board, through a Chair, shall enter an interim suspension Order which suspension shall remain in effect until Respondent remedies his or her failure to comply.

Hearing. If Respondent files a timely petition with the Clerk to withhold entry of an interim Order of suspension, the Clerk shall schedule an evidentiary hearing in the matter, and an interim Order of suspension shall not issue prior to that hearing. At the evidentiary hearing, Respondent has the burden to show compliance.

Sanctions. A Respondent suspended under this paragraph is subject to the provisions of Paragraph 13-29. Costs are not assessed against a Respondent under this paragraph (Paragraph 13-9.E).

Show Cause for Noncompliance with a Subpoena Duces Tecum (Paragraph 13-6.G.3)

The Board has jurisdiction to enforce a summons or a subpoena issued by any member of the Board, the Clerk of the Disciplinary System, Bar Counsel or any lawyer member of a District Committee.

Commencement. Bar Counsel will prepare a Notice of Noncompliance and Request for Interim Suspension placing Respondent on notice of the filing of the Notice of Noncompliance, and providing Respondent with the allegations of noncompliance with reasonable specificity and notifying Respondent that, unless Respondent petitions the Board, through the Clerk's Office, for a hearing within 10 days of service of the Notice of Noncompliance, an interim suspension shall be imposed.

Service. The Notice of Noncompliance is served by Bar Counsel upon Respondent by certified mail, to Respondent's last address of record with the Bar (Paragraph 13-12.C). Service is complete upon mailing, not receipt, and the 10 day deadline is jurisdictional. (Paragraph 13-12.B).

Default. If Respondent does not submit a timely petition in response to the Notice of the Board, the Board, through a Chair, shall enter an interim suspension Order which suspension shall remain in effect until Respondent remedies his or her failure to comply.

Hearing. If Respondent files a timely petition to withhold entry of an interim Order of suspension, an interim Order of suspension shall not issue prior to hearing. The Clerk shall schedule an evidentiary hearing in the matter, prepare a Notice and Order to Show Cause requiring the Respondent to produce these documents and records sought by Bar Counsel in the original subpoena duces tecum, and serve the Notice and Order to Show Cause upon the Respondent. Should Respondent bring documents and records to the hearing as required by the Notice and Order, the hearing will proceed as scheduled, but the Chair may suspend the imposition of sanctions, if any, for an appropriate time to allow Bar Counsel to determine whether Respondent has complied with the original subpoena duces tecum. If Respondent does not bring any documents or records under the Notice and Order, then the Respondent has the burden to show compliance.

Sanctions. A Respondent suspended under this paragraph is subject to the provisions of Paragraph 13-29. Costs are not assessed against a Respondent under this paragraph (Paragraph 13-9.E).

ISSUES AT HEARING

Limited Right of Discovery (Paragraph 13-11)

The nature and extent of discovery in disciplinary proceedings is set forth in Paragraph 13-11. The general rule is that there is no discovery, with several exceptions. The first exception is for information produced in response to authorized subpoenae and summonses. The subject of summonses and subpoenae is discussed *infra*. The other exception consists of certain categories of information which Bar Counsel must disclose. Bar Counsel shall furnish Respondent a copy of the Investigative Report considered by the Subcommittee with two limitations: (1) no information received in confidence from law enforcement or another disciplinary agency or documents protected by attorney client privilege or work product doctrine unless referred to or attached to the Investigative Report and (2) no communications between Bar Counsel and the Investigator or Bar Counsel and the Subcommittee. Bar Counsel is also required to make timely disclosure of information favorable to the Respondent, either in negating Misconduct or tending to support a lesser sanction.

Substantial Compliance (Paragraph 13-12)

The general rule, codified in Paragraph 13-12, is that substantial compliance with the provisions of the Rules shall be sufficient. Presumably this goes both ways, but the rule specifically says that allegations of misconduct shall not be dismissed solely because the provision has not been strictly complied with.

Time Deadlines (Paragraph 13-12.B)

Time deadlines are jurisdictional, except where the Clerk, Bar Counsel or the Board has been granted specific authority to modify the deadline.

Burden of Proof (Paragraph 13-1.1)

To prove that an attorney violated the Rules of Professional Conduct, the VSB must present clear and convincing evidence of the violation. (Paragraph 13-18.L and M). See, e.g., *Livingston v. Virginia State Bar*, 286 Va.1, 10, 744 S.E.2d 220, 224 (2013). In rules to show cause, the Respondent has the burden of proof by the same standard. In many instances, the Rules specify that Respondent has to meet a clear and convincing evidence standard. See, e.g., ¶¶ 13-22; 13-21; 13-18 O. Although the Rules do not state the evidentiary standard in every instance, there is no instance in which a less stringent standard is specified.

Evidentiary Issues (Paragraph 13-12.D)

The rule states that "evidentiary rulings shall be made favoring receipt into evidence all reasonably probative evidence to satisfy the ends of justice. The weight given such evidence shall be commensurate with its evidentiary foundation and likely reliability." Substantive objections to evidence are rare, and the rules of evidence

are relaxed. Affidavits and other evidence which would not be admissible in a trial court are routinely received by the Board.

Service of Notices on Respondents (Paragraph 13-12.C)

Service of Notices to Respondents is effective when mailed by certified mail to the Respondent at the Respondent's last address of record for licensing purposes with the Bar. It is important that the Respondent maintain a current address with the Bar membership department. If service cannot be made at the last address of record for certain specified reasons, service can be made by certified mail on the Clerk of the Supreme Court of Virginia.

Statute of Limitations and Laches

There is no time limit on when a disciplinary complaint may be filed. A complainant may file a complaint regarding conduct far in the past. *Moseley v. Virginia State Bar ex rel. Seventh District Committee*, 694 S.E.2d 586, 589 (Va. 2010). No case law in Virginia addresses the application of the doctrine of laches to disciplinary proceedings, but there may be instances in which, due to the passage of an extraordinary period of time between the events complained of and the filing of a complaint, proceeding might be unfair to the Respondent, but the Respondent's rights must be weighed against the purpose of attorney discipline, which is protection of the public. It is also generally held that laches cannot be invoked against the government. See, Michie's Jurisprudence, *Equity* §44. Since the Virginia State Bar is a governmental agency, it is dubious that laches would lie. A long delay in prosecution could likely be argued in mitigation of disciplinary charges under the ABA Standards for Imposing Lawyer Sanctions. *Falls v. Virginia State Bar, 240 Va. 416 (1990); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Virginia State Bar v. El-Amin, Case No. MC4992 (Three-Judge Panel, 1998); Green v. Virginia State Bar, 278 Va. 162, 677 S.E.2d 227 (2009).*

Counsel and Representation (Paragraph 13-13)

A Respondent may be represented by a member of the Bar or by a member of the bar of any state engaged *pro hac vice*, pursuant to all of the requirements of Rule 1A:4 of the Rules of the Supreme Court of Virginia. Admission of an attorney *pro hac vice* requires, *inter alia*, an application and motion, local counsel and payment of the requisite fee. Notwithstanding retention of counsel, the Respondent must sign any written response to a Complaint, Charge of Misconduct or Certification. The most complex part of the rule on Counsel sets out the rules for disqualification and imputed disqualification of counsel, which is beyond the scope of this handbook. Paragraph 13-13.C.

Subpoenas and Subpoenas Duces Tecum (Paragraph 13-6.G)

The Board has the power to issue subpoenas for attendance of witnesses and production of documents on its own motion or at the request of Bar Counsel or the Respondent. Subpoenas are issued by the Clerk or by any Board member and have the same force and effect as a subpoena issued by a Circuit Court. A subpoena may be served on a Respondent by certified mail at his or her last address of record for membership purposes. If for some reason a subpoena cannot be sent to the last address of record (e.g., Foreign Lawyer or a lawyer admitted *pro hac vice*) service can be made by first class mail to the Clerk of the Supreme Court of Virginia. ¶13-6 G. 2. Subpoenas to Respondents and witnesses are only effective within the Commonwealth. The failure of a Respondent to respond to a subpoena duces tecum issued by the Board can result in the imposition of an interim Suspension pursuant to ¶13-6 G. 1. See, e.g., *In The Matter of Charles Lowenberg Pincus, III*, VSB Docket Nos.: 03-021-1861, 03-021-1866, 03-021-1868 (2003).

Public Statements Concerning Disciplinary Information (Paragraph 13-30.D)

Board Members sit as judges. It is the policy of the Virginia State Bar that all press contact goes through the Deputy Executive Director.

DISCIPLINARY SANCTIONS (Paragraph 13-18.M)

When the Disciplinary Board of the Virginia State Bar finds, by clear and convincing evidence, that a respondent has committed an act of misconduct, it must impose one of several sanctions, including admonition, public reprimand, and suspension or revocation of the attorney's license. These sanctions form the respondent's disciplinary record with the Bar.

Suspensions issued for impairment or noncompliance with an SDT or a Board Order are not findings of misconduct and are considered administrative suspensions. Although they do not create a disciplinary record, they do become a part of the disciplinary history of the respondent, which may be considered in determining any future sanctions.

The Standing Committee on Lawyer Discipline (COLD) determined that it is neither fair nor appropriate to view impairment as disciplinary in nature because it derives only from attorney health or well-being issues, not professional misconduct. COLD reached the same conclusion with respect to administrative suspensions, which derive from financial and educational requirements, not professional misconduct.

Types of Sanctions (Paragraph 13.1)

Admonition

If the Board finds that a respondent has engaged in misconduct but that no substantial harm to the complainant or the public has occurred, it may impose an admonition.

Public Reprimand

A public reprimand is a public declaration stating that the respondent has engaged in misconduct (as defined) but it does not prevent the respondent from continuing to practice law.

Suspension of License

An attorney's license may be suspended for a stated period not exceeding 5 years; or for a stated period of 1 year or less, with or without terms, and when applied to a lawyer not admitted or authorized to practice law in Virginia, means the temporary or indefinite exclusion from the admission to, or the exercise of any privilege to, practice law in Virginia. Indefinite suspensions are not available under misconduct hearings and are only issued for impairment and noncompliance with a subpoena duces tecum or a Board Order. An indefinite suspension may be the subject of a reciprocal disciplinary proceeding if imposed by another jurisdiction.

Suspension of one year or less with Terms

An attorney's license may be suspended for more than one year with terms only by agreement. The Board may impose a suspension with terms for a year or less.

Revocation of License

In certain cases, an attorney's license may be revoked, and when applied to a lawyer not admitted or authorized to practice law in Virginia, means the exclusion from the admission to, or the exercise of any privilege to, practice law in Virginia.

Imposition of Terms and Alternative Sanctions

Upon a finding of misconduct, the disciplining authority may impose certain conditions, or terms, upon the respondent that he or she must perform in conjunction with receiving the sanction. The Board may only issue a suspension with terms if the suspension is for one year or less. If the respondent fails to comply with the terms, a new case dealing with the non-compliance will be opened and the alternative sanction will be imposed through a show cause hearing.

Authority to Impose Sanctions

The Disciplinary Board has the authority to impose any public sanctions as set forth in Paragraph 13-18.M.

Public Sanctions

All sanctions imposed by the Board are public.

Public Notification of Sanctions (Paragraph 13-9.G)

The Clerk of the Disciplinary System is required to provide notification of all public admonitions, reprimands, suspensions, and revocations to the Clerk of the Supreme Court of Virginia, the Clerks of each of the Circuit and District Courts in the Commonwealth, and any disciplinary authorities in any jurisdiction where it is reasonable to expect that the attorney may be licensed to practice law.

Respondent's Duties upon Suspension or Revocation (Paragraph 13-29)

After a respondent has had his or her license suspended or revoked, he or she must provide notice, by certified mail, within fourteen days of such suspension or revocation to all current clients and opposing attorneys as well as any judges presiding over any pending litigation. The respondent must also make arrangements for the disposition of any matters in his or her care in accordance with the wishes of his or her clients. Within sixty days of the suspension or revocation, the respondent must provide proof to the Bar that he or she has completed said actions.

If the panel has voted to delay the effective date of the sanction to a future date, please announce: "The respondent will not accept any new clients between now and [effective date of sanction]. The respondent shall comply with the requirements of 13-29 and notice all clients, judges, and opposing counsel that she/he is currently representing."

PRE-HEARING

The Chair or Vice Chair may issue orders and make rulings in cases prior to the hearing before the Board. Pre-Hearing orders and rulings aid in the orderly flow of the Disciplinary Proceedings. Pre-Hearing rulings by the Chair or Vice Chair may be subsequently overruled by a majority of the Panel hearing the matter.

Prehearing Orders (Paragraph 13-18.E)

Prior to the hearing before the Board in Misconduct cases, the Chair may enter an order designed to facilitate the orderly conduct of the hearing. The order may be entered, *sua sponte* by the Chair or upon motion of either Respondent or Bar Counsel. The order may establish time limits, direct the parties to exchange exhibit lists with copies to the Clerk of the Disciplinary System, encourage the parties to confer and discuss stipulations and direct the parties to exchange witness lists with copies to the Clerk of the Disciplinary System. The parties may file the copies of their objections and exhibit lists with the Clerk of the Disciplinary System via hand-delivery, first class mail, or electronically via email to clerk@vsb.org.

Agreed Dispositions (Paragraph 13-6.H)

Whenever the parties are in agreement as to the disposition of a Disciplinary Proceeding, they may submit a proposed Agreed Disposition to a Panel consisting of 5 members of the Board selected by the Clerk of the Disciplinary System on behalf of the Chair. The hearing on the proposed Agreed Disposition is conducted via telephonic conference call and is transcribed by a duly sworn court reporter. Before presenting the proposed Agreed Disposition to the Panel, Bar Counsel confirms that the Respondent was informed of both the agreement and the sanction. Following Bar Counsel's presentation, the Respondent or Respondent's counsel is given an opportunity to address the Panel. Once the Agreed Disposition has been presented, Panel members may question the parties regarding the proposed agreement. The Panel then deliberates in a private session. If the proposed Agreed Disposition is accepted by a majority of the Panel, it is adopted by order of the Board.

Rejection of an Agreed Disposition (Paragraph 13-6.H)

If the proposed Agreed Disposition is rejected by the Panel, the Disciplinary Proceeding will be set for a full hearing before another Panel of the Board at the earliest possible date. No member of the Panel that considered the proposed Agreed Disposition may be assigned to the Panel which hears the Disciplinary Proceeding.

Pre-Hearing Conference Call (Paragraph 13-6.G.5)

The Chair or Vice Chair may conduct a pre-hearing conference call with the parties in order to rule on any non-dispositive matters and any dispositive matters where all the parties are in agreement. Rulings made by the Chair or Vice Chair on non-dispositive matters may be overruled by a majority vote of the Panel which actually hears the matter.

Pre-Hearing Issues and Rulings (Paragraph 13-6.G.4 and 5)

Motions. Either party may file notice of a pre-trial motion with the Clerk of the Disciplinary System (i.e. a motion to quash). Such motions are heard by the Chair or Vice Chair. Rulings made by the Chair or Vice Chair are subject to being overruled by a majority of the Panel which actually hears the matter.

Exhibits. The Chair or Vice Chair may rule on the admissibility of exhibits submitted by the parties pursuant to the Pre-Hearing Order. Evidentiary rulings shall be made favoring receipt into evidence of all reasonably probative evidence to satisfy the ends of justice. The ruling by the Chair or one of the Vice Chairs is subject to being overruled by a majority of the Panel which actually hears the matter.

Cameras in the Courtroom. The issue of cameras in the courtroom is not covered in the Rules. However, the Board adopted a policy which precludes cameras or videotaping by any device in the courtroom because the Board deems it disruptive to the proceedings. The Board's policy does allow audio recordings in the courtroom. The Clerk typically receives requests from members of the media in high profile cases by letter or email prior to the hearing. If warranted, the Chair may issue an order in accordance with the Board's policy and direct the Clerk's Office to inform the members of the press.

Continuances. (Paragraph 13-18.F) Absent exceptional circumstances, a request to continue a matter that has been scheduled for a hearing will not be granted unless, in the judgment of the Chair, the continuance is necessary to prevent injustice. A request to continue due to a scheduling conflict on the part of Respondent or Respondent's counsel will not be granted unless the request is made in writing within 14 days after mailing of a notice of hearing. All continuance requests must be filed with the Clerk.

Change in Composition of Board Hearing Panel. (Paragraph 13-18.Q) Whenever a hearing has been adjourned prior to final disposition of the matter and one or more members of the Panel are unavailable on the next scheduled date, the hearing may still proceed. If the hearing proceeds with a Panel of less than 5 members, then a transcript of the subsequent proceedings must be furnished to the absent member. In the alternative, another Board member may be substituted for an absent member. The substituting Board member must be furnished with a transcript of the prior proceedings in the matter.

POST-HEARING

Disciplinary Board Orders (Paragraph 13-18.P)

The Board has jurisdiction to enter the various types of summary and other orders referenced below, examples of which are included in the appendices of this Handbook. The Clerk has authority to assess costs.

Orders, Findings and Opinions (Paragraph 13-18. and see Appendices 2 and 3). Immediately after a Misconduct hearing is concluded, the Board must issue a Summary Order summarizing and embodying the Board's decision. Thereafter, the Board must issue a detailed Memorandum Order, prepared by a member of the Board[12] for the signature of the Chair or the Chair's designee. Dissenting opinions may be filed.

[12] The Clerk's Office pre-assigns a Board member to prepare the Memorandum Order prior to the hearing. The Board Chair is usually, but not always, exempt from authoring the Memorandum Order. Lay members are not assigned order writing responsibilities.

The Memorandum Order, an example of which is found in the appendices of this Handbook, must include, inter alia, the Board's findings of fact, pretrial rulings (***which are not subject to being renewed at the hearing)***, rulings from the bench during the Misconduct hearing, a rule by rule recitation and discussion of each violation found or not found by the Board, the effective date of each sanction, each dismissal or withdrawal of alleged rule violations, and the respondent attorney's Paragraph 13-29 obligations (Duties of Disbarred or Suspended Respondent).

Prompt preparation and circulation to Chair/Panel/Clerk. Within seven (7) days of the hearing, the Order writer shall email by "bcc" (blind carbon copy) a draft Memorandum Order to all panel members for review and comment. The subject line of the emails circulating the Order must state "Confidential, Deliberative and Privileged." The panel members will then have seven (7) days within which to provide suggested revisions to the Order writer. The Order writer will make any necessary revisions and will forward the Order to the Chair for final approval and submission to the Clerk. The Clerk will review and return the Order to the Chair for entry.

Reconsideration of a Board Determination (Paragraph 13-18.R)

A request for reconsideration or modification of Board action following a Misconduct hearing must be filed with the Clerk within 10 days following the hearing. Such a motion cannot be granted except to prevent manifest injustice on the alternative grounds of (1) illness, injury or accident which prevented the Respondent or a witness from attending the hearing and which could not have been made known to the Board within a reasonable time prior to the hearing, or (2) after discovered evidence. If the request is timely, the Clerk's Office must forward the request to the panel, which then deliberates privately by conference call. The panel may deny the motion without response from Bar Counsel; however, relief cannot be granted without giving Bar Counsel the opportunity to oppose the motion in writing. If the motion or relief is not granted, the Board must enter an Order disposing of the motion.

Cost Assessment Review (Paragraph 13-9.E)

The Board typically receives two types of requests regarding costs assessed by the Clerk, (1) review of costs assessed by the Clerk's Office and (2) deferred payment plans to pay costs. Those requests are discussed below.

Review of Costs Assessment. A Respondent may petition the Board for review within 10 days of the notice assessing costs if he or she disagrees with the costs assessed by the Clerk as defined under paragraph 13-1, or if the payment of costs would create a hardship. The Chair, upon written request set forth in Respondent's petition, may grant a hearing on the costs issue. Bar counsel who prosecuted the case represents the Bar in these proceedings. The decision of the Chair shall be final and non-appealable.

Deferred Payment Plans. A Respondent may also petition the Board and allege that "the immediate payment [of costs] would create a hardship." Implicit in Paragraph 13-9(E) is the Board's authority to work out a payment plan with a Respondent if the immediate payment of costs would be a hardship. The Board routinely grants such requests in appropriate hardship cases memorialized in an order entered by the Board authorizing the deferred payment of costs, including the frequency and amount due each month, amortized over a 12 month period.

List of Appendices

g. Overview of a Prehearing Conference

1. Prehearing Order

2. Prehearing Agenda

Adopted: July 14, 2016

VSB DISCIPLINARY BOARD

AGENDA FOR INTERIM SUSPENSION HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent_____, VSB #_____

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. **[NOTE: If the Respondent is not present, request the VSB clerk to go to the ball/foyer, call the Respondent's name three times, and report whether there was a response.]**

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements -

A. This matter comes on to be heard upon the Virginia State Bar's Notice of Noncompliance and Request for Interim Suspension alleging that the Respondent failed to comply with the Bar's Summons and Subpoena Duces Tecum duly served on him and requesting the interim suspension of the Respondent's license until the Respondent complies, or a determination is made whether the failure to comply violated the Disciplinary Rules.

B. [The Respondent has timely petitioned for a hearing. In this hearing the Respondent has the burden of proving good cause by clear and convincing evidence for the alleged failure to comply.]

VII. **Order of Hearing:***

A. Are the Bar and the Respondent ready?

B. Respondent will proceed.

C. VSB will proceed.

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• Oath to witnesses: Do you swear or affirm that the testimony you give will be the truth?

D. Rebuttal by Respondent?

E. Closing arguments.

F. Board will retire to closed session for deliberation.

G. Board reconvenes and announces that based on the evidence and argument of VSB and Respondent:

[(1) Respondent has shown good cause for the alleged noncompliance with the VSB's Summons and Subpoena Duces Tecum, and VSB's Notice is dismissed.]

OR

[(2) Respondent has failed to show good cause for the alleged noncompliance with the VSB's Summons and Subpoena Duces Tecum, and accordingly, the Board ORDERS that effective this date the Respondent's Virginia license to practice law be and hereby is SUSPENDED until such time as the Respondent fully complies with the Bar's Summons and Subpoena Duces Tecum.]

VIII. Adjournment.

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VSB DISCIPLINARY BOARD

AGENDA FOR HEARING ON APPEAL
OF DISTRICT COMMITTEE DETERMINATION

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. [**NOTE: If the Respondent is not present, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. The Board has the record from the _____ District Committee, consisting of the charge of misconduct, the transcript of the hearing, all exhibits received or refused by the District Committee, the District Committee Determination, and all briefs, memoranda, or other papers filed with the District Committee [any supplemental material permitted by Board]) and also has the brief(s) filed by [the Respondent] [counsel for the Respondent], and Bar Counsel.

1. Have the Parties examined the record?

2. Does either Party contend that the record is either incomplete or contains any extraneous matter?

B. The purpose of this hearing is to ascertain whether there is substantial evidence in the record upon which the District Committee of the _____ District could reasonably have found as it did. The Respondent bears the burden of persuasion.

C. Oral argument will be permitted. [The Respondent] [Counsel for the Respondent] may present opening argument followed by Bar Counsel, and then [the Respondent] [counsel for the Respondent] may present rebuttal argument.

D. The Board will retire following argument to determine whether it will -

1. dismiss the charges of misconduct based on a finding that the District Committee's determination is contrary to the law or is not supported by substantial evidence; or

2. affirm the District Committee's determination, in which instance the Board may impose the same or any lesser sanction as that imposed by the District Committee; or

3. reverse the decision of the District Committee and remand the charges of misconduct to the District Committee for further proceedings.

VII. Are the Respondent and Bar Counsel ready to proceed? The Board will now proceed to hear argument.

VIII. The hearing will be in recess while the Board withdraws for its deliberations.

IX. The Board reconvenes the hearing following its deliberations and announces its decision [see VI D above].

X. [If the Board affirms the District Committee, argument is allowed on whether to impose the same or any lesser sanction as that imposed by the District Committee. The Board then recesses for its sanction determination, which it thereafter announces upon reconvening.]

XI. Adjournment.

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VSB DISCIPLINARY BOARD

AGENDA FOR TERMINATING IMPAIRMENT SUSPENSION HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel (guardian *ad litem*) _____]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. The purpose of this hearing is to determine whether to terminate a Suspension for Impairment, which is defined as "any physical or mental condition that materially impairs the fitness of an Attorney to practice law."

B. The burden of proving the termination of a Suspension of Impairment rests with the Respondent. The burden is proof by clear and convincing evidence.

C. The public and the witnesses will be excluded throughout this hearing when not testifying. **[NOTE: Direct witnesses to withdraw from the hearing room to wait outside until called to testify.]**

D. Are Bar Counsel and the Respondent [and/or the Respondent's counsel/guardian *ad litem*] familiar with the procedure that will be followed in this hearing? **[NOTE: If either Bar Counsel or the Respondent or counsel/guardian *ad litem* answers no, proceed with subparagraphs (1) through (5):]**

(1) The procedure consists of (i) opening statements, (ii) presentation of the Respondent's evidence, subject to Bar Counsel's cross-examination of witnesses, (iii) presentation of Bar Counsel's evidence, subject to the Respondent's cross-examination of witnesses, (iv) Respondent's rebuttal evidence, subject to the Bar Counsel's cross-examination of witnesses, (v) the Respondent's closing argument, (vi) Bar Counsel's closing argument, and (vii) the Respondent's rebuttal closing argument. The members of the Board may ask questions of witnesses.

(2) The Board will retire to deliberate following the conclusion of the evidence and argument of counsel to determine whether the Respondent has met the burden of proof to lift the Suspension by clear and convincing evidence.

(3) The Board will reconvene in open session and announce its decision.

(4) The rules of evidence are not strictly applied in disciplinary hearings.

(5) The Board's Chair will rule on motion and objections, subject to being overruled by a majority of the remaining Board members.

VII. The Board will now proceed with the hearing. Bar Counsel ready? Respondent/Guardian *ad litem* ready?

VIII. Opening statements. By Respondent/Guardian *ad litem.* By Bar Counsel

IX. Evidentiary presentations. **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth?]**

X. Closing Argument. By Respondent/Guardian *ad litem.* By Bar Counsel.

XI. Hearing will be in recess while the Board recesses for its deliberations.

XII. The Board reconvenes following its deliberations and announces its decision, as follows:

A. Based on the evidence presented, and consideration of argument of counsel [and the guardian *ad litem*], the Board finds that the Respondent continues to have an Impairment and therefore ORDERS that the Respondent's license to practice law in the Commonwealth of Virginia REMAINS SUSPENDED indefinitely.

OR

B. Based on the evidence presented, and considering argument of counsel [and the guardian *ad litem*], the Board finds that the Respondent does not have an Impairment and ORDERS that the Suspension of Respondent's license be and hereby is TERMINATED effective _____.

XIII. Adjournment.

VSB DISCIPLINARY BOARD

AGENDA FOR IMPAIRMENT HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel (guardian *ad litem*) _____] [is not present, but is represented by (his) (her) guardian *ad litem* _____]. [**NOTE: If the Respondent is not present and counsel, or the guardian *ad litem*, does not represent that the Respondent has chosen to be absent, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. The purpose of this hearing is to determine whether the Respondent has an Impairment, which is defined as "any physical or mental condition that materially impairs the fitness of an Attorney to practice law."

B. The burden of proving an Impairment rests with the Virginia State Bar. The burden is proof by clear and convincing evidence.

C. If this Board determines that an Impairment exists, it will enter an Order of Suspension which will suspend the Respondent's license to practice law indefinitely.

D. The public and the witnesses will be excluded throughout this hearing when not testifying. **[<u>NOTE</u>: Direct witnesses to withdraw from the hearing room to wait outside until called to testify.]**

E. Are Bar Counsel and the Respondent [and/or the Respondent's counsel/guardian *ad litem*] familiar with the procedure that will be followed in this hearing? **[<u>NOTE</u>: If either Bar Counsel or the Respondent or counsel/guardian *ad litem* answers no, proceed with subparagraphs (1) through (5):]**

(1) The procedure consists of (i) opening statements, (ii) presentation of Bar Counsel's evidence, subject to the Respondent's cross-examination of witnesses, (iii) presentation of the Respondent's evidence, subject to Bar Counsel's cross-examination of witnesses, (iv) Bar Counsel's rebuttal evidence, subject to the

Respondent's cross-examination of witnesses, (v) Bar Counsel's closing argument, (vi) the Respondent's closing argument, and (vii) Bar Counsel's rebuttal closing argument. The members of the Board may ask questions of witnesses.

(2) The Board will retire to deliberate following the conclusion of the evidence and argument of counsel to determine whether the Impairment alleged has been proven by clear and convincing evidence, and, if proven, will enter an Order of suspension.

(3) The Board will reconvene in open session and announce its decision.

(4) The rules of evidence are not strictly applied in disciplinary hearings.

(5) The Board's Chair will rule on motion and objections, subject to being overruled by a majority of the remaining Board members.

VII. The Board will now proceed with the hearing. Bar Counsel ready? Respondent/Guardian *ad litem* ready?

VIII. Opening statements. By Bar Counsel By Respondent/Guardian *ad litem.*

IX. Evidentiary presentations. **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth?] [NOTE: Standard for Respondent's motion to strike VSB's evidence: Whether it is conclusively apparent that VSB's evidence and inferences fairly drawn, viewed in the light most favorable to VSB, are not sufficient under any set of circumstances to establish the charges of impairment.]**

X. Closing Argument. By Bar Counsel. By Respondent/Guardian *ad litem.*

XI. Hearing will be in recess while the Board recesses for its deliberations.

XII. The Board reconvenes following its deliberations and announces its decision, as follows:

A. Based on the evidence presented, and consideration of argument of counsel [and the guardian *ad litem*], the Board finds that the Respondent has an Impairment and therefore ORDERS that effective this date the Respondent's license to practice law in the Commonwealth of Virginia be and hereby is SUSPENDED indefinitely.

OR

B. Based on the evidence presented, and considering argument of counsel [and the guardian *ad litem*], the Board finds that the Respondent does not have an Impairment.

XIII. Adjournment.

VSB DISCIPLINARY BOARD

AGENDA FOR IMPAIRMENT HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel (guardian *ad litem*) _____] [is not present, but is represented by (his) (her) guardian *ad litem* _____]. [**NOTE: If the Respondent is not present and counsel, or the guardian *ad litem*, does not represent that the Respondent has chosen to be absent, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. The purpose of this hearing is to determine whether the Respondent has an Impairment, which is defined as "any physical or mental condition that materially impairs the fitness of an Attorney to practice law."

B. The burden of proving an Impairment rests with the Virginia State Bar. The burden is proof by clear and convincing evidence.

C. If this Board determines that an Impairment exists, it will enter an Order of Suspension which will suspend the Respondent's license to practice law indefinitely.

E. Are Bar Counsel and the Respondent [and/or the Respondent's counsel/guardian *ad litem*] familiar with the procedure that will be followed in this hearing? **[<u>NOTE</u>: If either Bar Counsel or the Respondent or counsel/guardian *ad litem* answers no, proceed with subparagraphs (1) through (5):]**

(1) The procedure consists of (i) opening statements, (ii) presentation of Bar Counsel's evidence, subject to the Respondent's cross-examination of witnesses, (iii) presentation of the Respondent's evidence, subject to Bar Counsel's cross-examination of witnesses, (iv) Bar Counsel's rebuttal evidence, subject to the Respondent's cross-examination of witnesses, (v) Bar Counsel's closing argument, (vi) the Respondent's closing argument, and (vii) Bar Counsel's rebuttal closing argument. The members of the Board may ask questions of witnesses.

(2) The Board will retire to deliberate following the conclusion of the evidence and argument of counsel to determine whether the Impairment alleged has been proven by clear and convincing evidence, and, if proven, will enter an Order of suspension.

(3) The Board will reconvene in open session and announce its decision.

(4) The rules of evidence are not strictly applied in disciplinary hearings.

(5) The Board's Chair will rule on motion and objections, subject to being overruled by a majority of the remaining Board members.

VII. The Board will now proceed with the hearing. Bar Counsel ready? Respondent/Guardian *ad litem* ready?

VIII. Opening statements. By Bar Counsel By Respondent/Guardian *ad litem.*

IX. Evidentiary presentations. **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth?] [NOTE: Standard for Respondent's motion to strike VSB's evidence: Whether it is conclusively apparent that VSB's evidence and inferences fairly drawn, viewed in the light most favorable to VSB, are not sufficient under any set of circumstances to establish the charges of impairment.]**

X. Closing Argument. By Bar Counsel. By Respondent/Guardian *ad litem.*

XI. Hearing will be in recess while the Board recesses for its deliberations.

XII. The Board reconvenes following its deliberations and announces its decision, as follows:

A. Based on the evidence presented, and consideration of argument of counsel [and the guardian *ad litem*], the Board finds that the Respondent has an Impairment and therefore ORDERS that effective this date the Respondent's license to practice law in the Commonwealth of Virginia be and hereby is SUSPENDED indefinitely.

OR

B. Based on the evidence presented, and considering argument of counsel [and the guardian *ad litem*], the Board finds that the Respondent does not have an Impairment.

XIII. Adjournment.

Respondent: _____

Respondent=s Counsel:

Bar Counsel: _____

Court Reporter:

VSB Docket No(s):

Date:

NONPARTICIPATION QUESTIONNAIRE

1. When did you file your answer (if applicable)?

2. When did you file your list of witnesses and exhibits?

3. Have you filed any objections to the other side's witnesses or exhibits and, if so, attach copies of your objections and the grounds therefor to this response?

4. Have any stipulations been reached and if not, why not?

5. What is the status of any negotiations regarding a proposed agreed disposition?

6. Are you ready to proceed to hearing on _____?

7. Do you have any prehearing motions you plan on raising? If so, attach said motions and any authorities in support and state when you filed said motion and authorities.

Respondent: _____
Respondent=s Counsel:
Bar Counsel: _____
Court Reporter:
VSB Docket No(s):
Date:

CRITERIA FOR NONPARTICIPATION IN CONFERENCE CALL

1. Health reasons of party, counsel or their immediate family which would make it impossible, not just inconvenient, to appear.

2. A previously scheduled vacation outside the country or someplace where counsel would not be available to a phone.

3. A jury trial or hearing before an appellate court. Hearings before a lower court or a deposition should under most circumstances be able to be adjourned for the time such a call would take.

4. In all other cases, submit in writing the grounds for non-participation and the responses to the nonparticipation questionnaire for consideration by the presiding officer.

VSB DISCIPLINARY BOARD
SHOW CAUSE
HEARING AGENDA

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene show cause hearing in the matter of Respondent _____, VSB Docket No._____.

A. The Disciplinary Board has ordered the Respondent to show cause why his/her license should not be (further) suspended or revoked for . . . . . .

B. The Respondent shall have the burden of showing by clear and convincing evidence that . . . . . .

C. The procedures to be followed during the show cause hearing are as follows:

1. Brief opening statements by the Respondent, or the Respondent's counsel, and Bar Counsel are permitted but not required.
2. The Respondent may present witnesses and other evidence in support of his or her case. Bar Counsel shall be afforded the opportunity to cross-examine the Respondent's witnesses and to challenge any evidence introduced on the Respondent's behalf. Board members may also examine witnesses offered by the Respondent.
3. Bar Counsel shall be afforded an opportunity to present witnesses and other evidence. The Respondent shall be afforded an opportunity to cross-examine the bar's witnesses and to challenge any evidence introduced on behalf of the bar. Board members may also examine witnesses offered on behalf of the bar.
4. The Respondent may rebut the bar's evidence.
5. The Respondent, or the Respondent's counsel, may present closing argument.
6. Bar Counsel may then present closing argument.
7. The Respondent may present rebuttal argument.

D. The dispositions available to the Board following the show cause hearing are as follows:

1. If the Respondent has shown cause why his/her license should not be (further) suspended or revoked, the Board shall conclude the show cause proceeding without imposing any discipline.
2. If the Board concludes that the Respondent has failed to present clear and convincing evidence of compliance, the Board shall impose discipline and (further) suspend or revoke the Respondent's license to practice law.

III. The Virginia State Bar is represented by _____. The Respondent [is present, along with his or her counsel, _____] [is not present, in person or by counsel]. **NOTE: If the Respondent is not present, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response.**

IV. The members of the Disciplinary Board are: . . . . /will identify themselves for the record.

V. Each panel member will state on the record whether he or she has any business or financial interest or any personal bias that would impair, or could be perceived to impair, his or her ability to hear this matter fairly and impartially.

VI. Is the Virginia State Bar ready? Is the Respondent ready?

VII. Is there a motion to exclude witnesses?

VIII. Opening statements

IX. Evidentiary presentations. [Oath to witness: Do you swear or affirm that the testimony you give will be the truth?]

X. Closing Arguments.

XI. Hearing will be in recess while the Board withdraws to deliberate.

XII. Based on the testimony of the witnesses and the exhibits introduced into evidence, and having considered the argument of counsel (and the Respondent), the Board finds _____.

XIII. Adjournment.

VSB DISCIPLINARY BOARD

AGENDA FOR ADJUDICATION OF CRIME HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. [**NOTE: If the Respondent is not present, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. This matter comes on to be heard upon the Virginia State Bar's Rule to Show Cause and Order of Summary Suspension and Hearing. . The Board takes judicial notice of the Board's Rule to Show Cause and Order of Summary Suspension and Hearing and the attachments thereto, and of the Clerk's notice letter, and receives them in evidence collectively as Board Exhibit 1.

B. The purpose of this hearing is to provide the Respondent an opportunity to prove by clear and convincing evidence that his or her License should not be further suspended or revoked.

C. If the Board finds by clear and convincing evidence that the Respondent has been found guilty or convicted of a Crime by a Judge or Jury, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt, the Rules provide that the Board shall either(a) continue the Respondent's suspension, or issue an order of suspension for a period not exceeding five years or (b) issue an order of revocation.

D. Part 6, § IV, Para. 13-1 of the Rules of the Supreme Court of Virginia defines "Crime" as (i) any offense declared to be a felony by federal or state law, (ii) any other offense, federal or state, involving theft, fraud, forgery, extortion, bribery, or perjury, or (iii) an attempt, solicitation, or conspiracy to commit any of the foregoing.

E. Are Bar Counsel and the Respondent familiar with the procedure that will be followed in this hearing? **[NOTE: If either Bar Counsel or the Respondent answers no, proceed with subparagraphs (1) through (8):]**

(1) The procedure consists of (i) opening statements by Respondent and the Bar Counsel, (ii) presentation of Respondent's evidence, subject to Bar Counsel's cross-examination of witnesses, (iii) presentation of VSB's evidence, subject to the Respondent's cross-examination of witnesses, (iv) Respondent's rebuttal evidence, subject toVSB's cross-examination of witnesses, (v) Respondent's closing argument, (vi)Bar Counsel's closing argument, and (vii) Respondent's rebuttal argument. The members of the Board may ask questions of witnesses.

(2) The Board will retire to deliberate following the conclusion of the evidence and argument of counsel to determine whether the Respondent has proved by clear and convincing evidence either that he or she was not convicted of a crime/did not plead guilty to a crime/ or did not a plea wherein the facts found by the court would justify a finding of guilt of a Crime]

(3) The Board will reconvene in open session and announce its decision.

(4) The Board will then hear evidence in mitigation or aggravation to determine the sanction to be imposed.

(5) The Board will retire to deliberate following the conclusion of evidence.

(6) The Board will reconvene in open session and announce the sanction imposed.

(7) The rules of evidence are not strictly applied.

(8) The Board's Chair will rule on motions and objections, subject to being overruled by a majority of the remaining Board members.

VII. The Board will now proceed on the Rule to Show Cause. Respondent ready? VSB ready?

VIII. Exclusion of witnesses? **[NOTE: If witnesses are excluded, admonish them (1) to remain outside the hearing room until called, and (2) not to discuss his/her testimony with other witnesses, any spectator, or the Respondent, either before or after testifying, during the course of the hearing.]**

IX. Opening statements. By Respondent. By Bar Counsel.

X. Evidentiary presentations. **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth?] [NOTE: if the Respondent does not contest the conviction of or plea to a Crime, the hearing can proceed directly to the sanction to be imposed.]**

XI. Closing Argument. By Respondent. By Bar Counsel.

XII. Hearing will be in recess while the Board withdraws for its deliberations.

XIII. The Board reconvenes following its deliberations and announces its decision, as follows:

Based on the evidence presented, and upon consideration of argument of counsel [Respondent], the Board finds by clear and convincing evidence that the Respondent [has] [has not] proven by clear and convincing evidence that he or she has (not) been found guilty of or convicted of a Crime [has] [has not] entered a plea wherein the facts found by the court would justify a finding of guilt of a Crime] and why his (or her) license should (not) be further suspended or revoked.

XIV. The Board will now hear such evidence and argument as counsel [Respondent] wish to present in aggravation or mitigation. [**NOTE: If not stated by Bar Counsel, inquire whether the Respondent has a disciplinary record, in Virginia or elsewhere.]**

XV. Hearing will be in recess while the board withdraws for deliberation to determine whether to impose a further suspension or a revocation of the Respondent's license to practice law in Virginia and, if so, the effective date thereof.

XVI. The Board reconvenes following its deliberation and announces its decision, as follows:

Based on the Crime(s) proved, the evidence presented in aggravation and mitigation, and argument of counsel [Respondent], the Board imposes the following sanction: [a continuation of the Respondent's suspension imposed on _____] [suspension of the Respondent's license to practice law in the Commonwealth of Virginia for a period of (____months) (____ years), effective _____] [revocation of the Respondent's license to practice law in the Commonwealth of Virginia, effective _____].

XVII. Adjournment

VSB DISCIPLINARY BOARD

AGENDA FOR PARAGRAPH 13-29 HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. [**NOTE: If the Respondent is not present, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. This proceeding comes on to be heard upon the Virginia State Bar's Notice of Show Cause Hearing for Failure to Comply with ¶13-29 and the attached Petition for Rule to Show Cause and the Rule to Show Cause issued on _____, 20__. The Board takes judicial notice of these documents and receives them in evidence collectively as Board [VSB?] Exhibit 1.

B. In this proceeding the Respondent bears the burden of showing cause, by clear and convincing evidence, why (his) (her) license to practice law in Virginia should not be (revoked) (further suspended) for the alleged failure to comply with Part Six, § IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia.

C. The Board will hear evidence and argument to determine whether to (revoke) (further suspend) the Respondent's license to practice law in Virginia.

VII. VSB ready? Respondent ready?

VIII. Exclusion of witnesses? **[NOTE: If witnesses are excluded, admonish them (1) to remain outside the hearing room until called, and (2) not to discuss his/her testimony with other witnesses, any spectator, or the Respondent, either before or after testifying, during the course of the hearing.]**

IX. Opening statements. By Respondent. By Bar Counsel.

X. Evidentiary presentations.[1] **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth**?]

XI. Closing Argument. By Respondent. By Bar Counsel.

XII. Hearing will be in recess while the Board retires to closed session to determine whether Respondent has proven by clear and convincing evidence why his (her) license to practice law should not be further suspended or revoked and, if so, the effective date thereof.[2]

XIII. [Reconvene] Based on the Respondent's violation of Paragraph 13-29, the evidence presented, and argument of counsel, the Board hereby finds that Respondent has proven (failed to prove) that his (her) license to practice law in the Commonwealth of Virginia should (not) be further suspended or revoked and [revokes] [further suspends for a period of _____] the Respondent's license to practice law in the Commonwealth of Virginia effective _____.

XIV. Adjournment.

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[1] If the Board during the hearing believes that the Respondent may then have an impairment, the Board may postpone the hearing and initiate an impairment proceeding. Rules PT 6, § IV, Para. 13(6)(b).

[2] A Respondent who intends to rely upon evidence of an impairment in mitigation of misconduct shall, absent good cause shown, give notice to Bar Counsel and the Board not less than 14 days before the hearing of his/her intention to do so. Rules PT 6, § IV, Para. 13-23(A).

VSB DISCIPLINARY BOARD

AGENDA FOR IMPOSITION OF ALTERNATIVE SANCTION OF PRIOR ORDER

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. [**NOTE: If the Respondent is not present, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. In "In the Matter of _____," VSB Docket No. _____, the Disciplinary Board entered an order on _____, imposing a [public reprimand] [suspension for less than one year] with terms and an alternative sanction of a [suspension for _____ months] [revocation] if the Respondent violated one or more terms of the [public reprimand] [suspension]. Bar Counsel has determined that Respondent has failed to comply with the terms of the Order and issued a Notice of Show Cause Hearing for Terms Failure. The Board takes judicial notice of [*relevant notice and pleadings* – Clerk's Notice of Hearing and Rule to Show Cause dated __, the Rule to Show Cause and the Board's order entered ___, etc.], and receives them in evidence collectively as Board Exhibit 1.

B. In this proceeding, the Respondent bears the burden of proof to show his/her compliance with the terms by clear and convincing evidence and to show cause why the alternative disposition should not be imposed.

C. If the Respondent fails to show his/her compliance, Part Six, Section IV, Paragraph 13-18(O), provides that the alternative sanction shall be imposed.

VII. **Order of Hearing:**[*]

A. Are the Bar and the Respondent ready?

B. Respondent will proceed.

C. VSB will proceed.

D. Rebuttal by Respondent?

E. Closing arguments.

F. Board will retire to closed session for deliberation.

G. Board reconvenes and announces that based on the evidence and argument of VSB and Respondent:

(1) Respondent has shown compliance with the terms of the Board's order of _____, 20__, and the Virginia State Bar's notice to show cause is dismissed.

OR

(2) Respondent has failed to show compliance with the Board's order of _____, 20__, and accordingly, the Board ORDERS that effective this date the Respondent's Virginia license to practice law be and hereby is [SUSPENDED for a period of _____ months] [REVOKED].

VIII. Adjournment.

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[*] Oath to witnesses: Do you swear or affirm that the testimony you give will be the truth?

Respondent:_____

Respondent's Counsel: _____

Bar Counsel: _____

Court Reporter: _____

VSB Docket No(s): _____

Date:_____

AGENDA FOR PRE-HEARING CONFERENCE

I. Convene pre-hearing conference In re_____

VSB Docket No. _____

A. Swear court reporter [1], or, if none, announce the hearing is being recorded.

B. Identification of participants:

Bar Counsel_____

Respondent/Counsel_____

Clerk's Office_____

C. Identify presiding officer and affirm that he/she does not have any personal or financial interest that would impair, or reasonably could be perceived to impair, his/her ability to be impartial.

II. Checklist.

A. Has a timely answer been filed?

B. [If the Subcommittee considered an Investigative Report when it set the Complaint for hearing before the District Committee or to certify the Complaint to the Board] Has Bar Counsel furnished a copy of the Investigative Report to the Respondent? [Pt. 6, § IV, Para. 13D] [2]

C. Have the witness lists and exhibits been timely filed under the Pre-Hearing Order?

---

[1] Do you swear or affirm that you will well and truly record the incidents of this pre-hearing conference call?

[2] Unless attached to or referenced in the Investigative Report, Bar Counsel is not required to produce any information/document obtained in confidence from any law enforcement or disciplinary agency or document protected by attorney-client privilege or work product doctrine.

D. Are there any objections to the witnesses or exhibits and if so, have the objections been timely filed?

(1) Unless the Respondent has filed an objection to the Bar's pre-filed exhibits, they will be admitted into evidence at the hearing.

(2) If the Respondent has not pre-filed exhibits and a witness list, exhibits and witnesses will not be received at the hearing except for good cause shown.

E. What is the status of proposed stipulations and what can be done to facilitate same?

F. Are there any prehearing motions to be heard?

G. Is there any reason the matter can't go forward to hearing on the date scheduled?

H. What is the status of any proposed agreed disposition?

I. Can the matter be heard in one day and do any special arrangements need to be made for the presentment of the case?

J. Opening statements shall be brief and confined to the parties expectation of evidence to be presented and shall not be used for purposes of argument or testimony.

VSB/CIRCUIT COURT

AGENDA FOR TELEPHONIC HEARING ON MOTION

I. Identification of court reporter and oath: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding. (If none, announce recording of the hearing.)

II. Convene hearing in the matter of the Respondent _____, Case No #_____, .

III. Identification of persons participating –

A. Respondent [and/or counsel for Respondent].

B. Bar Counsel.

C. Clerk's office personnel.

D. Chief Judge (or Panel)

IV. State on the record that the Chief Judge does not have any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

V. The purpose of this proceeding is to hear the _____ (petition) (motion) for _____ in Case No. _____.

VI. Presentation:

A. Respondent/Bar Counsel (Party that brought the motion)

B. Bar Counsel/Respondent (Party responding to the motion)

C. Questions from Judge.

VII. Judge (a) announces decision, or (b) announces the matter is taken under advisement with order to issue shortly.

VIII. Adjourn

VSB DISCIPLINARY BOARD

AGENDA FOR CERTIFICATION OF SANCTION DETERMINATION

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. [**NOTE: If the Respondent is not present, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. This proceeding comes on a Certification for Sanction Determination from the [ ] District Committee as an alternative disposition for a Public Reprimand with Terms.

B. This proceeding will be conducted on the record consisting of the Public Reprimand with Terms issued by the [Subcommittee] [District Committee] of the [ ] District, the transcript of the District Committee show cause hearing, and the Certification for Sanction Determination.

C. The only evidence permitted in this proceeding will be in mitigation or aggravation with respect to compliance or certification.

D. Argument will be permitted at the close of the evidence with respect to the determination of a sanction.

E. The Board may impose a sanction of suspension, not exceeding five years, or a revocation of the Respondent's license to practice law in the Commonwealth of Virginia.

VII. Exclusion of witnesses? **[NOTE: If witnesses are excluded, admonish them (1) to remain outside the hearing room until called, and (2) not to discuss his/her**

testimony with other witnesses, any spectator, or the Respondent, either before or after testifying, during the course of the hearing.]

VIII. Opening statements.

IX. The Board will now hear such evidence as counsel wish to present in aggravation[1] or mitigation before determining an appropriate sanction.[2] **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth**?]

X. Closing argument.

XI. Hearing will be in recess while the Board withdraws for deliberation to determine an appropriate sanction and the effective date thereof.

XII. Based on the evidence presented in aggravation and in mitigation, and having considered the argument of counsel, the Board imposes the following sanction _____ _____, and states the effective date thereof as _____.

XIII. Adjournment.

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[1] If not stated by Bar Counsel, inquire whether the Respondent has a disciplinary record, in Virginia or elsewhere.

[2] If the Board during the hearing believes that the Respondent may then have an impairment, the Board may postpone the hearing and initiate an impairment proceeding. Rules Pt. 6, § IV, Para. 13-23(B). A Respondent who intends to rely upon evidence of an impairment in mitigation of misconduct shall, absent good cause shown, give notice to Bar Counsel and the Board not less than 14 days before the hearing of his/her intention to do so. Rules Pt. 6, § IV, Para. 13-23(A).

VSB DISCIPLINARY BOARD

AGENDA FOR TELEPHONIC HEARING ON COSTS* ASSESSED

I. Identification of court reporter and oath: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding. (If none, announce recording of the hearing.)

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. Identification of persons participating –

A. Respondent [and/or counsel for Respondent].

B. Bar Counsel.

C. Clerk's office personnel.

D. Chair, Disciplinary Board.

IV. State on the record that the Chair does not have any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

V. The purpose of this proceeding is to hear the Respondent's (petition) (motion) for review of the costs assessed in Case No. _____.

VI. Presentation:

A. Respondent

B. Bar Counsel

C. Questions from Chair.

VII. Chair (a) announces decision, or (b) announces the matter is taken under advisement with order to issue shortly.

VIII. Adjourn

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* "Costs" are defined as follows:
"Costs" means reasonable costs paid by the Bar to outside experts or consultants; reasonable travel and out-of-pocket expenses for witnesses; Court Reporter and transcript fees; copying, mailing, and required publication costs, and an administrative charge determined by Council.

VSB DISCIPLINARY BOARD

AGENDA FOR TELEPHONIC HEARING ON MOTION

I. Identification of court reporter and oath: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding. (If none, announce recording of the hearing.)

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. Identification of persons participating –

A. Respondent [and/or counsel for Respondent].

B. Bar Counsel.

C. Clerk's office personnel.

D. Chair, Disciplinary Board.(or Panel)

IV. State on the record that the Chair does not have any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

V. The purpose of this proceeding is to hear the _____ (petition) (motion) for _____ in Case No. _____.

VI. Presentation:

A. Respondent/Bar Counsel (Party that brought the motion)

B. Bar Counsel/Respondent (Party responding to the motion)

C. Questions from Chair.

VII. Chair (a) announces decision, or (b) announces the matter is taken under advisement with order to issue shortly. (Orders will be prepared by Clerk's office)

VIII. Adjourn

VSB DISCIPLINARY BOARD

AGENDA FOR EXPEDITED HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. [**NOTE: If the Respondent is not present, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. This is an expedited hearing pursuant to Para. 13-18(D) of the Rules based on the Bar's petition that the Respondent is engaging in misconduct which is likely to result in injury to, or loss of property of, one or more clients or any other person, and that the Respondent's continued practice of law poses an imminent danger to the public.

The purpose of this hearing is to determine whether the misconduct alleged in the Bar's Petition for Expedited Hearing is proved by clear and convincing evidence, and if so proved, to determine the sanction to be imposed on the Respondent. The misconduct alleged consists of a violation of Rule(s) _____.

B. Are the VSB and the Respondent familiar with the procedure that will be followed in this hearing? **[NOTE: If either the VSB or the Respondent answers no, proceed with subparagraphs (1) through (7)**:]

(1) The procedure for hearing will consist of (i) opening statements by Bar Counsel and Respondent, (ii) presentation of Bar Counsel's witnesses and other evidence, subject to Respondent's cross-examination and Board members' examination, (iii) presentation of Respondent's witnesses and other evidence, subject to Bar Counsel's cross examination and Board members' examination, (iv) Bar Counsel's rebuttal evidence, (v) Bar

Counsel's closing argument, (vi) Respondent's closing argument, and (vii) Bar Counsel's rebuttal closing argument. The members of the Board may ask questions of witnesses.

(2) At the conclusion of the VSB's evidence, or the conclusion of all evidence, the Respondent may move to strike the evidence as to any or all allegations of misconduct. **[NOTE: Standard for Respondent's motion to strike VSB's evidence: Whether it is conclusively apparent that VSB's evidence and inferences fairly drawn, viewed in the light most favorable to VSB, are not sufficient under any set of circumstances to establish the allegations of misconduct.]**

(3) The Board will deliberate following the conclusion of the evidence and argument of counsel on the allegations of misconduct that have not been struck. The Board will dismiss allegations of misconduct that have not been proved by clear and convincing evidence.

(4) If the Board finds that any allegations of misconduct have been proved by clear and convincing evidence, the Board will proceed to hear evidence of the Respondent's disciplinary record, in Virginia and elsewhere, and then Bar Counsel and the Respondent may present evidence and argument in aggravation and in mitigation of the misconduct found.

(5) The Board will then deliberate as to the sanction to be imposed for the misconduct found and the effective date of the sanction. One of the following sanctions will be imposed –

(i) Admonition, with or without Terms;

(ii) Public Reprimand, with or without Terms;

(iii) Suspension of the license of the Respondent for a stated period not exceeding five years;

(iv) Suspension of the license of the Respondent for stated period of one year or less, with or without term; or

(v) Revocation of the Respondent's license.

(6) The rules of evidence are not strictly applied in disciplinary hearings. Rulings on objections to evidence will favor the admission of all reasonably probative evidence to satisfy the ends of justice. The weight the Board gives such evidence will be based on the evidentiary foundation and the probable reliability thereof.

(7) The Board's chair will rule on motions and objections, subject to being overruled by a majority of the remaining Board members.

VII. The Board will now proceed on the Petition. VSB ready? Respondent ready?

VIII. Oath to translator: Do you swear or affirm that you will well and truly translate the testimony and other incidents of this proceeding from Spanish to English to the best of your ability?

IX. Exclusion of witnesses? **[NOTE: If witnesses are excluded, admonish them (1) to remain outside the hearing room until called, and (2) not to discuss his/her testimony with other witnesses, any spectator, or the Respondent, either before or after testifying, during the course of the hearing.]**

X. Opening statements. By Bar Counsel. By Respondent.

XI. Evidentiary presentations.[1] **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth**?]

XII. Closing Argument. By Bar Counsel. By Respondent.

XIII Hearing will be in recess while the Board withdraws for its deliberations on the allegations of misconduct in the Petition.

XIV. Based on the testimony of the witnesses and the exhibits introduced, and having considered the argument of counsel, the Board finds **[that the following violations of the Rules of Professional Conduct have been proved by clear and convincing evidence:] [that the following alleged violations of the Rules of Professional Conduct have not been proved by clear and convincing evidence**:]

XV. The Board will now hear such evidence and argument as counsel wish to present in aggravation of mitigation before determining an appropriate sanction.[2] **[NOTE: If not stated by Bar Counsel, inquire whether the Respondent has a disciplinary record, in Virginia or elsewhere**.]

XVI. Hearing will be in recess while the Board withdraws for deliberation to determine an appropriate sanction and the effective date thereof.

XVII. Based on the misconduct found, the evidence presented in aggravation and in mitigation, and having considered the argument of counsel, the Board imposes the following sanction _____, and states the effective date thereof as _____.

XVIII. Adjournment.

8/19/15

[1] If the Board during the hearing believes that the Respondent may then have an impairment, the Board may postpone the hearing and initiate an impairment proceeding. Rules Pt. 6, § IV, Para. 13-23(B).

[2] A Respondent who intends to rely upon evidence of an impairment in mitigation of misconduct shall, absent good cause shown, give notice to Bar Counsel and the Board not less than 14 days before the hearing of his/her intention to do so. Rules Pt. 6, § IV, Para. 13-23(A).

VSB DISCIPLINARY BOARD

AGENDA FOR EXPEDITED HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. [**NOTE: If the Respondent is not present, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. This is an expedited hearing pursuant to Para. 13-18(D) of the Rules based on the Bar's petition that the Respondent is engaging in misconduct which is likely to result in injury to, or loss of property of, one or more clients or any other person, and that the Respondent's continued practice of law poses an imminent danger to the public.

The purpose of this hearing is to determine whether the misconduct alleged in the Bar's Petition for Expedited Hearing is proved by clear and convincing evidence, and if so proved, to determine the sanction to be imposed on the Respondent. The misconduct alleged consists of a violation of Rule(s) _____.

B. Are the VSB and the Respondent familiar with the procedure that will be followed in this hearing? **[NOTE: If either the VSB or the Respondent answers no, proceed with subparagraphs (1) through (7)**:]

(1) The procedure for hearing will consist of (i) opening statements by Bar Counsel and Respondent, (ii) presentation of Bar Counsel's witnesses and other evidence, subject to Respondent's cross-examination and Board members' examination, (iii) presentation of Respondent's witnesses and other evidence, subject to Bar Counsel's cross examination and Board members' examination, (iv) Bar Counsel's rebuttal evidence, (v) Bar

Counsel's closing argument, (vi) Respondent's closing argument, and (vii) Bar Counsel's rebuttal closing argument. The members of the Board may ask questions of witnesses.

(2) At the conclusion of the VSB's evidence, or the conclusion of all evidence, the Respondent may move to strike the evidence as to any or all allegations of misconduct. **[NOTE: Standard for Respondent's motion to strike VSB's evidence: Whether it is conclusively apparent that VSB's evidence and inferences fairly drawn, viewed in the light most favorable to VSB, are not sufficient under any set of circumstances to establish the allegations of misconduct.]**

(3) The Board will deliberate following the conclusion of the evidence and argument of counsel on the allegations of misconduct that have not been struck. The Board will dismiss allegations of misconduct that have not been proved by clear and convincing evidence.

(4) If the Board finds that any allegations of misconduct have been proved by clear and convincing evidence, the Board will proceed to hear evidence of the Respondent's disciplinary record, in Virginia and elsewhere, and then Bar Counsel and the Respondent may present evidence and argument in aggravation and in mitigation of the misconduct found.

(5) The Board will then deliberate as to the sanction to be imposed for the misconduct found and the effective date of the sanction. One of the following sanctions will be imposed –

(i) Admonition, with or without Terms;

(ii) Public Reprimand, with or without Terms;

(iii) Suspension of the license of the Respondent for a stated period not exceeding five years;

(iv) Suspension of the license of the Respondent for stated period of one year or less, with or without term; or

(v) Revocation of the Respondent's license.

(6) The rules of evidence are not strictly applied in disciplinary hearings. Rulings on objections to evidence will favor the admission of all reasonably probative evidence to satisfy the ends of justice. The weight the Board gives such evidence will be based on the evidentiary foundation and the probable reliability thereof.

(7) The Board's chair will rule on motions and objections, subject to being overruled by a majority of the remaining Board members.

VII. The Board will now proceed on the certification. VSB ready? Respondent ready?

VIII. Exclusion of witnesses? **[NOTE: If witnesses are excluded, admonish them (1) to remain outside the hearing room until called, and (2) not to discuss his/her testimony with other witnesses, any spectator, or the Respondent, either before or after testifying, during the course of the hearing.]**

IX. Opening statements. By Bar Counsel. By Respondent.

X. Evidentiary presentations.[1] **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth**?]

XI. Closing Argument. By Bar Counsel. By Respondent.

XII Hearing will be in recess while the Board withdraws for its deliberations on the allegations of misconduct in the certification.

XIII. Based on the testimony of the witnesses and the exhibits introduced, and having considered the argument of counsel, the Board finds **[that the following violations of the Rules of Professional Conduct have been proved by clear and convincing evidence:] [that the following alleged violations of the Rules of Professional Conduct have not been proved by clear and convincing evidence**:]

XIV. The Board will now hear such evidence and argument as counsel wish to present in aggravation of mitigation before determining an appropriate sanction.[2] **[NOTE: If not stated by Bar Counsel, inquire whether the Respondent has a disciplinary record, in Virginia or elsewhere**.]

XV. Hearing will be in recess while the Board withdraws for deliberation to determine an appropriate sanction and the effective date thereof.

XVI. Based on the misconduct found, the evidence presented in aggravation and in mitigation, and having considered the argument of counsel, the Board imposes the following sanction _____, and states the effective date thereof as _____.

XVII. Adjournment.

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[1] If the Board during the hearing believes that the Respondent may then have an impairment, the Board may postpone the hearing and initiate an impairment proceeding. Rules Pt. 6, § IV, Para. 13-23(B).

[2] A Respondent who intends to rely upon evidence of an impairment in mitigation of misconduct shall, absent good cause shown, give notice to Bar Counsel and the Board not less than 14 days before the hearing of his/her intention to do so. Rules Pt. 6, § IV, Para. 13-23(A).

VSB DISCIPLINARY BOARD

AGENDA FOR HEARING TO ORDER MEDICAL EXAM AND PROVIDE RELEASES

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel (guardian *ad litem*) _____] [is not present, but is represented by (his) (her) guardian *ad litem* _____]. [**NOTE: If the Respondent is not present and counsel, or the guardian *ad litem*, does not represent that the Respondent has chosen to be absent, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. This is a private hearing. The public and witnesses when not testifying, except for the Respondent and the Complainant, shall be excluded from the hearing.

V. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

VI. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VII. Preliminary Statements –

A. This is a hearing under paragraph 13-23C of Pt. 6, § IV of the Supreme Court's Rules to determine whether it is appropriate to order that the Respondent undergo a medical examination by a healthcare provider selected by the Board, and provide releases to healthcare providers authorizing release of his medical records to Bar Counsel and to the Board c/o the Clerk of the Disciplinary System.

B. Bar Counsel bears the burden of proof by clear and convincing evidence with respect to the medical examination and release sought.

C. Are Bar Counsel and the Respondent [and/or the Respondent's counsel/guardian *ad litem*] familiar with the procedure that will be followed in this hearing? **[<u>NOTE</u>: If either Bar Counsel or the Respondent or counsel/guardian *ad litem* answers no, proceed with subparagraphs (1) through (5):]**

(1) The procedure consists of (i) opening statements, (ii) presentation of Bar Counsel's evidence, subject to the Respondent's cross-examination of witnesses, (iii) presentation of the Respondent's evidence, subject to Bar Counsel's cross-examination of witnesses, (iv) Bar Counsel's rebuttal evidence, subject to the Respondent's cross-examination of witnesses, (v) Bar Counsel's closing argument, (vi) the Respondent's closing argument, and

(vii) Bar Counsel's rebuttal closing argument. The members of the Board may ask questions of witnesses.

(2) The Board will retire to deliberate following the conclusion of the evidence and argument of counsel to determine whether to order the medical examination and release sought.

(3) The Board will reconvene in open session and announce its decision.

(4) The rules of evidence are not strictly applied in disciplinary hearings.

(5) The Board's Chair will rule on motion and objections, subject to being overruled by a majority of the remaining Board members.

VIII. The Board will now proceed with the hearing. Bar Counsel ready? Respondent/Guardian *ad litem* ready?

IX. Opening statements. By Bar Counsel. By Respondent/Guardian *ad litem.*

X. Evidentiary presentations. **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth?]**

XI. Closing Argument. By Bar Counsel. By Respondent/Guardian *ad litem.*

XII. Hearing will be in recess while the Board recesses for its deliberations.

XIII. The Board reconvenes following its deliberations and announces its decision, as follows:

A. Based on the evidence presented, and consideration and argument of counsel [the guardian *ad litem*], the Board refuses to order the medical examination and the release sought by the VSB.

OR

B. Based on the evidence presented, and considered and argument of counsel [and the guardian *ad litem*], the Board will enter an order granting the medical examination and the release sought by the VSB.

[Bar Counsel tenders sketch order, and the Respondent's counsel [guardian *ad litem*] notes objection/exception.]

XIV. Adjournment.

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VSB DISCIPLINARY BOARD

AGENDA FOR MISCONDUCT HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB No. _____.

III. VSB is represented by _____. The Respondent is present, along with his/her counsel, _____. [**NOTE: If the Respondent is not present, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. The purpose of this hearing is to determine whether the allegations of misconduct in the certification against the Respondent are proved by clear and convincing evidence, and if so proved, to determine the sanction to be imposed on the Respondent. The allegations of misconduct are contained in VSB Docket No. _____. Is the Respondent familiar with the certification? **[NOTE: If the Respondent answers no**:] The charge(s) of misconduct are summarized as follows:

_____

_____

_____

B. Are the VSB and the Respondent familiar with the procedure that will be followed in this hearing? **[NOTE: If either the VSB or the Respondent answers no, proceed with subparagraphs (1) through (7)**:]

(1) The procedure for hearing the certification will consist of (i) opening statements by Bar Counsel and Respondent, (ii) presentation of Bar Counsel's witnesses and other evidence, subject to Respondent's cross-examination and Board members' examination, (iii) presentation of Respondent's witnesses and other evidence, subject to Bar Counsel's cross examination and Board members' examination, (iv) Bar Counsel's rebuttal evidence, (v) Bar Counsel's closing argument, (vi) Respondent's closing argument, and (vii) Bar Counsel's rebuttal closing argument. The members of the Board may ask questions of witnesses.

(2) At the conclusion of the VSB's evidence, or the conclusion of all evidence, the Respondent may move to strike the evidence as to any or all allegations of misconduct. **[NOTE: Standard for Respondent's motion to strike VSB's evidence: Whether it is conclusively apparent that VSB's evidence and inferences fairly drawn, viewed in the light most favorable to VSB, are not sufficient under any set of circumstances to establish the charges of misconduct.]**

(3) The Board will deliberate following the conclusion of the evidence and argument of counsel on the allegations of misconduct that have not been struck. The Board will dismiss allegations of misconduct that have not been proved by clear and convincing evidence.

(4) If the Board finds that any allegations of misconduct have been proved by clear and convincing evidence, the Board will proceed to hear evidence of the Respondent's disciplinary record, in Virginia and elsewhere, and then Bar Counsel and the Respondent may present evidence and argument in aggravation and in mitigation of the misconduct found.

(5) The Board will then deliberate as to the sanction to be imposed for the misconduct found and the effective date of the sanction. One of the following sanctions will be imposed –

(i) Admonition, with or without terms;

(ii) Public Reprimand, with or without terms;

(iii) Suspension of the license of the Respondent for a stated period not exceeding five years;

(iv) Suspension of the license of the Respondent for a stated period of one year or less, with or without terms; or

(v) Revocation of the Respondent's license.

(6) The rules of evidence are not strictly applied in disciplinary hearings. Rulings on objections to evidence will favor the admission of all reasonably probative evidence to satisfy the ends of justice. The weight the Board gives such evidence will be based on the evidentiary foundation and the probably reliability thereof.

(7) The Board's chair will rule on motions and objections, subject to being overruled by a majority of the remaining Board members.

VII. The Board will now proceed on the certification. VSB ready? Respondent ready?

VIII. Exclusion of witnesses? **[NOTE: If witnesses are excluded, admonish them (1) to remain outside the hearing room until called, and (2) not to discuss his/her testimony with other witnesses, any spectator, or the Respondent, either before or after testifying, during the course of the hearing.]**

IX. Announce whether VSB or Respondent Exhibits are admitted.

X. Opening statements. By Bar Counsel. By Respondent.

XI. Closing Argument. By Bar Counsel. By Respondent.

XII. Hearing will be in recess while the Board withdraws for its deliberations on the allegations of misconduct in the certification.

XIII. Based on the testimony of the witnesses and the exhibits introduced, and having considered the argument of counsel, the Board finds **[that the following violations of the Rules of Professional Conduct have been proved by clear and convincing evidence:] [that the following alleged violations of the Rules of Professional Conduct have not been proved by clear and convincing evidence**:]

XIV. The Board will now hear such evidence and argument as counsel wish to present in aggravation of mitigation before determining an appropriate sanction.[1] **[NOTE: If not stated by Bar Counsel, inquire whether the Respondent has a disciplinary record, in Virginia or elsewhere**.

XV. Hearing will be in recess while the Board withdraws for deliberation to determine an appropriate sanction and the effective date thereof.

XVI. Based on the misconduct found, the evidence presented in aggravation and in mitigation, and having considered the argument of counsel, the Board imposes the following sanction _____, and states the effective date thereof as _____.

XVII. If the panel has voted to delay the effective date of the sanction to a future date, please announce: "The respondent will not accept any new clients between now and **[effective date of sanction]**. The respondent shall comply with the requirements of 13-29 and notice all clients, judges, and opposing counsel that s/he is currently representing."

XVIII. Adjournment.

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[1] A Respondent who intends to rely upon evidence of an impairment in mitigation of misconduct shall, absent good cause shown, give notice to Bar Counsel and the Board not less than 14 days before the hearing of his/her intention to do so. Rules Pt. 6, § IV, Para. 13-23(A).

VSB DISCIPLINARY BOARD

AGENDA FOR RECIPROCAL DISCIPLINE HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. VSB is represented by _____. The Respondent [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. [**NOTE: If the Respondent is not present, request the VSB clerk to go to the hall/foyer, call the Respondent's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. This matter comes on to be heard upon the Board's Rule to Show Cause and Order of Suspension and Hearing, with the order of [suspension] [revocation] in the State of _____ attached, and upon the Clerk's notice letter to the Respondent, both duly served on the Respondent by certified mail to [him] [her] at [his] [her] address of record with the Virginia State Bar. The Board takes judicial notice of the Board's Rule to Show Cause and Order of Suspension and Hearing and the attachments thereto, and of the Clerk's notice letter, and receives them in evidence collectively as Board Exhibit 1.

B. The purpose of this hearing is to provide the Respondent an opportunity to show cause by clear and convincing evidence why the same discipline that was imposed on the Respondent in [jurisdiction] should not be imposed by the Virginia State Bar Disciplinary Board.

C. The findings in the proceeding in [jurisdiction] are conclusive of all matters in this hearing except to the extent that the Respondent, within 14 days of the mailing of the Board's order to him, files a written response alleging, and in this proceeding proves, one or more of the following grounds:

(1) the record of the proceeding in the other jurisdiction would clearly show that such proceeding was so lacking in notice

or opportunity to be heard as to constitute a denial of due process;[1]

(2) the imposition by the Board of the same discipline or equivalent discipline upon the same proof would result in an injustice;

(3) the same conduct would not be grounds for disciplinary action or for the same or equivalent discipline in Virginia; or[2]

(4) the misconduct found in the other jurisdiction would warrant the imposition of substantially lesser discipline in the Commonwealth of Virginia.

If the Respondent has not filed a timely written response [but appears and expresses the intent to present evidence that one or more of the grounds specified in paragraph 13-24 C exists, Respondent shall make a proffer to the Board. The Board may hear evidence or refuse to hear the evidence as untimely. If Board decides to consider the evidence, Bar Counsel may be entitled to a continuance of the hearing] (or does not appear at this hearing), the Board will impose the same discipline as was imposed in the State of _____.

D. Are Bar Counsel and the Respondent familiar with the procedure that will be followed in this hearing and the dispositions available to the Board? **[<u>NOTE</u>: If either Bar Counsel or the Respondent answers no, proceed with subparagraphs (1) through (5):]**

(1) Since the Respondent bears the burden of proof, the procedure consists of (i) opening statement by the Respondent and the Bar Counsel, (ii) presentation of the Respondent's evidence, subject to Bar Counsel's cross-examination of witnesses, (iii) presentation of Bar Counsel's evidence, subject to the Respondent's cross-examination of witnesses, (iv) the Respondent's rebuttal evidence, subject to Bar Counsel's cross-examination of witnesses, (v) the Respondent's closing argument, (vi) Bar Counsel's closing argument, and (vii) the Respondent's rebuttal argument. The members of the panel may ask questions of witnesses.

(2) The Board will retire to deliberate following the conclusion of the evidence and argument of counsel to determine whether the Respondent has or has not proved any allegation made in his/her written response. If the Respondent has not, the Board will impose the same discipline as was imposed in [jurisdiction]; if the Respondent has, the Board will hear evidence on whether to dismiss this proceeding, or impose a lesser discipline than was imposed in [jurisdiction].

---

[1] Respondent is not permitted to relitigate issues of fact which were expressly or implicitly decided, and the foreign adjudication on the merits is conclusive. <u>Cummings v. VSB</u>, 233 Va. 363 (1987).

[2] This is a matter of law for the Board to determine. <u>Id</u>.

(3) The Board will reconvene in open session and announce its decision.

(4) The rules of evidence are not strictly applied in disciplinary hearings.

(5) The Board's Chair will rule on motions and objections, subject to being overruled by a majority of the remaining Board members.

VII. The Board will now proceed with the hearing. Respondent ready? Bar Counsel ready?

VIII. Exclusion of witnesses? **[NOTE: If witnesses are excluded, admonish them (1) to remain outside the hearing room until called, and (2) not to discuss his/her testimony with other witnesses, any spectator, or the Respondent, either before or after testifying, during the course of the hearing.]**

IX. Opening statements by Respondent and by Bar Counsel.

X. Evidentiary presentations. Respondent first, then VSB. **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth?]** Respondent may make proffer of 13 – 24 C factors if no timely response was filed, but wishes to present evidence. In such event, the Board will consider the proffer and decide whether to hear evidence.

XI. Closing Argument by Respondent and by Bar Counsel.

XII. Hearing will be in recess while the Board retires for its deliberations.

XIII. The Board reconvenes following its deliberations and announces its decision, as follows:

A. Based on the evidence presented, and consideration of the argument of counsel, the Board finds that the Respondent has failed to file a written response, and no evidence was allowed pursuant to Respondent's proffer, and therefore the Board finds that the same discipline that was imposed on the Respondent in [jurisdiction] should be imposed by the Board. Accordingly, it is ORDERED that the Respondent's license to practice law in the Commonwealth of Virginia be and hereby is (REVOKED) (SUSPENDED for a period of ____ (days) (months) (years) effective [date]) .

OR

B. Based on the evidence presented, and consideration of the argument of counsel, the Board finds that the Respondent has proved one (one or more) of the permitted allegations made in his/her written response *viz.* _____, and therefore finds that the same discipline that was imposed on the Respondent in [jurisdiction] should not be imposed by the Board. The Board will now hear evidence and argument on whether this proceeding should be dismissed or a lesser discipline should be imposed than was imposed in [jurisdiction], after which the Board will recess for its deliberation.

* * *

The Board reconvenes following its deliberation and announces its decision that, based on the evidence presented and considering argument of counsel, [this proceeding be and hereby is DISMISSED] [a lesser discipline should be imposed consisting of [a suspension of _____ (days) (months) (years)] [a public reprimand] [an admonition] and accordingly it is ORDERED that [the Respondent's license to practice law in the Commonwealth of Virginia be and hereby is SUSPENDED for a period of ____ (days) (months) (years) effective [date] [the Respondent be and hereby is issued a [public reprimand] [an admonition] effective [date].

XIV. Adjournment.

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VSB DISCIPLINARY BOARD

AGENDA FOR REINSTATEMENT HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Petitioner _____, VSB #_____.

III. VSB is represented by _____. The Petitioner [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. [**NOTE: If the Petitioner is not present, request the VSB clerk to go to the hall/foyer, call the Petitioner's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. This matter comes to the Board upon the Virginia Supreme Court's reference for a recommendation of approval or disapproval of the Petition for Reinstatement pursuant to Para. 13-25 of the Rules.

[ ] Reinstatement after Revocation. The Petitioner bears the burden of establishing by clear and convincing evidence that (he)(she) (1) within 5 years before filing the petition has attended 60 hours of CLE, of which at least 10 hours are in legal ethics or professionalism, (2) has taken the MPRE and received a scaled score of 85 or higher, (3) if applicable, has reimbursed the Bar's Client Protection Fund, (4) has paid the Bar all costs previously assessed, plus interest, (5) if applicable, has paid the Bar all receivership expenses, and (6) is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law.

B. Up to five character witnesses for and against the Petition for Reinstatement may be called. The Board may also consider any letter submitted regarding the Petitioner's character and fitness.

C. Are Bar Counsel and the Petitioner familiar with the procedures that will be followed in this hearing? **[<u>NOTE</u>: If either Bar Counsel or the Petitioner answers no, proceed with subparagraphs (1) through (5):]**

(1) Since the Petitioner bears the burden of proof, the procedure consists of (i) opening statement by the Petitioner and the Bar Counsel, (ii) presentation of the Petitioner's evidence, subject to Bar Counsel's cross-examination of witnesses, (iii) presentation of Bar Counsel's evidence, subject to the Petitioner's cross-examination of witnesses, (iv) the Petitioner's rebuttal evidence, subject to Bar Counsel's cross-examination of witnesses, (v) the Petitioner's closing argument, (vi) Bar Counsel's closing argument, and (vii) the Petitioner's rebuttal argument. The members of the panel may ask questions of witnesses.

(2) The Board will retire to deliberate in closed session following the conclusion of the evidence and argument of counsel to determine whether to recommend approval or disapproval of the Petition for Reinstatement.

(3) The Board will reconvene in open session and announce its recommendation to the Supreme Court of Virginia.

(4) The rules of evidence are not strictly applied.

(5) The Board's Chair will rule on motions and objections, subject to being overruled by a majority of the remaining Board members.

VII. The Board will now proceed with the hearing. Petitioner ready? Bar Counsel ready?

VIII. Exclusion of witnesses? **[NOTE: If witnesses are excluded, admonish them (1) to remain outside the hearing room until called, and (2) not to discuss his/her testimony with other witnesses, any spectator, or the Petitioner, either before or after testifying, during the course of the hearing.]**

IX. Opening statements by Petitioner and by Bar Counsel.

X. Evidentiary presentations. **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth?]**

XI. Closing Argument by Petitioner and by Bar Counsel.

XII. Hearing will be in recess while the Board retires for its deliberations.

XIII. Based on the evidence presented and argument of [counsel] [Petitioner and Bar Counsel], the Board has determined to recommend to the Supreme Court of Virginia that the Petition for Reinstatement be (approved) (disapproved).

XIV. Adjournment.

9/22/16

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Factors set out in the Matter of Alfred Lee Hiss,
VSB Docket #83-26 (Va. Sup. Ct. 7/2/84):

1. The severity of the petitioner's conduct, including, but not limited to, the nature and circumstances of the misconduct.

2. The petitioner's character, maturity and experience at the time of his or her disbarment.

3. The time elapsed since the petitioner's disbarment.

4. Restitution to clients and/or the Bar.

5. The petitioner's activities since disbarment, including, but not limited to, his or her conduct and attitude during that period of time.

6. The petitioner's present reputation and standing in the community.

7. The petitioner's familiarity with the Rules of Professional Conduct and his current proficiency in the law.

8. The sufficiency of the punishment undergone by the petitioner.

9. The petitioner's sincerity, frankness and truthfulness in presenting and discussing factors relating to his or her disbarment and reinstatement.

10. The impact upon public confidence in the administration of justice if the petitioner's license to practice law is restored.

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VSB DISCIPLINARY BOARD

AGENDA FOR RESIGNATION HEARING

I. Oath to court reporter: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding?

II. Convene hearing in the matter of the Applicant _____, VSB #_____.

III. VSB is represented by _____. The Applicant [is present, along with (his) (her) counsel, _____] [is not present, in person or by counsel]. [**NOTE: If the Applicant is not present, request the VSB clerk to go to the hall/foyer, call the Applicant's name three times, and report whether there was a response**.]

IV. The Disciplinary Board members forming this panel (are) (will identify themselves on the record).

V. Each member of the panel will state on the record whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

VI. Preliminary Statements –

A. This is a Resignation hearing pursuant to Para. 13-27(B) of the Rules based on the Bar's objection to the Applicant's Application for Resignation.

The purpose of this hearing is to accept or reject the Application for Resignation.

B. Are the VSB and the Applicant familiar with the procedure that will be followed in this hearing? **[NOTE: If either the VSB or the Applicant answers no, proceed with subparagraphs (1) through (4)**:]

(1) The procedure for hearing will consist of (i) opening statements by Bar Counsel and Applicant, (ii) presentation of Bar Counsel's witnesses and other evidence, subject to Applicant's cross-examination and Board members' examination, (iii) presentation of Applicant's witnesses and other evidence, subject to Bar Counsel's cross examination and Board members' examination, (iv) Bar Counsel's rebuttal evidence, (v) Bar Counsel's closing argument, (vi) Applicant's closing argument, and (vii) Bar Counsel's rebuttal closing argument. The members of the Board may ask questions of witnesses.

(2) The Board will then deliberate as to the decision to accept or reject the Application for Resignation.

(3) The rules of evidence are not strictly applied in disciplinary hearings. Rulings on objections to evidence will favor the admission of all reasonably probative evidence to satisfy the ends of justice. The weight the Board gives such evidence will be based on the evidentiary foundation and the probable reliability thereof.

(4) The Board's chair will rule on motions and objections, subject to being overruled by a majority of the remaining Board members.

VII. The Board will now proceed on the matter. VSB ready? Applicant ready?

VIII. Exclusion of witnesses? **[NOTE: If witnesses are excluded, admonish them (1) to remain outside the hearing room until called, and (2) not to discuss his/her testimony with other witnesses, any spectator, or the Applicant, either before or after testifying, during the course of the hearing.]**

IX. Opening statements. By Bar Counsel. By Applicant.

X. Evidentiary presentations. **[Oath to witness: Do you swear or affirm that the testimony you give will be the truth**?]

XI. Closing Argument. By Bar Counsel. By Applicant.

XII Hearing will be in recess while the Board withdraws for its deliberations.

XIII. Based on the testimony of the witnesses and the exhibits introduced, and having considered the argument of counsel, the Board **[accepts or rejects the Applicant's Application for Resignation].**

XIV. Adjournment.

3/15/12

VSB DISCIPLINARY BOARD

SUB-AGENDA IN CASE OF ABSENT RESPONDENT

I. If Respondent is not present, in person or by counsel:

II. Madame Clerk, please go to the hallway or foyer immediately outside the courtroom, call the Respondent's name three times and report back whether there was a response.

III. Swear in Clerk

IV. Madame Clerk, what is Respondent's last address on record for membership purposes with the Virginia State Bar?

V. Was that the Respondent's address on _____ (date of Notice)?

VI. On that date, did the Clerk's Office for the Virginia State Bar send a Notice of Hearing, by certified mail to Respondent at that address, advising Respondent of the date, time and place for today's hearing?

VII. Is Exhibit ___ a true and accurate copy of the Notice of Hearing sent on that date to Respondent?

VIII. It appearing to the Chair that the requirements of Rule 13-18C regarding notice and Rule 13-12C regarding service have been complied with and more than twenty-one days having passed since such Notice of Hearing was sent to Respondent, I find that the notice requirements of Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia have been fully complied with.

VSB DISCIPLINARY BOARD

AGENDA FOR TELEPHONIC AGREED DISPOSITION

I. Identification of court reporter and oath: Do you swear or affirm that you will well and truly record the testimony and other incidents of this proceeding.

II. Convene hearing in the matter of the Respondent _____, VSB #_____.

III. Identification of persons participating –

A. Respondent [and/or counsel for Respondent].

B. Bar Counsel.

C. Clerk's office personnel.

IV. The Disciplinary Board members forming this panel (are): Each member of the panel will identify themselves on the record and state whether (he) (she) has any personal or financial interest that may affect, or reasonably be perceived to affect, (his) (her) ability to be impartial.

V. The purpose of this proceeding is to determine whether to accept the Agreed Disposition which Bar Counsel and Respondent have presented to the Board pursuant to Pt. 6, § IV, Para. 13-6H.

VI. **Ask Bar Counsel if the complainant was informed of the agreement and the sanction.**

VII. Presentation of Agreed Disposition –

A. Bar Counsel

B. Respondent

C. Questions from Board.

VIII. Board will deliberate privately and the members of the panel will follow the telephone instructions to go into a private session.

IX. Confirmation of conference call participants in private session. Discussion by panel and vote to accept or reject.

X. The panel will return to the open session.

XI. [Confirmation of conference call participants]. The Board announces its decision to accept or not to accept the Agreed Disposition, and the effective date of the sanction.*

XII. Adjournment.

* **Upon rejecting an Agreed Disposition, the Board may, if the panel deems appropriate, advise the parties as to specific aspects of the Agreed Disposition (*e.g.* lack of remedial terms, length of period of suspension) which render the Agreed Disposition unacceptable. If the parties so request, the panel may afford them an opportunity to consult and modify the proposed Agreed Disposition, if they are so disposed.**

Or

***The matter shall go forward to the Disciplinary Board for a full hearing.**

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6/24/16

Respondent: _____ Bar Counsel: _____

Docket #s: _____ Hearing: _____
_____

Counsel: _____ Panel Chair: _____

TERMS OF ALTERNATIVE DISCIPLINE

[ ] RETURN OF FILE/APOLOGY

On or before _____, the Respondent shall return the file of _____ to _____ in accordance with Rule 1.16(e) [with a letter of apology] and shall provide proof of compliance to Bar Counsel, not later than _____.

[ ] NO FURTHER MISCONDUCT

For a period of _____ year(s) following the entry of this Order, the Respondent shall not engage in any conduct that violates the following provisions of the Virginia Rules of Professional Conduct, including any amendments thereto, and/or which violates any analogous provisions, and any amendments thereto, of the disciplinary rules of another jurisdiction in which the Respondent may be admitted to practice law. The terms contained in this paragraph shall be deemed to have been violated when any ruling, determination, judgment, order, or decree has been issued against the Respondent by a disciplinary tribunal in Virginia or elsewhere, containing a finding that Respondent has violated one or more provisions of the Rules of Professional Conduct referred to above, *provided, however*, that the conduct upon which such finding was based occurred within the period referred to above, and provided, further, that such ruling has become final.

[ ] MCLE

On or before _____, the Respondent shall complete _____ hours of continuing legal education credits by attending courses approved by the Virginia State Bar in the subject matter of legal ethics. The Respondent's Continuing Legal Education attendance obligation set forth in this paragraph shall not be applied toward his Mandatory Continuing Legal Education requirement in Virginia or any other jurisdictions in which the Respondent may be licensed to practice law. The Respondent shall certify his compliance with the terms set forth in this paragraph by delivering a fully and properly executed Virginia MCLE Board Certification of Attendance form (Form 2) to Bar Counsel, promptly following his attendance of each such CLE program(s).

[ ] ASSIGNED READING AND CERTIFICATION

The Respondent shall read in its entirety *Lawyers and Other People's Money* and Legal Ethics Opinion 1606 and shall certify compliance in writing to Bar Counsel not later than _____ days following the date of entry of this order,.

[ ] TRUST AUDIT

For a period of ____ years following entry of this Order, the Respondent hereby authorizes a Virginia State Bar Investigator to conduct unannounced personal inspections of his trust account books, records, and bank records to ensure his compliance with all of the provisions of Rule 1.15 of the Rules of Professional Conduct, and shall fully cooperate with the Virginia State Bar investigator.

[ ] ENGAGING CPA

1. Within fifteen days of the date of the effective date of this order, the Respondent shall confirm in writing his review of Rule 1.15 of the Rules of Professional Conduct to Bar Counsel.

2. Within thirty days from the effective date of this order, the Respondent shall engage the services of a CPA (Certified Public Accountant) (a) who will certify familiarity with the requirements of Rule 1.15 of the Rules of Professional Conduct, and (b) who has been pre-approved by Bar Counsel to review Respondent's attorney trust account record-keeping, accounting, and reconciliation methods and procedures to ensure compliance with Rule 1.15 of the Rules of Professional Conduct. In the event the CPA determines that the Respondent is in compliance with Rule 1.15, the CPA shall so certify in writing to the Respondent and Bar Counsel. In the event the CPA determines Respondent is NOT in compliance with Rule 1.15, the CPA shall notify Respondent and Bar Counsel, in writing, of the measures Respondent must take to bring himself into compliance with Rule 1.15. Respondent shall provide the CPA with a copy of this order at the outset of his engagement of the CPA.

3. The Respondent shall be obligated to pay when due the CPA's fees and costs for services, including provision to the Bar and to the Respondent of information concerning this matter.

4. In the event the CPA determines the Respondent is NOT in compliance with Rule 1.15, Respondent shall have forty-five (45) days following the date the CPA issues a written statement of the measures Respondent must take to comply with Rule 1.15 within which to bring himself into compliance. The CPA shall then be granted access to Respondent's office, books, and records, following the passage of the forty-five (45) day period, to determine whether Respondent has brought

himself into compliance as required. The CPA shall thereafter certify in writing to Bar Counsel and to the Respondent either that the Respondent has brought himself into compliance with Rule 1.15 within the forty-five (45) day period, or that he has failed to do so. Respondent's failure to bring himself into compliance with Rule 1.15 as of the conclusion of the forty-five (45) day period shall be considered a violation of the terms set forth herein.

5. Unless an extension is granted by Bar Counsel for good cause to accommodate the CPA's schedule, the terms specified in paragraphs 2, 3, and 4, shall be completed no later than _____.

6. On or about _____, the CPA engaged pursuant to paragraph 2 shall reassess Respondent's attorney's trust account record-keeping, accounting, and reconciliation methods and procedures to ensure continued compliance with Rule 1.15 of the Rules of Professional Conduct. In the event the CPA determines that Respondent has NOT remained in compliance with this Rule, such non-compliance will be considered a violation of the terms set forth herein.

[ ] LAW OFFICE MANAGEMENT CONSULTANT

1. Not later than _____, the Respondent shall engage the services of a law office management consultant approved by the Virginia State Bar to review and make written recommendations concerning the Respondent's law practice policies, methods, systems, trust account, and procedures. The Respondent shall institute and thereafter follow with consistency any and all recommendations made to him by the law office management consultant following the law office management consultant's evaluation of the practice. The Respondent shall grant the law office management consultant access to his law practice from time to time, at the consultant's request, for purposes of ensuring that the Respondent has instituted and is complying with the law office management consultant's recommendations. Bar Counsel shall have access, by telephone conferences and/or written reports, to the law office management consultant's findings and recommendations, as well as the consultant's assessment of the Respondent's level of compliance with said recommendations. The Respondent shall be obligated to pay when due the consultant's fees and costs, including, but not limited to, the provision to Bar Counsel of information concerning this matter.

2. Not later than _____, the Respondent shall be responsible for:

    a. Ensuring that the law office management consultant has previously reported to Bar Counsel his or her findings and recommendations regarding the Respondent's law practice.

    b. Certifying to Bar Counsel that the Respondent has fully complied with the law office management consultant's findings and recommendations and

provide written confirmation of same from the law office management consultant.

[ ] RESTITUTION

The Respondent shall pay, by certified, cashier's, or treasurer's check made payable to the order of _____, the principal sum of $_____, with interest thereon at the rate of nine percent per annum, from _____, until paid. The payment due hereunder, inclusive of principal and all interest, shall be made by delivery of a check to Bar Counsel, at Virginia State Bar, Eighth and Main Building, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800 no later than _____.

[ ] SUPERVISION

1. In the event the Respondent elects to return to the active practice of law and activates his status with the Virginia State Bar from Associate to Active, within ____ days of such activation he shall certify in writing to the Office of Bar Counsel that he is working under the supervision of a named lawyer, and shall provide a letter from such lawyer confirming his/her supervision of the Respondent.

2. Respondent shall remain under the active supervision of such lawyer for a period of not less than one year. Within thirty (30) days after the expiration of the period of active supervision, the Respondent shall furnish the office of Bar Counsel a letter from the supervising lawyer confirming his/her active supervision of the Respondent.

[ ] CLIENT COMMUNICATION

Within thirty (30) days after the effective date of this Order, the Respondent shall satisfy Bar Counsel, that the Respondent has installed adequate docketing procedure for (1) the prompt return of clients' telephone calls, and (2) if he is unable to reach them by telephone, a letter following up on their telephone call.

[ ] **MENTAL HEALTHCARE PROVIDER**

1. The Respondent shall remain under the care of _____ (or if _____ becomes unavailable, such other mental health care provider as agreed upon by Respondent and the Virginia State Bar), and such other health care providers to whom Respondent might be referred by _____, until at least _____, or such earlier time as the Respondent is discharged from _____'s care with the concurrence of Bar Counsel. Respondent shall

cooperate fully and comply with all treatment recommendations made by _____ and such other health care providers during the said period. Such compliance shall include, but not be limited to, attending all further therapy, counseling, and evaluation sessions with _____ and/or other health care providers to whom Respondent has been referred by _____, and submitting to such further testing, evaluation, and clinical assessments as may be required by _____ and any health care providers to whom Respondent has been referred by _____.

2. The Respondent shall immediately provide _____ and all health care providers to whom Respondent has been referred by _____ with a copy of this Order of the Disciplinary Board and a release which authorizes and directs _____ and such other health care providers to furnish to the Virginia State Bar, c/o _____, Assistant Bar Counsel _____ _____, written reports which state whether, in the professional opinion of the health care provider writing the report, the Respondent's physical or mental condition materially impairs the Respondent's ability to represent clients in the full time private practice of law. Such reports shall detail the basis for such opinions rendered, and shall further state whether, to the best of the health care provider's knowledge, the Respondent is in compliance with the terms enumerated herein. In the event a health care provider does not state that Respondent is in compliance with the terms hereof, such health care provider shall nonetheless present written facts (e.g., missed appointments, failure to take medication, failure to provide information required for continued treatment/assessments, and failure to pay a provider's bills) to the Virginia State Bar sufficient to permit Bar Counsel's assessment of whether Respondent is in compliance with the terms hereof. At a minimum, during the period that those terms remain in effect, _____ (or approved successors) shall furnish the Bar with such reports at quarterly intervals, commencing _____. Notwithstanding the reporting schedule set forth above _____ (or approved successors) shall notify the Bar immediately upon his or her assessment that the Respondent's physical or mental condition materially impairs the Respondent' ability to represent clients in the full time private practice of law.

3. The Respondent shall bear the cost and expense of compliance with the terms set forth herein, including, but not limited to, the cost of the assessments, therapy, counseling, medication, and all health care contemplated by the terms hereof, and the costs imposed, if any, by _____ (or approved successors) and all other health care providers in preparing and furnishing any and all reports submitted to the Virginia State Bar pursuant to the terms hereof.

[ ] LAWYERS HELPING LAWYERS

Not later than _____, the Respondent shall participate in an evaluation conducted by Lawyers Helping Lawyers ("LHL") and shall implement all of LHL's recommendations. The Respondent shall enter into a written contract with LHL

for a minimum period of one (1) year and shall comply with the terms of such contract, including, *inter alia*, personally meeting with LHL and its professionals, as directed. The Respondent shall authorize LHL (i) to provide periodic reports to the Office of Bar Counsel stating whether the Respondent is in compliance with LHL's contract with the Respondent, and (ii) to notify the Office of Bar Counsel promptly if the Respondent fails to follow the LHL-prescribed program, or ends participation in the LHL-prescribed program sooner than the expiration of the LHL contract.

[ ] ALTERNATIVE DISPOSITION

The alternative disposition hereby adopted is (revocation of the Respondent's license to practice law in the Commonwealth of Virginia) (suspension of the Respondent's license to practice law in the Commonwealth of Virginia for a period of _____ (days) (years)) upon the Respondent's failure to comply with the foregoing terms in the manner and at the time that compliance is required.

In the event of alleged noncompliance with the foregoing terms, a hearing will be convened upon an order for the Respondent to show cause why the alternative disposition should not be imposed. At such hearing the Respondent shall have the burden of proving compliance or good cause for the alleged noncompliance by clear and convincing evidence.

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

_____ VSB DOCKET NO. _____

SUMMARY ORDER

On _____, 20_____, the above-referenced matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony and documentary evidence, it is ORDERED that

_____ The Board accepts the Application for Resignation

_____ The Board rejects the Application for Resignation

The Board notes for the record in this matter that

_____ The Respondent was present in person and was advised of the imposition of the suspension and the effective date of the suspension; and

_____ The Respondent was not present and the Clerk of the Disciplinary System is directed to forward a copy of this Summary Order to him/her; and

That the Board shall issue a written opinion in this matter

It is further ORDERED THAT A COPY TESTE OF THIS Order shall be mailed by Certified Mail to the Respondent at his last address of record with the Virginia State Bar and hand-delivered to <>, Assistant/Deputy/Senior/Bar Counsel.

ENTERED THIS _____DAY OF _____, 20____
VIRGINIA STATE BAR DISCIPLINARY BOARD

_____
<>, Chair

V I R G I N I A :

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
_____ **VSB Docket Number _____**

IMPAIRMENT REINSTATEMENT SUMMARY ORDER

On the _____ day of _____, 20_____, the referenced matter came before the Virginia State Bar Disciplinary Board upon the Petition for Termination of Impairment Suspension filed by the Respondent on _____, 20_____,

WHEREFORE, upon consideration of the testimony and documentary evidence, and arguments of counsel, it is ORDERED that said Petition be

_____ APPROVED

_____ DENIED

The Board notes for the record in this matter that

_____ The Respondent was present in person and was advised of the Board's decision.

_____ The Respondent was not present and the Clerk of the Disciplinary System is directed to forward a copy of this Summary Order to the Respondent; and

The Board shall issue a Memorandum Order in this matter.

This Summary Order is effective on: _____, 20_____.

A copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his last address of record with the Virginia State Bar and mailed or hand-delivered to Bar Counsel in this matter.

ENTERED THIS _____ DAY OF _____, 20____.

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____
Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

> VSB DOCKET NO(S). >
RESPONDENT

DISTRICT COMMITTEE APPEAL SUMMARY ORDER

On >, this matter was heard by the Virginia State Bar Disciplinary Board pursuant to the Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the record from the > District Committee and arguments of counsel, it is **ORDERED** that:

1. _____ All charges are dismissed, based on a finding that the District Committee's determination is contrary to the law or is not supported by substantial evidence.

2. _____ The charges of the >, Section > are reversed and remanded to the District Committee for further proceedings.

3. _____ The > Committee Determination, Section > of a > is affirmed.

_____

_____

_____

4. This Summary Order is effective on:

_____ the date of this summary order

_____ _____, 20_____

5. The Board notes that:

_____ The Respondent was present in person and was advised of the Board's decision

_____ The Respondent was not present and the Clerk of the Disciplinary System is directed to forward a copy of this Summary Order to the Respondent

6. The Board shall issue a Memorandum Order in this matter.

7. The Clerk of the Disciplinary System shall comply with all requirements of Part

Six, § IV, ¶ 13 of the Rules of the Supreme Court, as amended, including: assessing costs pursuant to ¶ 13-9 E. of the Rules and complying with the Public Notice requirements of ¶ 13-9 G.

8. A copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his last address of record with the Virginia State Bar and mailed or hand-delivered to Bar Counsel in this matter.

ENTERED This _____ day of _____, 20 ____

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

ANTONIO PIERRE JACKSON **VSB DOCKET NO.** 17-000-107834
RESPONDENT

FAILURE TO COMPLY WITH PARAGRAPH 13-29
SUMMARY ORDER

On March 24, 2017, this matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony, documentary evidence, and arguments of counsel, it is **ORDERED** that:

1. With respect to the Rule to Show Cause set out in the Notice, the Board finds that:

   _____ Based upon clear and convincing evidence that the Respondent has failed to comply with Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia.

   _____ the Rule to Show Cause has not been proved by clear and convincing evidence and is hereby dismissed.

2. The Respondent shall receive a:

   _____ Suspension for _____ (not to exceed five years)

   _____ Suspension for _____(one year or less)

   _____ Suspension with Terms _____(one year or less)

   _____ Revocation

3. This Summary Order is effective on:

   _____ the date of this summary order

_____ _____, 20_____

4. The Board notes that:

_____ The Respondent was present in person and was advised of the Board's decision

_____ The Respondent was not present in person and the Clerk of the Disciplinary System is directed to forward a copy of this Summary Order to the Respondent

5. The Board shall issue a Memorandum Order in this matter.

6. The Board notes that concerning Paragraph 13-29 that:

_____ Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail of the suspension or revocation of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the sanction, and make such arrangements as are required herein within 45 days of the effective date of the suspension or revocation. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension or revocation that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the suspension or revocation, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board.

_____ Respondent has complied with notice provisions of Rules of Court, Paragraph 13-29 dealing with appropriate notification of suspension to his clients, judges, and opposing counsel in pending litigation

7. The Clerk of the Disciplinary System shall comply with all requirements of Part Six, § IV, ¶ 13 of the Rules of the Supreme Court, as amended, including: assessing costs pursuant to ¶ 13-9 E. of the Rules and complying with the Public Notice requirements of ¶ 13-9 G.

8. A copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his last address of record with the Virginia State Bar and mailed or hand-delivered to Bar Counsel in this matter.

ENTERED THIS _____ DAY OF _____, 20____

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____
Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

_____ **VSB Docket #_____**

Respondent

I M PA I R M E N T S U M M A R Y O R D E R

On _____, 20_____, the above-referenced matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony and documentary evidence, it is ORDERED

_____ The Board did not find the Respondent to be impaired and the case is dismissed

_____ That Respondent's license to practice law in the Commonwealth of Virginia is suspended for an indefinite period of time, effective _____

The Board notes for the record in this matter that

_____ The Respondent was present in person and was advised of the action of the Board and the effective date of the suspension; and

_____ The Respondent was not present in person, but the Clerk of the Disciplinary System is directed to communicate promptly to the Respondent the actions of the Board; and

that the Board shall issue a written opinion in this matter.

It is further ORDERED that pursuant to the provisions of Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia, as amended, that the Respondent shall forthwith give notice by certified mail, return receipt requested, of the Impairment Suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending

litigation. The Attorney shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the Suspension, and make such arrangements as are required herein within 45 days of the effective date of the Suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the Suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the Suspension, he shall submit an affidavit to that effect within 60 days of the effective date of the Suspension to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that a copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his last address of record with the Virginia State Bar and hand-delivered to Bar Counsel.

ENTERED THIS _____ DAY OF _____, 20____

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

> VSB DOCKET NO(S). >
RESPONDENT

INTERIM SUSPENSION SUMMARY ORDER

On _____, 20_____, the above-referenced matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony and documentary evidence, it is ORDERED that Respondent's license to practice law in the Commonwealth of Virginia is SUSPENDED, effective _____, 20_____ until such time as he/she fully complies with each subpoena or until a determination is made as to whether his/her noncompliance violated the disciplinary rules, unless Bar Counsel certifies that respondent has fully complied with each subpoena by _____.

The Board notes for the record in this matter that

_____ The Respondent was present in person and was advised of the imposition of the suspension and the effective date of the suspension; and

_____ The Respondent was not present and the Clerk of the Disciplinary System is directed to forward a copy of this Summary Order to the Respondent; and

that the Board shall issue a written opinion in this matter.

The Board notes that concerning Paragraph 13-29 that:

_____ The Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail of the Revocation or Suspension of his license to practice law in the Commonwealth of Virginia, to all clients for

whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the Revocation or Suspension, and make such arrangements as are required herein within 45 days of the effective date of the Revocation or Suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the Revocation or Suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the Revocation or Suspension, he shall submit an affidavit to that effect within 60 days of the effective date of the Revocation or Suspension to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

_____ Respondent has complied with notice provisions of Rules of Court, Paragraph 13-29 dealing with appropriate notification of suspension to his clients, judges, and opposing counsel in pending litigation

It is further ORDERED that a copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his/her last address of record with the Virginia State Bar and hand-delivered to Bar Counsel.

ENTERED THIS _____ DAY OF _____, 20_____

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

_____ VSB DOCKET NO(S)._____

RESPONDENT **_____**

S U M M A R Y O R D E R

On _____, 20_____, this matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony, documentary evidence, and arguments of counsel, it is **ORDERED** that:

1. With respect to the disciplinary rule violations set out in the Notice, the Board finds that:

_____ No disciplinary rule violations have been proved by clear and convincing evidence, and accordingly all charges of Misconduct are hereby dismissed.

_____ the following disciplinary rule violations have been proved by clear and convincing evidence:

Rule	Stipulated To	Withdrawn	Not Found	Found

2. The Respondent shall receive a(n):

_____ Admonition without terms

_____ Admonition with terms, as set out in the Record

Compliance Time Period: _____

_____

Alternative Disposition _____

_____ Public Reprimand without terms

_____ Public Reprimand with terms, as set out in the Record

Compliance Time Period: _____
_____

Alternative Disposition _____

3. This Summary Order is effective on:

_____ the date of this summary order

_____ _____, 20_____

4. The Board notes that:

_____ The Respondent was present in person and was advised of the imposition of the sanction

_____ The Respondent was not present in person and the Clerk of the Disciplinary System is directed to forward a copy of this Summary Order to the Respondent

5. The Board shall issue a Memorandum Order in this matter.

6. The Clerk of the Disciplinary System shall comply with all requirements of Part Six, § IV, ¶ 13 of the Rules of the Supreme Court, as amended, including: assessing costs pursuant to ¶ 13-9.E. of the Rules and complying with the Public Notice requirements of ¶ 13-9.G.

7. A copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his last address of record with the Virginia State Bar and mailed or hand-delivered to Bar Counsel in this matter.

ENTERED THIS _____ DAY OF _____, 20____

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____
Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

VSB DOCKET NO(S).: < >

_____
RESPONDENT

S U M M A R Y O R D E R

On **_____**, this matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony, documentary evidence, and arguments of counsel, it is **ORDERED** that:

1. With respect to the disciplinary rule violations set out in the Notice, the Board finds that:

_____ No disciplinary rule violations have been proved by clear and convincing evidence, and accordingly all charges of Misconduct are hereby dismissed.

_____ The following disciplinary rule violations have been proved by clear and convincing evidence:

Rule	Stipulated To	Withdrawn	Not Found	Found

2. The Respondent shall receive a:

_____ Suspension for _____ (not to exceed five years)

_____ Suspension for _____(one year or less)

_____ Suspension with Terms _____(one year or less)

_____ Revocation

3. This Summary Order is effective on:

_____ the date of this summary order

_____ _____, 20_____

4. The Board notes that:

_____ The Respondent was present in person and was advised of the Board's decision

_____ The Respondent was not present in person and the Clerk of the Disciplinary System is directed to forward a copy of this Summary Order to the Respondent

5. The Board shall issue a Memorandum Order in this matter.

6. The Board notes that concerning Paragraph 13-29 that:

_____ Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail of the suspension or revocation of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the sanction, and make such arrangements as are required herein within 45 days of the effective date of the suspension or revocation. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension or revocation that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the suspension or revocation, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board.

_____ Respondent has complied with notice provisions of Rules of Court, Paragraph 13-29 dealing with appropriate notification of suspension to his clients, judges, and opposing counsel in pending litigation

7. The Clerk of the Disciplinary System shall comply with all requirements of Part Six, § IV, ¶ 13 of the Rules of the Supreme Court, as amended, including: assessing costs pursuant to ¶ 13-9 E. of the Rules and complying with the Public Notice requirements of ¶ 13-9 G.

8. A copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his last address of record with the Virginia State Bar and mailed or hand-delivered to Bar Counsel in this matter.

ENTERED THIS _____ DAY OF _____, 20____

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

Chair

VIRGINIA:

Before the Virginia State Bar Disciplinary Board

In the Matter of

_____ VSB Docket No.(s)_____
Attorney at Law

On _____, came _____ and presented to the Board an Affidavit Declaring Consent to Revocation of his/her license to practice law in the courts of this Commonwealth. By tendering his/her Consent to Revocation at a time when disciplinary charges are pending, he/she admits that the charges in the attached Notice of Hearing/Certification document are true.

The Board having considered the said Affidavit Declaring Consent to Revocation, and Bar Counsel having no objection, the Board accepts his/her Consent to Revocation. Accordingly, it is ordered that the license to practice law in the courts of this Commonwealth heretofore issued to the said _____ be and the same hereby is revoked, and that the name of the said _____ be stricken from the Roll of Attorneys of this Commonwealth.

Entered this _____ day of _____, 20_____

Virginia State Bar Disciplinary Board

By _____
Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

_____ VSB DOCKET NO. _____
RESPONDENT

SHOW CAUSE SUMMARY ORDER

On _____, 201_, the above-referenced matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony and documentary evidence, it is ORDERED that Respondent shall receive a:

_____ Suspension for _____ (one year or less)

_____ Suspension with Terms _____(one year or less)

_____ Suspension _____(over a year / not more than 5)

_____ Revocation

This Summary Order is effective on:

_____ the date of this summary order

_____ _____, 20_____

The Board notes for the record in this matter that

_____ The Respondent was present in person and was advised of the imposition of the sanction; and

_____ The Respondent was not present and the Clerk of the Disciplinary System is directed to forward a copy of this Summary Order to the Respondent; and

The Board shall issue a Memorandum Order in this matter.

The Board notes that concerning Paragraph 13-29 that:

_____ Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail of the suspension or revocation of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the sanction, and make such arrangements as are required herein within 45 days of the effective date of the suspension or revocation. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension or revocation that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the suspension or revocation, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board.

_____ Respondent has complied with notice provisions of Rules of Court, Paragraph 13-29 dealing with appropriate notification of suspension to his clients, judges, and opposing counsel in pending litigation

The Clerk of the Disciplinary System shall comply with all requirements of Part Six, § IV, ¶ 13 of the Rules of the Supreme Court, as amended, including: assessing costs pursuant to ¶ 13-9 E. of the Rules and complying with the Public Notice requirements of ¶ 13-9 G.

It is further ORDERED that a copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his/her last address of record with the Virginia State Bar and hand-delivered to Bar Counsel.

ENTERED THIS _____ DAY OF DECEMBER, 201_

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

, Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

_____ VSB DOCKET NO. _____
RESPONDENT

SUMMARY ORDER

On _____, 201_, the above-referenced matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony and documentary evidence, it is ORDERED that Respondent _____

_____

_____

_____

The Board notes for the record in this matter that

_____ The Respondent was present in person and was advised of the Board's decision; and

_____ The Respondent was not present and the Clerk of the Disciplinary System is directed to forward a copy of this Summary Order to the Respondent; and

that the Board shall issue a written opinion in this matter.

This Summary order is effective on:

_____ The date of this Summary Order

_____ _____, 20____

It is further ORDERED that a copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his/her last address of record with the Virginia State Bar and hand-delivered to Bar Counsel.

ENTERED THIS _____ DAY OF DECEMBER, 201_

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

< > **VSB DOCKET NO(S). < >**
RESPONDENT

SUMMARY ORDER – RECIPROCAL CASE

On _____, 20____ the above-referenced matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony and documentary evidence, and arguments of counsel, it is ORDERED that:

_____ the Board shall impose the same discipline that was imposed in the other jurisdiction and the respondent shall receive a

_____

_____

_____

_____

_____ the Respondent shall receive a _____

_____

_____

_____ the case is dismissed.

The Board notes for the record in this matter that

_____ The Respondent was present in person and was advised of the Board's decision; and

_____ The Respondent was not present and the Clerk of the Disciplinary System is

directed to forward a copy of this Summary Order to the Respondent; and

The Board notes that concerning Paragraph 13-29 that:

_____ Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail of the suspension or revocation of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the sanction, and make such arrangements as are required herein within 45 days of the effective date of the suspension or revocation. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension or revocation that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the suspension or revocation, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

_____ Respondent has complied with notice provisions of Rules of Court, Paragraph 13-29 dealing with appropriate notification of suspension to his clients, judges, and opposing counsel in pending litigation

The Board shall issue a written opinion in this matter.

This Summary Order is effective on: _____, 20_____.

It is further ORDERED that a copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his/her last address of record with the Virginia State Bar and hand-delivered to Bar

Counsel.

ENTERED THIS ____ DAY OF _____, 2017

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

< >, Chair

V I R G I N I A :

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

_____ VSB Docket Number _____

R E I N S T AT E M E N T S U M M A R Y O R D E R

On the _____ day of _____, 20_____, the referenced matter came before this Board upon the Petition for Reinstatement of License to Practice Law filed with the Clerk of the Virginia State Bar on _____ _____, 20_____, for recommendation to the Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony and documentary evidence, it is ORDERED that a recommendation shall issue to the Supreme Court of Virginia that the said Petition be

_____ APPROVED

_____ DISAPPROVED.

This Board shall issue a written opinion in this matter containing the said recommendation. Final action on the said Petition shall be taken by the Supreme Court of Virginia pursuant to Part Six, § IV, ¶ 13-25 of the Rules of the Supreme Court of Virginia.

It is further ORDERED that a copy *teste* of this Order shall be served upon the Petitioner and Bar Counsel by the Clerk of the Virginia State Bar Disciplinary System.

Entered this _____ day of _____, 20____.

_____
Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF VSB DOCKET NO.

MEMORANDUM ORDER OF >

THIS MATTER came on to be heard on <date>, before a panel of the Disciplinary Board consisting of> Chair,>,>,>,> Lay member. The Virginia State Bar (the "VSB") was represented by>,>,>,>,>, (the "Respondent"). appeared in person and was represented by>,. The Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. >,court reporter, <address>, <telephone number>, after being duly sworn, reported the hearing and transcribed the proceedings.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System ("Clerk") in the manner prescribed by the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-18 of the Rules of Court.

The matter came before the Board on the District Committee Determination for Certification by the< District Committee Section> pursuant to Part Six,§ IV, ¶ 13-18 of the Rules of the Supreme Court of Virginia involving misconduct charges against the Respondent. Prior to the proceedings and at the final Pretrial Conference VSB Exhibits>,>,>, were admitted into evidence by the Chair, without objection from the Respondent. [Stipulations?].

The Board heard testimony from the following witnesses, who were sworn under oath: _____ . The Board considered the exhibits introduced by the parties; heard arguments of counsel; and met in private to consider its decision.

I. FINDINGS OF FACT

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

1. At all times relevant hereto,>, hereinafter the Respondent, has been an attorney licensed to practice law in the Commonwealth of Virginia and his address of record with the Virginia State Bar has been>. The Respondent received proper notice of this proceeding as required by Part Six, §IV, ¶ 13-12 and 13-18 A. of the Rules of Virginia Supreme Court.

2. The Complainant,>, hereinafter referred to as">", was

…….

Etc

[Note - it may make more sense in some cases to combine the findings of fact and the rule violations under a unified heading "Misconduct" rather than repeating them first in Findings of Fact then again in Nature of Misconduct. In that case, the Order writer can put the relevant facts under separate sub-headings for each rule].

II. NATURE OF MISCONDUCT

The following conduct by Respondent constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

[Cite each rule proven]

A. Rules 1.8 - Conflict of Interest and Prohibited Transaction

a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

3) the client consents in writing thereto.

Respondent 's actions that violated this rule include, but are not limited to, the following:

1. [Recite the facts that support each violation]

B. Rule 3.4 - Fairness to Opposing Party and Counsel

A lawyer shall not:

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

Respondent 's actions that violated this rule include, but are not limited to, the following:

1.

2.

III. IMPOSITION OF SANCTION

Thereafter, the Board received further evidence and argument in aggravation and mitigation from the Bar and Respondent, including Respondent 's prior disciplinary record. The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent. After due deliberation, the Board reconvened to announce the sanction imposed. The Chair announced the sanction as >.

Accordingly, it is ORDERED that the Respondent, <name>, <sanction> <effective date>.

It is further ORDERED that, as directed in the Board's <date>, Summary Order in this matter, Respondent must comply with the requirements of Part Six,§ IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the> of > license to practice law in the Commonwealth of Virginia, to all clients for whom> is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in > care in conformity with the wishes of > client. Respondent shall

give such notice within 14 days of the effective date of the>, and make such arrangements as are required herein within 45 days of the effective date of the>. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the > that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of > , > shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within 60 days of the effective day of the >. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to respondent at his address of record with the Virginia State Bar, being >, by certified mail, return receipt requested, by regular mail to Respondent's Counsel, at <, and by hand delivery to <Bar Counsel>, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

ENTERED this _____day of _____, _____.

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

<NAME>, Chair

SUMMARY OF THE
ABA *STANDARDS FOR IMPOSING LAWYER SANCTIONS*

Office of Bar Counsel
Virginia State Bar
September 2011

I. ABA Standards for Imposing Lawyer Discipline: Purposes of Discipline and Standards

A. The Purpose of Lawyer Discipline Proceedings

To protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system and the legal profession.

B. The Purposes of the Standards

1. To provide a model system for determining sanctions while permitting flexibility and creativity in assigning sanctions to particular cases.

2. To promote:

a. Consideration of all factors relevant to imposing the appropriate level of sanction in a case.

b. Consideration of the appropriate weight of such factors in light of the stated goal of attorney discipline.

c. Consistency of sanctions for the same or similar offenses within and among jurisdictions.

II. ABA Standards for Imposing Lawyer Discipline: The Four Questions

A. No. 1: What ethical duty did the lawyer violate?

1. A duty to a client?
2. A duty to the public?
3. A duty to the legal system?

4. A duty to the profession?

B. No. 2: What was the lawyer's mental state?

1. Did the lawyer act intentionally?
2. Did the lawyer act knowingly?
3. Did the lawyer act negligently?

C. No. 3: What was the extent of actual or potential injury caused by the lawyer's misconduct?

1. Was there a serious injury?
2. Was there potentially serious injury?

[Note: In Virginia no showing of harm is required. The fact that a client did not suffer any prejudice to his legal rights is not sufficient to exonerate an attorney. *Maddy v. District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964)].

D. No. 4: Are there any aggravating or mitigating circumstances?

III. ABA Standards for Imposing Lawyer Discipline: Duties to Clients

A. The standards assume that these are the most important duties.

B. The duty of loyalty to a client.

1. The duty to preserve the property of a client.

2. The duty to preserve the client's confidences.

3. The duty to avoid conflicts of interest.

C. The duty of diligence.

D. The duty of competence.

E. The duty of candor.

IV. ABA Standards for Imposing Lawyer Discipline: Duties to the General Public

A. The public must be able to trust lawyers to preserve their property, liberty and lives.

B. The public expects lawyers to exhibit the highest standards of honesty, integrity; and not to engage in dishonesty, fraud, deceit, misrepresentation; or interfere with the administration of justice.

V. ABA Standards for Imposing Lawyer Discipline: Duties to the Legal System

A. As officers of the court, lawyers must abide by the substantive law as well as rules of procedure,

B. Operate within the law, and

C. Cannot create or use false evidence or engage in any other illegal or improper conduct.

VI. ABA Standards for Imposing Lawyer Discipline: Duties to the Legal Profession

A. These duties are not part of the relationship of the lawyer to his community and do not relate to a lawyer's basic duties to his clients, his service as an officer of the court or maintaining the public trust.

B. These include rules regarding:

1. Restrictions on advertising and recommending employment.

2. Fees.

3. Assisting the unauthorized practice of law.

4. Accepting, declining or terminating representation.

5. Maintaining the integrity of the profession, i.e., bar admission, disciplinary investigations, reporting misconduct.

VII. ABA Standards for Imposing Lawyer Discipline: the Lawyer's Mental State

A. Intentional action [the most culpable mental state]

-When the lawyer acts with the conscious objective or purpose to accomplish a particular result.

B. Knowing action [the next most culpable mental state]

When the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result.

C. Negligent action [the least culpable mental state]

When a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

VIII. ABA Standards for Imposing Lawyer Discipline: Injury

A. The extent of injury is defined by the duty violated and the extent of actual or potential harm.

B. "Injury" is defined as harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct.

C. "Potential injury" is defined as the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

D. Levels of injury

1. Serious injury.

2. Injury.

3. Little or no injury.

[Note: In Virginia no showing of harm is required. The fact that a client did not suffer any prejudice to his legal rights is not sufficient to exonerate an attorney. *Maddy v. District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964)].

IX. ABA Standards for Imposing Lawyer Discipline: Aggravating Factors

Definition: Any considerations or factors which may justify an increase in the degree of discipline imposed. They include the following:

A. Prior disciplinary offenses.

B. A dishonest or selfish motive.

C. A pattern of misconduct.

D. Multiple offenses.

E. Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority.

F. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process.

G. Refusal to acknowledge the wrongful nature of conduct.

H. Vulnerability of victim.

I. Indifference to making restitution.

X. ABA Standards for Imposing Lawyer Sanctions: Mitigating Factors

Definition: Any considerations or factors that may justify a reduction in the degree of discipline to be imposed. They include the following:

A. Absence of a prior disciplinary record.

B. Absence of a dishonest or selfish motive.

C. Personal or emotional problems.

D. Timely good faith effort to make restitution or to rectify consequences of misconduct.

E. Full and free disclosure to disciplinary committee or board, or cooperative attitude toward proceedings.

F. Inexperience in the practice of law.

G. Character or reputation

H. Physical or mental disability or impairment.

I. Interim rehabilitation.

J. Imposition of other penalties or sanctions.

K. Remorse.

L. Remoteness of prior offenses.

XI. ABA Standards for Imposing Lawyer Sanctions: Factors Which Are Neither Aggravating nor Mitigating

A. Forced or compelled restitution.

B. Agreeing to the client's demand for certain improper behavior or result.

C. Withdrawal of bar complaint against the lawyer.

D. Resignation prior to completion of disciplinary proceedings.

E. Complainant's recommendation as to sanction.

F. Failure of injured client to complain.

XII. ABA Standards for Imposing Lawyer Sanctions: Sanctions Definitions

A. Disbarment[1] - Termination of the individual's status as a lawyer.

B. Suspension[2] - The removal of a lawyer from the practice of law for a specified minimum period of time.

C. Reprimand[3] - Public censure, which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

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[1] **VSB definition: "Disbarment"** has the same meaning as revocation. "Revocation" means any revocation of an attorney's license to practice law and includes a revocation of such license as the result of a voluntary surrender by an attorney of the attorney's license to practice law as provided in Paragraph 13. Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13-1.

[2] **VSB definition: "Suspension"** means the temporary suspension of an attorney's license to practice law for either a fixed or indefinite period of time. Paragraph 13-1.

[3] **VSB definition:** Public reprimand and private reprimand are defined separately. **"Public Reprimand"** means a form of public discipline that declares publicly the conduct of the respondent improper, but does not limit the respondent's right to practice law. **"Private reprimand"** means a form of non-public discipline that declares privately the conduct of the respondent improper but does not limit the respondent's right to practice law. Paragraph 13-1.

D. Admonition[4] - Private reprimand, which declares the conduct of the lawyer improper but does not limit the lawyer's right to practice.

[Also see Virginia dismissals which create a disciplinary record.[5]]

[4] **VSB definition: "Admonition"** means a private sanction imposed by a subcommittee, *sua sponte*, a private or public sanction based upon an agreed disposition approved by a subcommittee; or a public sanction imposed by a district committee or the board (or a three-judge court) upon a finding that misconduct has been established, but that no substantial harm to the complainant or the public has occurred, and that no further disciplinary action is necessary. Paragraph 13-1.

[5] Dismissals that create a disciplinary record:

Dismissal *de minimus* – a finding that the respondent has engaged in misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and respondent has taken reasonable precautions against a recurrence of same. Paragraph 13-1.

Dismissal for exceptional circumstances – a finding that the respondent has engaged in misconduct but there exist exceptional circumstances mitigating against further proceedings, which circumstances shall be set forth in writing. Paragraph 13-1.

RULES OF THE VIRGINIA SUPREME COURT
PART SIX, SECTION IV, PARAGRAPH 13

EFFECTIVE JANUARY 1, 2019

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS

13-1 DEFINITIONS

As used in this Paragraph, the following terms shall have the meaning herein stated unless the context clearly requires otherwise:

"Adjudication of a Crime Proceeding" means the proceeding which follows the summary Suspension of an Attorney after receipt by the Clerk of the Disciplinary System of initial notification from any court of competent jurisdiction stating that an Attorney has been found guilty of a Crime, irrespective of whether sentencing has occurred.

"Admonition" means a private sanction imposed by a Subcommittee *sua sponte*, a private or public sanction based upon an Agreed Disposition approved by a Subcommittee, or a public sanction imposed by a District Committee or the Board upon a finding that Misconduct has been established, but that no substantial harm to the Complainant or the public has occurred, and that no further disciplinary action is necessary.

"Agreed Disposition" means the disposition of a Disciplinary Proceeding agreed to by Respondent and Bar Counsel and approved by a Subcommittee, District Committee, the Board or a Circuit Court.

"Attorney" means a member of the Bar, a Corporate Counsel Registrant, Foreign Lawyer, Foreign Legal Consultant, and any member of the bar of any other jurisdiction while engaged, *pro hac vice* or otherwise, in the practice of law in Virginia.

"Bar" means the Virginia State Bar.

"Bar Counsel" means the Attorney who is appointed as such by Council and who is approved by the Attorney General pursuant to Va. Code § 2.2-510 and such deputies, assistants, and Investigators as may be necessary to carry out the duties of the office, except where the duties must specifically be performed by the individual appointed pursuant to Va. Code § 2.2-510.

"Bar Official" means any Bar officer or any member, employee, or counsel of Council, the Board, a District Committee, or COLD.

"Board" means the Bar Disciplinary Board.

"Certification" means the document issued by a Subcommittee or a District Committee when it has elected to certify allegations of Misconduct to the Board for its consideration, which document shall include sufficient facts to reasonably notify Bar Counsel and Respondent of the basis for such Certification and the Disciplinary Rules alleged to have been violated.

"Certification for Sanction Determination" means the document issued by a District Committee to certify to the Board that a sanction within the power of the Board is in order where the District

Committee has found that Respondent failed to fulfill the terms of a Public Reprimand with Terms issued either by a Subcommittee on the basis of an Agreed Disposition or by a District Committee.

"Chair," unless otherwise specified, means the Chair, Vice Chair, or Acting Chair of a District Committee, or a Section, Panel, or Subcommittee of a District Committee, or of the Board or any Panel of the Board.

"Charge of Misconduct" means the notice given by the Bar to a Respondent, setting forth generally the Misconduct alleged to have been committed by the Respondent, and identifying the specific Disciplinary Rule(s) alleged to have been violated by the Respondent. The Charge of Misconduct shall also include the date, time, and place of the hearing.

"Circuit Court" means a court designated as such by Va. Code §17.1-500.

"Clerk of the Disciplinary System" means the employee of the Bar who, together with such assistants as may be required, provides administrative support to the disciplinary system and serves as official custodian of the Disciplinary Records.

"COLD" means the Standing Committee on Lawyer Discipline.

"Complainant" means the initiator of a Complaint.

"Complaint" means any written communication to the Bar alleging Misconduct or from which allegations of Misconduct reasonably may be inferred.

"Committee Counsel" means an Attorney District Committee member assigned to prosecute a Complaint.

"Corporate Counsel Registrant" means a person who has been recorded by the Virginia State Bar as a Corporate Counsel Registrant pursuant to Rule 1A:5.

"Costs" means reasonable costs paid by the Bar to outside experts or consultants; reasonable travel and out-of-pocket expenses for witnesses; Court Reporter and transcript fees; Guardian Ad Litem's fees and costs, if assessed by the Board; electronic and telephone conferencing and recording costs, if such procedures are requested by Respondent; copying, mailing, and required publication costs; translator fees; and an administrative charge determined by Council.

"Council" means the Council of the Bar.

"Court Reporter" means a person who is qualified to transcribe proceedings in a Circuit Court.

"CRESPA" *See* "RESA."

"Crime" means:

1. Any offense declared to be a felony by federal or state law;
2. Any other offense involving theft, fraud, forgery, extortion, bribery, or perjury;
3. An attempt, solicitation or conspiracy to commit any of the foregoing; or
4. Any of the foregoing found by a foreign jurisdiction.

"Disbarment" has the same meaning as Revocation.

"Disciplinary Proceeding" means any proceeding governed by this Paragraph.

"Disciplinary Record" means any tangible or electronic record of:

1. Any proceeding in which the Respondent has been found guilty of Misconduct, including those proceedings in which (a) the Board's or Court's finding of Misconduct has been appealed to this Court; (b) the Respondent's License has been revoked upon consent to revocation or Respondent has been found guilty of a Crime; or (c) the Respondent has received a sanction pursuant to this Paragraph; and
2. Any proceeding which has been resolved by (a) a *De Minimis* Dismissal; (b) a Dismissal for Exceptional Circumstances; or (c) an Admonition; and
3. Any proceeding in which the Respondent has been found guilty of a violation of CRESPA or RESA; and
4. Any proceeding which resulted in a sanction which created a disciplinary record at the time it was imposed.

"Disciplinary Record" does not include administrative or Impairment Suspensions.

"Disciplinary Rules" means

1. the Virginia Rules of Professional Conduct and Virginia Code of Professional Responsibility, as applicable; and
2. the disciplinary rules of any other jurisdiction applicable under Rule 8.5 of the Virginia Rules of Professional Conduct.

"Dismissal" means the dismissal of a Complaint or Disciplinary Proceeding by Bar Counsel, a Subcommittee, a District Committee, the Board or a Circuit Court.

"Dismissal *De Minimis*" means a finding that the Respondent has engaged in Misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and Respondent has taken reasonable precautions against a recurrence of same.

"Dismissal for Exceptional Circumstances" means a finding that the Respondent has engaged in Misconduct but there exist exceptional circumstances mitigating against further proceedings, which circumstances shall be set forth in writing.

"District Committee" means one of the District Committees appointed as hereinafter provided or, where the context requires, a Panel, a Section, or a Subcommittee thereof.

"District Committee Determination" means the written decision of a District Committee or a Subcommittee of a District Committee, relating to a Complaint or Charge of Misconduct.

"Executive Committee" means the Executive Committee of the Bar.

"Executive Director" means the Executive Director of the Bar and any deputy or assistant designated by Council to act as Executive Director.

"Files" means those files maintained by the Clerk of the Disciplinary System, and office of Bar Counsel with respect to each Complaint.

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

"Foreign Legal Consultant" means a person who has been issued a foreign legal consultant certificate by the Virginia Board of Bar Examiners pursuant to Rule 1A:7.

"Impairment" means any physical or mental condition that materially impairs the fitness of an Attorney to practice law.

"Impairment Proceeding" means the proceeding:

1. Initiated by Bar Counsel to petition the Board to order the Respondent to undergo examination(s) and provide releases for records;
2. Initiated by Bar Counsel to determine whether an Attorney has an Impairment;
3. That follows the summary Suspension of an Attorney who may have an Impairment; or
4. That follows a request by Respondent to terminate an Impairment Suspension.

"Investigation" means any inquiry by Bar Counsel, Committee Counsel, or the Bar's designee concerning any alleged Misconduct or Crime committed by an Attorney or any Impairment of an Attorney.

"Investigative Report" means the report prepared as a result of an Investigation.

"Investigator" means a person designated by the Bar to conduct an Investigation.

"Judge" means a judge within the meaning of Va. Code §2.1-37.1, and any judge appointed or elected under the laws of any other jurisdiction.

"Lawyer Assistance Program" means a mental health and/or substance abuse treatment program for Attorneys that is approved by the Bar.

"License" means the license or authority to practice law granted by this Court.

"Memorandum Order" means the opinion and order of the Board entered following a Disciplinary Proceeding that shall contain a brief statement of the findings of fact; the nature of the Misconduct shown by such finding of facts; the Disciplinary Rules found to have been violated by clear and convincing evidence; the sanction imposed; the notice requirements, if any, imposed upon Respondent; the time in which Terms are required to be satisfied by Respondent, if Terms are imposed; the alternative sanction, if Respondent fails to comply with any Terms that are imposed; the name and address of the Court Reporter who served at the hearing; the names of the members of the Board that constituted the Panel; and that Costs shall be reimbursed by Respondent.

"Misconduct" means any:

1. Unlawful conduct described in Va. Code § 54.1-3935;
2. Violation of the Disciplinary Rules;
3. Conviction of a Crime;

4. Conviction of any other criminal offense or commission of a deliberately wrongful act that reflects adversely on the Attorney's honesty, trustworthiness, or fitness as an Attorney; or
5. Violation of RESA or any regulations adopted pursuant thereto.

"Panel" means a group of members of a Section, District Committee, or the Board hearing a disciplinary matter that constitutes the quorum required by this Paragraph.

"Paragraph" means Paragraph 13 of the Rules of this Court, Part Six, Section IV.

"Petitioner" means:
1. An Attorney seeking Reinstatement after a Revocation; or
2. An Attorney seeking termination of an Impairment Suspension; or
3. A Bar Counsel or District Committee Chair seeking an expedited hearing before the Board and alleging that an Attorney is engaging in Misconduct likely to result in injury to or loss of property of a client or other entity, or alleging an Attorney poses imminent danger to the public.

"Private Discipline" means an Admonition without Terms issued by a Subcommittee *sua sponte*, a Private Reprimand or any form of discipline which is not public.

"Private Reprimand" means a form of non-public discipline that declares privately the conduct of the Respondent improper but does not limit the Respondent's right to practice law.

"Proceeding" means the same as Disciplinary Proceeding.

"Public Reprimand" means a form of public discipline that declares publicly the conduct of the Respondent improper, but does not limit the Respondent's right to practice law.

"Receivership" means a receivership created pursuant to Va. Code § 54.1-3900.01 or § 54.1-3936.

"Reinstatement" means the restoration by this Court of an Attorney's License in the manner provided in this Paragraph.

"Reinstatement Proceeding" means the proceeding which takes place upon referral from this Court of a Petition for Reinstatement by an Attorney whose License was previously revoked.

"RESA" means Chapter 27.2 of Title 55 of the Code of Virginia entitled "Real Estate Settlement Agents" (formerly "Consumer Real Estate Settlement Protection Act" or "CRESPA").

"Respondent" means any Attorney:
1. Who is the subject of a Complaint;
2. Who is the subject of any proceeding under this Paragraph, Va. Code §§ 54.1-3900.01, 54.1-3935, 54.1-3936, or RESA; or
3. Who is the subject of an Adjudication of a Crime Proceeding, Proceedings upon Disbarment, Revocation or Suspension in another jurisdiction, Impairment Proceeding, or Reinstatement Proceeding.

"Revocation" means any revocation of an Attorney's License and, when applied to a lawyer not admitted or authorized to practice law in Virginia, means the exclusion from the admission to, or the exercise of any privilege to, practice law in Virginia.

"Section" means a subgroup of a District Committee that has the same powers, authority, and duties as the District Committee.

"Subcommittee" means a subgroup of a District Committee or any Section thereof, convened for the purpose of performing the functions of a Subcommittee as described in this Paragraph.

"Summary Order" means a bench order entered by the Chair following a Disciplinary Proceeding that outlines in summary form the findings as to the allegations of Misconduct, the sanctions to be imposed, the effective date of any sanctions imposed, and any notice requirements.

"Suspension" means the temporary suspension of an Attorney's License for either a fixed or indefinite period of time and, when applied to a lawyer not admitted or authorized to practice law in Virginia, means the temporary or indefinite exclusion from the admission to, or the exercise of any privilege to, practice law in Virginia.

"Terms" shall mean those conditions imposed on the Respondent by a Subcommittee, District Committee, Board, or Circuit Court, that require the Respondent to perform certain remedial actions as a necessary condition for the imposition of an Admonition, a Private or Public Reprimand, or a Suspension pursuant to this Paragraph.

"Va. Code" means the 1950 Code of Virginia, as amended.

13-1.1 BURDEN OF PROOF
The burden of proof in all Disciplinary Proceedings is clear and convincing evidence.

13-2 AUTHORITY OF THE COURTS
Nothing in this Paragraph shall be interpreted so as to eliminate, restrict or impair the jurisdiction of the courts of this Commonwealth to deal with the disciplining of Attorneys as provided by law. Every Judge shall have authority to take such action as may be necessary or appropriate to protect the interests of clients of any Attorney whose License is subject to a Suspension or Revocation. Every Circuit Court shall have power to enforce any order, summons or subpoena issued by the Board, a District Committee or Bar Counsel and to adjudge disobedience thereof as contempt.

13-3 GENERAL ADMINISTRATIVE AUTHORITY OF COUNCIL
Council shall have general administrative authority over and responsibility for the disciplinary system created pursuant to this Paragraph.

13-4 ESTABLISHMENT OF DISTRICT COMMITTEES

A. Creation of District Committees. Council shall appoint a sufficient number of District Committees to carry out the purposes of this Paragraph. District Committees shall be established in geographical areas consisting of one or more judicial circuits. In creating the District Committee areas, Council shall give due consideration to Attorney population and the community of interest among different judicial circuits within a District Committee area. Each District Committee shall consist of ten, or in the discretion of Council, 20, 30 or 40 members.

Three members of a ten-member District Committee, six members of a 20-member District Committee, nine members of a 30-member District Committee, and 12 members of a 40-member District Committee shall be nonlawyers. All other members shall be active members of the Bar. Former members of a District Committee may serve on a District Committee Subcommittee or participate in a District Committee hearing whenever the District Committee Chair determines that such service is necessary for the orderly administration of the District Committee's work.

B. Panel Quorum. A Panel quorum shall consist of five or more persons. One person assigned to a District Committee Panel shall be a present or former nonlawyer member of a District Committee. If the scheduled nonlawyer is unable to attend, and if an alternate nonlawyer is not reasonably available, participation by a nonlawyer member shall not be required in a proceeding if a quorum is otherwise present. The action of a majority of a quorum shall be the action of the District Committee Panel.

C. Geographic Criteria. Each member of a District Committee shall be a resident of or have his or her office in the District Committee area for which such member is appointed. Members shall, to the extent practicable, be appointed from different geographical sections of their districts.

D. Term of Office. Council shall appoint members of each District Committee for such terms of service as will allow for the retirement from the District Committee, or completion of the existing terms, of one-third of the District Committee membership at the end of each fiscal year. A District Committee member's term shall be for three years, and, upon completion of such term, such member is eligible for appointment to a second successive three-year term. A member who has served two full successive terms of three years each on a District Committee shall not be eligible to serve again until one year after the expiration of the second term.

E. Qualifications of Members. Before nominating any individual for membership on a District Committee, the Council members making such recommendation shall first determine that the nominee is willing to serve on the District Committee and will conscientiously discharge the responsibility as a member of the District Committee. Council members making the nominations shall also obtain a statement from the nominees, in writing, that the nominees are willing to serve on the District Committee, if elected. In order to be considered as a potential appointee to a District Committee, each potential appointee shall execute the following: (1) a waiver of confidentiality with respect to his or her Disciplinary Record and any pending Complaints and a release allowing production of his or her Disciplinary Record and any pending Complaints from any jurisdiction for purposes of the appointment process; and (2) an authorization for the Bar to conduct a criminal records check of all jurisdictions for any conviction of a Crime and provide the results to the members of Council and the staff of the Bar for purposes of the appointment process. No member of Council shall be a member of a District Committee; however, this rule shall not apply to the chair or president of any conference of the Virginia State Bar, such as the Conference of Local Bar Associations, Diversity Conference, Senior Lawyers Conference, or Young Lawyers Conference, who are ex-officio members of Council. An ex-officio member of Council who is also a member of a District Committee shall not vote on the selection or confirmation of nominees for any District Committee.

F. Persons Ineligible for Appointment. Any potential appointee shall be ineligible for appointment to a District Committee if such potential appointee has: (1) ever been convicted in any jurisdiction of a Crime; (2) ever committed any criminal act that reflects adversely on the potential appointee's honesty, trustworthiness or fitness as a member of a District Committee; (3) a Disciplinary Record in any jurisdiction consisting of a Disbarment, Revocation, Suspension imposed at any time or Public Reprimand imposed within the ten years immediately preceding the proposed appointment date; or (4) a Disciplinary Record in any jurisdiction consisting of Private Discipline, except for a *de minimis* dismissal or a dismissal for exceptional circumstances, or an Admonition imposed within the five years immediately preceding the

proposed appointment date. The Standing Committee on Lawyer Discipline shall have the sole discretion to determine whether a *de minimis* dismissal or a dismissal for exceptional circumstances shall disqualify a potential appointee.

G. Interim Vacancies. Whenever a vacancy occurs on a District Committee, the Executive Committee may fill the vacancy. Bar Counsel or a majority of the members of a District Committee may request the Executive Committee to declare that a District Committee position held by any particular District Committee member has become vacant when, in the judgment of Bar Counsel or the Committee majority, such member has become, or has been for any reason, unavailable for or delinquent in the conduct of the District Committee's business. Similarly, upon request of Bar Counsel, the Executive Committee shall have the power to declare such vacancy. Before such vacancy is declared, the particular District Committee member shall be afforded notice and a reasonable opportunity to be heard.

13-5 AUTHORITY AND DUTIES OF COLD

All powers and duties of Council, with respect to the Disciplinary System, except the power to appoint District Committee members, may be exercised by COLD, subject to the direction and control of Council. Notwithstanding any rule to the contrary, any member of COLD may attend proceedings of the Subcommittees, District Committees or the Board. Service by an Attorney on COLD shall be deemed to be a professional relationship within the meaning of Disciplinary Rules 1.6, 1.7, 1.9, 1.10 and 3.7. Such service shall be deemed the holding of public office within the meaning of Disciplinary Rules 1.11 and 1.12. Consent under Disciplinary Rules 1.6, 1.7 and 1.9 shall be deemed to include Bar Counsel's consent on behalf of the Bar. The membership of COLD shall consist of twelve persons, ten of whom shall be active members of the Bar and two shall be nonlawyers. In addition, a vice chair of the Board shall be an ex-officio, nonvoting member.

13-6 DISCIPLINARY BOARD

A. Appointment of Members. This Court shall appoint, upon recommendation of Council, 20 members of the Board, 16 of whom shall be active members of the Bar and four of whom shall be nonlawyers. One Attorney member shall be designated by the Court as Chair and two Attorney members as Vice Chairs, upon recommendations of Council. Before nominating any individual for membership on the Board, the Bar's nominating committee shall first determine that the nominee is willing to serve on the Board and will conscientiously discharge the responsibilities as a member of the Board. All nominees shall have previously served on a district committee. The Bar nominating committee shall also obtain a statement from the nominees, in writing, that the nominees are willing to serve on the Board, if elected and appointed. In order to be considered as a potential appointee to the Board, each potential appointee shall execute the following: (1) a waiver of confidentiality with respect to his or her Disciplinary Record and any pending Complaints and a release allowing production of his or her Disciplinary Record and pending Complaints from any jurisdiction for purposes of the appointment process; and (2) an authorization for the Bar to conduct a criminal records check of all jurisdictions for any conviction of a Crime and provide the results to the members of Council and the staff of the Bar for purposes of the appointment process.

B. Persons Ineligible for Appointment. Any potential appointee shall be ineligible for appointment to the Board if such potential appointee has (1) ever been convicted in any jurisdiction of a Crime; (2) ever committed any criminal act that reflects adversely on the potential appointee's honesty, trustworthiness, or fitness as a Board member; (3) a Disciplinary Record in any jurisdiction of a Disbarment, Revocation, Suspension or Public Reprimand imposed within the ten years immediately preceding the proposed appointment date; (4) a Disciplinary Record in any jurisdiction consisting of Private Discipline, except for a *de minimis*

dismissal or a dismissal for exceptional circumstances, or an Admonition within the five years immediately preceding the proposed appointment date. The Standing Committee on Lawyer Discipline shall have the sole discretion to determine whether a *de minimis* dismissal or a dismissal for exceptional circumstances shall disqualify a potential appointee.

C. Term of Office. Members shall serve staggered terms of three years each. No member shall serve more than two consecutive three-year terms but shall be eligible for reappointment after the lapse of one or more years following expiration of the previous three-year term. At the expiration of the initial term of any member so appointed for less than a three-year term, such member shall be eligible for immediate reappointment to the Board for two additional consecutive three-year terms.

D. Meetings and Quorum. The Board shall meet on reasonable notice by the Chair or a Vice Chair. A Panel of five members shall constitute a quorum, and the action of a majority of a Panel shall constitute action of the Board. One of the five persons assigned to any Panel shall be a present or former nonlawyer member. If the scheduled nonlawyer is unable to attend and an alternate nonlawyer member or former member is not reasonably available, participation by a nonlawyer shall not be required in any Proceeding if a quorum is otherwise present.

E. Roster. The Clerk of the Disciplinary System shall establish a roster of Board members sufficient to constitute a quorum for action on the matter to which they are being assigned. Former members of the Board may serve on a Panel of the Board or participate in Board matters whenever the Chair, Vice Chair or Clerk of the Disciplinary System determines that such service is necessary for the orderly administration of the Board's work.

F. Jurisdiction. The Board shall have jurisdiction to consider: (1) Appeals from Public or Private Reprimands, with or without Terms, or Admonitions, with or without Terms, imposed by District Committees or Dismissals that otherwise create a Disciplinary Record; (2) Complaints and Certifications submitted to it by a Subcommittee or a District Committee; (3) Misconduct by reason of conviction of a Crime; (4) Impairment Proceedings; (5) Revocation or Suspension in another jurisdiction; (6) Petitions from Bar Counsel or the Chair of a District Committee seeking summary Suspension upon a belief that an Attorney is engaging in Misconduct likely to result in injury to or loss of property of a client or other entity or alleging an Attorney poses imminent danger to the public; (7) Petitions for Reinstatement referred to the Board for its recommendation to this Court; (8) Violations of RESA or any regulations adopted pursuant thereto; (9) Failure of Respondent to make a complete transcript part of the Record, as provided in this Paragraph; (10) Failure of an Attorney to comply with an order, summons or subpoena issued in connection with a Disciplinary Proceeding; and (11) Failure of Respondent to fulfill the terms of a Public Reprimand with Terms certified to it by a District Committee for sanction determination.

G. Additional Board Powers. The Board shall have the following powers in addition to all other powers granted to the Board:

1. To sanction a Respondent for failing to comply with an order issued by the Board. This sanction can include an interim Suspension. Before imposing an interim Suspension, the Board shall issue a notice to the Respondent advising the Respondent that he or she may petition the Board within ten days after service of the notice to withhold entry of an interim Suspension order and to hold an evidentiary hearing. If ten days after service of the notice the Respondent has not petitioned the Board to withhold entry of an interim Suspension order, the Board shall enter an Order suspending the Attorney's License until such time as the Attorney remedies the failure to comply or a determination is made as to whether the Attorney has violated any Disciplinary Rules. An Attorney suspended pursuant to this subparagraph G.1. is subject to the provisions of subparagraph 13-29;

2. On its own motion or upon request by Bar Counsel or the Respondent, to summon and examine witnesses under oath or affirmation administered by any member of the Board and to compel the attendance of witnesses and the production of documents necessary or material to any proceeding. Any summons or subpoena may be issued by any Board member or the Clerk of the Disciplinary System and shall have the force of and may be enforced as a summons or subpoena issued by a Circuit Court. A subpoena duces tecum which compels the Respondent to produce documents may be served upon the Respondent by certified mail at the Respondent's last address of record for membership purposes with the Bar or, if service cannot be effected at the Respondent's last address on record, and if the Respondent is a Foreign Lawyer, a lawyer engaged *pro hac vice* in the practice of law in Virginia, or a lawyer not admitted in Virginia, when mailed by first class mail to the Clerk of the Supreme Court of Virginia.

3. To impose an interim Suspension if an Attorney fails to comply with a summons or subpoena issued by any member of the Board, the Clerk of the Disciplinary System, Bar Counsel or any lawyer member of a District Committee for trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm. In the event of alleged noncompliance, Bar Counsel may file with the Board and serve on the Attorney a notice of noncompliance requesting the Board to suspend the Attorney's License. The noncompliance notice must advise the Attorney that he or she may petition the Board within 10 days of service of the notice to withhold entry of a Suspension order and to hold a hearing, at which time the Attorney shall have the burden of proving good cause for the alleged noncompliance. If 10 days after service of the notice of noncompliance the Attorney has not petitioned the Board to withhold entry of an interim Suspension order, the Board shall enter an Order suspending the Attorney's License until such time as the Attorney fully complies with the summons or subpoena or a determination is made as to whether the Attorney's noncompliance violated the Disciplinary Rules. An Attorney suspended pursuant to this subparagraph G.3. is subject to the provisions of subparagraph 13-29;

4. To rule on the admissibility of evidence, through a panel Chair, which rulings may be overruled by a majority of the Panel; and

5. To act through its Chair or one of the Vice Chairs (an officer) on any non-dispositive pre-hearing matters and on any dispositive matters where all parties are in agreement, subject to the following qualification and exception: (1) any pre-hearing ruling on a non-dispositive matter made by an officer of the Board shall be subject to being overruled by a majority vote of the Panel which actually hears the matter; and (2) Agreed Dispositions must be approved by a Panel.

H. Agreed Disposition. Whenever Bar Counsel and Respondent are in agreement as to the disposition of a Disciplinary Proceeding, the parties may submit a proposed Agreed Disposition to five members of the Board selected by the Chair. The five members so selected will constitute a Panel. If the proposed Agreed Disposition is accepted by a majority of the Panel so selected, the Agreed Disposition will be adopted by order of the Board. If the Agreed Disposition is not accepted by the Panel, the Disciplinary Proceeding will then be set for hearing

before another Panel of the Board at the earliest possible date. No member of the Panel which considered the proposed Agreed Disposition shall be assigned to the Panel which hears the Disciplinary Proceeding.

13-7 DISTRICT COMMITTEES

A. Powers. Each District Committee and Section thereof shall have the power to:

1. Elect a Chair, Vice Chair and Secretary, and such other officers as it considers appropriate;
2. Conduct hearings and adjudicate Charges of Misconduct as provided in this Paragraph;
3. Summon and examine witnesses under oath to be administered by any member of the District Committee;
4. Issue, through any of its Attorney members or through Bar Counsel, any summons or subpoena necessary to compel the attendance of witnesses and the production of documents or evidence necessary or material to any Investigation or Disciplinary Proceeding. Any such summons or subpoena issued to a non-Attorney shall have the force of and be enforced as a summons or subpoena issued by a Circuit Court. A subpoena duces tecum which compels the Respondent to produce documents may be served upon the Respondent by certified mail at the Respondent's last address of record for membership purposes with the Bar or, if service cannot be effected at the Respondent's last address on record, and if the Respondent is a Foreign Lawyer, a lawyer engaged *pro hac vice* in the practice of law in Virginia, or a lawyer not admitted in Virginia, when mailed by first class mail to the Clerk of the Supreme Court of Virginia.
5. Direct Bar Counsel to file a notice of noncompliance requesting the Board to suspend an Attorney's License until such time as the Attorney fully complies with a subpoena requiring production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm;
6. Rule on the admissibility of evidence and other matters relating to the conduct of a Disciplinary Proceeding;
7. Rule on motions to limit or quash any summons or subpoena;
8. Maintain order in all its proceedings through its Chair; and
9. Approve, through a Subcommittee acting by a unanimous vote, an Agreed Disposition of a Complaint or Charge of Misconduct submitted by Bar Counsel and the Respondent.

B. Creation of Subcommittees. The Chair shall appoint one or more Subcommittees of each District Committee. Where a District Committee is divided into two or more Sections, there shall be one or more Subcommittees of each Section, as determined by the respective District Committee Section Chair. Each Subcommittee shall consist of three members of that District Committee or that Section of the District Committee. Two members of a Subcommittee shall be members of the Bar, one of whom shall be appointed by the District Committee or Section Chair to act as Chair of that Subcommittee, and one member of the Subcommittee shall be a nonlawyer member.

C. Subcommittee Quorums. A quorum of a Subcommittee shall consist of three members, who may act in a meeting in person or through any means of communication by which all three members participating may simultaneously hear each other during the meeting.

D. District Committee Jurisdiction. A District Committee shall have jurisdiction over all Complaints referred to it.

E. Limitation on Private Discipline. Private Discipline shall be imposed only in cases of minor Misconduct, when there is little or no injury to any of the following: a client, the public, the legal system or the profession, and when there is little likelihood of repetition by the Respondent. When any Respondent has received two determinations of Private Discipline, excepting only *de minimis* Dismissals, during any ten-year period, it shall be presumed that further Private Discipline is not an appropriate disposition. Any Respondent who has received two determinations of Private Discipline within the ten-year period immediately preceding the Bar's receipt of the oldest Complaint that the Subcommittee is considering, shall receive public discipline for any violation of the Disciplinary Rules, unless there are sufficient facts and circumstances to rebut such presumption.

F. Venue. Venue shall not be jurisdictional, but venue shall lie with the District Committee, in the following order of preference, where:

1. Any portion of the alleged Misconduct occurred;
2. The Respondent resides;
3. The Respondent maintains an office;
4. The Respondent has an address on record with the Bar as the Respondent's address for membership purposes; or
5. The Complainant resides.

G. Preferred Venue. If preferred venue does not lie with any District Committee able to adjudicate the Complaint against a Respondent, such Complaint may be filed with and adjudicated by a District Committee designated by the Clerk of the Disciplinary System. In determining to which District Committee a Complaint should be referred, the Clerk of the Disciplinary System shall consider the volume of Complaints pending before the District Committee and the inconvenience imposed upon the Respondent and the witnesses by the location of the District Committee.

H. Objections to Venue. Either the Respondent or Bar Counsel may object to venue by filing a notice of objection with the Clerk of the Disciplinary System within ten days of notification of the referral of the Complaint to a District Committee. Objections to venue shall be deemed waived unless made within this ten-day time period. Upon receipt of a timely filed notice of objection, the Clerk of the Disciplinary System shall forward the notice of objection to the Chair of the Board for decision.

I. Complaints Referred to District Committee or Subcommittee. A District Committee or Subcommittee shall consider, adjudicate and dispose of Complaints referred to the District Committee pursuant to this Paragraph. Where appropriate, the District Committee or Subcommittee shall also counsel Respondents concerning their conduct. In addition, members of a District Committee, other than nonlawyer members, may participate in the Investigation of Complaints, provided that a member participating in such Investigation shall not participate in a District Committee's consideration, adjudication and disposition of such Complaint or Charge of Misconduct.

J. Service by a Member of the Bar and Professional Relationship. Service by a member of the Bar on a District Committee shall be deemed to be a professional relationship within the meaning of Disciplinary Rules 1.6, 1.7, 1.9, 1.10 and 3.7. Such service shall be deemed the holding of public office within the meaning of Disciplinary Rules 1.11 and 1.12.

K. Consent by Bar Counsel. Consent under Disciplinary Rules 1.6, 1.7 and 1.9 shall be deemed to include Bar Counsel's consent on behalf of the Bar.

L. Recusal or Disqualification of District Committee Members. In the event of recusal or disqualification of so many District Committee members that the District Committee is unable to discharge its responsibilities under this Rule, the District Committee may supplement its membership with members from other District Committees to achieve a quorum. If every member of a District Committee is recused or is disqualified from considering Charges

of Misconduct, the Clerk of the Disciplinary System shall assign the Charges of Misconduct to another District Committee.

13-8 BAR COUNSEL

A. Authority. Bar Counsel shall have the authority, to the extent provided in this Paragraph and subject to the general supervision of COLD, to:

1. Initiate, investigate, present or prosecute Complaints or other Proceedings before Subcommittees, District Committees, the Board and Circuit Courts. Bar Counsel may represent the Bar in matters pending in this Court. In the course of performing such functions, Bar Counsel shall act independently and exercise prosecutorial autonomy and discretion;
2. Examine criminal history record information relating to any Attorney or former Attorney from any state or federal law enforcement agency;
3. Examine financial books and records, once a Complaint has been filed, including, without limitation, any and all escrow accounts, trust accounts, estate accounts, fiduciary accounts and operating or other accounts, maintained by the Attorney, the Attorney's law firm or any other third party organization by whom the Attorney is employed or with whom the Attorney is associated;
4. Examine the accounts described in the preceding subparagraph A.3. at any time when Bar Counsel reasonably believes that such accounts may not be in compliance with the Disciplinary Rules. In every instance in which Bar Counsel initiates examination of accounts or issues any summons or subpoena in the conduct of an examination or an Investigation concerning accounts, other than on the basis of a Complaint against the Attorney, Bar Counsel shall file a written statement as part of the record setting forth the reasons supporting the belief that the accounts may not comply with the Disciplinary Rules. A copy of this written statement shall be served upon the Attorney who is the subject of the Investigation when an examination has begun or any summons or subpoena has been issued;
5. Issue such summons for the attendance of witnesses and subpoenae for the production of documents necessary or material to any Investigation, District Committee or Board proceeding; and
6. File a notice of noncompliance requesting the Board to suspend the Attorney's License until such time as the Attorney fully complies with subpoena issued by the Bar Counsel, a District Committee or the Board, for the production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm.

B. Acting Bar Counsel. In the event of disqualification or recusal of Bar Counsel in any Proceeding, the allegation of Misconduct shall be prosecuted by a District Committee member designated by the District Committee Chair if the Proceeding is before a District Committee, or by the Attorney General or his designee if the Proceeding is before the Board or a three-judge Circuit Court.

13-9 CLERK OF THE DISCIPLINARY SYSTEM

A. Current Dockets. The Clerk of the Disciplinary System shall maintain a docket of current Attorney discipline and RESP matters pending before the District Committees, the Board or courts of this Commonwealth.

B. Records Retention. The Clerk of the Disciplinary System shall retain all Files with respect to any Disciplinary Record for a period of at least five years from the date of the final Order in the Disciplinary Proceeding that created that Disciplinary Record. The Clerk may destroy all other Files upon the expiration of one year after the Dismissal.

C. File Destruction. Whenever a File is destroyed, the following information shall be preserved:

1. The name and Bar identification number of Respondent;
2. The name and last known address of the Complainant;
3. The date the matter was initially received by the Bar;
4. A summary of the Complaint or allegation of Misconduct;
5. The date of the Dismissal or any sanction(s) imposed; and
6. The disposition of the matter, including the basis for Dismissal or the sanction(s) imposed.

Such summary information shall be retained for at least five years whenever the Complaint or allegation of Misconduct is dismissed with no Disciplinary Record having been created, and for at least ten years whenever a Disciplinary Record has been created, an Impairment determined, a Reinstatement Proceeding held or a finding of Misconduct involving a RESA violation made.

D. Preservation of Determinations and Orders. The Clerk of the Disciplinary System shall preserve a copy of all District Committee Determinations and Board or court orders in which an Attorney has been found to have engaged in Misconduct, to be impaired, to have committed a violation of RESA or requested Reinstatement.

E. Costs. The Clerk of the Disciplinary System shall assess Costs against the Respondent in the following cases:

1. All cases in which a final determination of Misconduct is made by a Subcommittee, District Committee, three-judge Circuit Court, the Board or this Court;
2. All cases against a Respondent who consents to revocation;
3. All proceedings under this Paragraph in which there is a finding that a Respondent has been found guilty of a Crime;
4. All reciprocal cases under this Paragraph in which a final determination imposing discipline is made;
5. All Reinstatement cases under this Paragraph;
6. All cases before the Board in which sanctions were imposed for violations of RESA and/or the Bar's RESA regulations; and
7. With respect to Guardian Ad Litem's fees and costs, all Disciplinary Proceedings in which a Guardian Ad Litem is appointed and the Board, in its discretion, assesses the Guardian Ad Litem's fees and costs against Respondent.

F. Review of Costs Assessment. If the Respondent disagrees with the amount of Costs as calculated by the Clerk, or if the Respondent asserts that the immediate payment thereof would constitute a hardship, the Respondent may petition the Board for review within ten days of the notice assessing Costs. The Chair, upon written request of Respondent, included with his petition, may grant Respondent a hearing on the Costs issue. The decision of the Chair shall be final and non-appealable. Interest at the judgment rate shall commence on the Costs assessed 30 days after the issuance of the notice of assessment, unless otherwise prescribed by the Board. If the Respondent fails to pay the Costs and interest so assessed within 30 days of the notice of assessment or within such other time as the Board may order, then the Costs assessed and interest shall be a debt subject to collection by the Bar, and the Board shall issue an order of

Suspension against the Respondent until such time as Respondent shall pay all of the Costs and accrued interest.

G. Public Notification of Sanctions. The Clerk shall issue a statement to the communications media summarizing each public Admonition, Public Reprimand, Suspension or Revocation. The Clerk shall notify the following individuals and entities of each public Admonition, Public Reprimand, Suspension or Revocation:

1. The Clerk of the Supreme Court;
2. Clerks of the Circuit and District Courts in each judicial circuit in the Commonwealth where the Attorney resides or maintains an office; and
3. Disciplinary authorities for jurisdictions, federal or state, wherein it is reasonable to expect that the Attorney may be licensed.

13-10 PROCESSING OF COMPLAINTS BY BAR COUNSEL

A. Review. Bar Counsel shall review all Complaints. If, following review of a Complaint, Bar Counsel determines that the conduct questioned or alleged does not present an issue under the Disciplinary Rules, Bar Counsel shall not open an Investigation, and the Complaint shall be dismissed.

B. No Dismissal by Complainant. No Complaint or allegation of Misconduct shall be dismissed at any stage of the process solely upon a request by a Complainant to withdraw his or her Complaint.

C. Summary Resolution. Bar Counsel shall decide whether a Complaint is appropriate for an informal or abbreviated Investigation. When a Complaint involves minor allegations of Misconduct susceptible to early resolution, Bar Counsel may assign the Complaint to a staff member, a District Committee member, or use any other means practicable to speedily investigate and resolve the allegations of Misconduct. If the Complaint is resolved through this process, Bar Counsel shall then dismiss the Complaint. Such dismissal shall not become a part of the Respondent's Disciplinary Record. If Bar Counsel chooses not to proceed under this subsection, or, having elected to proceed under this subsection, the Complaint is not resolved within 90 days from the date of filing, Bar Counsel shall proceed pursuant to the following subsections.

D. Preliminary Investigation. A preliminary Investigation may consist of obtaining a response, in writing, from the Respondent to the Complaint and sharing the response, if any, with the Complainant, so the Complainant may have an opportunity to provide additional information.

E. Disposition by Bar Counsel after Preliminary Investigation. Bar Counsel may conduct a preliminary Investigation of any Complaint to determine whether it should be referred to the District Committee. Bar Counsel shall not file a Complaint with a District Committee following a preliminary Investigation when, in Bar Counsel's judgment:

1. As a matter of law, the conduct questioned or alleged does not constitute Misconduct;
2. The evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged;
3. There is no credible evidence to support any allegation of Misconduct by the Respondent; or
4. The evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard.

F. Referral to District Committee. Bar Counsel shall notify the District Committee Chair that a Complaint has been referred to a District Committee for investigation. Thereafter, the Complaint shall be investigated and a report thereof made to a Subcommittee.

G. Report to Subcommittee. When submitting an Investigative Report to the Subcommittee, Bar Counsel or Committee Counsel may also send a recommendation as to the appropriate disposition of the Complaint.

13-11 LIMITED RIGHT TO DISCOVERY

There shall be no right to discovery in connection with disciplinary matters, including matters before three-judge Circuit Courts, except:

A. Issuance of such summonses and subpoenae as are authorized; and

B. Bar Counsel shall furnish to Respondent a copy of the Investigative Report considered by the Subcommittee when the Subcommittee set the Complaint for hearing before the District Committee or certified the Complaint to the Board, with the following limitations:

1. Bar Counsel shall not be required to produce any information or document obtained in confidence from any law enforcement or disciplinary agency, or any documents that are protected by the attorney-client privilege or work product doctrine, unless attached to or referenced in the Investigative Report;
2. Bar Counsel shall not be required to reveal other communications between the Investigator and Bar Counsel, or between Bar Counsel and the Subcommittee; and
3. Bar Counsel shall make a timely disclosure to the Respondent of all known evidence that tends to negate the Misconduct of the Respondent or mitigate its severity or which, upon a finding of Misconduct, would tend to support imposition of a lesser sanction than might be otherwise imposed.

C. Bar Counsel shall make a timely disclosure to the Respondent of all known evidence that tends to negate the Misconduct of the Respondent or mitigate its severity or which, upon a finding of Misconduct, would tend to support imposition of a lesser sanction than might be otherwise imposed. Bar counsel shall comply with the duty to disclose this evidence regardless of whether the information is confidential under this Paragraph. If Bar Counsel discloses under this subparagraph information that is otherwise confidential, Bar Counsel shall promptly notify the Attorney or Complainant who is the subject of the disclosure unless Bar Counsel decides that giving such notice would prejudice a disciplinary investigation. Notice shall be in writing and shall be deemed effective when mailed by first-class mail to the Bar's last known address of the subject Complainant or Attorney.

13-12 SUBSTANTIAL COMPLIANCE, NOTICE AND EVIDENTIARY RULINGS, AND ADDRESS NOTIFICATION

A. Substantial Compliance. Except where this Paragraph provides specific time deadlines, substantial compliance with the provisions hereof shall be sufficient, and no allegation of Misconduct shall be dismissed on the sole ground that any such provision has not been strictly complied with.

B. Time Deadlines. Where specific time deadlines are provided, such deadlines shall be jurisdictional, except when the Clerk of the Disciplinary System, Bar Counsel, a District Committee or the Board is granted specific authority herein to extend or otherwise modify any such deadline.

C. Service. Whenever any notice or other writing directed to the Respondent is required or permitted under this Rule, such notice or other writing shall be deemed effective and served when mailed by certified mail to the Respondent at the Respondent’s last address on record for membership purposes with the Bar or, if service cannot be effected at the

Respondent's last address on record, and if the Respondent is a Foreign Lawyer, a lawyer engaged *pro hac vice* in the practice of law in Virginia, or a lawyer not admitted in Virginia, when mailed by first class mail to the Clerk of the Supreme Court of Virginia.

D. Evidentiary Rulings. In any Disciplinary Proceeding, evidentiary rulings shall be made favoring receipt into evidence of all reasonably probative evidence to satisfy the ends of justice. The weight given such evidence received shall be commensurate with its evidentiary foundation and likely reliability.

E. Rights of Counsel for Complainant or Witness. Neither counsel for the Complainant, if there is one, nor counsel for any witnesses, may examine or cross-examine any witness, introduce any evidence or present any argument.

F. Notice of Impairment Evidence. A Respondent who intends to rely upon evidence of an Impairment in mitigation of Misconduct shall, absent good cause excusing his or her failure to do so, provide notice not less than 14 days prior to the hearing to Bar Counsel and the District Committee or Board of his or her intention to do so.

G. English Required. All communication with the Bar, whether written or oral, shall be in English.

13-13 PARTICIPATION AND DISQUALIFICATION OF COUNSEL

A. Attorney for Respondent. A Respondent may be represented by a member of the Bar, or any member of the bar of any other jurisdiction while engaged *pro hac vice* in the practice of law in Virginia, at any time with respect to a Complaint.

B. Signature Required by Respondent. A Respondent must sign his or her written response to any Complaint, Charge of Misconduct or Certification.

C. Disqualification. An Attorney shall not represent a Respondent with respect to a Complaint or allegation of Misconduct:

1. While such Attorney is a current employee or current officer of the Bar or is a member of Council, COLD, the Board, or a District Committee;
2. For 90 days after such Attorney ceases to be an employee or officer of the Bar or a member of Council, COLD, the Board, or a District Committee;
3. At any time, after such Attorney ceases to be an employee or officer of the Bar or a member of Council, COLD, the Board or a District Committee, if such Attorney was personally involved in the subject matter of the Complaint, allegation of Misconduct or any related matter while acting as such employee, officer or member;
4. At any time after such Attorney ceased to be a liaison from COLD to a District Committee before which the Disciplinary Proceeding involving such Complaint or Charge of Misconduct was pending during the time such Attorney was such liaison; or
5. If such Attorney is a partner or an associate of, or is a member, shareholder or has a similar relationship with an Attorney who is a current member of COLD or an officer of the Bar, or who was a member of COLD or an officer of the Bar within the previous 90 days.
6. If such Attorney is a partner or an associate of, or is a member, shareholder or has a similar relationship with an Attorney who is a current member of the Board or was a member of the Board within the previous 90 days, unless the Attorney's representation of the Respondent with respect to a Complaint or allegation of Misconduct preceded the Board member's appointment to the Board. In such cases, the Attorney may continue to represent the Respondent as follows:

a. Before a Three Judge Court in proceedings conducted pursuant to Va. Code § 54.1-3935, or any appeal therefrom;

b. Before any District Committee.

7. If such Attorney is a partner or an associate of, or is a member, shareholder or has a similar relationship with an Attorney who is a member of a District Committee, before that District Committee, or if the District Committee is divided into sections, before the District Committee section of which the Attorney's partner or associate is a member.

D. No Imputation of Conflict. Except as set forth in subparagraph C, there shall be no imputation of conflict that disqualifies an Attorney from representing a Respondent with respect to a Complaint or Charge of Misconduct.

13-14 DISQUALIFICATION OF DISTRICT COMMITTEE MEMBER OR BOARD MEMBER

A. Personal or Financial Interest. A member or former member of a District Committee or the Board shall be disqualified from adjudicating any matter with respect to which the member has any personal or financial interest that might affect or reasonably be perceived to affect the member's ability to be impartial. The Chair shall rule on the issue of disqualification, subject to being overruled by a majority of the Panel or Subcommittee.

B. Complaint Against a Member. Upon the referral of any Complaint against a member or former member of a District Committee or the Board to a District Committee for Investigation, the member shall be recused from any service on the District Committee or the Board until the Dismissal of the Complaint without the imposition of any form of discipline.

C. Imposition of Discipline. Upon the final imposition of a Private Reprimand, a Public Reprimand, an Admonition, a Suspension or a Revocation against a member or former member of a District Committee or the Board, the member shall automatically be terminated from membership or further service on the District Committee or Board. Upon the final imposition of any other form of Attorney discipline, COLD shall have sole discretion to determine whether the member shall be terminated from membership or further service on the District Committee or the Board.

D. Interpretation. Unless otherwise stated, all questions of interpretation under this subparagraph 13-14 shall be decided by the tribunal before which the proceeding is pending, except that COLD shall determine discretionary termination of membership or further service.

E. Ineligibility. Any member or former member of a District Committee or the Board shall be ineligible to serve in a Disciplinary Proceeding in which:

1. The District Committee or Board member or any member of his or her firm is involved in any significant way with the matter on which the District Committee or Board would act;
2. The Board member or any member of the Board member's firm was serving on the District Committee that certified the matter to the Board or has otherwise acted on the matter;
3. A Judge would be required to withdraw from consideration of, or presiding over, the matter under the Canons of Judicial Conduct adopted by this Court;
4. The District Committee or Board member previously represented the Respondent; or
5. The District Committee or Board member, upon reasonable notice to the Clerk of the Disciplinary System or to the Chair presiding over a matter, disqualifies himself or herself from participation in the matter, because

such member believes that he or she is unable to participate objectively in consideration of the matter or for any other reason.

13-15 SUBCOMMITTEE ACTION

A. Referral. Following receipt of the report of Investigation and Bar Counsel's recommendation, the Subcommittee may refer the matter to Bar Counsel for further Investigation.

B. Other Actions. Once the Investigation is complete to the Subcommittee's satisfaction, it will take one of the following actions.

1. Dismiss. It shall dismiss the Complaint when:
   a. As a matter of law the conduct questioned or alleged does not constitute Misconduct; or
   b. The evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard; or
   c. The Subcommittee concludes that a Dismissal *De Minimis* should be imposed; or
   d. The Subcommittee concludes that a Dismissal for Exceptional Circumstances should be imposed; or
   e. The action alleged to be Misconduct is protected by superseding law.

   In making the determination in the preceding subparagraphs B.1.c. and B.1.d., the Subcommittee shall have access to Respondent's prior Disciplinary Record. Respondent, within ten days after the issuance of a dismissal which creates a Disciplinary Record, may request a hearing before the District Committee.
2. Impose an Admonition without Terms. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record. Respondent, within ten days after the issuance of an Admonition without Terms, may request a hearing before the District Committee.
3. Certify to the Board. Certify the Complaint to the Board pursuant to this Paragraph or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935. Certification shall be based on a reasonable belief that the Respondent has engaged or is engaging in Misconduct that, if proved, would justify a Suspension or Revocation. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record.
4. Approve an Agreed Disposition. Approve an Agreed Disposition imposing one of the following conditions or sanctions:
   a. Admonition, with or without Terms; or
   b. Private Reprimand, with or without Terms; or
   c. Public Reprimand, with or without Terms.
5. Set the Complaint for Hearing before the District Committee. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record.

C. Vote Required for Action. All actions taken by Subcommittees, except for approval of Agreed Dispositions, shall be by majority vote.

D. Report of the Subcommittee. All decisions of the Subcommittee shall be reported to the District Committee in a timely fashion.

E. Notice of Action of the Subcommittee. If a Subcommittee has dismissed the Complaint, the Chair shall promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor. If a Subcommittee determines to issue an Admonition with or without Terms, or a Private or Public Reprimand with or without Terms, the Chair shall promptly send the Complainant, the Respondent and Bar Counsel a copy of the Subcommittee's determination. If a Subcommittee elects to certify a Complaint to the Board, the Subcommittee Chair shall promptly mail a copy of the Certification to the Clerk of the Disciplinary System, Bar Counsel, the Respondent and the Complainant.

F. Procedure in All Terms Cases. If a Subcommittee imposes Terms, the Subcommittee shall specify the time period within which compliance with the Terms shall be completed. If Terms have been imposed against a Respondent, that Respondent shall deliver a certification of compliance with such Terms to Bar Counsel within the time period specified by the Subcommittee. If a Subcommittee issues an Admonition with Terms, a Private Reprimand with Terms, or a Public Reprimand with Terms based on an Agreed Disposition, the Agreed Disposition shall specify the alternative disposition to be imposed if the Terms are not complied with or if the Respondent does not certify compliance with Terms to Bar Counsel. If the Respondent does not comply with the Terms imposed or does not certify compliance with Terms to Bar Counsel within the time period specified, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the District Committee at its next available hearing date as determined in the discretion of the District Committee Chair. The burden of proof shall be on the Respondent to show timely compliance and timely certification by clear and convincing evidence. If the District Committee determines that the Respondent failed to comply with the Terms or failed to certify compliance within the stated time period, the alternative disposition shall be imposed. Bar Counsel shall be responsible for monitoring compliance with Terms and reporting any noncompliance to the District Committee.

G. Alternative Disposition for Public Reprimand with Terms. The alternative disposition for a Public Reprimand with Terms shall be a Certification For Sanction Determination unless the Respondent has entered into an Agreed Disposition for the imposition of an alternative disposition of a specific period of Suspension of License.

13-16 DISTRICT COMMITTEE PROCEEDINGS

A. Charge of Misconduct. If the Subcommittee determines that a hearing should be held before a District Committee, Bar Counsel shall, at least 42 days prior to the date fixed for the hearing, serve upon the Respondent by certified mail the Charge of Misconduct, a copy of the Investigative Report considered by the Subcommittee and any exculpatory materials in the possession of Bar Counsel.

B. Response by Respondent Required. After the Respondent has been served with the Charge of Misconduct, the Respondent shall, within 21 days after service of the Charge of Misconduct:

1. File an answer to the Charge of Misconduct, which answer shall be deemed consent to the jurisdiction of the District Committee; or
2. File an answer to the Charge of Misconduct and a demand with the Clerk of the Disciplinary System that the proceedings before the District Committee be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon such demand and provision of available dates as specified above, further proceedings before the District Committee shall terminate, and Bar Counsel shall file the complaint required by Va. Code §

54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held.

C. Failure of Respondent to Respond. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the District Committee.

D. Pre-Hearing Orders. The Chair may, *sua sponte* or upon motion of the Respondent or Bar Counsel, enter such pre-hearing order as is necessary for the orderly conduct of the hearing before the District Committee. Such order may establish time limits and:

1. Direct Bar Counsel and Respondent to provide to each other, with a copy to the Chair, a list of and copies of all exhibits proposed to be introduced at the Misconduct stage of the hearing;
2. Encourage Bar Counsel and Respondent to confer and discuss stipulations; and
3. Direct Bar Counsel and Respondent to serve on each other, with a copy to the Chair, lists setting forth the name of each witness the party intends to call.

E. Subpoenae, Summonses and Counsel. The Respondent may be represented by counsel. The Respondent may request Bar Counsel or the Chair of the District Committee to issue summonses or subpoenae for witnesses and documents. Requests for summonses and subpoenae shall be granted, unless, in the judgment of the Chair of the District Committee, such request is unreasonable. Either Bar Counsel or Respondent may move the District Committee to quash such summonses or subpoenae.

F. Continuances. Once a District Committee has scheduled a hearing, no continuance shall be granted unless in the judgment of the Chair the continuance is necessary to prevent injustice.

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

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

I. Oral Testimony and Exhibits. Oral testimony shall be taken and preserved by a Court Reporter. All exhibits or copies thereof received in evidence or marked refused by the District Committee shall be preserved in the District Committee file on the matter.

J. Opening Remarks by the Chair. After swearing the Court Reporter, who thereafter shall administer oaths or affirmations to witnesses, the Chair shall make opening remarks in the presence of the Respondent and the Complainant, if present. The Chair shall also inquire of the members present whether any member has any personal or financial interest that may affect, or be reasonably perceived to affect, his or her ability to be impartial. Any member answering in the affirmative shall be excused from participation in the matter.

K. Motion to Exclude Witnesses. Witnesses other than the Complainant and the Respondent shall be excluded until excused from a public hearing on motion of Bar Counsel, the Respondent or the District Committee.

L. Presentation of the Bar's Evidence. Bar Counsel or Committee Counsel shall present witnesses and other evidence supporting the Charge of Misconduct. Respondent shall be afforded the opportunity to cross-examine the Bar's witnesses and to challenge any evidence

introduced on behalf of the Bar. District Committee members may also examine witnesses offered by Bar Counsel or Committee Counsel.

M. Presentation of the Respondent's Evidence. Respondent shall be afforded the opportunity to present witnesses and other evidence on behalf of Respondent. Bar Counsel or Committee's Counsel shall be afforded the opportunity to cross-examine Respondent's witnesses and to challenge any evidence introduced on behalf of Respondent. District Committee members may also examine witnesses offered on behalf of Respondent.

N. No Participation by Other Counsel. Neither counsel for the Complainant, if there be one, nor counsel for any witness, may examine or cross-examine any witness, introduce any other evidence, or present any argument.

O. Depositions. Depositions may be taken only when witnesses are unavailable, in accordance with Rule 4:7(a)(4) of the Rules of this Court.

P. Testimony by Videoconferencing and Telephone. Testimony by videoconferencing and/or telephonic means may be utilized, if in compliance with the Rules of this Court.

Q. Admissibility of Evidence. The Chair shall rule on the admissibility of evidence, which rulings may be overruled by a majority of the remaining District Committee members participating in the hearing.

R. Motion to Strike. At the conclusion of the Bar's evidence or at the conclusion of all of the evidence, the District Committee on its own motion, or the Respondent or the Respondent's counsel may move to strike the Bar's evidence as to one or more allegations of Misconduct contained in the Charge of Misconduct. A motion to strike an allegation of Misconduct shall be sustained if the Bar has failed to introduce sufficient evidence that would under any set of circumstances support the conclusion that the Respondent engaged in the alleged Misconduct that is the subject of the motion to strike. If the Chair sustains the motion to strike an allegation of Misconduct, subject to being overruled by a majority of the remaining members of the Committee, that allegation of Misconduct shall be dismissed.

S. Argument. The District Committee shall afford a reasonable opportunity for argument on behalf of the Respondent and Bar Counsel on the allegations of Misconduct.

T. Deliberations. The District Committee members shall deliberate in private on the allegations of Misconduct. After due deliberation and consideration, the District Committee shall vote on the allegations of Misconduct.

U. Change in District Committee Composition. When a hearing has been adjourned for any reason and any of the members initially constituting the quorum for the hearing cannot be present, the hearing of the matter may be completed by furnishing a transcript of the subsequent proceedings conducted in one or more member's absence to any such absent member or members; or substituting another District Committee member for any absent member or members and furnishing a transcript of the prior proceedings in the matter to such substituted member or members.

V. Show Cause for Compliance with Terms. Any show cause proceeding involving the question of compliance with Terms shall be deemed a new hearing and not a continuation of the hearing that resulted in the imposition of Terms.

W. Dismissal. After due deliberation and consideration, the District Committee may dismiss the Charge of Misconduct, or any allegation thereof, as not warranting further action when in the judgment of the District Committee:

1. As a matter of law the conduct questioned or alleged does not constitute Misconduct;
2. The evidence presented shows that the Respondent did not engage in the Misconduct alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence does not

reasonably support any allegation of Misconduct under a clear and convincing evidentiary standard;

3. The action alleged to be Misconduct is protected by superseding law; or
4. The District Committee is unable to reach a decision by a majority vote of those constituting the hearing panel, the Charge of Misconduct, or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonably support the Charge of Misconduct, or one or more allegations thereof, under a clear and convincing evidentiary standard.

X. Sanctions. If the District Committee finds that Misconduct has been shown by clear and convincing evidence, then the District Committee shall, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has been the subject of any Disciplinary Proceedings in this or any other jurisdiction and shall give Bar Counsel and the Respondent an opportunity to present material evidence in aggravation or mitigation, as well as argument. In determining what disposition of the Charge of Misconduct is warranted, the District Committee shall consider the Respondent's Disciplinary Record. A District Committee may:

1. Conclude that a Dismissal *De Minimis* should be imposed;
2. Conclude that a Dismissal for Exceptional Circumstances should be imposed;
3. Conclude that an Admonition, with or without Terms, should be imposed;
4. Issue a Public Reprimand, with or without Terms; or
5. Certify the Charge of Misconduct to the Board or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935.

Y. District Committee Determinations. If the District Committee finds that the evidence shows the Respondent engaged in Misconduct by clear and convincing evidence, then the Chair shall issue the District Committee's Determination, in writing, setting forth the following:

1. Brief findings of the facts established by the evidence;
2. The nature of the Misconduct shown by the facts so established, including the Disciplinary Rules violated by the Respondent; and
3. The sanctions imposed, if any, by the District Committee.

Z. Notices.

If the District Committee:

1. Issues a Dismissal, the Chair shall promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor.
2. Issues a Public Reprimand, with or without Terms; an Admonition, with or without Terms; a Dismissal *De Minimis*; or a Dismissal for Exceptional Circumstances, the Chair shall promptly send the Complainant, the Respondent and Bar Counsel a copy of the District Committee's Determination.
3. Finds that the Respondent failed to comply with the Terms imposed by the District Committee, the Chair shall notify the Complainant, the Respondent and Bar Counsel of the imposition of the alternative disposition.
4. Has elected to certify the Complaint, the Chair of the District Committee shall promptly mail to the Clerk of the Disciplinary System a copy of the Certification. A copy of the Certification shall be sent to Bar Counsel, Respondent and the Complainant.

AA. District Committee Determination Finality and Public Statement. Upon the expiration of the ten-day period after service on the Respondent of a District Committee Determination, if either a notice of appeal or a notice of appeal and a written demand that further Proceedings be conducted before a three-judge Circuit Court pursuant to Va. Code § 54.1-3935 has not been filed by the Respondent, the District Committee Determination shall become final, and the Clerk of the Disciplinary System shall issue a public statement as provided for in this Paragraph for the dissemination of public disciplinary information.

BB. Enforcement of Terms. In all cases where Terms are included in the disposition, the District Committee shall specify the time period within which compliance shall be completed and, if required, the time period within which the Respondent shall deliver a written certification of compliance to Bar Counsel. The District Committee shall specify the alternative disposition if the Terms are not complied with or, if required, compliance is not certified to Bar Counsel. Bar Counsel shall be responsible for monitoring compliance and reporting any noncompliance to the District Committee. Whenever it appears that the Respondent has not complied with the Terms imposed, including written certification of compliance if required, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the District Committee at its next available hearing date as determined in the discretion of the District Committee Chair. The burden of proof shall be on the Respondent to show compliance by clear and convincing evidence. If the Respondent has failed to comply with the Terms, including written certification of compliance if required, within the stated time period as determined by the District Committee, the alternative disposition shall be imposed. Any show cause proceeding involving the question of compliance shall be deemed a new matter and not a continuation of the matter that resulted in the imposition of Terms.

CC. Alternative Disposition and Procedure for Public Reprimand with Terms. The alternative disposition for a Public Reprimand with Terms shall be a Certification for Sanction Determination. Upon a decision to issue a Certification for Sanction Determination, Bar Counsel shall order the transcript of the show cause hearing and file it and a true copy of the Public Reprimand with Terms determination with the Clerk of the Disciplinary System.

DD. Reconsideration of Action by the District Committee.

1. A Charge of Misconduct dismissed by a District Committee may be reconsidered only upon:
   a. A finding by a majority vote of the Panel that heard the matter originally that material evidence not known or available when the matter was originally presented has been discovered; or
   b. a unanimous vote of the Panel that heard the matter originally.
2. No action by a District Committee imposing a sanction or certifying a matter to the Board shall be reconsidered unless a majority of the Panel that heard the matter votes to reconsider the sanction.
3. No member shall vote to reconsider a District Committee action unless it appears to such member that reconsideration is necessary to prevent an injustice or warranted by specific exceptional circumstances militating against adherence to the initial action of the District Committee.
4. District Committee members may be polled on the issue of whether to reconsider an earlier District Committee action.
5. Any reconsideration of an earlier District Committee action must occur at a District Committee meeting, whether in person or by any means of communication which allows all members participating to simultaneously hear each other.

13-17 PERFECTING AN APPEAL OF A DISTRICT COMMITTEE DETERMINATION BY THE RESPONDENT

A. Notice of Appeal; Demand. Within ten days after service on the Respondent of the District Committee Determination, the Respondent may file with the Clerk of the Disciplinary System either a notice of appeal to the Board or a notice of appeal and a written demand that further Proceedings be conducted pursuant to Va. Code § 54.1-3935. In either case, the Respondent shall send copies to the District Committee Chair and to Bar Counsel. Upon such demand, further proceedings before the Board shall terminate, and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. If the Respondent fails to file a demand, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

B. Staying of Discipline. If the Clerk of the Disciplinary System receives a timely notice of appeal from a Public Reprimand, with or without Terms, or an Admonition, with or without Terms, the sanction shall be stayed during the pendency of the appeal.

C. Filing the Transcript and Record on Appeal. The Respondent shall certify in the notice of appeal or written demand that he or she has ordered from the Court Reporter a complete transcript of the proceedings before the District Committee, at the Respondent's cost. Upon receipt of the notice of appeal or written demand, Bar Counsel shall forward those portions of the record in his or her possession to the Clerk of the Disciplinary System. The transcript is a part of the record when it is received in the office of the Clerk of the Disciplinary System within 40 days after filing of the notice of appeal or written demand. The Clerk of the Disciplinary System shall retain the records until the transcript has been received or for 40 days after the notice of appeal or written demand has been received, whichever occurs first, and shall then dispose of the record as prescribed in the records retention policy set forth in this Paragraph. Failure of the Respondent to make the complete transcript a part of the Record as specified herein shall result in Dismissal of the appeal by the Board, whether initiated by notice of appeal or written demand, and affirmance of the sanction imposed by the District Committee. Bar Counsel shall initiate the three-judge Circuit Court process for the appeal only after receipt of the transcript by the Clerk of the Disciplinary System.

D. Appeal to a Circuit Court. An appeal to a Circuit Court pursuant to Va. Code § 54.1-3935 shall be conducted before a duly convened three-judge Circuit Court as an appeal on the record using the same procedure prescribed for an appeal of a District Committee Determination before the Board under this Paragraph. The Clerk of the Disciplinary System shall forward the record to the clerk of the designated Circuit Court only upon receipt of the transcript as provided in the preceding subparagraph C.

E. Appeal from Agreed Sanction Prohibited. No appeal shall lie from any sanction to which the Respondent has agreed.

13-18 BOARD PROCEEDINGS UPON CERTIFICATION

A. Filing by Respondent. After a Subcommittee or District Committee certifies a matter to the Board, and the Respondent has been served with the Certification, the Respondent shall, within 21 days after service of the Certification:

1. File an answer to the Certification with the Clerk of the Disciplinary System, which answer shall be deemed consent to the jurisdiction of the Board; or file an answer to the Certification and a demand with the Clerk of the Disciplinary System that the proceedings before the Board be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand.

2. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall terminate, and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held.

B. No Filing by Respondent. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

C. Notice of Hearing. The Board shall set a date, time, and place for the hearing, and shall serve notice of such hearing upon the Respondent at least 21 days prior to the date fixed for the hearing.

D. Expedited Hearings.

1. If Bar Counsel or a District Committee Chair has reasonable cause to believe that an Attorney is engaging in Misconduct which is likely to result in injury to, or loss of property of, one or more of the Attorney's clients or any other person, and that the continued practice of law by the Attorney poses an imminent danger to the public, Bar Counsel or the District Committee Chair may petition the Board to issue an order requiring the Attorney to appear before the Board for a hearing in accordance with the procedures set forth below.
2. The petition shall be under oath and shall set forth the nature of the alleged Misconduct, the factual basis for the belief that immediate action by the Board is reasonable and necessary and any other facts which may be relevant to the Board's consideration of the matter, including any prior Disciplinary Record of the Attorney.
3. Upon receipt of the petition, the Chair or Vice-Chair of the Board shall issue an order requiring the Respondent to appear before the Board not less than 14 nor more than 30 days from the date of the order for a hearing to determine whether the Misconduct has occurred and the imposition of sanctions is appropriate. The Board's order shall be served on the Respondent no fewer than ten days prior to the date set for hearing.
4. If the Respondent, at the time the petition is received by the Board, is the subject of an order then in effect by a Circuit Court pursuant to Va. Code § 54.1-3936 appointing a receiver for his accounts, the Board shall issue a further order summarily suspending the License of the Respondent until the Board enters its order following the expedited hearing.
5. At least five days prior to the date set for hearing, the Respondent shall either file an answer to the petition with the Clerk of the Disciplinary System, which answer shall be conclusively deemed consent to the jurisdiction of the Board; or file an answer and a demand with the Clerk of the Disciplinary System that proceedings before the Board be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 days nor more than 120 days from the date of the Board order. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held. If any order of summary Suspension has been entered, such Suspension shall

remain in effect until the court designated under Va. Code § 54.1-3935 enters a final order disposing of the issue before it. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

E. Pre-Hearing Orders. The Chair may, *sua sponte* or upon motion of the Respondent or Bar Counsel, enter such pre-hearing order as is necessary for the orderly conduct of the hearing before the Board in Misconduct cases. Such order may establish time limits and:

1. Direct Bar Counsel and the Respondent to provide to each other, with a copy to the Clerk of the Disciplinary System, a list of and copies of all exhibits proposed to be introduced at the Misconduct stage of the hearing;
2. Encourage Bar Counsel and the Respondent to confer and discuss stipulations; and
3. Direct Bar Counsel and the Respondent to provide to each other, with a copy to the Clerk of the Disciplinary System, lists setting forth the name of each witness the party intends to call.

F. Continuance of a Hearing. Absent exceptional circumstances, once the Board has scheduled a hearing, no continuance shall be granted unless, in the judgment of the Chair, the continuance is necessary to prevent injustice. No continuance will be granted because of a conflict with the schedule of the Respondent or the Respondent's counsel unless such continuance is requested in writing by the Respondent or the Respondent's counsel within 14 days after mailing of a notice of hearing. Any request for a continuance shall be filed with the Clerk of the Disciplinary System.

G. Preliminary Explanation. The Chair shall state in the presence of the Respondent and the Complainant, if present, a summary of the alleged Misconduct, the nature and purpose of the hearing, the procedures to be followed during the hearing, and the dispositions available to the Board following the hearing. The Chair shall also inquire of the members present whether any member has any personal or financial interest that may affect, or be reasonably perceived to affect, his or her ability to be impartial. Any member answering in the affirmative shall be excused from participation in the matter.

H. Attendance at Hearing. Witnesses other than the Complainant and the Respondent shall be excluded until excused from a public hearing on motion of Bar Counsel, the Respondent or the Board.

I. Order of Hearing.

1. Brief opening statements by Bar Counsel and by the Respondent or the Respondent's counsel shall be permitted but are not required.
2. Bar Counsel shall present witnesses and other evidence supporting the Certification. The Respondent shall be afforded the opportunity to cross-examine the Bar's witnesses and to challenge any evidence introduced on behalf of the Bar. Board members may also examine witnesses offered by Bar Counsel.
3. Respondent shall be afforded the opportunity to present witnesses and other evidence. Bar Counsel shall be afforded the opportunity to cross-examine Respondent's witnesses and to challenge any evidence introduced on behalf of Respondent. Board members may also examine witnesses offered on behalf of a Respondent.
4. Bar Counsel may rebut the Respondent's evidence.
5. Bar Counsel may make the initial closing argument.
6. The Respondent or the Respondent's counsel may then make a closing argument.

7. Bar Counsel may then make a rebuttal closing argument.

J. Motion to Strike. At the conclusion of the Bar's evidence or at the conclusion of all the evidence, the Board on its own motion, or the Respondent or the Respondent's counsel may move to strike the Bar's evidence as to one or more allegations of Misconduct contained in the Certification. A motion to strike an allegation of Misconduct shall be sustained if the Bar has failed to introduce sufficient evidence that would under any set of circumstances support the conclusion that the Respondent engaged in the alleged Misconduct that is the subject of the motion to strike. If the Chair sustains the motion to strike an allegation of Misconduct, subject to being overruled by a majority of the remaining members of the Board, that allegation of Misconduct shall be dismissed from the Certification.

K. Deliberations. As soon as practicable after the conclusion of the evidence and arguments as to the issue of Misconduct, the Board shall deliberate in private. If the Board finds by clear and convincing evidence that the Respondent has engaged in Misconduct, the Board shall, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has been the subject of any Disciplinary Proceeding in this or any other jurisdiction and shall give Bar Counsel and the Respondent an opportunity to present material evidence and arguments in aggravation or mitigation. The Board shall deliberate in private on the issue of sanctions. The Board may address any legal questions to the Office of the Attorney General.

L. Dismissal for Failure of the Evidence. If the Board concludes that the evidence fails to show under a clear and convincing evidentiary standard that the Respondent engaged in the Misconduct, the Board shall dismiss any allegation of Misconduct not so proven.

M. Disposition Upon a Finding of Misconduct. If the Board concludes that there has been presented clear and convincing evidence that the Respondent has engaged in Misconduct, after considering evidence and arguments in aggravation and mitigation, the Board shall impose one of the following sanctions and state the effective date of the sanction imposed:

1. Admonition, with or without Terms;
2. Public Reprimand, with or without Terms;
3. Suspension of the License of the Respondent:
    a. For a stated period not exceeding five years; provided, however, if the Suspension is for more than one year, the Respondent must apply for Reinstatement as provided in this Paragraph; or
    b. For a stated period of one year or less, with or without terms; or
4. Revocation of the Respondent's License.

N. Dismissal for Failure to Reach a Majority Decision. If the Board is unable to reach a decision by a majority vote of those constituting the hearing panel, the Certification, or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonably support the Certification, or one or more allegations thereof, under a clear and convincing evidentiary standard.

O. Enforcement of Terms. In all cases where Terms are included in the disposition, the Board shall specify the time period within which compliance shall be completed and, if required, the time period within which the Respondent shall deliver a written certification of compliance to Bar Counsel. The Board shall specify the alternative disposition if the Terms are not complied with or, if required, compliance is not certified to Bar Counsel. Bar Counsel shall be responsible for monitoring compliance and reporting any noncompliance to the Board. Whenever it appears that the Respondent has not complied with the Terms imposed, including written certification of compliance if required, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the Board at its next available hearing date. The burden of proof shall be on the Respondent to show compliance by clear and convincing evidence. If the Respondent has failed to comply with the Terms, including written certification

of compliance if required, within the stated time period, as determined by the Board, the alternative disposition shall be imposed. Any show cause proceeding involving the question of compliance shall be deemed a new matter and not a continuation of the matter that resulted in the imposition of Terms.

P. Orders, Findings and Opinions. Upon disposition of a matter, the Board shall issue the Summary Order. Thereafter, the Board shall issue the Memorandum Order. A Board member shall prepare the Summary Order and Memorandum Order for the signature of the Chair or the Chair's designee. Dissenting opinions may be filed.

Q. Change in Composition of Board Hearing Panel. Whenever a hearing has been adjourned for any reason and one or more of the members initially constituting the quorum for the hearing are unable to be present, the hearing of the matter may be completed by furnishing a transcript of the subsequent proceedings conducted in one or more member's absence to such absent member, or substituting another Board member for any absent member and furnishing a transcript of the prior proceedings in the matter to such substituted member(s).

R. Reconsideration of Board Action. No motion for reconsideration or modification of the Board's decision shall be considered unless it is filed with the Clerk of the Disciplinary System within 10 days after the hearing before the Board. The moving party shall file an original and six copies of both the motion and all supporting exhibits with the Clerk of the Disciplinary System. Such motion shall be granted only to prevent manifest injustice upon the ground of:

1. Illness, injury or accident which prevented the Respondent or a witness from attending the hearing and which could not have been made known to the Board within a reasonable time prior to the hearing; or
2. Evidence which was not known to the Respondent at the time of the hearing and could not have been discovered prior to, or produced at, the hearing in the exercise of due diligence and would have clearly produced a different result if the evidence had been introduced at the hearing.
3. If such a motion is timely filed, the Clerk of the Disciplinary System shall promptly forward copies to each member of the hearing panel. The panel may deny the motion without response from Bar Counsel. No relief shall be granted without allowing Bar Counsel an opportunity to oppose the motion in writing. If no relief is granted, the Board shall enter its order disposing of the case.

13-19 BOARD PROCEEDINGS UPON APPEAL

A. Docketing An Appeal. Upon receipt of notice from the Clerk of the Disciplinary System that a Respondent has filed an appeal from a District Committee Determination the Board shall place such matter on its docket for review.

B. Notice to the Appellant. The Clerk of the Disciplinary System shall notify the appellant when the entire record of the Proceeding before the District Committee has been received or when the time for appeal has expired.

C. Record on Appeal. The record shall consist of the Charge of Misconduct, the complete transcript of the Proceeding, any exhibits received or refused by the District Committee, the District Committee Determination, and all briefs, memoranda or other papers filed with the District Committee by the Respondent or the Bar. Upon petition of the Respondent, for good cause shown, the Board may permit the record to be supplemented to prevent injustice, such supplement to be in such form as the Board may deem appropriate.

D. Briefing. Thereafter, briefs shall be filed in the office of the Clerk of the Disciplinary System, as follows:

1. The appellant shall file an opening brief within 40 days after the mailing of the notice to the appellant regarding the record by the Clerk of the Disciplinary System. Failure of the appellant to file an opening brief within the time specified herein shall result in the Dismissal of the appeal and affirmance of the decision by the District Committee.
2. The appellee shall file its brief within 25 days after filing of the opening brief.
3. The appellant may file a reply brief within 14 days after filing of the appellee's brief.

E. Standard of Review. In reviewing a District Committee Determination, the Board shall ascertain whether there is substantial evidence in the record upon which the District Committee could reasonably have found as it did.

F. Oral Argument. Oral argument shall be granted, unless waived by the appellant.

G. Imposition of Sanctions. Upon review of the record in its entirety, the Board may:

1. Dismiss the Charge of Misconduct upon a finding that the District Committee Determination is contrary to the law or is not supported by substantial evidence;
2. Affirm the District Committee Determination, in which instance the Board may impose the same or any lesser sanction as that imposed by the District Committee. In no case shall it increase the severity of the sanction imposed by the District Committee; or
3. Reverse the decision of the District Committee and remand the Charge of Misconduct to the District Committee for further proceedings.

13-20 BOARD PROCEEDINGS UPON CERTIFICATION FOR SANCTION DETERMINATION

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

B. Proceedings Upon the Record. The proceeding shall be conducted upon the record which shall consist of the Public Reprimand with Terms determination issued by either a Subcommittee or a District Committee, the transcript of the District Committee show cause hearing, and the Certification for Sanction Determination.

C. Evidence. Evidence only of mitigation and aggravation with respect to compliance or certification shall be permitted in the proceeding.

D. Argument. Argument shall be conducted as in the sanction phase of a Misconduct case.

E. Sanctions. The Board may impose a sanction of Suspension or Revocation of License.

13-21 BOARD PROCEEDINGS UPON A FIRST OFFENDER PLEA

A. Action Upon Receipt of Notification. Whenever the Clerk of the Disciplinary System receives written notification from any court of competent jurisdiction stating that an Attorney has entered a plea to a Crime under a first offender statute, and that the court has found facts that would justify a finding of guilt and ordered that the Attorney be put on probation, the Board shall forthwith enter an order requiring the Attorney to appear at a specified time and place for a hearing before the Board to determine whether the Attorney's License should be revoked or suspended or, if not, whether the Attorney should be required to give notice, by

certified mail, of the plea and probation ordered by the court, including the terms and duration of the probation, to all clients for whom the Attorney is currently handling matters, and to all opposing attorneys and the presiding judges in pending litigation. A copy of the written notification from the court shall be served with the order fixing the time and place of the hearing. The hearing shall be set not less than 14 or more than 30 days after the date of the Board's order.

B. Burden of Proof. At the hearing, the Attorney shall have the burden of proving why his or her License should not be suspended or revoked and why he or she should not be required to give notice of the plea and probation ordered by the court.

C. Demand for Three Judge Court. If the Attorney elects to have further proceedings conducted pursuant to Va. Code § 54.1-3935, the Attorney shall file a demand with the Clerk of the Disciplinary System not later than ten days prior to the date set for the Board hearing, and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held. If the Respondent fails to file a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

D. Attorney Compliance with Notice Requirements. If the Board or court suspends or revokes the Attorney's License, the Attorney must comply with the notice requirements set out in subparagraph 13-29. If the Board or court orders the Attorney to give notice of the plea and court ordered probation, the Attorney shall give such notice within 14 days after the effective date of the Board's order and furnish proof to the Bar within 60 days of the effective date of the order that such notices have been timely given. Issues concerning the adequacy of the notice shall be determined by the Board, which may suspend or revoke the Attorney's License for failure to comply with the above notice requirements.

13-22 BOARD PROCEEDINGS UPON A GUILTY PLEA OR AN ADJUDICATION OF A CRIME

A. Action Upon Receipt of Notification. Whenever the Clerk of the Disciplinary System receives written notification from any court of competent jurisdiction stating that an Attorney (the "Respondent") has been found guilty or convicted of a Crime by a Judge or jury, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt, irrespective of whether sentencing has occurred, a member of the Board shall forthwith and summarily enter an order of Suspension requiring the Respondent to appear at a specified time and place for a hearing before the Board to show cause why the Respondent's License to practice law should not be further suspended or revoked. A copy of the written notification from the court shall be served upon the Respondent with the Board's order of Suspension.

B. Time of Hearing, Continuance and Interim Hearing. The hearing shall be set not less than 14 or more than 30 days after the date of the Board's order. Upon written request of the Respondent, the hearing may be continued until any probation ordered by a court has ended or after sentencing has occurred. Upon receipt by the Board of a certified copy of a notice of appeal from the conviction, proceedings before the Board shall, upon request of the Respondent, be continued pending disposition of such appeal. The Board shall, upon request of the Respondent, hold an interim hearing and shall terminate such Suspension while the probation, sentencing, or appeal is pending, if the Board finds that such Suspension, if not terminated, would be likely to exceed the discipline imposed by the Board upon a hearing on the merits of the case.

C. Reversal of Conviction. Upon presentation to the Board of a certified copy of an order setting aside the verdict or reversing the conviction on appeal, any Suspension shall be automatically terminated and any Revocation shall be vacated, and the License shall be deemed automatically reinstated. Discharge or Dismissal of a guilty plea or termination of probation

shall not result in the automatic termination of the Suspension or vacation of the Revocation. Nothing herein shall preclude further proceedings against the Respondent upon allegations of Misconduct arising from the facts leading to such conviction.

D. Burden of Proof. At the hearing, the Respondent shall have the burden of proving why his or her License should not be further suspended or revoked.

E. Action by the Board and Notice to Respondent. If the Board finds at the hearing that the Respondent has been found guilty or convicted of a Crime by a Judge or jury, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt, an order shall be issued, and a copy thereof served upon the Respondent in which the Board shall continue the Suspension or issue an order of Suspension against the Respondent for a stated period not in excess of five years; or issue an order of Revocation against the Respondent.

F. Procedure. The procedure applicable to Proceedings related to Misconduct shall apply to Proceedings relating to guilty pleas or Adjudication of a Crime. If the Respondent elects to have further Proceedings conducted pursuant to Va. Code § 54.1-3935, the Respondent shall file a demand with the Clerk of the Disciplinary System not later than ten days prior to the date set for the hearing before the Board, and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held. The order of Suspension issued by the Board shall remain in effect until the court designated under Va. Code § 54.1-3935 enters a final order disposing of the issue before it. If the Respondent fails to file a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

13-23 BOARD PROCEEDINGS UPON IMPAIRMENT

A. Suspension for Impairment. The Board shall have the power to issue an order of Suspension to a Respondent who has an Impairment. The term of such Suspension shall be indefinite, and, except as provided below, shall be terminated only upon determination by the Board that Respondent no longer has the Impairment. A Respondent who intends to rely upon evidence of an Impairment in mitigation of Misconduct shall, absent good cause excusing his or her failure to do so, provide notice not less than 14 days prior to the hearing to Bar Counsel and the District Committee or Board of his or her intention to do so. A finding of Impairment or transfer to the Disabled and Retired class of membership under Paragraph 13-23.K may be utilized by Bar Counsel to dismiss any pending Complaints or allegations of Misconduct on the basis of a finding of Impairment or a transfer to the Disabled and Retired class of membership militating against further proceedings, which circumstances of Impairment shall be set forth in the Dismissal.

B. Burden of Proof. Whenever the existence of an Impairment is alleged in a Proceeding under this Rule or in mitigation of allegations of Misconduct, the burden of proving such an Impairment shall rest with the party asserting its existence. The issue of the existence of an Attorney's Impairment may be raised by any person at any time, and if a District Committee or the Board, during the course of a hearing on allegations of Misconduct against a Respondent, believes that the Respondent may then have an Impairment, the District Committee or the Board

may postpone the hearing and initiate an Impairment Proceeding under this Rule. In Proceedings to terminate a Suspension for Impairment, the burden of proving the termination of an Impairment shall be on the Respondent.

C. Investigation. Upon receipt of notice or evidence that an Attorney has or may have an Impairment, Bar Counsel shall cause an Investigation to be made to determine whether there is reason to believe that the Respondent has the Impairment. As a part of the Investigation of whether an Impairment exists, and for good cause shown in the interest of public protection Bar Counsel may petition the Board to order the Respondent:

1. To undergo a psychiatric, physical or other medical examination by qualified physicians or other health care provider selected by the Board; and
2. To provide appropriate releases to health care providers authorizing the release of Respondent's psychiatric, physical or other medical records to Bar Counsel and the Board for purposes of the Investigation and any subsequent Impairment proceedings.

Upon notice to the Respondent, the Board shall hold a hearing to determine whether any such examination or release is appropriate.

D. Summary Suspension. Upon receipt of a notice from the Clerk of the Disciplinary System with supporting documentary evidence that an Attorney has been adjudicated by a court of competent jurisdiction to have an Impairment, or that an Attorney has been involuntarily admitted to a hospital (as defined in Va. Code §37.1-1) for treatment of any addiction, inebriety, insanity or mental illness, any member of the Board shall summarily issue on behalf of the Board an order of Suspension against the Respondent and cause the order to be served on such Respondent.

E. Action by Board after a Hearing.

1. If Bar Counsel determines that there is reason to believe that an Attorney has an Impairment, Bar Counsel shall file a petition with the Board, and the Board shall promptly hold a hearing to determine whether such Impairment exists. A copy of the petition shall be served on the Respondent. If the Board determines that an Impairment exists, it shall enter an order of Suspension.
2. The Board shall hold a hearing upon petition of a Respondent who is subject to a Suspension for Impairment that alleges that the Impairment no longer exists. Evidence that the Respondent is no longer hospitalized shall not be conclusive to the Board's determination of the Respondent's ability to resume the practice of law.

F. Procedure. Such hearing shall be conducted substantially in accordance with the procedures established in proceedings related to Misconduct, except that the public and witnesses, other than the Complainant and the Respondent, shall be excluded throughout an Impairment Proceeding when not testifying.

G. Guardian *Ad Litem*. The notice of any hearing to determine whether the Respondent has an Impairment shall order Respondent to advise the Board whether Respondent has retained counsel for the hearing. Unless counsel for such Respondent enters an appearance with the Board within ten days of the date of the notice, the Board shall appoint a guardian *ad litem* to represent such Respondent at the hearing.

H. Examination. Following a psychiatric, physical or other medical examination, written reports of the results of such examination, along with written reports from other qualified physicians or other health care providers who have examined Respondent, may be considered as evidence by the Board. Such reports shall be filed with the Clerk of the Disciplinary System.

I. Termination of Suspension. In cases where a Suspension is based upon an adjudication of an Impairment by a court, upon receipt of documentary evidence of adjudication by a court of competent jurisdiction that the Respondent's Impairment has terminated, the Board shall promptly enter an order terminating such Suspension.

J. Enforcement. The Board shall have the power to sanction an Attorney for failure to comply with its orders and subpoenae issued in connection with an Impairment Proceeding. The sanction can include a summary Suspension in a case where it is determined that the public and/or the clients of the Attorney are in jeopardy; such action can be *sua sponte* or on motion by Bar Counsel, with appropriate notice to the Attorney and the Attorney's counsel or guardian *ad litem*.

K. Transfer of Membership Status. Bar Counsel may terminate and close an Impairment Proceeding if the Respondent transfers to the Disabled and Retired class of membership pursuant to Part 6, Section IV, Paragraph 3 of the Rules of Court and files a declaration with the Clerk of the Disciplinary System and the Virginia State Bar's Membership Department that the Respondent will not seek transfer from the Disabled and Retired class of membership. The declaration shall be endorsed by the Respondent and the Respondent's counsel or Guardian Ad Litem. Termination of the Impairment Proceeding shall not be considered a final order in an Impairment Proceeding under Paragraph 13-30. The Respondent's transfer to the Disabled and Retired class of membership and filing of the declaration pursuant to this subparagraph may be utilized by Bar Counsel to dismiss any pending Complaints or allegations of Misconduct on the basis of transfer to the Disabled and Retired class of membership, militating against further proceedings, which shall be set forth in the Dismissal.

13-24 BOARD PROCEEDINGS UPON DISBARMENT, REVOCATION OR SUSPENSION IN ANOTHER JURISDICTION

A. Definitions Specific to Paragraph 13-24. The following terms shall have the meaning set forth below unless the content clearly requires otherwise:

1. "State Jurisdiction" means any state, United States Territory, or District of Columbia law licensing or attorney disciplinary authority, including the highest court of any such Jurisdiction, authorized to impose attorney discipline effective throughout the Jurisdiction.
2. "Jurisdiction" shall refer to either a "State Jurisdiction" or any federal court or agency authorized to discipline attorneys, including the United States military.

B. Initiation of Proceedings. Upon receipt of a notice from the Clerk of the Disciplinary System that another Jurisdiction has, as a disciplinary measure, suspended or revoked the law license of an Attorney ("Respondent") or has suspended or revoked Respondent's privilege to practice law in that Jurisdiction, and that such action has become final (the "Suspension or Revocation Notice"), any Board member shall enter on behalf of the Board an order requiring Respondent to show cause why discipline that is the same or equivalent to the discipline imposed in the other Jurisdiction should not be imposed by the Board. If the Suspension or Revocation Notice is from a State Jurisdiction and the suspension or revocation has not been suspended or stayed, then the Board's order shall suspend Respondent's License pending final disposition of the Proceeding hereunder. The Board shall serve upon Respondent by certified mail the following: a copy of the Suspension or Revocation Notice; a copy of the Board's order; and a notice fixing the date, time and place of the hearing before the Board to determine what action should be taken in response to the Suspension or Revocation Notice and stating that the purpose of the hearing is to provide Respondent an opportunity to show cause why the same or equivalent discipline that was imposed in the other Jurisdiction should not be imposed by the Board. Notwithstanding the above, notice of a suspension or revocation for

merely administrative reasons, such as the failure to pay dues or the failure to complete required continuing legal education, shall not be considered a Suspension or Revocation Notice.

C. Opportunity for Response. Within 14 days of the date of mailing of the Board order, via certified mail, to Respondent's last address of record with the Bar, Respondent shall file with the Clerk of the Disciplinary System a written response, which shall be confined to argument and exhibits supporting one or more of the following grounds for dismissal or imposition of lesser discipline:

1. The record of the proceeding in the other Jurisdiction would clearly show that such proceeding was so lacking in notice or opportunity to be heard as to constitute a denial of due process;
2. The imposition by the Board of the same or equivalent discipline upon the same proof would result in an injustice;
3. The same conduct would not be grounds for disciplinary action or for the same or equivalent discipline in Virginia; or
4. The misconduct found in the other Jurisdiction would warrant the imposition of substantially lesser discipline in the Commonwealth of Virginia.

D. Scheduling and Continuance of Hearing. Unless continued by the Board for good cause, the hearing shall be set not less than 21 nor more than 30 days after the date of the Board's order.

E. Provision of Copies. The Clerk of the Disciplinary System shall furnish to the Board members designated for the hearing and make available to Respondent copies of the Suspension or Revocation Notice, the Board's order against the Respondent, the notice of hearing, any notice of continuance of the hearing, and any written response or materials filed by Respondent or by Bar Counsel.

F. Hearing Procedures. Insofar as applicable, the procedures for Proceedings on allegations of Misconduct shall govern. Bar Counsel has discretion to put forth evidence and argument that one or more of the grounds specified in Paragraph 13-24.C exists. If Respondent does not file a timely written response, but appears at the hearing and expresses intent to present evidence or argument supporting the existence of one or more of the grounds specified in Paragraph 13-24.C, Respondent shall make a proffer to the Board. The Board may refuse to consider such evidence or argument as untimely. If the Board in its discretion is willing to consider such evidence or argument, then Bar Counsel, upon motion, may be entitled to a continuance.

G. Burden of Proof. The burden of proof to establish the existence of one or more of the grounds specified in Paragraph 13-24.C is clear and convincing evidence. Unless one or more of the grounds specified in Paragraph 13-24.C has been established by clear and convincing evidence, the Board shall conclude that Respondent was afforded due process by the other Jurisdiction and the findings of the other Jurisdiction shall be conclusive of all matters for purposes of the Proceeding before the Board.

H. Action by the Board. If the Board determines that none of the grounds specified in Paragraph 13-24.C exist by clear and convincing evidence, it shall impose the same or equivalent discipline as imposed in the other Jurisdiction. If the Board finds by clear and convincing evidence the existence of one or more of the grounds specified in Paragraph 13-24.C, the Board shall enter an order it deems appropriate. A copy of any order imposing discipline shall be served upon Respondent via certified mail, return receipt requested. Any such order shall be final and binding, subject only to appeal as set forth in the Rules of Court.

13-25 BOARD PROCEEDINGS FOR REINSTATEMENT

A. Waiver of Confidentiality. The filing by a former Attorney of a petition for Reinstatement shall constitute a waiver of all confidentiality relating to the petition, and to the Complaint or Complaints that resulted in, or were pending at the time the former Attorney resigned or his or her License was revoked.

B. Investigation of Impairment in Reinstatement Matters. Upon receipt of notice or evidence that an individual seeking Reinstatement has or may have an Impairment, Bar Counsel shall cause an Investigation to be made to determine whether there is reason to believe that the Impairment exists. As part of the Investigation of whether an Impairment exists, and for good cause shown in the interest of public protection, Bar Counsel may petition the Board to order the individual:

1. To undergo at his or her expense a psychiatric, physical or other medical examination by a qualified physician or other health care provider selected by the Board; and

2. To provide appropriate releases to health care providers authorizing the release of his or her psychiatric, physical or other medical records to Bar Counsel and the Board for purposes of the Investigation and any subsequent Reinstatement Proceedings. The Board shall hold a hearing to determine whether such examination(s) and releases(s) are appropriate, upon notice to the individual petitioning for Reinstatement.

C. Readmission After Resignation. If after resigning from the Bar, a former Attorney wishes to resume practicing law in the Commonwealth of Virginia, the former Attorney must apply to the Board of Bar Examiners, satisfy the character and fitness requirements and pass the Bar examination. Before being readmitted to the Bar, the former Attorney must also satisfy any membership obligations that were delinquent when the former Attorney resigned.

D. Reinstatement After Disciplinary Suspension for More than One Year. After a Suspension for more than one year, the License of the Attorney subject to the Suspension shall not be reinstated unless the Attorney demonstrates to the Board that he or she has:

1. Attended 12 hours of continuing legal education, of which at least two hours shall be in the area of legal ethics or professionalism, for every year or fraction thereof of the Suspension;

2. Taken the Multistate Professional Responsibility Examination since imposition of discipline and received a scaled score of 85 or higher;

3. Reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of the Attorney's Misconduct;

4. Paid to the Bar all Costs that have been assessed against him or her, together with any interest due thereon at the judgment rate at the time the Costs are paid; and

5. Reimbursed the Bar for any sums of money it may have paid as a result of a receivership involving Petitioner's law practice.

E. Petition for Reinstatement After Revocation. After a Revocation, a Petitioner may file with the Clerk of the Disciplinary System a petition for Reinstatement, setting forth in that petition the reasons why his or her License should be reinstated. The Petitioner must comply with the requirements of subparagraph 13-25.F as a precondition to filing the petition. Compliance with subparagraph 13-25.F shall be determined by the Clerk of the Disciplinary System after the petition is filed, and the Clerk of the Disciplinary System shall notify the Petitioner of compliance or noncompliance. Upon a determination of compliance with the requirements of subparagraph 13-25.F, the Clerk of the Disciplinary System shall enter the petition on the docket of the Board and shall refer it to the office of Bar Counsel for investigation. The Board may recommend approval or disapproval of the petition. Final action on the petition shall be taken by the Supreme Court of Virginia.

F. Threshold Requirements for Reinstatement After Revocation. After a Revocation, Petitioner's License shall not be considered for Reinstatement unless the Petitioner has provided clear and convincing evidence of proof of compliance with the following requirements:

1. No petition may be filed sooner than five years from the effective date of the Revocation;

2. The petition has been filed under oath or affirmation with penalty of perjury;

3. Within five years prior to the filing of the petition, Petitioner has attended 60 hours of continuing legal education, of which at least ten hours shall be in the area of legal ethics or professionalism;

4. The Petitioner has taken the Multistate Professional Responsibility Examination and received a scaled score of 85 or higher;

5. The Petitioner has reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of Petitioner's Misconduct;

6. The Petitioner has paid the Bar all Costs previously assessed against Petitioner, together with any interest due thereon at the judgment rate;

7. The Petitioner has reimbursed the Bar for any sums of money paid as a result of a receivership involving Petitioner's law practice; and

8. The Petitioner has posted with his or her petition for Reinstatement a $5,000 cash bond for payment of Costs resulting from the Reinstatement Proceedings.

G. Reinstatement Proceedings After a Revocation. If the threshold requirements of subparagraph 13-25.F have been met, the following processes shall ensue:

1. Investigation. Bar Counsel shall conduct such Investigation and make such inquiry as it deems appropriate. On request of Bar Counsel, the Petitioner shall promptly sign such forms and give such permission as are necessary to permit inquiry of the Petitioner's background through the Internal Revenue Service, the National Criminal Information Center, the National Criminal Information Network and any other similar information network or system. The petition for Reinstatement shall not proceed without such forms and permissions being signed by Petitioner and returned to Bar Counsel.

2. Bill of Particulars. On written request by Bar Counsel, served by certified mail, return receipt requested, a Petitioner seeking Reinstatement shall file with the Clerk of the Disciplinary System within 21 days after service of the request, an original and six copies of a bill of particulars setting forth the grounds for Reinstatement. The petition for Reinstatement shall not proceed without such Bill of Particulars being filed with the Clerk of the Disciplinary System.

3. Hearing Date. The date of the hearing shall be determined by the Clerk of the Disciplinary System, in consultation with the Bar Counsel and the Petitioner.

4. Notice. Reasonable notice of filing of the petition and the date of the hearing shall be distributed by mail or electronic means by the Clerk of the Disciplinary System to all members of the Bar of the circuit in the jurisdictions in which the Petitioner resided, and of the circuit in which the Petitioner maintained a principal office, at the time of the Revocation. The Clerk of the Disciplinary System shall also distribute by mail or electronic means the notice to the members of the District Committee who heard the original Complaint, to members of the Board who heard the original Complaint, to the members of the District Committee for the judicial circuit in which the Petitioner currently resides, to the complaining witness or witnesses on all Complaints pending against the Petitioner before the Board, a District Committee or a court at the date of the Revocation or Suspension and to such other individuals as the Clerk of the Disciplinary

System deems appropriate. The Clerk of the Disciplinary System shall publish a synopsis of the petition in the Virginia Lawyer and in a newspaper of general circulation in the judicial circuit where the Petitioner currently resides and where the Petitioner maintained a principal office at the time of the Revocation or Suspension. The entire petition, as well as the transcript, exhibits, pleadings and orders from the original Disciplinary Proceedings and Bill of Particulars, together with the documents referred to in subparagraph 13-25.F above, shall be available for inspection and copying at the office of the Bar on reasonable notice and on payment of costs incurred to make the copies.

5. Proof of Good Character. Petitioner must prove by clear and convincing evidence that Petitioner is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law. After a Revocation, an attorney's license shall not be reinstated without such proof.

6. Powers of the Board in Reinstatement Cases. The Board is empowered to hold a hearing and make its recommendation to this Court either to approve or disapprove the petition.

a. Hearing. On the date set for the hearing, the Petitioner shall have the right to representation by counsel, to examine and cross-examine witnesses and to present evidence. The testimony and other incidents of the hearing shall be transcribed and preserved, together with all exhibits (or copies thereof) received into evidence or refused. Bar Counsel shall appear and represent the Commonwealth and its citizens. Bar Counsel shall have the right to cross-examine, call witnesses and present evidence in opposition to the petition. Board members may examine witnesses called by either party. Legal advice to the Board, if required, shall be rendered by the Office of the Attorney General.

b. Factors to be Considered. In considering the matter prior to making a recommendation to this Court, the Board may consider the following factors:

i. The severity of the Petitioner's Misconduct, including, but not limited to, the nature and circumstances of the Misconduct;

ii. The Petitioner's character, maturity and experience at the time of his or her Revocation;

iii. The time elapsed since the Petitioner's Revocation;

iv. Restitution to the clients and/or the Bar;

v. The Petitioner's activities since Revocation, including, but not limited to, his or her conduct and attitude during that period of time;

vi. The Petitioner's present reputation and standing in the community;

vii. The Petitioner's familiarity with the Virginia Rules of Professional Conduct and his or her current proficiency in the law;

viii. The sufficiency of the punishment undergone by the Petitioner;

ix. The Petitioner's sincerity, frankness and truthfulness in presenting and discussing factors relating to his or her Revocation and Reinstatement; and

x. The impact upon public confidence in the administration of justice if the Petitioner's License is restored.

c. Character Witnesses. Up to five character witnesses supporting and up to five character witnesses opposing the petition shall be heard. In addition, the Board may consider any letters submitted regarding the Petitioner's character and fitness.

d. Character and Fitness Determination. The Board shall offer an opinion in its recommendation as to whether the Petitioner is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law.

e. Determination by the Board. The Board shall, within 60 days after the receipt of the transcript, forward the record and its recommendations to the Supreme Court of Virginia. A copy of the recommendation shall be forwarded to the Petitioner and Bar Counsel.

i. If the Board recommends Reinstatement, it may be conditioned upon Petitioner obtaining malpractice insurance coverage and/or a blanket fidelity bond or dishonesty insurance coverage in an amount(s) set by the Board from an approved professional insurance carrier for a definite term or on an ongoing basis.

ii. At the conclusion of the Reinstatement Proceeding, the Clerk of the Disciplinary System shall determine the Costs associated with such Proceeding. The Clerk of the Disciplinary System shall refund any remaining surplus or shall assess to the Petitioner any deficiencies that exist and submit a report on same to the Clerk of the Supreme Court of Virginia as part of the Board's recommendation order.

iii. Upon approval of a petition by this Court, the Petitioner shall meet the following requirements prior to and as a condition of his or her Reinstatement:

a) Pay to the Bar any Costs assessed in connection with the Reinstatement Proceeding;

b) Take and pass the written portion of the Virginia State Bar examination;

c) If required by the Board, obtain and maintain a professional liability insurance policy issued by a company authorized to write such insurance in Virginia at the cost of the Petitioner in an amount and for such term as set by the Board; and

d) If required by the Board, obtain and maintain a blanket fidelity bond or dishonesty insurance policy issued by a company authorized to write such bonds or insurance in Virginia at the Petitioner's cost in an amount and for such term as set by the Board.

13-26 APPEAL FROM BOARD DETERMINATIONS

A. Right of Appeal. As a matter of right any Respondent may appeal to this Court from an order of Admonition, Public Reprimand, Suspension, or Disbarment imposed by the Board using the procedures outlined in Rule 5:21(b) of the Rules of the Supreme Court of Virginia. An appeal shall lie once the Memorandum Order described in this Paragraph has been served on the Respondent. No appeal shall lie from a Summary Order. If a Respondent appeals to the Supreme Court, then the Bar may file assignments of cross-error pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia.

B. Determination. This Court shall hear the case and make such determination in connection therewith as it shall deem right and proper.

C. Office of the Attorney General. In all appeals to this Court, the Office of the Attorney General, or the Bar Counsel, if so requested by the Attorney General, shall represent the interests of the Commonwealth and its citizens as appellees.

13-27 RESIGNATION

A. Application. A sworn and notarized application to resign from the practice of law shall be submitted to the Clerk of the Disciplinary System. The application shall state that the resignation is not being offered to avoid disciplinary action and that the Attorney has no knowledge of any complaint, investigation, action, or proceeding in any jurisdiction involving allegations of Misconduct by the Attorney. An application to resign will not prevent or preclude any disciplinary proceeding or action against an Attorney.

B. Procedure. The Clerk of the Disciplinary System shall submit applications for resignation to Bar Counsel, who shall investigate each application and determine whether, based upon the information available, the statements in the sworn application appear to be true and complete. If Bar Counsel files a written objection to the application with the Clerk of the Disciplinary System, the Board shall hold a hearing on whether the application should be accepted. If Bar Counsel does not file an objection, the Board may enter an order accepting the Attorney's resignation without a hearing. A resignation shall be effective only upon entry of an order accepting it. Upon entry of an order accepting an Attorney's resignation, the former Attorney shall immediately cease the practice of law and make appropriate arrangements for the disposition of matters in the Attorney's care in conformity with the wishes of the Attorney's clients.

C. When Not Permitted. An Attorney may not resign while the Attorney is the subject of a disciplinary complaint, investigation, action, or proceeding involving allegations of Misconduct.

13-28 CONSENT TO REVOCATION

A. When Permitted. An Attorney who is the subject of a disciplinary complaint, investigation or Proceeding involving allegations of Misconduct may consent to Revocation, but only by delivering to the Clerk of the Disciplinary System an affidavit declaring the Attorney's consent to Revocation and stating that:

1. The consent is freely and voluntarily rendered, that the Attorney is not being subjected to coercion or duress, and that the Attorney is fully aware of the implications of consenting to Revocation;
2. The Attorney is aware that there is currently pending a complaint, an investigation into, or a Proceeding involving, allegations of Misconduct, the nature of which shall be specifically set forth in the affidavit;
3. The Attorney acknowledges that the material facts upon which the allegations of Misconduct are predicated are true; and
4. The Attorney submits the consent to Revocation because the Attorney knows that if disciplinary Proceedings based on the alleged Misconduct were brought or prosecuted to a conclusion, the Attorney could not successfully defend them.

B. Admissions. The admissions offered in the affidavit consenting to Revocation shall not be deemed an admission in any proceeding except one relating to the status of the Attorney as a member of the Bar.

C. Procedure. The Clerk of the Disciplinary System shall submit the affidavit to Bar Counsel, who shall investigate the affidavit and determine whether, based upon the information available, the statements in the sworn application appear to be true and complete. If Bar Counsel files a written objection to the affidavit with the Clerk of the Disciplinary System, the Board shall hold a hearing on whether the affidavit and consent to Revocation should be accepted. If Bar Counsel does not file an objection, the Board shall enter an order revoking the Attorney's License by consent without a hearing.

D. Attorney Action Required upon Revocation. Upon entry of such an order of Revocation by consent, the revoked Attorney shall immediately cease the practice of law and shall comply with the notice requirements set forth in subparagraph 13-29.

E. Dismissal of Complaints or Allegations of Misconduct. When an Attorney's License is revoked by consent, Bar Counsel, in his or her discretion, may dismiss without prejudice any and all Complaints or allegations of Misconduct then pending by notifying the Clerk of the Disciplinary System and the District Committee, Board or court wherein the matter or matters lie.

13-29 DUTIES OF DISBARRED OR SUSPENDED RESPONDENT

After a Suspension against a Respondent is imposed by either a Summary or Memorandum Order and no stay of the Suspension has been granted by this Court, or after a Revocation against a Respondent is imposed by either a Summary Order or Memorandum Order, that Respondent shall forthwith give notice, by certified mail, of his or her Revocation or Suspension to all clients for whom he or she is currently handling matters and to all opposing Attorneys and the presiding Judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his or her care in conformity with the wishes of his or her clients. The Respondent shall give such notice within 14 days of the effective date of the Revocation or Suspension, and make such arrangements as are required herein within 45 days of the effective date of the Revocation or Suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective date of the Revocation or Suspension that such notices have been timely given and such arrangements made for the disposition of matters. The Board shall decide all issues concerning the adequacy of the notice and arrangements required herein, and the Board may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph 13-29.

13-30 CONFIDENTIALITY OF DISCIPLINARY RECORDS AND PROCEEDINGS

A. Confidential Matters. Except as otherwise provided in this subparagraph 13-30, or in subparagraph 13-11, the following Disciplinary Proceedings, records, and information are confidential and shall not be disclosed:

1. Complaints, unless introduced at a public hearing or incorporated in a pending Charge of Misconduct, when the matter is placed on the public District Committee hearing docket, or a Certification;
2. Investigations, except that Investigative Reports admitted as exhibits at a public hearing are public;
3. Impairment proceedings, except that final orders are public;
4. Notes, memoranda, research, and all other work product of Bar Counsel;
5. Records, communications, and information protected by Disciplinary Rule 1.6;
6. Subcommittee records and proceedings, except determinations imposing public discipline; and
7. Deliberations and working papers of District Committees, the Board or a three-judge Circuit Court.

B. Timing of Disclosure of Disciplinary Record in Sanctions Proceedings. If an Attorney has a Disciplinary Record and is subsequently found by a Subcommittee, a District Committee, the Board or a three-judge Circuit Court empaneled under Va. Code § 54.1-3935 to have engaged in Misconduct, the facts and circumstances giving rise to such Disciplinary Record may be disclosed (i) to the Subcommittee, District Committee, Board or three-judge Circuit Court prior to the imposition of any sanction and (ii) by the Subcommittee, District Committee, Board or three-judge Circuit Court in its findings of fact set forth in its order. The facts and

circumstances giving rise to such Disciplinary Record may also be disclosed to the Board during a hearing concerning whether an affidavit and consent to Revocation should be accepted.

C. Timing of Public Access to Disciplinary Information. All records of a matter set for public hearing remain confidential until the matter is dismissed or a public sanction is imposed except:

1. A Charge of Misconduct is public when the matter is placed on the public District Committee hearing docket; and
2. A Certification is public when filed with the Clerk of the Disciplinary System.

D. Public Statements Concerning Disciplinary Information. To the extent necessary to exercise their official duties, Bar Officials have access to all confidential information; however, except for Bar Counsel, no Bar Official shall communicate with a member of the media or the public concerning a matter that is confidential under this Paragraph. If an inquiry is made about a matter that, although confidential under this Paragraph, has become a matter of public record or has become known to the public, Bar Counsel may confirm whether the Bar is conducting an Investigation or if an Investigation resulted in a determination that further proceedings were not warranted.

E. Protection of the Public. Bar Counsel may transmit confidential information to persons or agencies outside of the disciplinary system if such disclosure is necessary to protect the public or the administration of justice.

F. Disclosure to Other Jurisdictions. Bar Counsel may share information regarding an Investigation with his or her counterparts in other jurisdictions provided that such jurisdiction agrees to maintain the confidentiality of the information as provided in this Paragraph.

G. Disclosure of Criminal Activity. If Bar Counsel or a Chair of the Board or a Chair of a District Committee discovers evidence of criminal activity by an Attorney, Bar Counsel, the Chair of the Board or a Chair of a District Committee shall forward such evidence to the appropriate Commonwealth's Attorney, United States Attorney or other law enforcement agency. The Attorney concerned shall be notified whenever this information is transmitted pursuant to this subparagraph 13-30 unless Bar Counsel decides that giving such notice will prejudice a disciplinary investigation.

H. Disclosure of Information to Government Entities. By order of this Court, confidential information may be disclosed to the Joint Legislative Audit and Review Commission or other governmental entities incident to their discharge of official duties, provided the entity is required or agrees to maintain the confidentiality of the information provided.

I. Waiver of Confidentiality. Confidential information, excluding notes, memoranda, research, and all other work product of Bar Counsel, may upon written request be disclosed when and to the extent confidentiality is waived by the Respondent, by the Complainant, and, if protected by Disciplinary Rule 1.6, by Respondent's client.

J. Testimony about Disciplinary Proceedings.

1. In no case shall Bar Counsel, a member of COLD, a member of a District Committee, a member of the Board, or a Committee Counsel be subject to a subpoena or otherwise compelled to testify in any proceeding regarding except that an Investigator may be compelled to testify in a Disciplinary Proceeding, subject to rulings of the court or Chair.
2. In no case shall the Clerk of the Disciplinary System be subject to a subpoena or otherwise compelled to testify regarding any matter investigated or considered in the disciplinary system, or the records of any such matter, dealt with by the Clerk of the Disciplinary System in his or her official capacity, except that the Clerk of the Disciplinary System may

be compelled to testify in a Disciplinary Proceeding in order to authenticate records of the Clerk of the Disciplinary System.

K. Records of the Disciplinary System. In no case shall confidential records of the attorney disciplinary system be subject to subpoena.

L. Virginia Lawyer Referral Service. Bar Counsel shall notify the Virginia Lawyer Referral Service when a Complaint involving any Attorney member of the service is referred to a District Committee for Investigation or when any Attorney member of the service is disciplined. Bar Counsel shall also notify the Virginia Lawyer Referral Service when any Complaint involving an Attorney member of the service is dismissed following Investigation or when any Attorney member of the service complies with Terms imposed.

M. Disclosure of Information to Lawyer Assistance Program. If Bar Counsel believes that an Attorney may benefit from the services of a Lawyer Assistance Program, Bar Counsel may make an informal referral to a Lawyer Assistance Program and may share information deemed confidential under this Paragraph as part of that referral. Bar Counsel shall not share information that is protected from disclosure by other state or federal privacy laws. Bar Counsel may, but shall not be required to, notify the subject Attorney of the informal referral or transmission of confidential information to the Lawyer Assistant Program. Unless the subject Attorney has signed a release allowing the Lawyer Assistance Program to share information with Bar Counsel, the Lawyer Assistance Program shall not report information about the subject Attorney to Bar Counsel, and Bar Counsel shall not receive such information from the Lawyer Assistance Program.

13-31 DISMISSAL OF COMPLAINTS AND ALLEGATIONS OF MISCONDUCT UPON REVOCATION WITHOUT CONSENT, OR UPON DEATH

When an Attorney's License is revoked without consent, or upon the death of an Attorney, Bar Counsel, in his or her discretion, may dismiss without prejudice any and all Complaints or allegations of Misconduct then pending against said Attorney by notifying the Clerk of the Disciplinary System, the Complainant(s) and the District Committee, Board or court wherein the matter(s) lies.

DISCIPLINARY CASE LAW

[updated June 21, 2019]

Contents

I. PROCEDURE

Agreed Dispositions

Respondent signed the agreed disposition and had raised no objections to the terms of the agreed disposition. The Supreme Court affirmed the imposition of the sanction finding that execution of the Agreed Disposition and failure to object to its terms during the telephonic conference precluded his challenge to the imposition of the sanction. The Court also found that premature publication of the sanction was not a basis for dismissal of the charges. *Curtis Tyrone Brown v. Virginia State Bar, ex rel. Second District Committee*, No. 070162 (Va. S. Ct. Oct. 19, 2007).

Amendments to Certification at Board Hearing Not Permitted

The Board's decision to permit an amendment to a Certification issued by a District Committee was improper where the amendment was tantamount to a new charge against the Respondent. *Pappas v. Virginia State Bar*, 271 Va. 580, 628 S.E.2d 534 (2006).

Appeals, Late Notice of Appeal

Appeal dismissed due to Respondent's failure to timely file notice of appeal with trial court. Confirms applicability of Part 5 of the Rules in appeals of three-judge court determinations, specifically Rule 5:9(a) requiring notice of appeal to be filed within 30 days after entry of judgment. Requirement now explicitly codified in 5:21(b). *Curtis T. Brown v. Virginia State Bar*, No. 100491 (Va. S. Ct. May 10, 2010).

Appeals, Late Transcript, Dismissal Appropriate

Where a Respondent appealed from a District Committee Determination and failed to timely file a transcript, under the language of the Rules the Board had no choice but to dismiss the appeal. *Pilli v. Virginia State Bar*, No. 001990 (Va. S. Ct. Feb. 16, 2001).

Board Members—Substitution of New Members

Respondent objected to substitution of new board members who were not sitting at prior hearing. The bar fulfilled the requirements of Part 6, § IV, ¶ 13-18(Q) by providing the substituted Board members with a transcript of the prior hearing and the Board was not required to note or document the reason for the inability of members to be present. *Green v. Virginia State Bar*, 278 Va. 162, 677 S.E.2d 227 (2009).

Burden of Proof, Clear and Convincing

The bar is required to prove attorney misconduct by "clear proof," which is interchangeable with "clear and convincing evidence." *Norfolk and Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934); *Blue v. Seventh District Committee*, 220 Va. 1056,

265 S.E.2d 753 (1980); *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Certification—Amendment of Charges

In a discipline proceeding in which the Virginia State Bar Disciplinary Board suspended an attorney's license to practice law for a period of six months, the Board's decision to permit amendment of the subcommittee's certification of charges and to admit certain deposition testimony by a former client were improper. *Pappas v. Virginia State Bar*, 271 Va. 580, 628 S.E.2d 534 (2006).

Certification—Delay in Issuing Notice of Certification

To secure a dismissal of the charges, Respondent must show that he was prejudiced by bar counsel's delay in serving the Notice of Certification more than one year after the Subcommittee voted to certify the charges. Here Respondent made no such showing and therefore is not entitled to dismissal of the charges. *Green v. Virginia State Bar*, 278 Va. 162, 677 S.E.2d 227 (2009).

Circuit Court, Power to Discipline Attorney

A circuit court was acting within its authority when it revoked Respondent's privilege to practice before the circuit courts of the 17th judicial circuit, and the statutory mechanism for revocation of an attorney's license throughout the Commonwealth was not applicable. Conversely, the attorney's license to practice law in Virginia was not affected by the circuit court's order in this case. Licensure of an attorney, and revocation of that license, are matters governed by statute, and it is not within the jurisdiction of a circuit court to adjudicate the revocation of a license to practice law except in compliance with the statutory authority. *In the Matter of Jonathan A. Moseley*, 273 Va. 688, 643 S.E.2d 190 (2007).

Client Complaint Not Required

There is no provision in the statutes or rules which requires a complaint by a client before lawyer misconduct may be investigated, and a District Committee may instigate a disciplinary proceeding on its own. *Delk v. Virginia State Bar*, 233 Va. 187, 355 S.E.2d 558 (1987).

Client Protection Fund: Obligation Non-Dischargeable in Bankruptcy

Sums ordered in repayment to the Client Protection Fund were not dischargeable in bankruptcy. *In re: Rickey Gene Young*, Case No. 6-60353, United States Bankruptcy Court for the Western District of Virginia; *In the Matter of Rickey Gene Young*, VSB Docket No. 13-000-093093.

Confrontation of Witnesses, Right Inapplicable

Where a complaint (or, presumably, a certification) does not allege any wrongdoing which would constitute a crime, the federal and state rights affording the accused the right to

confront witnesses against him are inapplicable. *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987) (bar and Respondent had agreed to elicit facts surrounding one complaint from Respondent rather than calling the complainant as a witness in that matter).

Continuances

Whether a continuance should be granted is a matter of discretion on the part of the Board, and will be reviewed under an abuse of discretion standard. *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Continuances: Competency

At a special private hearing on June 9, 2009, a petition in the impairment case concerning Respondent was heard. At the same hearing, Respondent's counsel renewed his motion that the misconduct case be continued generally. The Board Chair had already denied the motion during a conference call, but had given Respondent's counsel the option of bringing it before a full panel at this hearing. The continuance motion was filed on the basis of Respondent's alleged incompetency to participate in a hearing on his disciplinary charges. While the only inference that can be drawn from the denial of the continuance is that the Board panel found that there is no competency requirement in bar disciplinary cases, only a summary order was issued regarding the decision. *Alfred M. Tripp*, VSB Docket No. 08-021-073929.

Corporate Counsel

The VSB approved Respondent's corporate counsel application. Respondent acknowledged that under his corporate counsel status, his practice in Virginia was limited to providing legal services to his employer. Respondent's employer ceased doing business in 2009; however, Respondent did not report this change in employment as required. In 2016, Respondent opened his own law practice in Virginia, identified as the "Billups Law Firm," and identified himself as an attorney at law in his correspondence. Respondent handled several civil matters for paying clients, and qualified for court-appointed defense work, eventually handling nine criminal matters although he was never admitted to full, active VSB membership. Respondent failed to appear at his hearing before the Disciplinary Board, which revoked his privilege to practice law in Virginia. RPCs 5.5 (c-d), 8.5 (a). *In the Matter of B. Walter Billups*, VSB Docket No. 17-10-2-108947.

Criminal Convictions

When a disciplinary proceeding is based upon a conviction, the Board is bound by that conviction. It may not look behind the finding of guilt. *In Re Carl McAfee*, VSB Docket No. 87-000-0954.

The Supreme Court of Virginia affirmed Respondent's revocation, finding that

Respondent's plea, pursuant to *North Carolina v. Alford*, constituted an admission that the facts presented by the Commonwealth at the hearing on the felony charge would justify a finding of guilt. *Lee v. Virginia State Bar*, No. 071464 (Va. S. Ct. Dec. 7, 2007).

Dismissals

The three-judge court acknowledged that pursuant to Part 6, Section IV, Paragraph 13.B.7 a (1), *Rules of the Supreme Court*, "Bar counsel is given the authority to 'initiate, investigate, present or prosecute Complaints' and to act independently and exercise prosecutorial autonomy and discretion." In granting bar counsel's motion to dismiss, the three-judge court found that "[i]nherent within …[the bar's] authority is the authority to move the court to dismiss a complaint with prejudice." *Virginia State Bar ex rel. Third District Committee, Section III v. Debra Desmore Corcoran*, CL07-2749-3 (Circuit Court of the City of Richmond, August 2, 2007).

Discovery, No Right To

Respondent has no procedural due process right to discovery in a disciplinary proceeding. *Gunter v. Virginia State Bar*, 241 Va. 186, 399 S.E. 2d 820 (1991).

Double Jeopardy, Prior Record

The Board's consideration of prior discipline does not constitute double jeopardy or multiplicity of charges. *Wright v. Virginia State Bar*, 233 Va. 491, 357 S.E. 2d 518 (1987).

Due Process, Notice of Charges

During a disciplinary proceeding, Ohio's Board of Commissioners on Grievances and Discipline heard testimony from an attorney and his investigator and, based on their testimony, added a new charge against the attorney. The attorney was ultimately suspended based on the new charge. The United States Supreme Court held that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *In re Ruffalo*, 390 U.S. 544 (1968).

Respondent was charged with violating Rule 4.2 based on a conversation he had with a represented person regarding a civil matter. The District Committee found that Respondent violated 4.2, but based the finding on Respondent's discussion of a pending criminal matter with the same person. Respondent appealed to the Disciplinary Board, which affirmed the finding of a violation of Rule 4.2, finding that the charge of misconduct gave adequate notice for Respondent to develop his defense. The Supreme Court of Virginia reversed because the charge of misconduct "neither included the factual allegation that Spencer had discussed the pending criminal offense with the defendant, nor accused him of misconduct in that regard." *Spencer v. Virginia State Bar*, No. 111489 (Va. S. Ct. Feb. 24, 2012).

Due Process, Argument Must be Raised at Hearing

Respondent argued that the Disciplinary Board proceedings denied him due process and equal protection of the law, but he never raised that argument during the Board proceedings. Pursuant to Rule 5:25 of the Rules of Supreme Court of Virginia, the court refused to consider objections not raised at the trial level. *Earls v. Virginia State Bar,* No. 002230 (Va. S. Ct. Mar. 2, 2001).

Expansion of Investigation

The fact an investigation expanded from an isolated incident regarding Respondent's trust account into a broader review of the account does not support a claim of a violation of due process or equal protection. As disciplinary proceedings are civil and disciplinary in nature and summary in character, they are informal proceedings and it is only necessary that the attorney be advised of the nature of the charge against him and be given an opportunity to answer. *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Federal Intervention in Pending Disciplinary Proceeding—*Younger Abstention Doctrine*

Even though Respondent has asserted a First Amendment claim against the VSB in federal court, a federal court will not enjoin the state proceeding and will abstain from asserting jurisdiction over the claim if Respondent has a full and fair opportunity to litigate his claim in the state disciplinary proceeding. The Fourth Circuit has not confronted this precise issue, but other courts of appeals have affirmed dismissal under *Younger* where an attorney filed suit in federal court seeking to enjoin state disciplinary proceedings. *See, e.g., Gillette v. N.D. Disciplinary Bd. Counsel*, 610 F.3d 1045 (8th Cir. 2010); *Am. Family Prepaid Legal Corp. v. Columbus Bar Ass'n*, 498 F.3d 328 (6th Cir. 2007); *Sekerez v. Supreme Court of lnd*., 685 F.2d 202 (7th Cir. 1982). *Horace Hunter v. Virginia State Bar*, 786 F. Supp. 2d 1107 (E.D. Va. May 9, 2011).

Filing Achieved Only upon Receipt by Clerk's Office

The timeliness of a demand for a three-judge panel is determined by the date the demand is received by Clerk's Office, rather than date of mailing. *In the Matter of Denny Pat Dobbins*, VSB Docket No. 04-010-1580; *see also Robinson v. VSB*, No. 052638 (Va. S. Ct. May 19, 2006) (certified mailing sent on 21st day insufficient). The bar, however, should object to an untimely demand and may waive the requirement by stipulating that the demand was timely. *Brown v. Virginia State Bar*, 270 Va. 409, 621 S.E.2d 106 (2005).

Foreign Lawyer—Disciplinary Suspension—Unauthorized Practice of Law

North Carolina lawyer whose license was under administrative suspension by NC State Bar practiced "continuously and systematically" in Virginia in violation of Rule 5.5; failed to maintain trust account records; failed to deposit client funds into trust account suspended with terms for two years. *Virginia State Bar v. Walters*, VSB Docket No. 10-060-082176.

Immunity

Qualified immunity exists pursuant to statute for written or spoken words made in Bar complaint matters. The immunity is lost if the statements are false and were made willfully and maliciously. Va. Code. § 54.1-3908.

Assistant Bar Counsel has absolute prosecutorial immunity under the 11th amendment to the U.S. constitution. "In each case where a prosecutor is involved in the charging process, under Virginia law, that action is intimately connected with the prosecutor's role in judicial proceedings and the prosecutor is entitled to absolute immunity from suit for such actions." *Andrews v. Ring*, 266 Va. 311, 321, 585 S.E.2d 780, 785 (2003). The same rule applies under federal law. *Imbler v.Pachtman*, 424 U.S. 409, 422-29 (1976) (incorporating common law principle of prosecutorial immunity). *Horace Hunter v. Virginia State Bar*, 786 F.Supp. 2d 1107 (E.D. Va. 2011).

Impairment Investigation: Suspension of law license after adjudication by a court of competent jurisdiction to have an impairment

An out-of-state licensing authority placed Respondent on inactive status by consent pending further order of its court following multiple findings of professional misconduct against Respondent. Respondent voluntarily ceased practicing law. The other jurisdiction also enjoined Respondent from practicing law based upon five years of treatment for depression and a psychiatric commitment indicating that Respondent's condition materially affected his ability to practice law. Respondent explained that he did not notify VSB of the suspension because it was related to his illness. Disciplinary Board suspended Respondent's law license in accordance with Rule of Court requiring such action upon notice with supporting documentary evidence that an attorney has been adjudicated by a court of competent jurisdiction to have an impairment. VSB Docket No. 18-000-____. (Complete cite withheld for confidentiality).

Judges May Testify

It was not prejudicial error to consider the testimony of a Circuit Judge, even though the testimony contained hearsay evidence. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964).

Laches, Does Not Apply

Laches does not apply to state or local governments when acting in a governmental capacity. The bar, which is an administrative arm of the Supreme Court, is a state agency, and therefore laches does not apply to disciplinary proceedings. *Virginia State Bar v. El-Amin*, Case No. MC4992 (Three-Judge Panel, 1998).

Mitigation Evidence Need Not Be Discussed In Opinion

The Board is not required to mention mitigating evidence in its written or oral opinion, and the failure to state that mitigating evidence was considered does not mean it was not considered. *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Mitigation Evidence—Exclusion Improper

Respondent sought to introduce documents and witness testimony from his office staff to substantiate the adverse economic impact on his legal practice caused by an allegedly untimely press release by the Virginia State Bar announcing that his license to practice law had been suspended and detailing the reasons underlying the suspension. The Board ruled that it would only hear argument on the appropriate sanction and would not allow admission of Respondent's mitigation evidence. The Supreme Court held that Respondent was entitled to present evidence tending to mitigate the sanction to be imposed by showing to what extent he had already suffered adverse consequences because of the public dissemination of the Disciplinary Board's findings that he had violated the Disciplinary Rules and the suspension of his license to practice law. *Green v. Virginia State Bar*, 272 Va. 612, 636 S.E.2d 412 (2006).

Nature Of The Proceedings

A disciplinary proceeding is civil, and not criminal in nature. They are special proceedings, peculiar to themselves, sui generis, disciplinary in nature and of a summary character. Such a proceeding is not a lawsuit between the parties litigant, but is rather in the nature of an inquest or inquiry as to the conduct of the Respondent. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964).

We have previously stated that the proceeding to discipline an attorney is a civil proceeding. *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 837, 172 S.E. 282, 284 (1934).

Notice Proceedings Only

Disciplinary proceedings are informal proceedings and it is only necessary that the defendant be informed of the nature of the charge and be given an opportunity to answer. *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833 (1934); *Maddy v. District Committee*, 205 Va. 652 (1964); As disciplinary proceedings are civil and disciplinary in nature and summary in character, they are informal proceedings and it is only necessary that the attorney be advised of the nature of the charge against him and be given an opportunity to answer. *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Courts are not required to list with specificity the factual basis for issuing a rule to show cause why such privilege should not be revoked. The record shows that the attorney received adequate notice of the conduct that the circuit court would consider in deciding whether to revoke his privilege to practice before that court. *In the Matter of Jonathan A. Moseley*, 273 Va.

688, 643 S.E.2d 190 (2007).

Respondent contends that his due process rights were violated. Moseley argues that the disciplinary proceedings are quasi-criminal; therefore, he asserts that the original complaint was not valid because it was not verified by an affidavit that included detailed allegations which could not be amended during the proceedings. Moseley also argues that the panel erred in failing to dismiss as invalid various allegations that never identified the precise conduct violating the rules. We have previously stated that the proceeding to discipline an attorney is a civil proceeding. *Norfolk & Portsmouth Bar Ass'n v. Drewry,* 161 Va. 833, 837, 172 S.E. 282, 284 (1934). The primary purpose of such disciplinary proceedings is to protect the public, not punish the attorney. *Virginia State Bar v. Gunter*, 212 Va. 278, 284, 183 S.E.2d 713, 717 (1971). To that end, "it is only necessary that the attorney be informed of the nature of the charge preferred against him and be given an opportunity to answer." *Id.* The record reflects that Moseley had adequate notice and opportunity to answer, as he was present for the proceedings and responded not only to the charges of misconduct pending against him, but disputed the underlying facts as well. Further, the Virginia State Bar complied with the statutory requirements of Code § 54.1-3935 by verifying the district committee complaint by affidavit. Therefore, we reject Moseley's contention that his due process rights were violated by the proceedings before the panel. *Moseley v. Virginia State Bar*, 280 Va. 1, 694 S.E.2d 586 (2010).

Privilege—Waiver—Inadvertent Disclosure

The Supreme Court of Virginia adopts a five-part test for determining whether an inadvertent disclosure of a document covered by the attorney-client privilege waives the privilege. The Court held that the ACP had been waived and reversed the trial court, applying these five factors: "(1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances." *Walton v. Mid-Atlantic Spine Specialists PC*, 280 Va. 113, 694 S.E.2d 545 (2010).

Procedural Compliance

Dismissal of a complaint for failure of the bar to comply with a procedural requirement of the Rules of Supreme Court of Virginia is inappropriate, absent some showing of prejudice to the respondent because for the failure. *Motley v. Virginia State Bar*, 260 Va. 251 (2000) (Bar sent certification to Respondent 11 months after Subcommittee made the decision to certify, although Rule at that time required such mailing "promptly"); *accord Green v. Virginia State Bar*, 278 Va. 162, 677 S.E.2d 227 (2009) (more than one year delay in issuance of certification not a basis for dismissal absent showing that respondent was prejudiced by the delay).

Reciprocal Discipline

Effective March 1, 2017, Paragraph 13-24 regarding reciprocal discipline was amended to clarify that it applies to disciplinary suspensions and revocations arising from not only state disciplinary authorities, but also federal courts and agencies that are authorized to impose attorney discipline. Prior to this amendment, the Board had imposed reciprocal discipline in cases arising from a Maryland bankruptcy court (*See In re Bridgette M. Harris*, No. 01-000-3232 (2001)) and the Patent and Trademark Office (*In re Martin G. Mullen*, VSB Docket No. 02-000-1877 (Disc. Bd. 2002) (one dissent)).

Pursuant to Paragraph 13-24.G, if the respondent fails to show cause that the matter should be dismissed or that lesser discipline should be imposed, then the Board shall impose the same or equivalent discipline imposed by the other jurisdiction, even if the other jurisdiction imposed a type of discipline that is not recognized in Virginia. *In re: Alexander Manjaja Chanthunya*, No. 17-000-106756 (Disc. Bd. 2016); *In re Harry P, Friedlander*, No. 15-000-101182 (Disc. Bd. 2015); *In re Bridgette M. Harris*, No. 01-000-3232 (Disc. Bd. 2001).

In order to attempt to prove that "imposition of the same discipline upon the same proof would result in a grave injustice," a respondent is permitted to introduce evidence of extenuating circumstances that might mitigate the sanction to be imposed in Virginia. The Board's refusal to allow this evidence resulted in a reversal by the Supreme Court of Virginia. *Cummings v. Virginia State Bar*, 233 Va. 363, 355 S.E.2d 588 (1987).

Recusal

Whether a Board member should recuse himself in response to a recusal motion is a matter of discretion and is reviewed for abuse of discretion. The fact that two Board members previously sat on cases involving the current Respondent does not require recusal, and the fact a judge is familiar with a party and his legal difficulties through prior judicial hearings does not automatically or inferentially raise the issue of bias. *Motley v. Virginia State Bar*, 260 Va. 251, 536 S.E.2d 101 (2000).

Self-Incrimination Rights Inapplicable

Where a complaint (or, presumably, a certification) does not allege any wrongdoing which would constitute a crime, the federal and state rights against self-incrimination are inapplicable. *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987).

Show Cause Hearing, Burden on Respondent

At a show cause hearing, the burden is on the respondent to show by clear and convincing evidence that he complied with the terms imposed. *Williams v. Virginia State Bar*, 261 Va. 258, 542 S.E.2d 385 (2001).

Show Cause Hearing, While Respondent is Under Impairment Suspension, and Appointment of Guardian Ad Litem

The Virginia State Bar may pursue a criminal show cause and discipline against a lawyer who is under an impairment suspension. A Guardian Ad Litem can be appointed if the impaired respondent does not have counsel. *In the Matter of Shelly Renee Collette*, VSB Docket No. 18-000-111181.

Statute of Limitations, None

Proceedings to discipline lawyers are not set on foot to punish them, but to protect the public. It is want of character which is important and not the place where that is manifest. The public is not interested in the situs of their misdeeds and we know of no statute of limitations which can be invoked. *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934); *see also Moseley v. Virginia State Bar*, 280 Va. 1, 694 S.E.2d 586 (2010).

Suspended Lawyers Are Subject to Discipline under the Rules of Professional Conduct

Suspended lawyers retain their status as a lawyer, even though their privileges of practice are withdrawn during their suspension. Accordingly, the Rules of Professional Conduct apply to them. Equal protection was afford Respondent as he was treated similarly to other suspended lawyers as suspended lawyers are a class unto themselves. *Barrett v. Virginia State Bar*, 277 Va. 412, 675 S.E.2d 827 (2009).

Suspension, Failure to Give Notice, Paragraph 13-29

Respondent continued to negotiate personal injury case after license suspension. By a 3 to 2 vote, the Disciplinary Board found that Respondent had not violated Para. 13(M).1 Alleging violation of Para. 13 (M) may not be the correct enforcement procedure when a suspended lawyer continues to practice after their license has been suspended. *In the Matter of Steven Scott Biss*, VSB Docket No. 09-000-079001.

But see In the Matter of Tracey Suzann Foughty –Deavers, VSB Docket No. 11-000-088251. Respondent was revoked in this ¶ 13-29 case. Paragraph 13-29 requires that upon license suspension, an attorney give notice to clients and opposing counsel and make arrangements with clients for the handling of all matters during said suspension, and provide proof of both to the bar. Respondent was serving an interim suspension for failure to respond to a VSB subpoena *duces tecum* issued in the course of an investigation. Board heard evidence of actual harm to two clients caused by delay of their matters.

1 Paragraph 13-M is now Paragraph 13-29.

Suspension, Discipline of Lawyer While Lawyer is Suspended

A lawyer whose license is suspended is still an active member of the bar and, although not in good standing, is subject to discipline for violating the Rules of Professional Conduct. *Barrett v. Virginia State Bar*, 277 Va. 412, 675 S.E.2d 827 (2009).

Suspension, Pleadings Filed by Suspended Lawyer are a Nullity

Notice of appeal was signed and filed by attorney whose license was under an administrative suspension at the time. The lawyer said he did not know about the suspension and therefore his client should not be penalized as a result of it. The Court held that pleadings signed by a suspended lawyer are a nullity, regardless of whether the suspension is administrative and regardless of whether the lawyer had actual knowledge of the suspension. Accordingly, the notice of appeal was not properly filed and the Court did not have jurisdiction to hear the appeal. *Jones v. Jones*, 635 S.E.2d 594 (Va. App. 2006).

Teleconference, Hearing Conducted by

Disciplinary Board did not err in conducting the proceedings via telephonic conference call. *Green v. Virginia State Bar*, 272 Va. 612, 636 S.E.2d 412 (2006).

Terms, Authority to Impose

A District Committee imposed a public reprimand with terms, which included a requirement that Respondent engage a consultant to review and make recommendations regarding his "methods and timeliness of client communication, fee agreements and billing practices." Respondent appealed to the Disciplinary Board and then to the Supreme Court of Virginia, arguing that the terms exceeded the District Committee's authority and were otherwise unjustified. The Court held that the District Committee had authority to impose a public reprimand with terms, and that "[w]hile the Rules do not explicitly provide for the [law practice consultant], they do not forbid it, and Robinson provides no authority for his position that such a sanction is beyond the Committee's authority." Moreover, "[g]iven that the VSB has the power to suspend or revoke an attorney's license for misconduct, it follows that the VSB also possesses the lesser power to require an attorney with a history of problematic billing practices to engage a consultant to review and improve those practices to conform to the minimum level of professional competency." *Ronald Albert Robinson, Jr. v. Virginia State Bar*, No. 151501 (Va. S. Ct. Apr. 14, 2016).

Terms Compliance, Rule to Show Cause

In a show cause proceeding before the Board, the burden of proof is on the respondent to show by clear and convincing evidence that he complied with the terms imposed under an agreed disposition order. In this case, the agreed disposition order suspended the six-month suspension of the attorney's license to practice law for a period of one year, subject to certain terms. The Board found that the attorney failed to comply with the order because he did not submit the

required certifications during that year, and because he failed to demonstrate by clear and convincing evidence sufficient cause to explain his failure to comply with that condition. The record in this case supports the Board's findings. *Williams v. Virginia State Bar*, 261 Va. 258, 542 S.E.2d 385 (2001).

Three-Judge Panel Timely Election Required

Rule requiring demand for a three-judge panel to be filed within 21 days of service of charge of Misconduct is fully consistent with Code Sections 54.1-3935 and 3915; right to a Three-Judge panel may be waived by failure to timely make such a demand; Section 54.1-3915 is akin to "territorial jurisdiction" or venue, as opposed to subject matter jurisdiction. *Fails v. Virginia State Bar*, 265 Va. 3, 574 S.E.2d 530 (2003), *reaffirming Wright v. VSB*, 233 Va. 491, 357 S.E. 2d 518 (1987).

A failure to make a timely demand for a three-judge court constitutes a conclusive waiver of the right to subsequently file such a demand. *Wright v. Virginia State Bar*, 233 Va. 491 (1987).

Mailing a demand for a three-judge panel on the 21st day by certified mail is untimely; Rule 5:5(b), which deems a pleading timely filed when it is mailed by certified mail, applies only to the Clerk of the Supreme Court and not to the Clerk of the Disciplinary System. *Robinson v. VSB*, No. 052638 (Va. S. Ct. May 19, 2006).

Respondent did not file his Answer and Demand for a Three-Judge Panel until two days after the deadline for filing the same. This requirement is jurisdictional, and Respondent is deemed to have consented to the jurisdiction of the Disciplinary Board. *In the Matters of David Redden*, VSB Docket Nos. 11-021-085200 and 11-021-086547; *citing In the Matter of Stephen Alan Bamberger*, VSB Docket No. 08-052-073229.

Three-Judge Panel, Expedited Hearing

Respondent timely filed a request for a three-judge panel, but Respondent failed to provide dates between 30 and 120 days from the date of the Board's Order requiring him to appear. Respondent also failed to produce credible evidence demonstrating that he was unavailable during the required timeframe. Respondent's request for a three-judge panel was denied and the hearing took place before the Disciplinary Board. *In Re: Jean Jerome Dandy Ngando Ekwalla*, VSB Docket Nos. 15-053-101414 et al. On appeal, the Supreme Court of Virginia affirmed, holding that the "Rule itself contains no good cause or ends-of-justice exception." *Ngando Ekwalla v. Virginia State Bar*, Record No. 160401 (Va. Dec. 8, 2016).

Three-Judge Panel, Withdrawal of Objection to Timeliness of Respondent's Election

When the bar withdrew its objection to the attorney's demand for a three-judge panel and stipulated that the demand was timely filed, the bar submitted itself to the jurisdiction of the

three-judge panel. At that point, the Board's jurisdiction over the attorney and the Virginia State Bar terminated. Therefore, the Board did not have jurisdiction to enter an order suspending the attorney's license to practice law. The order is reversed, and the matter is remanded with directions to bar counsel to file the Complaint required by Code § 54.1-3935. *Brown v. Virginia State Bar*, 270 Va. 409, 621 S.E.2d 106 (2005).

Three-Judge Court, Right to Elect for Hearing on Compliance With Paragraph 13 (M)[2](Notice to Clients of Suspension)

An attorney charged with failure to provide required notice to clients that his license to practice law was suspended made a timely demand that the alleged violations be tried before a three-judge court, and from that point the Virginia State Bar Disciplinary Board had no authority to adjudicate the adequacy of the attorney's compliance with the notice requirement. *Cilman v. Virginia State Bar*, 266 Va. 66, 580 S.E.2d 830 (2003).

Three-Judge Panel, Jurisdiction On Remand from VA Supreme Court

Respondent appealed a District Committee's decision and invoked the jurisdiction of a three-judge panel. He then appealed the three-judge panel's decision to the Virginia Supreme Court. The Supreme Court affirmed two of the Rule violations found by the three-judge panel and remanded the case to the three-judge panel to consider the appropriate sanction. Respondent argued that the three-judge panel did not have jurisdiction to "hear evidence and determine a sanction on remand." The Court disagreed, holding that the three-judge panel retained the jurisdiction Respondent had previously invoked by requesting it. *Kuchinsky v. Virginia State Bar*, No. 150878 (Va. S. Ct. Oct. 29, 2015).

Three-Judge Panel, Untimely Demand

No conflict is found between Rule 13(C)(6)3 and Code § 54.1-3915. The rule and the statute complement each other. The message of Rule 13(C)(6) is clear: if an attorney does not wish to be tried by the Disciplinary Board, he or she should not file an answer to a certification of misconduct within twenty-one days. Instead, the attorney should file within that time a demand for trial by a three-judge court. This simple procedural step neither eliminates the jurisdiction of the courts to deal with the discipline of attorneys nor denies the right of an attorney to trial by a three-judge court. The failure of an attorney charged with misconduct to make a timely demand for a three-judge court constitutes a conclusive waiver of the right to subsequently file such demand. *Fails v. Virginia State Bar*, 265 Va. 3, 574 S.E.2d 530 (2003).

Respondent's license was suspended for three years by the Virginia State Bar Disciplinary Board. Respondent argued on appeal that the Board erred in denying the appellant's request for a three-judge panel. The Supreme Court of Virginia held that the Board did not err in

2 Paragraph 13(M) is now Paragraph 13-29.

3 Currently, Paragraph 13-18.A governs the method by which a respondent can demand a three-judge panel.

concluding that the appellant's request for a three-judge panel was untimely. Respondent's letter, sent by certified mail on the 21st day after service of the Certification, was not received until the 22nd day after service of the Certification. Moreover, Rule 5:5(b) does not apply to pleadings filed with the Board. The Court also found that Respondent's unsigned request for a three-judge panel that was sent by facsimile on the 21st day after service of the Certification was without effect. *Robinson v. VSB*, No. 052638 (Va. S. Ct. May 19, 2006).

Three-Judge Court, Request Not Signed by Respondent

Although the Respondent's Answer to a Certification and Demand for Three-Judge Panel was filed within 21 days of service of the bar's Certification, it was not signed by the Respondent as required by Rule 13-13(B), but only by Respondent's counsel. Respondent's request for a three-judge court was therefore not timely made and the Board retained jurisdiction over the matter. *In the Matter of Stephen Alan Bamberger*, VSB Docket No. 08-052-073229 (Disc. Bd. Jan. 28, 2011); *see also In the Matter of Michelle Warner Waller*, VSB Docket No. 14-033-098480 (Disc. Bd. 2015); *In the Matter of James Amery Thurman*, VSB Docket No. 14-022-099259 (Disc. Bd. 2015).

Venue, District Committee

A District Committee has a duty to investigate misconduct if the misconduct occurs in its district or if the attorney resides in its district. This is a venue requirement, which is waived if not timely made. Failure to object to venue either in person or in writing before one's first appearance before the District Committee constitutes waiver of any objection to venue. *Stith v. Virginia State Bar*, 233 Va. 222, 355 S.E.2d 310 (1987).

Virginia Supreme Court—Standard of Review

We conduct an independent examination of the entire record. We consider the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the bar, the prevailing party in the trial court. We accord the trial court's factual findings substantial weight and view those findings as prima facie correct. Although we do not give the trial court's conclusions the weight of a jury verdict, we will sustain those conclusions unless it appears that they are not justified by a reasonable view of the evidence or are contrary to law. *Zaug v. Virginia State Bar*, 285 Va. 457, 737 S.E.2d 914 (2013).

Virginia Supreme Court—Standard of Review—Findings of Fact Necessary to Support Charges

While the Board could have concluded in its findings of fact that Northam had actual knowledge of Lewis's disqualification, or that such actual knowledge was inferred from the circumstances, that finding was not made. Had the Board made this determination, we would have reviewed the entire record for reasonable inferences in support of its determination, and viewed conflicts in the evidence in the light most favorable to the bar as the prevailing party.

But lacking any factual determination by the Board as to Northam's knowledge of disqualification, we will not inspect the record to determine facts required to establish a violation of the rule. *Northam v. Va. State Bar* 285 Va. 429, 737 S.E.2d 905 (2013).

The district committee's determination complied with Part 6, § IV, ¶ 13-16(Y). Brief findings of fact, nature of the misconduct explained based on the facts, and the sanctions imposed are all that is necessary. The rules do not require that a District Committee list the specific facts relied upon in finding individual rule violations. Therefore, the District Committee did not err by failing to include an exhaustive list for each violation. The rules do not require that a District Committee list the specific facts relied upon in finding individual rule violations. Therefore, the District Committee did not err by failing to include an exhaustive list for each violation. *Kuchinsky v. Virginia State Bar*, 287 Va. 491, 756 S.E.2d 475 (2014).

Waiver of Assignment of Error Due to Failure to Make Timely Objection

Respondent failed to make timely objections to introduction of his prior disciplinary record at subcommittee hearings and failed to timely object to participation of a subcommittee member Respondent asserted had a conflict of interest. The Disciplinary Board properly overruled Respondent's motion to dismiss the Certification on those bases due to Respondent's failure to make a timely objection to these alleged procedural irregularities. *Green v. Virginia State Bar*, 278 Va. 162, 677 S.E.2d 227 (2009).

Witnesses, Inmates, No Subpoena Power

The bar's power to summon and compel the attendance of witnesses at hearings does not include the power to require the Department of Corrections to transport imprisoned witnesses to hearings. *In the Matter of John Doe*, Richmond Circuit Court, Chancery No. HN-1759-4 (Nov. 30, 2000). This case addressed only witnesses at a District Committee hearing, but the same analysis would apply to a Board hearing. The Circuit Court relied on the recent Supreme Court case of *Commonwealth ex rel. Virginia Department of Corrections v. Demetrious Eric Brown*, 259 Va. 697, 529 S.E.2d 96 (2000), which addressed the lack of statutory authority for a General District Court to issue a transportation order for an inmate to appear in a civil proceeding.

II. SUBSTANCE

Address of Record, Duty to Update

The Rules require an attorney to inform the bar of any change in the attorney's membership mailing address, and a failure to do so will not support a due process objection based on lack of receipt of materials mailed to the then current address of record. *Meade v. Virginia State Bar*, No. 022051 (Va. S. Ct. Feb. 7, 2003).

Advertising—Specific Case Results

Hunter's blog posts, while containing some political commentary, are commercial speech. The VSB's Rules 7.1 and 7.2 do not violate the First Amendment. As applied to Hunter's blog posts, they are constitutional, and the panel did not err. *Hunter v. Va. State Bar ex rel. Third Dist. Comm.* 285 Va. 485, 744 S.E.2d 611 (2013).

Business Transaction with a Client—Rule 1.8(a)—acquiring an interest in client's property

Respondent knowingly acquired an interest in his client's property, while representing client in a partition suit, when Respondent directed the Special Commissioner to issue a quitclaim deed to Respondent in which Respondent was given a 25% ownership interest in the client's property. The common law exception to champerty and maintenance, allowing a lawyer to take an interest in the client's property as a fee, does not apply here because Rule 1.8(j)(prohibiting a lawyer from obtaining a proprietary interest in the subject of litigation) was not charged in this proceeding, but had been adjudicated at an earlier proceeding that is not a part of Respondent's appeal. There is no common law doctrine which permits an attorney to "knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" in violation of Rule 1.8(a) simply because the client is indigent. Finally, although Respondent claimed he had discontinued representing his client after the partition suit was filed he admitted there were uncollected rents to be divided; and a final order had not been entered in the case and Respondent had taken no steps to withdraw as counsel in the suit. Finally, the prior admonition without terms did not require that Kuchinsky divest himself of his interest in the client's real estate. Therefore, the three-judge court erred in finding that Kuchinsky had violated Rule 3.4(d). *Kuchinsky v. Virginia State Bar*, 287 Va. 491, 756 S.E.2d 475 (2014).

Competence—Rule 1.1

Even if an attorney has the necessary legal knowledge and skill, "thoroughness and preparation" require the "[c]ompetent handling of a particular matter," which includes "inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners." Va. Sup. Ct. R., Part 6, § II, R. 1.1, cmt. 5 (emphasis added). Livingston obtained three indictments against Collins. Each was based on factual and/or legal errors due not to mere negligence, but to his failure to analyze the evidence and the elements of the charges he brought against Collins. And, without checking the accuracy of the charge in the third indictment, which contained the wrong criminal offense, he

presented the indictment to a grand jury and pursued it in the trial court and also on appeal when he filed the untimely petition for appeal. It is not necessary to determine whether any one of these acts of misconduct alone would violate Rule 1.1. In this case, viewing the record in its entirety, there is clear and convincing evidence that Livingston failed to provide competent representation to his client in the prosecution of Collins. Note: Violations of Rules 3.1 and 8.4(a) not supported by the record and dismissed. *Livingston v. Va. State Bar*, 286 Va. 1, 744 S.E.2d 220 (2013). On remand, Respondent was issued a Public Reprimand with terms to complete two hours of additional CLE in Ethics. *In the Matter of Eric Joseph Livingston*, Docket No. 10-031-084027 (VSB Disc. Bd., December 13, 2013). Respondent's appeal to the Supreme Court of Virginia was dismissed.

Respondent was incompetent in representing a criminal defendant in federal court charged with 10 counts of receiving child pornography. Respondent, who had never handled a child pornography case, misadvised client, failed to object to the government's sentencing guidelines enhancement and failed to research the guidelines regarding the propriety of the enhancement; misapplied federal sentencing guidelines and incorrectly advised client regarding the time he would receive under a plea agreement. Client filed habeas alleging Respondent was ineffective. Federal court found that client did not have competent counsel. Plea agreement and conviction were vacated due to Respondent's ineffective assistance and new proceedings were brought. In addition, Respondent took his whole fee of $35K before matter was concluded and made misrepresentations to the court in the habeas proceeding regarding what he told his client regarding the maximum sentence he would receive. The three-judge court found violations of Rules 1.1, 1.15(a), 3.3 and 8.4(c) and revoked Respondent's license based on this case and a bankruptcy case in which Respondent failed to disclose client's transfer of property in the Statement of Financial Affairs, resulting in dismissal of the client's Chapter 7 petition. *Virginia State Bar ex rel. Second District Comm. v. John Wesley Bonney*, CL 13-3441 (Three Judge Court, Norfolk Circuit Court, March 25, 2014).

Confidentiality Attaches to Initial Meeting

The duty of confidentiality under Rule 1.6(a) attaches to information gathered by an attorney in the initial meeting with the potential client, even if an attorney/client relationship is not ultimately established. LEO 1794 [responding to an inquiry from the Roanoke Circuit Court in *Joslyn v. Joslyn*, 23 Cir. CH03596 (2003)]. *See also* Rule 1.18 of Va. Rules of Professional Conduct.

Confidentiality—Rule 1.6—Disclosure of information in the "public record"

To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment. *Hunter v. Va. State Bar ex rel. Third Dist. Comm.* 285 Va. 485, 744 S.E.2d 611 (2013); *Compare Turner v. Commonwealth*, 726 S.E.2d 325 (Va. 2012) (J. Lemons, concurring):

Keeley violated Rule 1.9 by testifying against Turner, his former client, about information gained in the course of the representation that was to Turner's disadvantage when such information was not "generally known." The trial judge abused his discretion by permitting this testimony.

ABA Model "Rule 1.9(c) extends to the revelation of information obtained through the attorney client relationship to any third party to the detriment of the former client, regardless of the former attorney's relationship with that third party." *Pallon v. Roggio*, Civ. Nos. 04–3625(JAP), 06–§1068(FLW), 2006 WL 2466854, at *8, 2006 U.S. Dist. LEXIS 59881, at *25 (D.N.J. Aug. 24, 2006). Moreover, ABA Model "Rule 1.9(c) is broader than the protection afforded by the duty of confidentiality and is not limited to confidential information. However, [ABA Model] Rule 1.9(c) does not apply to information that is 'generally known.'" Id. at *7, 2006 U.S. Dist. LEXIS 59881, at *23 (internal citation omitted). In discussing what constitutes information that is "generally known," the court in *Pallon* stated:

> "Generally known" does not only mean that the information is of public record. The information must be within the basic understanding and knowledge of the public. The content of form pleadings, interrogatories and other discovery materials, as well as general litigation techniques that were widely available to the public through the internet or another source, such as continuing legal education classes, does not make that information "generally known" within the meaning of Rule 1.9(c).

Id. at *7, 2006 U.S. Dist. LEXIS 59881, at *23–24 (internal citation omitted).

CRESPA/RESA

Clear and convincing evidence is required to prove a CRESPA violation. *In the Matter of David Thomas Steckler,* VSB Docket No. 00-000-3308.

The Board may suspend or revoke an attorney's law license, as well as his registration as a settlement agent, once a CRESPA violation is found. *In the Matter of David Thomas Steckler*, VSB Docket No. 00-000-3308.

Attorney may not rely on staff to insure CRESPA registration completed and filed; duty to properly register is a personal responsibility of attorney. *In the Matter of Roy Reid Young, III*, VSB Docket No. 99-000-2831.

Recodified under Va. Code §§55-525.8-525.15.

Communications With Represented Persons—Rule 4.2

The bar must prove three separate facts to establish a violation of the Rule: (1) that the attorney knew that he or she was communicating with a person represented by another lawyer; (2) that the communication was about the subject of the representation; and (3) that the attorney (a) did not have the consent of the lawyer representing the person and (b) was not otherwise

authorized by law to engage in the communication. *Zaug v. Va. State Bar ex rel. Fifth Dist.-Section III Comm*. 285 Va. 457, 737 S.E.2d 914 (2013).

Rule 4.2 requires an attorney to disengage from such communications when they are initiated by a person the lawyer knows is represented. But the Rule does not require attorneys to be discourteous or impolite when they do so. *Id.*

Communications With Unrepresented Persons

Rule 4.3(b)'s prohibition against giving legal advice to an unrepresented party does not apply when the lawyer is representing himself in a divorce from his wife. The attorney expressed only his opinion that he held a superior legal position on certain issues in controversy between himself and his wife. His statements may have been intimidating, but he did not purport to give legal advice. The wife knew that her husband was a lawyer and that he had interests opposed to hers. The concern articulated as underlying this Rule is not borne out in this case. *Barrett v. Virginia State Bar*, 269 Va. 583, 611 S.E.2d 375 (2005).

Conflicts of Interest—Imputation—Rule 1.10

Rule 1.10 is not a rule of strict liability. The bar must prove that Respondent actually knew his law partner was disqualified in order to establish a violation of Rule 1.10. *Northam v. Va. State Bar*, 285 Va. 429, 737 S.E.2d 905 (2013).

Criminal Appeals

Appointed counsel may not simply refuse to file an appeal he deems frivolous. Instead, the attorney must follow the procedure outlined in *Anders v. California*, 386 U.S. 738 (1967), which requires a Motion to Withdraw accompanied by a brief referring to anything in the record that might arguably support an appeal. *Akbar v. Commonwealth*, 7 Va. App. 611, 376 S.E.2d 545 (1989).

Defendants facing probation revocation are entitled to counsel, and presumably, to the same type of compliance with *Anders* and *Akbar* regarding their appeal requests. Code of Virginia Sections 19.2-157 and 19.2-326; *Dodson v. Director, Dept. of Corrections*, 233 Va. 303, 355 S.E.2d 573 (1987).

Failure to file motion for delayed appeal after missing the deadline for filing a criminal appeal is disciplinary neglect in violation of Rule 1.3. The Virginia State Bar Second District Committee, Section II, imposed an admonition on Alana Sherrise Powers for defaulting on a criminal appeal. Ms. Powers missed a deadline, which caused the appeal to be dismissed before it could be considered on its merits. She then failed to take steps to obtain a delayed appeal, which would have remedied the default. *Alana Sherrise Powers,* VSB Docket No. 07-022-0958.

Failure to appear for oral argument in two criminal appeals before the Court of Appeals justified holding Respondent in contempt, and, based on two prior public reprimands for failure

to perfect and prosecute criminal appeals, the Court of Appeals suspended Respondent's privilege to practice before it for two years. *In re Davey*, 54 Va. App. 228, 677 S.E.2d 66 (2009).

Criminal or Wrongful Acts; Conviction Not Required

Acquittal in a criminal proceeding does not bar a disciplinary proceeding arising out of the same set of facts. *Smolka v. Second District Committee*, 224 Va. 161, 295 S.E.2d 267 (1982).

The fact that federal or state authorities decline to prosecute a criminal charge does not preclude a finding the attorney violated a disciplinary rule prohibiting criminal or deliberately wrongful acts. *In the Matter of Sam Garrison*, VSB Docket No. 02-080-3027.

While the effect of a suspended imposition of sentence followed by dismissal of the original criminal charge can be argued, a conviction is not a prerequisite to a finding the attorney violated a disciplinary rule prohibiting criminal or deliberately wrongful acts. *In the Matter of Elliot M. Schlosser*, VSB Docket No. 01-010-2990.

Criminal Conduct, Obscene Phone Call to Clerk's Office

Respondent was convicted of a misdemeanor for making an obscene phone call to the clerk of the Combined District Court for Rappahannock County. The committee found that he committed a crime that reflected adversely on his honesty, trustworthiness or fitness to practice law, and approved an Agreed Disposition for Public Reprimand. *David Louis Konick, Rock Mills***,** VSB Docket Nos. 06-070-0783 & 06-070-2264.

Criticism of Judges

A derogatory statement concerning the qualifications or integrity of a judge, made by a lawyer with knowing falsity or with reckless disregard of its truth or falsity, violates Rule 8.2 of the Rules of Professional Conduct and does not qualify as constitutionally protected speech. An appropriate test for balancing a lawyer's free speech rights against the restrictions imposed by the Rules of Professional Conduct is whether the conduct in question creates a substantial likelihood of material prejudice to the administration of justice. *Anthony v. Virginia State Bar*, 270 Va. 601, 621 S.E.2d 121 (2005).

In reviewing the Board's determination that Respondent violated Rule 8.2, two separate elements must be established to prove a violation of that Rule. First, the bar must establish that a lawyer made a statement about a judge or other judicial officer involving his or her qualifications or integrity. Second, the bar must prove that the statement was made with reckless disregard of its truth or falsity or with knowledge that the statement was false. *Pilli v. Virginia State Bar*, 269 Va. 391, 611 S.E.2d 389 (2005).

After an evidentiary hearing in which Respondent and his client were sanctioned,

Moseley also wrote a letter to the AAA, stating that the circuit court judge who had adjudicated the evidentiary hearing "was caught engaging in serious misconduct" and that the circuit court judge was the subject of an investigation by JIRC. Moseley sent an email to colleagues in which he stated that the monetary sanctions award entered by the circuit court judge was "an absurd decision from a whacko judge, whom I believe was bribed," and that he believed that opposing counsel was demonically empowered. A three-judge court found that Moseley had violated Rules 3.3(a)(1), 3.4(e), 3.4(j), 4.1(a), 8.2 and 8.4(a), (b), and (c). The panel suspended Moseley's license to practice law for six months. The Supreme Court of Virginia affirmed. *Moseley v. Virginia State Bar*, 280 Va. 1, 694 S.E.2d 586 (2010).

Attempting to have a circuit judge disqualified, Respondent made several remarks that were found to have violated Rule 8.2:

- "I don't feel that you're appropriate to hear any cases that I might be. . .defending."
- "It makes me feel comfortable for you not to hear any jury trial that I got against any of my clients."
- Respondent accused the judge of harboring animosity toward Respondent and implied it would cause the judge to treat the defendant unfairly.
- Respondent suggested that the judge was biased for the Commonwealth in criminal cases.

A three-judge court found Respondent violated Rules 3.5(f) (conduct intended to disrupt a tribunal) and Rule 8.2 (attacking qualifications or integrity of a judge). *Virginia State Bar v. Curtis Tyrone Brown*, No. CL09-5166 (Dec. 15, 2009). Respondent defaulted on his appeal by failing to timely file the notice of appeal with the trial court. *Curtis Tyrone Brown v. Virginia State Bar*, Record No. 100491 (Va. S. Ct. May 10, 2010).

Damage To Client Not Required

The fact the client did not suffer any prejudice to his legal rights is not sufficient to exonerate an attorney. In disbarment proceedings it is not necessary to show an attorney's actions prejudiced his client's legal rights. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964).

Direct Connection To Practice Of Law Not Necessary

It is not necessary that the offense charged be committed in court or even in the discharge of any professional duty. It is want of character which is important and not the place where that is manifest. The public is not interested in the situs of their misdeeds and we know of no statute of limitations which can be invoked. *Norfolk and Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934) (citing numerous out-of-state cases).

Discovery Rules; Finding of Failure to Comply cannot be

Collaterally Attacked

Once an attorney's failure to comply with discovery rules is established by a trial court, the attorney may not collaterally attack those findings in a subsequent Bar proceeding; however, the Board should make specific factual findings with respect to how such failure to comply violate the applicable ethics rules. *Bean v. Va. State Bar*, No. 050508 (Va. S. Ct. Jul, 8 2005).

False Statements in Connection With Application for Admission to the bar

A three-judge panel found that Respondent violated Rule 8.1 prohibiting an applicant for admission to the bar from "knowingly mak[ing] a false statement of material fact" in connection with a bar admission application. As part of the application process, Respondent indicated that he had never been "a party to or otherwise involved" in "any civil or administrative action or legal proceeding;" or "any criminal or quasi-criminal action or legal proceeding (whether involving a felony, misdemeanor, minor misdemeanor, or any traffic offense. . . . " Respondent, however, had been convicted in 1997 of manslaughter in Jamaica and served a prison sentence of 16 months. He had also been the subject of a United States Marine Corps administrative action and a Board of Inquiry proceeding to determine whether he should be separated from the Marine Corps for misconduct. Respondent also had been charged and convicted of four traffic offenses in the continental United States. On appeal, Respondent argued he did not "knowingly make false statements on the application" because an employee of the Pennsylvania Disciplinary Committee told him that he was not required to report the conviction because it occurred outside the United States and that he did not report the Marine Court proceedings because they too were based on the Jamaica incident and because he was not dishonorably discharged. Respondent also relied on *Small v. United States*, 544 U.S. 385 (2005) for the proposition that foreign convictions cannot provide the basis for disciplinary action. Respondent also contended that his false answers did not involve matters of "material fact." The Supreme Court of Virginia rejected the Respondent's reliance on advice from another jurisdiction and his reliance on *Small.* The Court also held that "[i]t strains logic to suggest that participation in criminal and military disciplinary proceedings, as well as repeated traffic violations, *while not dispositive* to the admission decision, *would not be material* to that decision." (Emphasis added). *Patrick Earl Bailey v. Virginia State Bar, ex rel First District Committee***,** No. 060098 (Va. S. Ct. Jun. 23, 2006).

Fee Agreements

Respondent's agreement with Client stipulated that Respondent's unpaid legal fees could not be discharged in bankruptcy and permitted Respondent to charge client for time spent defending and responding to bar investigation. The Disciplinary Board found that Respondent violated Rules 1.5, 1.7(a)(3) and 8.4. *In the Matter of Brian Gay*, VSB Docket No. 08-222-073165.

Fees

Non-refundable advanced legal fees are improper (because they potentially violate the rule requiring an attorney to refund any advanced legal fee that has not been earned, and a fee that is not earned is per se an unreasonable fee). *LEO 1606* (1994). *See also In the Matter of Richard James Oulton,* VSB Docket No. 05-032-3243 (public reprimand with terms for using non-refundable fee provisions in contracts with clients, violating Rules 1.5 and 8.4 (a)).

Respondent violated Rule 1.5 by charging Client for time spent preparing and appearing on motion to withdraw from Client's case. *In the Matter of Brian Gay,* VSB Docket No. 08-222-073165.

Industrial Commission entered an order awarding attorney a $2,500 fee out of a $15,000 settlement. Pursuant to his fee agreement with the client, the attorney charged the client an additional $2,500 fee, for a total of $5,000. Because the applicable statute entitled the Commission to approve and award attorney's fees, the charge of the additional $2,500 constituted an "illegal fee" and was subject to discipline. *Hudock v. Virginia State Bar,* 233 Va. 390, 355 S.E.2d 601 (1987).

Fraud and Misrepresentation

The Supreme Court of Virginia assumed (without deciding) that scienter or actual knowledge is an essential element in proving misrepresentation under former DR 1-102(A)(4). *Pickus v. Virginia State Bar,* 232 Va. 5, 348 S.E.2d 202 (1986); *Gibbs v. Virginia State Bar,* 232 Va. 39, 348 S.E.2d 209 (1986).

- Note, however, it is the attorney's knowledge and intentional misrepresentation, and not a wrongful intent to defraud, which is required. *Gay v. Virginia State Bar,* 239 Va. 401, 389 S.E.2d 470 (1990); *Delk v. Virginia State Bar,* 233 Va. 187, 355 S.E.2d 558 (1987).

Frivolous Motions or Pleadings

The attorney filed a motion to strike the pleadings asserting that he did not know and was not married to the plaintiff, his wife. The motion was denied. He later testified before the Board that he filed the motion because "Valerie Jill Barrett is Jill's legal name, not Valerie Jill Rudy [sic] Barrett." Although the Board's Order does not directly tie the Rule 3.1 violation to the motion to strike the pleadings, the record clearly supports a finding that the attorney violated Rule 3.1. *Barrett v. Virginia State Bar,* 269 Va. 583, 611 S.E.2d 375 (2005).

A trial court's order awarding sanctions under Va. Code § 8.01-271.1, by itself, does not make out a prima facie showing that Respondent violated Rule 3.1. The three-judge court erred not permitting Respondent to challenge or mitigate the factual matters at the disciplinary hearing or introduce evidence to explain his actions. Bar confessed error on appeal. *John W. Toothman v. Virginia State Bar, ex rel., Fourth District Committee*, No. 062630 (Va. S. Ct. Sept. 11, 2007).

In Virginia State Bar disciplinary proceedings, there was no error in an order revoking

the license to practice law of an attorney who, while under a prior suspension of his license to practice law, represented himself in domestic relations proceedings during which he asserted persistently and repeatedly before the circuit court and the Court of Appeals of Virginia that he is no longer required to support his children. In light of the facts and applicable law, his position was completely frivolous and in violation of Rule 3.1 of the Virginia Rules of Professional Conduct. A lawyer whose license is suspended is still an active member of the bar and, although not in good standing, is subject to the Rules, and there is no merit to the lawyer's constitutional challenge to the application of the Rules in this case. Respondent is subject to Rule 3.1 when representing himself. *Barrett v. Virginia State Bar*, 277 Va. 412, 675 S.E.2d 827 (2009).

Respondent filed a civil action for medical malpractice on behalf of woman who was operated on at Warren County Hospital. The doctor against whom Respondent filed suit did not operate on the plaintiff and she was not his patient. Before filing suit, Respondent did not contact the defendant doctor nor request any medical records that would have established that plaintiff was not his patient. Nor did Respondent check with the hospital to learn that Defendant doctor did not have privileges at Warren County Hospital. There were several simple actions Respondent could have taken that would have shown that the defendant had no involvement with the plaintiff whatsoever. The three-judge Court did not err when it found that Respondent's actions were frivolous in violation of Rule 3.1. *Weatherbee v. Virginia State Bar*, 279 Va. 303, 689 S.E.2d 753 (2010) (public reprimand aff'd).

A circuit court sanctioned Moseley and Ammons because they proceeded with their decision to have an evidentiary hearing regarding the existence of an agreement to arbitrate, knowing that the alleged employment contract containing an arbitration clause existed. The circuit court also reprimanded Ammons and Moseley, who filed in excess of eighty pleadings and motions in the case, for using abusive discovery tactics and filing frivolous pleadings. The circuit court stated that Ammons and Moseley conducted the proceeding without any basis and with the goal "to specifically harm, deter, and harass the Defendant through vexatious litigation." Moseley and Ammons were sanctioned and ordered to pay attorney's fees and costs. The circuit court revoked Moseley's right to practice before that court, Moseley appealed and the Virginia Supreme Court affirmed. *In re Moseley*, 273 Va. 688, 643 S.E.2d 190 (2007). In this proceeding, a three-judge court found that Moseley had violated Rules 3.3(a)(1), 3.4(e), 3.4(j), 4.1(a), 8.2 and 8.4(a), (b), and (c). The panel suspended Moseley's license to practice law for six months. The Va. S. Ct. affirmed. *Moseley v. Virginia State Bar*, 280 Va. 1, 694 S.E.2d 586 (2010).

Harassment of Opposing Counsel

Harassing ad hominem attacks on opposing counsel are prohibited under Rule 3.4 (j). Attorney's comments to opposing counsel were "other action" under Rule 3.4(j) meant to harass her in her capacity as his wife's attorney, *Barrett v. Virginia State Bar*, 269 Va. 583, 611 S.E.2d 375 (2005).

Ignorance No Excuse

All Virginia lawyers are expected to be fully aware of each and every disciplinary rule,

and no lawyer can escape a finding of a violation or an appropriate sanction by pleading ignorance or the rules. Nor can an attorney avoid discipline by claiming other lawyers also engage in the unethical conduct ("everyone is doing it"). *Shea v. Virginia State Bar*, 236 Va. 442, 374 S.E.2d 63 (1988).

Lawful Requests, Failure to Respond as a Rule 8.1 Violation

Attorney's repeated failure to communicate with the bar's representatives or to supply requested information and records relevant to an investigation constitutes a willful violation of Rule 8.1, requiring attorneys to cooperate with the bar in disciplinary proceedings by responding to all lawful requests for information and by not obstructing such proceedings. *Meade v. Virginia State Bar*, No. 022051 (Va. S. Ct. Feb. 7, 2003).

Failure to respond to the bar's initial letter enclosing the complaint and requesting a response is a violation of Rule 8.1(c). *In the Matter of John Michael DiJoseph*, VSB Docket Nos. 02-041-2657.

A failure of the respondent to appear at the hearing pursuant to a summons is not grounds for finding a violation of Rule 8.1(c) unless the hearing panel finds it was unable to gather information from the Respondent as a result of his or her failure to appear. *Rice v. Virginia State Bar*, 267 Va. 299, 592 S.E.2d 643 (2004).

Lawyers as their own Clients

An attorney who represents himself in a proceeding acts as both lawyer and client. He takes some actions as an attorney, such as filing pleadings, making motions, and examining witnesses, and undertakes others as a client, such as providing testimonial or documentary evidence. Rules 1.1, 3.4(j) and 4.4 apply when an attorney is representing himself. *Barrett v. Virginia State Bar*, 272 Va. 260, 634 S.E.2d 341 (2006). *But see Barrett v. Virginia State Bar*, 269 Va. 583, 611 S.E.2d 375 (2005) (holding that Rule 4.3 (b)'s prohibition against giving legal advice does not apply to *pro se* lawyer in divorce proceedings against his unrepresented wife).

Several well-reasoned out-of-state decisions hold an attorney representing himself is subject to ethics rules referring to representation of a client. *Attorney Grievance Commission v. Allison*, 317 Md. 523, 565 A.2d 660, 668 (Md. Ct. App. 1988) (violation of Rule 4.4); *In re Segall*, 117 Ill.2d1, 509 N.E.2d 988 (Ill. 1987) [violation of DR 7-104(a)(1)]; *Montgomery County Bar Association v. Hecht*, 456 Pa. 13, 317 A.2d 597 (1974) (lying under oath in own deposition). The most compelling statement comes from *In re Glass*, 784 P.2d 1094 (Oregon 1989) [violation of DR 7-102(A)(1)], where the court stated the reference in the rules to representation of a client was not intended to grant a license to lawyers to abuse procedures for their own personal advantage, but instead is to specify that such conduct by a lawyer will not be excused simply because the lawyer's improper conduct was ostensibly in the service of a client.

Layperson Signing Pleadings with Attorney Authorization

A lawyer violates several ethics rules when he authorizes a non-lawyer to sign pleadings or endorse orders. *VSB v. Iweanoge*, Arlington Circuit Chancery No. 05-145, VSB Docket Nos. 04-041-1312 and 04-041-2657 (Three-Judge Panel 8/19/05). Rules found to be violated included 1.1, 3.4(d), 5.3(a), (b) and (c), 5.5(a) and 8.4(a).

Medical Bills and Liens

Lawyer violates Rule 1.15 (c)(4) when refusing to honor chiropractor's consensual lien with Client, directing Client's lawyer to pay total amount owed to chiropractor out of settlement of Client's personal injury case. Although Lawyer was not a party to the assignment of benefits, Lawyer knew that Client had contracted with chiropractor to pay the medical bill out of settlement. When chiropractor refused to reduce his bill, Lawyer unilaterally arbitrated the dispute by disbursing to chiropractor an amount less than what was owed. Lawyer owed a duty to either pay the full amount owed to chiropractor or hold the amount in dispute in trust until Client and chiropractor could resolve their dispute or interplead the disputed funds into court. This was an appeal from a District Committee determination. The court cited with approval LEO 1747 and comment [4] to Rule 1.15 and affirmed the District Committee's finding of misconduct. *Virginia State Bar v. Timothy O'Connor Johnson*, Case No. CL09-2034 (Richmond Cir. Ct. August 11. 2009).

An attorney must honor a valid lien on a case for medical bills, or a contract signed by the client agreeing to pay such obligations out of settlement proceeds. If there is a dispute, the attorney should escrow or interplead the funds. *LEO 1747* (2000) (overruling LEO 1413), relying on Rule 1.15(c)(4). *See also* Comment [4] to Rule 1.15.

Neglect Requires a Pattern of Conduct

Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986), quoting from ABA Informal Opinion 1273 (1973).

Neglect, Withholding Services Due to Client Failing to Pay

Respondent violated Rules 1.16, 1.3, 1.7 and 8.4(a) and (b) by withholding services because Client was not paying Respondent's fees. Respondent withheld legal services of submitting sketch final decree of divorce to the court for entry and failed to withdraw for a period of 14 ½ months for Client's failure to pay outstanding legal fees. The divorce would have been completed in Respondent's own estimation in "one billable hour." Respondent refused to proceed until he was paid in full. Client proposed to pay her obligation from the proceeds she anticipated receiving from her ex-husband's military pension upon entry of the final decree.

In the Matter of Brian Gay, VSB Docket No. 08-222-073165. Notice of Appeal dismissed by Va. S. Ct. on 4/20/10.

Notary Misconduct, Lawyer Serving as Notary, False Acknowledgment

Respondent, acting as a notary, falsely certified that persons who had signed a "deed of dedication and easement" had appeared before him to acknowledge their signatures. Three-judge court approved agreed disposition for public reprimand. *In the Matter of Claude T. Compton*, VSB Docket No. 05-053-3671.

Prosecutors, Disclosure of Exculpatory Evidence

The day before an arson trial was set to begin, an eyewitness identified the defendant as the person he saw at the scene of an arson. This identification occurred at a lineup where both parties were present. That same night, the eyewitness told a clerk in the Commonwealth's Attorney's office, and then the prosecutor, that he was doubtful about his identification. After the first day of trial, the eyewitness told the prosecutor that he was certain the defendant was NOT the man he saw at the scene of the fire. The prosecutor did not call the eyewitness in his own case and rested. Meanwhile, the eyewitness had already spoken with defense counsel and defense counsel made plans to call him in his case.

As defense counsel prepared to call his first witness, the prosecutor claimed that he tried to pass defense counsel a note disclosing that the eyewitness has retracted his identification. The prosecutor said that defense counsel refused to accept it. At any rate, defense counsel called the eyewitness and the defendant ultimately prevailed in the case.

The District Committee recommended a private reprimand, and the prosecutor appealed that decision. On appeal, the Board revoked the prosecutor. The Supreme Court of Virginia reversed the Board's order and dismissed the case. It held that there was no violation of Brady because the eyewitness's retraction was actually made available to the defendant during trial, such that he was able to use it effectively. *Read v. Virginia State Bar*, 233 Va. 560, 357 S.E.2d 544 (1987).

Real Estate Closings

When a lawyer acts as a closing or settlement attorney and no other lawyer is involved, the closing or settlement attorney represents all the parties, and, in this limited sense, all the parties are his clients. In this case, that included the lenders to the transaction. *Pickus v. Virginia State Bar*, 232 Va. 5 (1986).

Safekeeping Property - Collection of Quantum Meruit Fee

In an attempt to collect a quantum meruit fee after his representation was terminated, Respondent violated Disciplinary Rule 1.15(a)(3)(ii) by unilaterally transferring $143.30 from the trust fund to his firm's operating account in partial payment of his fees. At the time that

Respondent transferred the funds, the client disputed his entitlement to the balance of the funds and did so in good faith. *Roberts v. Virginia State Bar*, Record No. 180122, (September 6, 2018).

Tape Recording

Attorney suggested that his domestic relations client install a recording device on the family telephone. The attorney's investigator installed the device and reviewed the tapes of all of the conversations, reporting the substance of the conversations to the attorney. Through these recordings, the attorney learned that the wife was consulting attorneys and receiving advice from them. The District Committee and the three-judge court found that the attorney had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on his fitness to practice law. The Supreme Court of Virginia affirmed, holding that even if the recording was not illegal, attorneys are held to a heightened standard and the recording did involve dishonesty, fraud or deceit. *Gunter v. Virginia State Bar*, 238 Va. 617, 385 S.E.2d 597 (1989); *but see* LEO 1765, summarized below, which was approved by the Supreme Court of Virginia and therefore carries the force of law.

LEO #1738 (1999): The Committee relaxed the bright line prohibition against lawful but undisclosed tape recording expressed in earlier LEO's to permit law enforcement and housing discrimination counsel to engage in investigative or fact-finding action involving recording of conversations with consent of a party (the recorder) to the conversation. The Committee concluded that the Gunter Rule as relied on in LEO's 1324, 1448, and 1635 was overly-restrictive (they "sweep too broadly") and that those opinions were overruled to the extent they prohibited legitimate law enforcement actions, civil investigations such as housing discrimination investigations, or situations involving threatened or actual criminal activity.

LEO 1765 (2003): The Committee held that legitimate covert intelligence activity did not consist of conduct involving fraud, dishonesty, deceit or misrepresentation reflecting, adversely on an attorney's fitness to practice law. The Committee upheld the general prohibition against secret recording, which though lawful is still unethical; but reiterated the narrow exceptions permitted in LEO #1738. LEO 1765 was approved by the Supreme Court of Virginia and is therefore a binding opinion.

LEO 1802 (2010): A lawyer representing the victim of childhood abuse who is considering a civil claim against her abuser may advise his client to record a conversation with the abuser without the abuser's knowledge; an in-house lawyer for a corporation may advise management to equip an employee complaining of sexual harassment with a hidden recording device.

LEO 1814 (2011): A lawyer representing a criminal defendant, or the lawyer's agent, may ethically use undisclosed recording during an interview with an unrepresented witness, provided the recording is lawful and the witness is informed of the lawyer's or agent's identity and role in the matter.

Threatening Disciplinary or Criminal Charges

The evidence was sufficient to support the Board's finding that Respondent threatened his wife's counsel with disciplinary complaints in order to obtain an advantage in the divorce and custody proceedings in violation of Rule 3.4(i). *Barrett v. Virginia State Bar*, 269 Va. 583, 611 S.E.2d 375 (2005).

Tracing is Appropriate

Clients retain an equitable or beneficial ownership interest in funds held in trust by an attorney, and to the extent those funds can be traced, distribution of such funds should be made to the specific client. Only where ownership cannot be traced is a *pro rata* distribution appropriate. *Virginia State Bar v. Goggin*, 260 Va. 31, 530 S.E.2d 415 (2000) (decided in the context of a receivership).

Trust Funds, Loss Not Required

A client's loss of funds is not a prerequisite for an attorney's suspension due to mishandling funds; it is enough if the lawyer knew or should have known he was misusing client funds. *Gay v. Virginia State Bar*, 239 Va. 401, 389 S.E.2d 470 (1990); *Delk v. Virginia State Bar*, 233 Va. 187, 355 S.E.2d 558 (1987).

III. SANCTIONS

Consecutive Sanctions

The Board may run a new sanction consecutively with a prior sanction (revocation to begin at the end of a current suspension). *In the Matter of Vincent Napoleon Godwin*, VSB Docket No. 02-000-2789.

Effective Date of Sanction

The Board has discretion to set the effective date of a sanction, including the effective date of a revocation. *Fugate v. Virginia State Bar*, No. 022259 (Va. S. Ct. Feb. 21, 2003).

Precedents of Little Aid

In arriving at the punishment to be imposed, precedents are of little aid, and each case must be largely governed by its particular facts, and the matter rests within the sound discretion of the court. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964), quoting Corpus Juris Secundum, Attorney and Client, Section 38.

Prior Record Properly Considered

The Board has a perfect right to consider an attorney's prior disciplinary record when determining an appropriate sanction. *Shea v. Virginia State Bar*, 236 Va. 442, 374 S.E.2d 63 (1988).

While misconduct proved at a hearing, considered in isolation, might warrant a lesser penalty, final sanction is properly based upon consideration of an attorney's entire disciplinary history. *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987).

Purpose

When a delinquent is disciplined the purpose of the proceeding is not to punish him, but to protect the public. The proceeding is not to punish, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them. *Norfolk and Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934).

The question is not what punishment may the offense warrant, but what does it require as a penalty to the offender, as a deterrent to others and as an indication to laymen that the courts will maintain the ethics of the profession. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964), quoting Corpus Juris Secundum, Attorney and Client, Section 38.

Reputation of the Attorney not Major Factor

A good reputation in the community is not controlling or entitled to great weight in a disciplinary proceeding but may be considered by the court. *Maddy v. First District Committee*, 205 Va. 652, 139 S.E.2d 56 (1964)

Sanctions Within Discretion of Board

The determination of a proper sanction is a matter within the discretion of the Board. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986), *citing Gibbs v. Virginia State Bar*, 232 Va. 39, 348 S.E.2d 209 (1986) and *Blue v. Seventh District Committee*, 220 Va. 1056, 265 S.E.2d 753 (1980). The sanction must be within the limits of Paragraph 13. *Gibbs, supra*.; *see also Delk v. Virginia State Bar*, 233 Va. 187, 355 S.E.2d 558 (1987).

On appeal, the penalty imposed by the Board will be viewed as *prima facie* correct and will not be changed unless, upon independent review of the record, the Court determines the penalty was not justified by the evidence or was contrary to law. *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987); *Gay v. Virginia State Bar*, 239 Va. 401, 389 S.E.2d 470 (1990).

VIRGINIA STATE BAR ADMINISTRATIVE POLICY ON GUARDIAN *AD LITEM* COMPENSATION EFFECTIVE JULY 1, 2017

Attorneys who serve as GALs in VSB disciplinary proceedings offer a critical service to the public and profession. It is the hope and expectation of the VSB that these attorneys will serve *pro bono*. If the GAL does not serve *pro bono*, the GAL shall be paid as set forth below.

The Executive Director shall determine the rate, if any, for those attorneys who serve as guardians *ad litem* (GALs) in Virginia State Bar disciplinary proceedings. As of July 1, 2017, the Supreme Court of Virginia rate of payment to GALs for incapacitated adults is $75 per hour for in-court services and $55 per hour for out-of-court services. The VSB is an arm of the Supreme Court of Virginia, therefore, the hourly rate paid to GALs by the VSB in disciplinary proceedings shall be identical to the hourly rate authorized by the Supreme Court of Virginia to be paid to GALs in other proceedings, currently $75 per hour for in-court services and $55 per hour for out-of-court services. Should the Supreme Court of Virginia change its rates of payment, the VSB shall follow suit.

The GAL must submit a monthly invoice to the VSB Clerk of the Disciplinary System enumerating by quarterly hour increments the services rendered and any costs or expenses to be reimbursed. The GAL may not engage the services of any witness requiring payment without the prior approval of the Executive Director.

Effective July 1, 2017

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF VSB DOCKET Choose an item. Click here to enter text.
Click here to enter text.

ORDER APPOINTING GUARDIAN AD LITEM
IN IMPAIRMENT CASE

By Notice of Hearing dated Click here to enter a date., the Virginia State Bar notified Click here to enter text. that unless counsel entered an appearance for Respondent within ten (10) days of the date of that Notice, the Disciplinary Board would appoint a Guardian Ad Litem to serve in this pending impairment proceeding. Click here to enter text. has not advised the bar that Choose an item. has retained counsel nor has any counsel entered an appearance on Respondent's behalf.

It is ORDERED that in accordance with Paragraph 13-23.G that Click here to enter text. ("The GAL") shall serve as Guardian Ad Litem for the Respondent;

It is FURTHER ORDERED that:

1. "Guardian Ad Litem" means an attorney who represents the best interest of Respondent as it pertains to Respondent's fitness to practice law;
2. During the pendency of the appointment, the GAL shall be a member of the Virginia State Bar in good standing and shall maintain coverage under a professional liability insurance policy;
3. The GAL is not counsel for Respondent and shall not owe Respondent a duty of confidentiality with regard to information relevant to this proceeding;
4. During the pendency of this matter, the GAL shall owe the Disciplinary Board a duty of disclosure of information relevant to this proceeding;

5. Respondent may hire counsel to represent Respondent in this matter; and at the Board's discretion, the Board may relieve the GAL of the appointment if it finds that Respondent is represented by counsel;

6. The GAL shall perform an investigation of Respondent sufficient for the GAL to form an opinion as to the best interest of Respondent as it pertains to Respondent's fitness to practice law, and the GAL shall timely inform Respondent of the GAL's opinion as to the best interests of Respondent with regard to Respondent's fitness to practice law;

7. The GAL shall advise the Disciplinary Board of the wishes of Respondent in any case where those wishes conflict with the opinion of the GAL as to what is in the best interest of Respondent with regard to Respondent's fitness to practice law;

8. The GAL is not expected to make a formal recommendation or file a written report with the Board, but the GAL must answer the Board's questions regarding the GAL's knowledge of the facts of the case and the best interests of Respondent as they pertain to Respondent's fitness to practice law;

9. The GAL's opinion is not binding or controlling on the Board, but may be considered by the Board;

10. The GAL's opinion shall not serve as a substitute for medical evidence or other evidence probative of Respondent's fitness to practice law; and the Board shall consider all the evidence presented in the case to determine whether Respondent is impaired and should be suspended from the practice of law; and

11. The GAL shall remain appointed in this proceeding until relieved by the Board or until Respondent has been found by the Board not to be suffering from an impairment.

It is FURTHER ORDERED that the Clerk of the Disciplinary System of the Virginia State Bar shall mail copies of this Order by certified mail to Respondent, Click here to enter text., at Choose an item. last address of record with the Virginia State Bar, Click here to enter text. and by regular mail to Click here to enter text., Guardian Ad Litem for Respondent, at Click here to enter text. and hand-delivered to Click here to enter text., Choose an item., Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-0026.

ENTERED THIS Click here to enter text. DAY OFClick here to enter text., Click here to enter text.

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

Click here to enter text.
Choose an item.

Respondent: _____ Bar Counsel: _____

Docket #s: _____ Hearing: _____
_____

Counsel: _____ Panel Chair: _____

TERMS OF ALTERNATIVE DISCIPLINE

[ ] RETURN OF FILE/APOLOGY

On or before _____, the Respondent shall return the file of _____ to _____ in accordance with Rule 1.16(e) [with a letter of apology] and shall provide proof of compliance to Bar Counsel, not later than _____.

[ ] NO FURTHER MISCONDUCT

For a period of _____ year(s) following the entry of this Order, the Respondent shall not engage in any conduct that violates the following provisions of the Virginia Rules of Professional Conduct, including any amendments thereto, and/or which violates any analogous provisions, and any amendments thereto, of the disciplinary rules of another jurisdiction in which the Respondent may be admitted to practice law. The terms contained in this paragraph shall be deemed to have been violated when any ruling, determination, judgment, order, or decree has been issued against the Respondent by a disciplinary tribunal in Virginia or elsewhere, containing a finding that Respondent has violated one or more provisions of the Rules of Professional Conduct referred to above, *provided, however*, that the conduct upon which such finding was based occurred within the period referred to above, and provided, further, that such ruling has become final.

[ ] MCLE

On or before _____, the Respondent shall complete _____ hours of continuing legal education credits by attending courses approved by the Virginia State Bar in the subject matter of legal ethics. The Respondent's Continuing Legal Education attendance obligation set forth in this paragraph shall not be applied toward his Mandatory Continuing Legal Education requirement in Virginia or any other jurisdictions in which the Respondent may be licensed to practice law. The Respondent shall certify his compliance with the terms set forth in this paragraph by delivering a fully and properly executed Virginia MCLE Board Certification of Attendance form (Form 2) to Bar Counsel, promptly following his attendance of each such CLE program(s).

[ ] ASSIGNED READING AND CERTIFICATION

The Respondent shall read in its entirety *Lawyers and Other People's Money* and Legal Ethics Opinion 1606 and shall certify compliance in writing to Bar Counsel not later than _____ days following the date of entry of this order,.

[ ] TRUST AUDIT

For a period of ____ years following entry of this Order, the Respondent hereby authorizes a Virginia State Bar Investigator to conduct unannounced personal inspections of his trust account books, records, and bank records to ensure his compliance with all of the provisions of Rule 1.15 of the Rules of Professional Conduct, and shall fully cooperate with the Virginia State Bar investigator.

[ ] ENGAGING CPA

1. Within fifteen days of the date of the effective date of this order, the Respondent shall confirm in writing his review of Rule 1.15 of the Rules of Professional Conduct to Bar Counsel.

2. Within thirty days from the effective date of this order, the Respondent shall engage the services of a CPA (Certified Public Accountant) (a) who will certify familiarity with the requirements of Rule 1.15 of the Rules of Professional Conduct, and (b) who has been pre-approved by Bar Counsel to review Respondent's attorney trust account record-keeping, accounting, and reconciliation methods and procedures to ensure compliance with Rule 1.15 of the Rules of Professional Conduct. In the event the CPA determines that the Respondent is in compliance with Rule 1.15, the CPA shall so certify in writing to the Respondent and Bar Counsel. In the event the CPA determines Respondent is NOT in compliance with Rule 1.15, the CPA shall notify Respondent and Bar Counsel, in writing, of the measures Respondent must take to bring himself into compliance with Rule 1.15. Respondent shall provide the CPA with a copy of this order at the outset of his engagement of the CPA.

3. The Respondent shall be obligated to pay when due the CPA's fees and costs for services, including provision to the Bar and to the Respondent of information concerning this matter.

4. In the event the CPA determines the Respondent is NOT in compliance with Rule 1.15, Respondent shall have forty-five (45) days following the date the CPA issues a written statement of the measures Respondent must take to comply with Rule 1.15 within which to bring himself into compliance. The CPA shall then be granted access to Respondent's office, books, and records, following the passage of the forty-five (45) day period, to determine whether Respondent has brought

himself into compliance as required. The CPA shall thereafter certify in writing to Bar Counsel and to the Respondent either that the Respondent has brought himself into compliance with Rule 1.15 within the forty-five (45) day period, or that he has failed to do so. Respondent's failure to bring himself into compliance with Rule 1.15 as of the conclusion of the forty-five (45) day period shall be considered a violation of the terms set forth herein.

5. Unless an extension is granted by Bar Counsel for good cause to accommodate the CPA's schedule, the terms specified in paragraphs 2, 3, and 4, shall be completed no later than _____.

6. On or about _____, the CPA engaged pursuant to paragraph 2 shall reassess Respondent's attorney's trust account record-keeping, accounting, and reconciliation methods and procedures to ensure continued compliance with Rule 1.15 of the Rules of Professional Conduct. In the event the CPA determines that Respondent has NOT remained in compliance with this Rule, such non-compliance will be considered a violation of the terms set forth herein.

[ ] LAW OFFICE MANAGEMENT CONSULTANT

1. Not later than _____, the Respondent shall engage the services of a law office management consultant approved by the Virginia State Bar to review and make written recommendations concerning the Respondent's law practice policies, methods, systems, trust account, and procedures. The Respondent shall institute and thereafter follow with consistency any and all recommendations made to him by the law office management consultant following the law office management consultant's evaluation of the practice. The Respondent shall grant the law office management consultant access to his law practice from time to time, at the consultant's request, for purposes of ensuring that the Respondent has instituted and is complying with the law office management consultant's recommendations. Bar Counsel shall have access, by telephone conferences and/or written reports, to the law office management consultant's findings and recommendations, as well as the consultant's assessment of the Respondent's level of compliance with said recommendations. The Respondent shall be obligated to pay when due the consultant's fees and costs, including, but not limited to, the provision to Bar Counsel of information concerning this matter.

2. Not later than _____, the Respondent shall be responsible for:

    a. Ensuring that the law office management consultant has previously reported to Bar Counsel his or her findings and recommendations regarding the Respondent's law practice.

    b. Certifying to Bar Counsel that the Respondent has fully complied with the law office management consultant's findings and recommendations and

provide written confirmation of same from the law office management consultant.

[ ] RESTITUTION

The Respondent shall pay, by certified, cashier's, or treasurer's check made payable to the order of _____, the principal sum of $_____, with interest thereon at the rate of nine percent per annum, from _____, until paid. The payment due hereunder, inclusive of principal and all interest, shall be made by delivery of a check to Bar Counsel, at Virginia State Bar, Eighth and Main Building, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800 no later than _____.

[ ] SUPERVISION

1. In the event the Respondent elects to return to the active practice of law and activates his status with the Virginia State Bar from Associate to Active, within ____ days of such activation he shall certify in writing to the Office of Bar Counsel that he is working under the supervision of a named lawyer, and shall provide a letter from such lawyer confirming his/her supervision of the Respondent.

2. Respondent shall remain under the active supervision of such lawyer for a period of not less than one year. Within thirty (30) days after the expiration of the period of active supervision, the Respondent shall furnish the office of Bar Counsel a letter from the supervising lawyer confirming his/her active supervision of the Respondent.

[ ] CLIENT COMMUNICATION

Within thirty (30) days after the effective date of this Order, the Respondent shall satisfy Bar Counsel, that the Respondent has installed adequate docketing procedure for (1) the prompt return of clients' telephone calls, and (2) if he is unable to reach them by telephone, a letter following up on their telephone call.

[ ] **MENTAL HEALTHCARE PROVIDER**

1. The Respondent shall remain under the care of _____ (or if _____ becomes unavailable, such other mental health care provider as agreed upon by Respondent and the Virginia State Bar), and such other health care providers to whom Respondent might be referred by _____, until at least _____, or such earlier time as the Respondent is discharged from _____'s care with the concurrence of Bar Counsel. Respondent shall

cooperate fully and comply with all treatment recommendations made by _____ and such other health care providers during the said period. Such compliance shall include, but not be limited to, attending all further therapy, counseling, and evaluation sessions with _____ and/or other health care providers to whom Respondent has been referred by _____, and submitting to such further testing, evaluation, and clinical assessments as may be required by _____ and any health care providers to whom Respondent has been referred by _____.

2. The Respondent shall immediately provide _____ and all health care providers to whom Respondent has been referred by _____ with a copy of this Order of the Disciplinary Board and a release which authorizes and directs _____ and such other health care providers to furnish to the Virginia State Bar, c/o _____, Assistant Bar Counsel _____ _____, written reports which state whether, in the professional opinion of the health care provider writing the report, the Respondent's physical or mental condition materially impairs the Respondent's ability to represent clients in the full time private practice of law. Such reports shall detail the basis for such opinions rendered, and shall further state whether, to the best of the health care provider's knowledge, the Respondent is in compliance with the terms enumerated herein. In the event a health care provider does not state that Respondent is in compliance with the terms hereof, such health care provider shall nonetheless present written facts (e.g., missed appointments, failure to take medication, failure to provide information required for continued treatment/assessments, and failure to pay a provider's bills) to the Virginia State Bar sufficient to permit Bar Counsel's assessment of whether Respondent is in compliance with the terms hereof. At a minimum, during the period that those terms remain in effect, _____ (or approved successors) shall furnish the Bar with such reports at quarterly intervals, commencing _____. Notwithstanding the reporting schedule set forth above _____ (or approved successors) shall notify the Bar immediately upon his or her assessment that the Respondent's physical or mental condition materially impairs the Respondent' ability to represent clients in the full time private practice of law.

3. The Respondent shall bear the cost and expense of compliance with the terms set forth herein, including, but not limited to, the cost of the assessments, therapy, counseling, medication, and all health care contemplated by the terms hereof, and the costs imposed, if any, by _____ (or approved successors) and all other health care providers in preparing and furnishing any and all reports submitted to the Virginia State Bar pursuant to the terms hereof.

[ ] LAWYERS HELPING LAWYERS

Not later than _____, the Respondent shall participate in an evaluation conducted by Lawyers Helping Lawyers ("LHL") and shall implement all of LHL's recommendations. The Respondent shall enter into a written contract with LHL

for a minimum period of one (1) year and shall comply with the terms of such contract, including, *inter alia*, personally meeting with LHL and its professionals, as directed. The Respondent shall authorize LHL (i) to provide periodic reports to the Office of Bar Counsel stating whether the Respondent is in compliance with LHL's contract with the Respondent, and (ii) to notify the Office of Bar Counsel promptly if the Respondent fails to follow the LHL-prescribed program, or ends participation in the LHL-prescribed program sooner than the expiration of the LHL contract.

[ ] ALTERNATIVE DISPOSITION

The alternative disposition hereby adopted is (revocation of the Respondent's license to practice law in the Commonwealth of Virginia) (suspension of the Respondent's license to practice law in the Commonwealth of Virginia for a period of _____ (days) (years)) upon the Respondent's failure to comply with the foregoing terms in the manner and at the time that compliance is required.

In the event of alleged noncompliance with the foregoing terms, a hearing will be convened upon an order for the Respondent to show cause why the alternative disposition should not be imposed. At such hearing the Respondent shall have the burden of proving compliance or good cause for the alleged noncompliance by clear and convincing evidence.

How to Comport Yourself as a Quasi-Judicial Disciplinary Board Member

Prepared by The Honorable W. Allan Sharrett

Chief Judge, Sixth Judicial Circuit

I. Constructive Leadership & Effective Communication

A. Opening remarks

1. Don't read the opening remarks as a script, but modulate your voice so that you are **talking** to the persons assembled.
2. A copy of the script with the blanks filled in with the style of the case, names of the attorneys, respondent, case number, panel members, etc., can be very helpful.
3. Thorough preparation here is indispensable.
4. This is an important point in the hearing – tension and anxiety is high – on all sides; Bar Counsel, witnesses, Respondent's Counsel, Respondent, Panel Members
5. Effective leadership here will help to put everyone at ease.

B. Lead by example

1. Be courteous, patient and dignified.
2. Never even *appear* to be discourteous, impatient or unnecessarily casual.
3. Remember that these proceedings are stressful for the litigant.
    i. It must be mortifying for them to be there defending their behavior, with their future in the profession at stake.
    ii. Are they thinking the deck is stacked against them already, or that they are appearing before a kangaroo tribunal where the panel and the prosecutor already know what the outcome will be?

C. Perception may heighten the appearance of a lack of impartiality. Guard against indicators of a lack of impartiality, and remain aware of this issue

1. Always be mindful that each person present is someone's sibling, parent, spouse or child. They entitled to be treated with dignity and respect.
2. Treating everyone with dignity and respect is part of exercising constructive leadership. This leadership requirement applies not just to the chair but also to the panel members.

D. Panel members must maintain an appropriate demeanor throughout the proceeding

1. No rolling of eyes, stares of disbelief, or like behavior. Maintain your impassivity throughout the proceeding.
2. Canon 3.B(5): "A judge shall perform judicial duties without bias or prejudice…."

Commentary: "A judge must perform judicial duties impartially and fairly….Facial expression and body language, in addition to oral communication, can give … an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial."

3. Panel members must be engaged in the proceedings. You cannot look at your phone, close your eyes, or otherwise evidence that you are not fully paying attention to the hearing. You are part of the tribunal who will be deciding the respondent's fate and the validity of the Bar's assertions. You owe both sides your full attention, your active listening. There is no substitute for eye contact.
4. If you need to take a break, raise your hand and ask the chair for such an opportunity.

II. Judicial Decorum

Canon 2.A.: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Judicial Canon 3.B(4): "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control."

This is a serious adversarial proceeding.

A. Be patient

Remember, you are going to hear two sides of a story.

1. The hearing wouldn't be taking place if everyone agreed on everything.
2. Keep an open mind until you hear all of the evidence and argument, and until other panel members, and you, have had an opportunity to discuss and comment upon the evidence.
3. There is undoubtedly somewhere else you would rather be. But, this is what you've committed to do today, and nothing at this moment is more important than giving a fair hearing to both sides, and to making it obvious that you are doing so.

B. Be courteous

1. Extend the same courtesy, civility and dignity to the respondent, witnesses, counsel, panel members and court personnel that you would want for you or your family member.
2. Know how to pronounce participant's names correctly, and do so.
3. All communications must be directed to the bench, not to opposing counsel.

C. Act with dignity

1. Humor rarely has a place in the courtroom. Jokes are generally inappropriate. Appropriate moments of levity seem to create themselves. If sparingly used, humor should only and always be self-deprecating.
2. Watch how you address each other and VSB staff. Don't publically use 1st names with anyone.
3. You are not part of a good old boy or girl club when you are part of a disciplinary proceeding, even before it begins or after it concludes.

III. Disruptive Observers, Witnesses, Litigants and Counsel

Canon 3.B(3): "A judge shall require order, decorum, and civility in proceedings before the judge."

A. **Public observers**
   1. Admonish them courteously. Sometimes it is helpful to remind them that they are observers of, and not participants in, the proceeding.
   2. This forum is sacred secular space. They, like everyone involved, must accord it the dignity to which it is entitled, otherwise they will have to leave.
   3. Same admonition applies for both verbal and nonverbal communication.

B. Witnesses
   1. Testifying can be a traumatic, fraught experience for witnesses.
   2. Treat them gently, but firmly and fairly
   3. Admonish outbursts, incivility, discursions from the subject, and comments directed to the respondent.
   4. Politely control their testimony; "Counsel, it would be helpful if perhaps you asked more specific questions of the witness."

C. Respondents

If respondents are disruptive, speak to their attorney and ask them to inform their client that the behavior in question (e.g., shaking their head, rolling their eyes, voicing their disbelief over the testimony), is inappropriate and will not be tolerated. Such behavior amounts to unsolicited non-verbal testimony which cannot be cross-examined.

D. Counsel
   1. If lawyers address each other in argument instead of the panel, admonish them that they must address their comments to the panel. "Everything is directed to the panel."

E. Control of the courtroom is very important
   1. Treat everyone with respect and modulate your tone while doing so.

2. Part of being patient is not letting people seize control. You must rein them in. Don't let them control the situation.
3. Never forget you control the pace of the hearing. If tensions arise, take a break/recess, or any panel member can make a request for a break.
4. Reserve moments of sternness for extreme situations. Remember that the record can take down *what* you say but not *how* you say it.
4. If you are concerned that someone is leaving the courtroom to prep witnesses after observing the proceedings, admonish them that they may not have any contact with any witness. In addition, you could inform them that they may step out, but they will not be permitted to reenter the courtroom. Deal with the situation and move on. Do not have a hearing within a hearing about what may have been overheard in the hallway.

IV. Time Management

Control the time without appearing to be rushed

A. Any preliminary motions that have not already been dealt with should be disposed of immediately prior to the start of the evidence by offering each side a short period of time (~5 minutes). This can be expanded if necessary.

B. Ask counsel how much time they believe they will need for opening/closing. Don't set a time limit unless they are long-winded. An effective approach is to get a time commitment from the attorneys, then "remind them when their time is up," though not actually cutting them off.

C. Rambling or repetitive testimony
   1. Make a comment directed to the attorney and tell them to ask questions of the witness.
   2. If the respondent is rambling, you have to let them do some of that. Then admonish them: "We've heard that before - thank you for telling us. Do you have anything additional?"

V. Lessons Learned from Panel Hearings v. Single Judge Proceedings

A. In a panel hearing, the chair must act collaboratively while conducting the proceeding.
   1. *Objections* – handled by chair, subject to dissent from the panel members.
   2. *Deliberations* – It is important to present, if possible, a united front in a panel's decision.
      a. The chair will be speaking on behalf of the panel about what is hopefully a **unanimous** opinion.

b. The panel should "deliberate with a view towards reaching a unanimous agreement, if it can be done without violence to individual judgment." That is, the panel should attempt to find common ground. Members may have to make concessions to reach unanimity.
c. It is important to give every member of the panel a chance to speak during deliberations and to express their views.
d. During the course of deliberations, members should not hesitate to examine their own view, and to change them if convinced they are erroneous. However, no one should "surrender (their) honest conviction solely because of the opinion of a fellow (panel member) or for the mere purpose of returning a verdict."
e. Listen carefully to the views and opinion of your fellow panel members.
f. It takes courage, both to speak and to stand for your convictions, OR to change your mind if convinced you are wrong.

3. The chair announces the decision, but, others may want to comment (a concurring perspective). However, use this sparingly. Impromptu remarks should be avoided.
    a. If the verdict is unanimous, state so at the outset.
    b. Best to either script the verdict, or to make substantial notes re the same.
    c. Then, stay on script! Little good happens when you go off script on the record.
    d. It's always appropriate to make comments, if applicable, regarding the more personal side of the decision. (E.g., "the panel was aware that this was a very difficult time in the respondent's life"; or, "the panel understands that no one was seriously injured as a result of the misconduct; however…").
    e. Likewise, if the verdict is in favor of the respondent, offer a summary of the panel's reasoning. (E.g., "the panel simply could not find, by clear and convincing evidence, that the respondent in fact…"), or (to quote the Va S.Ct. in overruling a decision of the JIRC) "…although (the judge's actions and conduct did not exemplify the level of professionalism that judges in this Commonwealth should exhibit, we cannot say that (the judge's) actions and conduct violated the Canons."; or, as judges sometimes say to criminal defendants just before acquitting them, "you're guilty, but not beyond a reasonable doubt."
    f. Both verdicts - culpability and sanction (if necessary) - should be carefully scripted and choreographed before leaving deliberations and publically reconvening.
    g. Once back in the hearing forum and on the record, stick to the script upon which you agreed while deliberating. "Throwing the floor open" to additional comments by panel members is fraught with pitfalls, and should be avoided.

VI. Applicable Paragraph 13 Language

Paragraph 13-6.A, Disciplinary Board Qualifications: Board members have agreed to "conscientiously discharge the[ir] responsibilities as a member of the Board."

Paragraph 13-14 Disqualification of District Committee Member or Board Member

Personal or Financial Interest. A member or former member of a District Committee or the Board **shall be disqualified from adjudicating any matter with respect to which the member has any personal or financial interest that might affect or reasonably be perceived to affect the member's ability to be impartial**. The Chair shall rule on the issue of disqualification, subject to being overruled by a majority of the Panel or Subcommittee. [Emphasis added.]

A. Complaint Against a Member. Upon the referral of any Complaint against a member or former member of a District Committee or the Board to a District Committee for Investigation, the member shall be recused from any service on the District Committee or the Board until the Dismissal of the Complaint without the imposition of any form of discipline.

B. Imposition of Discipline. Upon the final imposition of a Private Reprimand, a Public Reprimand, an Admonition, a Suspension or a Revocation against a member or former member of a District Committee or the Board, the member shall automatically be terminated from membership or further service on the District Committee or Board. Upon the final imposition of any other form of Attorney discipline, COLD shall have sole discretion to determine whether the member shall be terminated from membership or further service on the District Committee or the Board.

C. Interpretation. Unless otherwise stated, all questions of interpretation under this subparagraph 13-14 shall be decided by the tribunal before which the proceeding is pending, except that COLD shall determine discretionary termination of membership or further service.

D. Ineligibility. Any member or former member of a District Committee or the Board **shall be ineligible** to serve in a Disciplinary Proceeding in which:

1. The District Committee or Board member or any member of his or her firm is **involved in any significant way with the matter on which the District Committee or Board would act**;

2. **The Board member or any member of the Board member's firm was serving on the District Committee that certified the matter to the Board or has otherwise acted on the matter**;

3. **A Judge would be required to withdraw from consideration of, or presiding over, the matter under the Canons of Judicial Conduct adopted by this Court**;

4. The District Committee or **Board member previously represented the Respondent**; or

5. **The** District Committee or **Board member, upon reasonable notice to the Clerk of the Disciplinary System or to the Chair presiding over a matter, disqualifies himself or herself from participation in the matter, because such member believes that he or she is unable to participate objectively in consideration of the matter or for any other reason.**

[Emphasis added.]

Virginia State Bar
Most Frequently Alleged & Violated Rules
(eff 4/2018)

Top 5 Most Frequent Allegations

Rule	Description
1.3(a)	Act w/ reasonable diligence, promptness in representing client
1.4(a)	Keep client informed; promptly comply with info request
8.4(c)	Conduct involving dishonesty/fraud/deceit/misrepresentation
8.4(b)	Crime, deliberately wrongful act; refl. adversely on honesty
1.15(b)(4)	Pay or deliver property to client or other such person entitled

Top 5 Most Frequent Violations

Rule	Description
1.4(a)	Keep client informed; promptly comply with info request
1.3(a)	Act w/ reasonable diligence, promptness in representing client
1.16(d)	Protect client's interest upon termination of representation
1.4(b)	Explain matter to client to permit informed decision
1.15(b)(5)	No disbursement without consent or court order

Ex parte Communications

The discussion of the **merits or substance** of a matter with a party **without the other party present** constitutes an **improper *ex parte* communication**. Disciplinary Board members should avoid improper *ex parte* communications or any communication that can reasonably be interpreted as an improper *ex parte* communication. If a Disciplinary Board member gets the impression that a party is attempting to discuss the merits or substance of a matter when the other party is not present, the Board member should inform the party of the prohibition on improper *ex parte* communications.

Even after a panel has issued its order and the matter has been ruled on by the Board or Court, the panel members must avoid discussing the merits of the case with a party to the matter **or anyone else**. Doing otherwise could potentially undermine the integrity of the system if a party interprets a member's statements as inconsistent with the substance of the order.

The Clerk's Office will schedule all conference calls and notify the parties of any orders or rulings.

Dealing with the Press/Media

Board Members sit as judges. Disciplinary board members must refrain from commenting about the substance or merits of a matter assigned to their panels, especially to the press/media. Remember, the deliberations of the Board members are confidential. In fact, Board members should refrain from making public comments on any matter that is pending within the disciplinary system.

Board members should refer press inquiries to the Clerk of the Disciplinary System.

Aggravating or Mitigating Factors

The factors can be found below or in §9 of the ABA Standards.

1. **Aggravating** factors are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Aggravating factors include:
   - prior disciplinary offenses;
   - dishonest or selfish motive;
   - a pattern of misconduct;
   - multiple offenses;
   - bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
   - submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
   - refusal to acknowledge wrongful nature of conduct;
   - vulnerability of victim;
   - substantial experience in the practice of law;
   - indifference to making restitution;
   - illegal conduct, including that involving the use of controlled substances.

2. **Mitigating** factors are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating factors include:

   - absence of a prior disciplinary record;
   - absence of a dishonest or selfish motive;
   - personal or emotional problems;
   - timely good faith effort to make restitution or to rectify consequences of misconduct;
   - full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
   - inexperience in the practice of law;
   - character or reputation;
   - physical disability;
   - mental disability or chemical dependency including alcoholism or drug abuse when:
     - there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
     - the chemical dependency or mental disability caused the misconduct;
     - the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
     - the recovery arrested the misconduct and recurrence of that misconduct us unlikely.

   [Medical evidence must be introduced to support a finding of mental impairment. *In re Marinoff*, 2001-2584 (La. 6/7/02), 819 So.2d 305; *In re Rudman*, 2001-1644

(La. 6/29/01), 791 So.2d 1280; *In re Rudman*, 1999-1037 (La. 6/25/99), 738 So.2d 537; *In re Stoller*, 2004-2758 (La. 5/24/05), 902 So.2d 981.]

- delay in disciplinary proceedings;
- imposition of other penalties or sanctions;
- remorse;
- remoteness of prior offenses.

- Factors which are neither aggravating nor mitigating:
  - forced or compelled restitution;
  - agreeing to the client's demand for certain improper behavior or result;
  - withdrawal of complaint against the lawyer;
  - resignation prior to completion of disciplinary proceedings;
  - complainant's recommendation as to sanction;
  - failure of injured client to complain.

DISCIPLINARY BOARD ORDERS

DO'S AND DON'TS

THE DO'S	THE DON'TS
Address all pertinent factual allegations on contested matters in the Findings of Fact.	Don't overelaborate detail or particularization of unnecessary facts.
Resolve material conflicts in the evidence in the Findings of Fact.[1]	Don't fail to reconcile material conflicts in the evidence.
Analyze all alleged rule violations in the Conclusions of Law and discuss whether the burden of proof was met.	Don't simply say: "The rule violations have been established by clear and convincing evidence."
You must connect the rule violations to the facts. The Conclusions of Law section must connect the factual findings and the specific rule violations.	Don't assume that, just because you made factual findings in the Findings of Fact, you don't need to connect those Findings of Fact to the Conclusions of Law.
Make proper Findings of Fact, e.g.: *Respondent failed to notify the Complainant of the trial date. *Respondent used money in his trust account to pay personal bills, including payment of his daughter's tuition bills.	Don't make defective Findings of Fact, e.g.: *Complainant testified that respondent told her when the case was scheduled for trial. *Respondent <u>may</u> have used money in his trust account to pay personal bills, including his daughter's tuition bills.
Make proper Conclusions of Law: *For example: "We find that the burden of proof was met by clear and convincing evidence that…"	Don't make defective Conclusions of Law, e.g.: *"There was evidence that …"[2]

[1] In *Northam v. Va. State Bar*, 285 Va. 429, 737 S.E.2d 905 (2013), the Court stated: "**An attorney charged with a violation of professional responsibility is entitled to findings of fact that contain a clear statement of how the Board resolved disputed issues**." 737 S.E.2d at 911 (emphasis added.)

[2] The burden of proof in VSB disciplinary cases is **clear and convincing evidence**. (Paragraph 13-1.1, Rules of Court, Part Six, §IV.) Simply stating "there was evidence" does not establish that the burden of proof was met. The Supreme Court will have a clear understanding of the basis for the holding if the opinion states, **e.g.**, "we find that the burden of proof was met by clear and convincing evidence that Respondent used money in his trust account to pay … in violation of Rule of Professional Conduct 1.15."

MORE ON *NORTHAM* AND ITS CONSEQUENCES

In *Northam v. Va. State Bar*, 285 Va. 429, 737 S.E.2d 905 (2013), the Court stated: "**An attorney charged with a violation of professional responsibility is entitled to findings of fact that contain a clear statement of how the Board resolved disputed issues**." 737 S.E.2d at 911.

In *Northam* the SCV ruled that "lacking any factual determination by the Board as to Northam's knowledge of disqualification, we will not inspect the record to determine facts required to establish a violation of the rule." The Court further concluded:

> The Board was not required to establish that Northam knew why Lewis was disqualified but the **Board was required by the language of the Rule to establish by clear and convincing evidence that Northam's continued representation of Mr. Adams was with the knowledge that Lewis was disqualified from said representation**. Had the Board made this determination, we would have reviewed the entire record for reasonable inferences in support of its determination, and viewed conflicts in the evidence in the light most favorable to the Bar as the prevailing party. [Emphasis added.]

737 S.E.2d at 911.

The Court reversed the decision of the Board and dismissed the charge of misconduct.

APPELLATE REVIEW PARAMETERS

The Supreme Court of Virginia said in *Zaug*:

> **When we review a lawyer discipline proceeding, "the State Bar has the burden of proving by clear and convincing evidence that the attorney violated the relevant Rules of Professional Conduct**." *Weatherbee v. Virginia State Bar*, 279 Va. 303, 306, 689 S.E.2d 753, 754 (2010) (citing *Barrett v. Virginia State Bar*, 272 Va. 260, 268 n. 4, 634 S.E.2d 341, 345 n. 4 (2006);….

737 S.E.2d at 916 (bf and underlining added).

The SCV makes an "independent examination of the whole record, giving the **factual findings of the Disciplinary Board substantial weight** and viewing them as prima facie correct." *Ekwalla v. VSB* (SCV, unpublished decision, 12/8/2016), citing *Blue v. Seventh Dist. Comm.*, 220 Va. 1056, 1061-62, 265 S.E.2d 753, 757 (1980).

The SCV "view(s) the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the Bar." *Green v. VSB ex rel Seventh Dist. Comm.*, 27 Va. 775, 783 (2007).

These findings are "not given the weight of a jury verdict" but **will be sustained unless it appears they are not justified by a reasonable view of the evidence or are contrary to law**." Id. at 1062, 265 S.E.2d at 757.

The interpretation of the Disciplinary Rules, however, is a question of law we review de novo. *Zaug v. Virginia State Bar ex rel. Fifth Dist.-Section III Comm.*, 285 VA. 457, 462, 737 S.E.2d 914, 916-17 (2013).

Disciplinary Board Decisions: Through the Appellate Mirror

What is entailed in a lawyer's right to a meaningful appeal?

In *Kuchinsky v. Virginia State Bar*, 287 Va. 491, 756 S.E.2d 475 (2014), appellant argued that he had been denied a meaningful appeal because he could not properly determine which facts the District Committee considered in making its decision because it stated under each rule violation: "Respondent's actions that violated this rule include, but are not limited to, the following." The SCV resolved this issue against Kuchinsky, holding:

1. The procedures outlined in Part Six ensure the integrity of the disciplinary process and protect the rights of the attorney, citing to *Pappas v. VSB*, 271 Va. 580, 628 S.E.2d 534 (2006). 756 S.E.2d at 479.
2. The District Committee's determination satisfied Part 6, § IV, ¶ 13-16 (Y) because it included findings of fact, **explained the nature of Kuchinsky's misconduct that was established by those facts**, and stated what sanction was to be imposed. The Court elaborated: "Part 6, § IV, ¶ 13-16 (Y) does not require that a District Committee list the specific facts relied upon in finding individual rule violations." 756 S.E.2d at 480.
3. Kuchinsky further argued he was denied a meaningful appeal because the three-judge panel could not ascertain what facts the District Committee considered in making its decision. The Court pointed out that the rules specifically state that the three-judge panel is to determine "whether there is substantial evidence *in the record* upon which the District Committee could reasonable have found as it did." *Id*.

Note in the *Kuchinsky* case that the district committee decision, relied upon by the three-judge panel in upholding the decision, **explained the nature of Kuchinsky's misconduct that was established by those facts**. *See Kuchinsky*, CL13-71, Memorandum Order at pg. 5-6:

> The District Committee further found that it based its findings of misconduct, in part, on the following facts:
> 1. Appellant continued ownership interest in the property and pursued a partition of the property pursuant to his interest as set forth in the deed.
> 2. Appellant failed to formally terminate his representation prior to

filing suit against Person in district court and circuit court.

3. Appellant disregarded the Admonition from the Virginia State Bar as he continued to pursue his ownership interest in Person's property after March 3, 2010.
4. Appellant did not divest himself of his ownership interest until one year after he received Person's complaint to the Virginia State Bar.
5. Appellant accepted and recorded the deed after receiving the Admonition.
6. Appellant filed suit to partition the property after receiving the Admonition, thereby using the court system to enforce the deeded interest he knew violated the Rules of Professional Conduct.

See pg 3-4 of the *Kuchinsky* district committee determination, VSB Docket No. 11-031-0852428 for the exact language used by the district committee**.**

What must opinion writers include in opinions to support rule violations if the Board resolves <u>disputed</u> issues?

In *Northam v. Va. State Bar*, 285 Va. 429, 737 S.E.2d 905 (2013), the Court stated: "**An attorney charged with a violation of professional responsibility is entitled to findings of fact that contain a clear statement of how the Board resolved disputed issues**." 737 S.E.2d at 911.

In *Northam* there was a finding that "lacking <u>any</u> factual determination by the Board as to Northam's knowledge of disqualification, we will not inspect the record to determine facts required to establish a violation of the rule." The Court further concluded:

> The Board was not required to establish that Northam knew why Lewis was disqualified but the **Board was required by the language of the Rule to establish by clear and convincing evidence that Northam's continued representation of Mr. Adams was with the knowledge that Lewis was disqualified from said representation**. Had the Board made this determination, we would have reviewed the entire record for reasonable inferences in support of its determination, and viewed conflicts in the evidence in the light most favorable to the Bar as the prevailing party. [Emphasis added.]

737 S.E.2d at 911.

VIRGINIA:

BEFORE THE CIRCUIT COURT FOR THE CITY OF COLONIAL HEIGHTS

AUG 19 2013

VIRGINIA STATE BAR EX REL
THIRD DISTRICT COMMITTEE,
Complainant,

v. Case No. CL13-71

NEIL KUCHINSKY,
Respondent

MEMORANDUM ORDER

This cause came to be heard on the 19th day of June 2013, before a Three-Judge Court duly impaneled pursuant to Section 54.1-3935 of the Court of Virginia, 1950, as amended, consisting of the Honorable Ann Hunter Simpson, Judge Designate, the Honorable Walter W. Stout, III, Judge Designate, and the Honorable Charles E. Poston, Chief Judge Designate. The Virginia State Bar appeared through its Assistant Bar Counsel Kara L. McGehee, and the Respondent/Appellant appeared in person and through his counsel, Melvin Yeamans.

The panel dismissed the Bar's Motion to Strike and/or Exclude Certain Items from the Appellate Record and to Strike Arguments Not Preserved Below, and overruled the Bar's Objection to Appellant's Statement of Facts and Exhibits. The panel considered the record, as well as the arguments contained in the briefs and oral arguments by counsel.

A. Standard of Review

The standard of review in an appeal from a District Committee determination is whether there is substantial evidence in the record upon which the District Committee

could reasonably have found as it did. See Part 6, §IV, Paragraph 13-19(E) of the Rules of the Supreme Court of Virginia.

B. The Proceedings

The transcript and record having been filed, and the matter having been briefed in accordance with the Rules of the Supreme Court of Virginia, the Panel proceeded to hear argument from Assistant Bar Counsel and Appellant's counsel.

The issue before the Panel is whether there is substantial evidence in the record to support the District Committee's findings that the Appellant's conduct violated the following Rules of Professional Conduct:

> Rule 1.8 - Conflict of Interest and Prohibited Transactions
> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> > (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
> > (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
> > (3) the client consents in writing thereto.
>
> Rule 3.4 - Fairness to Opposing Party and Counsel
> A lawyer shall not:
> (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.
>
> Rule 8.4 - Misconduct
> It is professional misconduct for a lawyer to:
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

C. The Record and Findings of Fact

The record indicates that the District Committee convened on October 18, 2012, and took testimony of the Respondent/Appellant, Neil Kuchinsky, and Virginia State Bar

Investigator Robert Heinzman. The District Committee also received Exhibits into evidence. The testimony of the witnesses, along with the exhibits admitted, provided a substantial evidentiary basis for the factual finding made by the District Committee. Those factual findings appear in the District Committee Determination and are quoted here in full:

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

2. Dillwyn Person ("Person") hired Respondent to represent him in an estate matter in March 2008. Person and Respondent entered into a contingency fee agreement wherein Respondent would get one third of the first $50,000 recovered, or its value, and one fourth of the value of anything recovered in excess of that amount. Person's father died intestate in 2007, and he had five children and numerous assets at the time of his death.

3. Respondent drafted and Person signed a "Quitclaim Deed" on June 27, 2008, giving Respondent a 25% interest in six specific parcels of land, "as well as 25% of any other real estate interest I may have that may appear of record." This deed was recorded in the Greensville County Clerk's office on September 3, 2008.

4. Person discharged Respondent in the summer of 2008, after Respondent had filed suit on his behalf and entered an appearance. Before Respondent formally withdrew or had new counsel substituted, Person re-hired him. Respondent and Person entered into a new "Retention Agreement" on November 3, 2008. That agreement acknowledged that Respondent had earned his "25% real estate quitclaim from Mr. Kuchinsky (sic.)"

5. On December 8, 2008, the Virginia State Bar received a Complaint

submitted by Clinton Person, Dillwyn Person's brother, against Mr. Kuchinsky. The Complaint concerned the Quitclaim Deed prepared by Respondent and signed by Dillwyn Person on June 27, 2008 (paragraph 3, above) A subcommittee of the Third District Committee, Section 1, found that Respondent had violated Rule 1.8(j) of the Rules of Professional Conduct by acquiring a proprietary interest in the cause of action or subject matter of litigation. It issued a Private Admonition without terms ("the Admonition") to Respondent. The Admonition was served on Respondent on March 3, 2010. Respondent informed Person of the Admonition during a later conversation.

6. An order was entered on March 24, 2010, in the matter of *Dillwyn Person v. Lyndia P. Ramsey, et als,* appointing C. Ridley Bain as Special Commissioner for the purpose of conveying certain property. On March 30, 2010, the commissioner executed a Special Commissioner's Deed, conveying 25% of the interest in two parcels of real estate to Respondent and 75% to Person. The deed was recorded on May 5, 2010.

7. Respondent continued to be Person's attorney of record for several months after the March 24, 2010 order was entered, although he did not make any additional court appearances on Person's behalf.

8. Respondent filed a Warrant in Debt in the Greensville General District Court on May 10, 2010. He obtained a default judgment against Person on June 8, 2010, in the amount of $2,896 in principal, $6,756 in attorney's fees, and $53 in court costs. He recorded the judgment as a lien against the jointly owned real estate (hereinafter, "the properties,") the same day.

9. Respondent filed a partition suit in the Greensville County Circuit Court on May 18, 2010, (*Kuchinsky v. Person*, CL2010-136). He did not serve Person

immediately, but attempted to negotiate an agreement with him wherein Person would pay Respondent for Respondent's interest in the properties. Prior to the completion of that transaction, Person filed the subject complaint with the Virginia State Bar. Person enclosed a copy of the March 30, 2010 deed with the complaint.

10. After being unable to resolve the matter by agreement, Respondent obtained service on Person in January 2011. The Greensville County Circuit Court referred the case to a Commissioner in Chancery, Charles G. Butts, Jr. Commissioner Butts conducted a hearing on May 25, 2011.

11. During that hearing, Respondent testified about his attempts to get Person to cooperate in determining a value for the properties and stated that the houses were both uninhabitable. Respondent and Person also testified that they had each made payments toward the cost of maintenance and taxes for the property.

12. In late 2011, Person and Respondent negotiated an agreement whereby Person was to sign a Promissory Note for fees and costs owed to Respondent under the Retainer Agreement dated November 3, 2008, secured by a deed of trust. On November 3, 2011, Respondent executed and recorded a deed conveying his 25% interest in the properties back to Person.

13. On December 8, 2011, the Circuit Court entered an order of nonsuit in *Kuchinsky v. Person*, CL2010-136, at Respondent's request.

The District Committee further found that it based its findings of misconduct, in part, on the following facts:

1. Appellant continued ownership interest in the property and pursued a partition of the property pursuant to his interest as set forth in the deed.

2. Appellant failed to formally terminate his representation prior to filing suit against Person in district court and circuit court.

3. Appellant disregarded the Admonition from the Virginia State Bar as he continued to pursue his ownership interest in Person's property after March 3, 2010.

4. Appellant did not divest himself of his ownership interest until one year after he received Person's complaint to the Virginia State Bar.

5. Appellant accepted and recorded the deed after receiving the Admonition.

6. Appellant filed suit to partition the property after receiving the Admonition, thereby using the court system to enforce the deeded interest he knew violated the Rules of Professional Conduct.

D. Decision

Upon completion of argument, the hearing was recessed to give the Panel the opportunity to further review the record and to deliberate. The Chief Judge announced that it was the unanimous decision of the Panel that there is substantial evidence in the record upon which the District Committee could reasonably found as it did. The District Committee's determination that Appellant's conduct violated Rules 1.8(a), 3.4(d), and 8.4(a) and its Public Reprimand of Respondent/Appellant are, therefore, affirmed.

It is FURTHER ORDERED that the Clerk of this Circuit Court shall send a copy *teste* of this Order to the Respondent by Certified Mail, at Kuchinsky & Yeamans, P.C., 200 Lakeview Ave., Suite B, Colonial Heights, Virginia 23834, the Respondent's last address of record with the Virginia State Bar, and send copies *teste,* by first class mail to Assistant Bar Counsel, Kara L. McGehee, Esquire, at 707 East Main Street, Suite 1500, Richmond, Virginia 23219, to Respondent's counsel, Melvin E. Yeamans, Jr., Esquire, at

Kuchinsky & Yeamans, P.C., 200 Lakeview Avenue, Suite B, Colonial Heights, Virginia 23834 and to Barbara Sayers Lanier, Clerk of the Disciplinary System, Virginia State Bar, at 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED: August 9, 2013

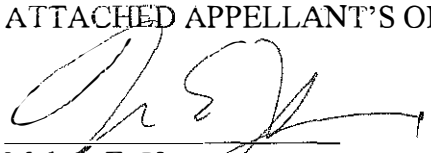
Charles E. Poston, Chief Judge

A COPY, TESTE:
STACY L. STAFFORD, CLERK
COLONIAL HEIGHTS CIRCUIT COURT
BY: Deputy Clerk

SEEN:

Kara L. McGehee, Assistant Bar Counsel
Virginia State Bar
707 East Main St., Ste. 1500
Richmond, VA 23219
804-775-0560

SEEN AND OBJECTED TO FOR THE REASONS SET FORTH IN THE ATTACHED APPELLANT'S OBJECTIONS:



Melvin E. Yeamans
Co nsel for Appellant
Kuchinsky and Yeamans, PC
200 La eview Ave., Ste. B
Colonial Heights, VA 23834-0125

OBJECTIONS OF RESPONDENT NEIL KUCHINSKY TO
MEMORANDUM ORDER IN CASE NUMBER CL 13-71

Respondent Neil Kuchinsky, by counsel, objects to the Memorandum Order of the Three-Judge Court (hereinafter, "the Panel"), for the following reasons:

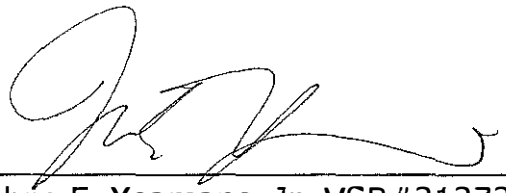
1. The Panel's Memorandum Order fails to include any of its own findings of fact and conclusions of law, much less all the relevant facts and conclusions of law (only what the VSB itself, *sua sponte*, added to this Order); it therefore fails to address the respondent's arguments set forth in its brief and before the panel, the most important fact being the *entirety* of the content of the second contract between the attorney and his client, which make clear his reasonable and bona fide efforts to comply with the very rule he stands charged with violating. Conclusions of law that merely state, in essence, 'it was all reasonable', do not provide a proper framework for appeal and for setting forth Assignments of Error to the Virginia Supreme Court.

2. It is not reasonable, as a matter of law, to expect the respondent to be able to meaningfully respond to or appeal from District Committee findings that include the words, "Respondent's actions that violated this rule include, *but are not limited to* the following..." (emphasis added), as in the alleged violations of Rule 3.4 and Rule 8.4; it is not reasonable to discipline an attorney "for failure to formally terminate his representation" prior to filing suit against the client, where nothing remains to be done in the underlying cases; to find (implicitly) that respondent's creation of a new contract with his client were not "steps taken in good faith" to comply with rules or the "ruling of a tribunal"; to find that the respondent "disregarded" the prior private admonition, when the new disciplinary action alleged a different violation of the

rules under the same underlying facts; it is unreasonable, and a blatant untruth, to find that the respondent "accepted and recorded" the deed in question, when in fact this was accomplished by way of a court order objected to by the respondent, and then drafted and recorded by a special commissioner under that order; to find that the respondent "knew" he violated the rules of professional conduct, when a cogent, unrebutted explanation was provided for his actions (i.e., drafting, in good faith, a new agreement with his client*); where the client in question could find no other attorney to represent him because he had no cash up front;* where the rule the respondent is now charged with violating offers precisely the roadmap counsel sought to use in cases where the alternative is that *the client would go unrepresented;* and where, despite all that has transpired, the respondent has still not been fully paid.

3. Furthermore, the record lacked "substantial evidence" upon which the District Committee could have reasonably found as it did.

WHEREFORE, the respondent, by Counsel, objects to the entry of the proposed Memorandum Order.



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287 Va. 491
756 S.E.2d 475

Neil KUCHINSKY
v.
VIRGINIA STATE BAR, ex rel. THIRD DISTRICT COMMITTEE.

Record No. 131656.

Supreme Court of Virginia.

April 17, 2014.

[756 S.E.2d 477]

Melvin Yeamans, Jr. (Kuchinsky & Yeamans, Colonial Heights, on briefs), for appellant.

Christy Warrington Monolo, Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General; Wesley G. Russell, Deputy Attorney General; Peter R. Messitt, Senior Assistant Attorney General & Chief, on brief), for appellee.

Present: All the Justices.

Opinion by Justice ELIZABETH A. McCLANAHAN.

In this appeal of right from an attorney disciplinary proceeding before a three-judge panel appointed pursuant to Code § 54.1–3935, we consider whether an attorney violated Rules 1.8(a), 3.4(d), and 8.4(a) of the Virginia Rules of Professional Conduct.

I. Facts and Proceedings

A. *Background and Prior Private Admonition*

Neil Kuchinsky is an attorney licensed to practice law in the Commonwealth. In March 2008, Dillwyn T. Person ("Person" or "Dillwyn") hired Kuchinsky to represent him in connection with Dillwyn's claim for a portion of his father's estate.[1] Person and Kuchinsky entered into a contingency fee agreement providing that Kuchinsky would receive one-third of the first $50,000 recovered, or its fair market value, and one-fourth of anything recovered in excess of that amount, or its fair market value. Kuchinsky then filed a partition suit on behalf of Person against Person's siblings in the Greensville County Circuit Court. After filing the partition suit, Kuchinsky drafted a quitclaim deed, which was executed by Person. The quitclaim deed granted Kuchinsky a 25% interest in any "right, title, and interest" Person may possess in the six parcels of land that were the subject matter of the partition suit against Person's siblings "as well as 25% of any other real estate interest [Person] may have that may appear of record." The quitclaim deed was recorded in the Greensville County Circuit Court.[2]

In December 2008, the Virginia State Bar ("VSB") received a complaint submitted by Dillwyn's brother, Clinton Person. The complaint alleged that Kuchinsky's acquisition of a 25% quitclaim interest in the subject matter of the underlying partition suit was a "clear conflict of interest." In an agreed-upon disposition, a subcommittee of the Third District Committee, Section I, of the VSB, found that Kuchinsky violated Rule 1.8(j) of the Virginia Rules of Professional Conduct by acquiring "a proprietary interest in the cause of action or subject matter of litigation." [3] As a result, Kuchinsky was issued a private admonition without terms on February 18, 2010.

B. *Events Occurring After the Private Admonition*

On March 24, 2010, an Order was entered in the partition suit between Person and his siblings appointing a Special Commissioner for the purpose of conveying the property that was subject to the suit. The Special Commissioner then executed a deed conveying to Kuchinsky a 25% interest and to Person a 75% interest in two specific parcels

of real estate, 211 Wadlow Street and 640 Clay Street in Emporia, Virginia. After the deed was issued, Kuchinsky wrote to the Special Commissioner and asked him to "[p]lease file

[756 S.E.2d 478]

'our' deed as soon as possible." [4] The Special Commissioner's Deed was then recorded in the Greensville County Circuit Court.

After the Special Commissioner's deed was recorded, Kuchinsky proceeded to file two actions against Person. First, Kuchinsky filed a Warrant in Debt against Person in the Greensville County General District Court. The court entered a default judgment against Person for $2,896 in principal, $6,756 in attorney's fees, and $53 in court costs. The same day, Kuchinsky recorded the default judgment as a lien against the jointly owned properties. Secondly, Kuchinsky filed a suit against Person in the Greensville County Circuit Court to partition the jointly owned properties.

Before serving Person in the partition suit, Kuchinsky sought to negotiate an agreement by which Person would pay Kuchinsky for his interest in the properties. Prior to the completion of that transaction, however, Person filed a complaint with the VSB in September 2010 alleging that Kuchinsky "took total advantage of my faith and ignorance in him for his self-interest." Subsequently, during the pendency of the VSB's investigation into Person's complaint, Kuchinsky served Person with notice of the partition suit. The case was referred to the Commissioner in Chancery for Greensville County, who conducted a hearing.[5]

In June 2012, the VSB filed a Charge of Misconduct against Kuchinsky pursuant to the Rules of the Virginia Supreme Court, Part 6, § IV, ¶ 13–16(A). Specifically, the VSB alleged that Kuchinsky violated Rules 1.8(a), 3.4(d), and 8.4(a)[6] through his conduct towards Person after the issuance of the prior admonition. After referral to the Third District Committee, which conducted a hearing, the Committee found, by clear and convincing evidence, that Kuchinsky had violated Rules 1.8(a), 3.4(d), and 8.4(a) of the Rules of Professional Conduct and issued Kuchinsky a public reprimand without terms. The District Committee then issued a Written Determination explaining its decision. In its Determination, the District Committee made several findings of fact. Then, in a section titled "Nature of Misconduct," the District Committee listed the rules that it found Kuchinsky had violated. Under each rule, the District Committee stated that "[r]espondent's actions that violated this rule include, but are not limited to, the following" and provided a non-exhaustive list of Kuchinsky's

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actions it found to be in violation of each rule.[7]

Kuchinsky filed a notice of appeal and demand for review of the District Committee's determination by a three-judge panel, pursuant to Code § 54.1–3935.[8] After each party submitted briefs, the panel heard argument and issued an Order holding that there was substantial evidence in the record to support the District Committee's decision. Subsequently, the panel issued a Memorandum Order incorporating the District Committee's findings of fact in full and affirming its decision.

Kuchinsky appeals.

II. Analysis

A. *Standard of Review*

To prove that an attorney violated the Rules of Professional Conduct, the VSB must present clear and convincing evidence of the violation. *Livingston v. Virginia State Bar,* 286 Va. 1, 10, 744 S.E.2d 220, 224 (2013).

When reviewing a disciplinary decision by a three-judge panel:

"[W]e will make an independent examination of the whole record, giving the factual findings ... substantial weight and viewing them as prima facie correct. While not given the weight of a jury verdict, those conclusions will be sustained unless it appears they are not justified by a reasonable view of the evidence or are contrary to law."

Green v. Virginia State Bar ex rel. Seventh Dist. Comm., 274 Va. 775, 783, 652 S.E.2d 118, 121 (2007) (quoting *El–Amin v. Virginia State Bar,* 257 Va. 608, 612, 514 S.E.2d 163, 165 (1999)). Furthermore, "[c]onsistent with well-established appellate principles, we view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the Bar, the prevailing party below." *Id.*

B. *Kuchinsky's "Right to a Meaningful Appeal"*

In his first assignment of error, Kuchinsky argues that he was deprived of his right to a meaningful appeal because the District Committee's Determination stated under each finding of a Rule violation: "Respondent's actions that violated this rule include, *but are not limited to,* the following." (Emphasis added.) Because the listings of facts which followed were not exhaustive, Kuchinsky asserts that the three-judge panel could not properly determine which facts the District Committee considered in making its decision.

An attorney subject to disciplinary proceedings is entitled to notice and the opportunity to be heard. *Pappas v. Virginia State Bar,* 271 Va. 580, 587, 628 S.E.2d 534, 538 (2006). In construing this right, we have held that "it is only necessary that the attorney be informed of the nature of the charge preferred against him and be given an opportunity to answer." *Moseley v. Virginia State Bar,* 280 Va. 1, 3, 694 S.E.2d 586, 589 (2010) (internal quotation marks omitted). Although we have not previously considered the extent of an attorney's due process rights in the context of an appeal, we have held that "[t]he procedures outlined in Part Six [of the Rules of the Supreme Court of Virginia] ensure the integrity of the disciplinary process and protect the rights of the attorney." *Pappas,* 271 Va. at 587, 628 S.E.2d at 538.

Part 6, § IV, ¶ 13–16(Y) of the Rules of Court establishes what a District Committee must include in its written determination. Specifically, the Rule states:

If a District Committee finds that the evidence shows the Respondent engaged in Misconduct by clear and convincing evidence, then the Chair shall issue the District Committee's Determination, in writing, setting forth the following:

[756 S.E.2d 480]

1. Brief findings of the facts established by the evidence;

2. The nature of the Misconduct shown by the facts so established, including the Disciplinary Rules violated by the Respondent; and

3. The sanctions imposed, if any, by the District Committee.

In the case at bar, the District Committee's Determination satisfied each of the three requirements. It included findings of fact, explained the nature of Kuchinsky's misconduct that was established by those facts, and stated what sanction was to be imposed. Part 6, § IV, ¶ 13–16(Y) does not require that a District Committee list the specific facts relied upon in finding individual rule violations. Therefore, the District

Committee did not err by failing to include an exhaustive list for each violation.

Furthermore, Kuchinsky's argument that the three-judge panel could not ascertain what facts the District Committee considered in making its decision lacks merit. A three-judge panel appointed pursuant to Code § 54.1–3935 reviews a District Committee determination to determine "whether there is substantial evidence *in the record* upon which the District Committee could reasonably have found as it did." Va. Sup.Ct. R., Part 6, § IV, ¶ 13–19(E) (emphasis added). Thus, in addition to the District Committee's findings of fact, a three-judge panel has the benefit of considering the entire record in reviewing a District Committee's Determination. Accordingly, we hold that Kuchinsky was not deprived of his right to a meaningful appeal in this case.

C. *Rule 1.8(a)*

Rule 1.8(a) of the Rules of Professional Conduct states that:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

The District Committee found that Kuchinsky violated Rule 1.8(a) through his "continued ownership interest in [Person's] property and his pursuit of a partition of the property pursuant to his interest as set forth in the deed" and through his "failure to formally terminate his representation prior to filing suit against Person in district court and circuit court."

1. Kuchinsky Acquired a 25% Interest in Two Specific Properties Through the Special Commissioner's Deed

Kuchinsky argues that his *continued* interest in Person's property was not an *acquisition* of an interest in the property. To violate Rule 1.8(a), an attorney must "knowingly *acquire* an ownership, possessory, security or other pecuniary interest adverse to a client." (Emphasis added.)

While the quitclaim deed gave Kuchinsky a 25% interest in Person's undivided ownership interests in the six properties at issue in the underlying partition suit against Person's siblings, the Special Commissioner partitioned, at Kuchinsky's request as counsel for Person, the various interests in those properties. The Special Commissioner's Deed then conveyed to Kuchinsky a 25% interest and to Person a 75% interest in two of the six properties—to the exclusion of Kuchinsky's other co-tenants' interests implicated by the execution of the quitclaim deed, and to the exclusion of Kuchinsky's interests in the other four properties. Accordingly, Kuchinsky and Person thereafter exclusively owned the two properties as tenants in common. Thus, only Kuchinsky and Person had the "right to possess, use and enjoy [these two] common propert[ies]," *City of Richmond v. SunTrust Bank*, 283 Va. 439, 443, 722 S.E.2d 268, 271 (2012) (quoting *Graham v. Pierce*, 60 Va. (19 Gratt.) 28, 38 (1869)). Moreover, although Kuchinsky initially objected to the Special Commissioner's Deed, he later wrote a letter

to the Special Commissioner encouraging him to record it; and Kuchinsky did not

[756 S.E.2d 481]

disclaim the deed after it was recorded. Through these actions, Kuchinsky "knowingly acquire[d]" an interest in Person's property for purposes of Rule 1.8(a).

2. The Common Law Exceptions to the Rules of Champerty and Maintenance do not apply to Rule 1.8(a)

Alternatively, Kuchinsky contends that his actions are protected by the common law exception to the doctrine of champerty and maintenance for aiding the indigent. *See* 3B Michie's Jurisprudence, *Champerty and Maintenance*, § 2 ("Aiding the indigent is one of the generally recognized exceptions to the law of maintenance."). Because Person could not afford to pay an attorney in advance, Kuchinsky argues that his fee arrangement with Person falls within the exception. We disagree.

In relevant part, Comment 16 to Rule 1.8 explains that " *Paragraph (j)* states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules." (Emphasis added.) However, unlike the earlier disciplinary proceeding against Kuchinsky, the case at bar does not involve a Rule 1.8(j) violation. There is no common law doctrine which permits an attorney to "knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" in violation of Rule 1.8(a) simply because the client is indigent.

3. Person was Still Kuchinsky's Client at the Time the Offending Conduct Occurred

Finally, Kuchinsky asserts that Person was no longer his client at the time the offending conduct took place because "nothing remained to be done in Person's case" and because Person allegedly informed Kuchinsky that he did not intend to pay Kuchinsky for his services. We reject this argument.

During the hearing before the District Committee, Kuchinsky testified that by the time he filed the partition suit against Person on May 18, 2010 " [t]here may have been some rents that remained to be divided, cash assets" from the underlying partition suit between Person and his siblings. Additionally, Kuchinsky acknowledges on brief that no final order had been entered in the underlying partition suit when he acquired the Special Commissioner's deed and filed his partition suit against Person. Finally, Kuchinsky took no steps to formally withdraw from his representation of Person in accordance with Rule 1.16(b) before engaging in the violative conduct. [9]

Therefore, Person was still Kuchinsky's client at the time he knowingly acquired an interest in Person's property, and we hold that the three-judge panel did not err in affirming the District Committee's finding that Kuchinsky violated Rule 1.8(a) of the Rules of Professional Conduct.

D. *Rule 8.4(a)*

Rule 8.4(a) of the Rules of Professional Conduct establishes that "[i]t is professional misconduct for a lawyer to ... violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

As we explained in Part II.C., *supra*, Kuchinsky violated Rule 1.8(a) by acquiring an interest in Person's property through the Special Commissioner's Deed, by asking that the Special Commissioner record the deed,

and by pursuing a partition of Person's property once the deed had been recorded. Therefore, he also committed professional misconduct under Rule 8.4(a) by violating the Rules of Professional Conduct, both through his own acts and through the acts of the Special Commissioner.

[756 S.E.2d 482]

However, Kuchinsky argues that we should reverse the three-judge panel's finding that he violated Rule 8.4(a) because "a redundancy of charges in disciplinary proceedings is disfavored." In support, Kuchinsky cites *Morrissey v. Virginia State Bar*, 248 Va. 334, 448 S.E.2d 615 (1994). In *Morrissey*, a three-judge panel found that Respondent violated DR 1–102(A)(4) of the former Virginia Rules of Professional Responsibility, which stated that "[a] lawyer shall not ... [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law." [10] *Id.* at 336, 448 S.E.2d at 616. On appeal, the VSB assigned as cross-error the panel's failure to also find that Respondent had violated former DR 1–102(A)(3), which established that "[a] lawyer shall not.... [c]ommit a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law." *Id.* at 334, 448 S.E.2d at 621. We rejected the VSB's argument and affirmed the panel's decision, holding that "[a]lthough Morrissey's concealments were deliberate and wrongful, we do not think that the language of DR 1–102(A)(3) indicates a clear intent to provide multiple punishment for such acts under the circumstances of this case." *Id.* (citing *Fitzgerald v. Commonwealth*, 223 Va. 615, 635, 292 S.E.2d 798, 810 (1982)).

In contrast to the rules at issue in *Morrissey*,Rule 8.4(a) clearly supports a finding that an attorney has committed professional misconduct under Rule 8.4(a)*in addition to* a finding that the attorney violated another underlying Rule of Professional Conduct. Rule 8.4(a) states that a violation or attempted violation of another rule is professional misconduct. This misconduct provision would be rendered meaningless if it did not provide for the imposition of a separate and additional violation. It is a "well established rule of construction that a statute ought to be interpreted in such manner that it may have effect, and not be found vain and elusive." *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952). We believe that the same principle applies to our interpretation of the Rules of Professional Conduct. Accordingly, we hold that the three-judge panel did not err in affirming the District Committee's finding that Kuchinsky violated Rule 8.4(a) of the Rules of Professional Conduct.

E. *Rule 3.4(d)*

In relevant part, Rule 3.4(d) of the Rules of Professional Conduct states that "[a] lawyer shall not ... [k]nowingly disobey ... a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling."

The District Committee found that Kuchinsky violated Rule 3.4(d) by "continu[ing] to pursue his ownership interest in Person's property" after receiving the prior admonition from the VSB and by failing to "divest himself of his ownership interest [in Person's property] until one year after he received Person's [bar] complaint." However, the admonition issued to Kuchinsky was a private admonition *without terms*. The admonition did not require that Kuchinsky divest himself of his interest in Person's property, nor did it indicate that he must refrain from taking additional steps to secure his interest. Rather, it merely stated that Kuchinsky violated Rule 1.8(j) by *acquiring* the original quitclaim deed from Person. Because the private admonition issued to Kuchinsky did not include terms requiring

that Kuchinsky either take or refrain from taking any action, he could not "knowingly disobey" the admonition. Accordingly, we hold that the three-judge panel erred in affirming the District Committee's finding that Kuchinsky violated Rule 3.4(d) of the Rules of Professional Conduct.[11]

[756 S.E.2d 483]

III. Conclusion

We affirm the three-judge panel's decision with regard to Rules 1.8(a) and 8.4(a), reverse its decision with regard to Rule 3.4(d), and remand the case for reconsideration of the sanction to be imposed.

Affirmed in part, reversed in part, and remanded.

Notes:

[1.] Person's father, Thomas McCoy Person, died intestate. At the time of his passing, Thomas Person owned several parcels of land in the City of Emporia and Greensville County, Virginia.

[2.] Sometime after the quitclaim deed was recorded, Person dismissed Kuchinsky as his counsel. However, later that year, Person re-employed Kuchinsky and executed a second fee agreement which stated that Person would pay Kuchinsky's attorney's fees for any unproven bar complaints lodged against Kuchinsky, reaffirmed that Kuchinsky had earned "all prior fees" (including the 25% quitclaim interest), and waived potential conflicts of interest in the renewed representation.

[3.] The subcommittee's determination was based on Kuchinsky's acquisition of the quitclaim deed from Person, as well as his acquisition of a similar interest from another client.

[4.] Initially, Kuchinsky had objected to the Special Commissioner's deed, stating that he intended his 25% quitclaim interest to be a "springing attorney's lien for legal work, not as a proprietary interest." Therefore, Kuchinsky argued, "conveyances and debts set forth by the Commissioner as transferable or payable to Neil Kuchinsky should be permitted to be converted to a deed of trust and note" between himself and Person.

[5.] Kuchinsky and Person eventually reached an agreement whereby Person signed a promissory note for fees and costs owed to Kuchinsky, secured by a deed of trust. Finally, in November 2011, Kuchinsky executed and recorded a deed conveying his 25% interest in the jointly owned properties back to Person. Subsequently, pursuant to Kuchinsky's request, the Greensville County Circuit Court issued an order of nonsuit in Kuchinsky's partition suit against Person.

[6.] In relevant part, the rules Kuchinsky was charged with violating, all of which appear in Part 6, § II of the Rules of Court, read as follows:

Rule 1.8—Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Rule 3.4—Fairness to Opposing Party and Counsel

A lawyer shall not:

....

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

Rule 8.4—Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

[7.] The Written Determination also noted that one member of the Committee dissented from the District Committee's finding that Kuchinsky violated Rule 3.4(d) by disregarding the VSB's prior admonition on the basis that the Committee member "did not believe that the Committee is a 'tribunal' within the contemplation of the rule."

[8.] On the same day, Kuchinsky also filed a Motion to Reconsider the District Committee's determination on the basis that one of the Committee members should have recused himself from the proceedings. The District Committee denied Kuchinsky's Motion to Reconsider, and the issue raised therein is not before this Court on appeal.

[9.] In relevant part, Comment 8 to Rule 1.16 states that "[a] lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs." Thus, although Person allegedly informed Kuchinsky that he would not honor their fee agreement, the representation continued absent Kuchinsky's withdrawal.

[10.] The panel also found that Respondent violated former DR 8–101, which prohibited a lawyer serving in public office from "[a]ccept[ing] anything of value" when the lawyer "knows or it is obvious that the offer is for the purpose of influencing his action as a public official." However, that portion of the opinion is not relevant to the issue presented

by the case at bar.

[11] The related issue of whether a disciplinary arm of the VSB constitutes a "tribunal" for purposes of Rule 3.4(d) is not before this Court on appeal.

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Thomas Long NORTHAM
v.
VIRGINIA STATE BAR.

Record No. 121623.

Supreme Court of Virginia.

Feb. 28, 2013.

[737 S.E.2d 906]

Bernard J. DiMuro, Alexandria (Michael S. Lieberman, Alexandria; Reeves W. Mahoney, Virginia Beach; DiMuroGinsberg; Poole Mahoney, on briefs), for appellant.

Mike F. Melis, Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General; Wesley G. Russell, Jr., Deputy Attorney General; Peter R. Messitt, Senior Assistant Attorney General, on brief), for appellee.

Present: All the Justices.

OPINION BY Justice LEROY F. MILLETTE, JR.

In this appeal of right from an order entered by the Virginia State Bar Disciplinary Board (Board), we consider whether an attorney violated Rule 1.10(a) of the Virginia Rules of Professional Conduct.

I. Background

Thomas Long Northam is an attorney licensed to practice law in Virginia. During the relevant time period, Northam was a partner in Poulson, Northam & Lewis, PLC (the Firm) in Accomac, Virginia. On April 7, 2010, Laura Ashley Adams (Ms. Adams) visited the Firm with the intention of employing Lynwood W. Lewis, Jr., (Lewis) as her attorney to represent her regarding matters of custody, support, separation, and divorce from her husband, Thomas James Adams (Mr. Adams). The Firm's receptionist arranged for an initial meeting between Ms. Adams and Lewis to be held on April 13, 2010.

On April 9, 2010, Northam, Lewis's partner, received a phone call from Mr. Adams. Mr. Adams indicated that he was seeking representation for a "domestic situation," which he described in some detail. Northam told Mr. Adams to "tell [him] when he got served and [they] would go from there."

When Ms. Adams returned to the Firm on April 13, 2010, she met with Lewis, recounted the events leading up to the separation, and informed him of her goals in the divorce proceedings. Lewis took approximately one page of notes during this initial interview before asking if Ms. Adams knew if Mr. Adams had retained an attorney. Ms. Adams answered that he had, and his name was "Northam something." Lewis stopped taking notes and terminated the interview.

The following day, Lewis spoke with Northam to inquire about Northam's alleged representation of Mr. Adams and to inform Northam that he had met with Ms. Adams. Following this conversation, the Firm's receptionist notified Ms. Adams that Lewis would not be able to represent her in her dispute with Mr. Adams. The receptionist told Ms. Adams that Lewis could not serve as her attorney because Lewis's partner, Northam, had already agreed to represent Mr. Adams in the matter. Ms. Adams

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sought alternative legal representation. Northam continued to represent Mr. Adams.

Ms. Adams filed a complaint with the Virginia State Bar (Bar). After receiving the complaint and conducting an initial

investigation, the Second District Committee of the Bar (District Committee) charged Northam with violations of Rules 1.7(a)(2) (Conflict of Interest), 1.10(a) (Imputed Disqualification), and 1.16(a)(1) (Declining or Terminating Representation) of the Rules of Professional Conduct. At the conclusion of a hearing before the District Committee, Northam was held to have violated Rules 1.7(a)(2), 1.10(a), and 1.16(a)(1), and the District Committee ordered a public admonition, with terms.

Northam appealed the decision to the Board. The Board reversed and dismissed the District Committee's determination that Northam had violated Rules 1.7(a)(2) and 1.16(a)(1), and affirmed the determination that Northam had violated Rule 1.10(a). The Board ordered an admonition, without terms.

Northam made a timely appeal to this Court, assigning three errors to the decision of the Board:

1) The Disciplinary Board erred when it failed to find that the District Committee misinterpreted and misapplied Rule 1.10 because Rule 1.10 is not a strict liability rule of professional conduct and instead requires that Respondent have knowledge that his partner could not ethically represent Appellant's client before imputing the partner's knowledge to [the] Appellant.

2) The Disciplinary Board erred because there was no finding of fact by the District Committee that Appellant knew that his partner had a conflict of interest and was prohibited from representing Appellant's client.

3) The Disciplinary Board improperly upheld the District Committee's error as a matter of law in limiting Appellant's right to examine Ms. Adams' attorney after Ms. Adams had already testified as to her version of communications with her attorney on the same subject.*

II. Discussion

A. *Standard of Review*

In reviewing the Board's decision in a disciplinary proceeding, the factual conclusions reached by the Board will be given "substantial weight and [we] view those findings as prima facie correct." *Pilli v. Virginia State Bar*, 269 Va. 391, 396, 611 S.E.2d 389, 391 (2005). These conclusions, "[w]hile not given the weight of a jury verdict, ... will be sustained unless they are not justified by the evidence or are contrary to law."

[737 S.E.2d 908]

Barrett v. Virginia State Bar, 277 Va. 412, 413, 675 S.E.2d 827, 828 (2009). In conducting this review, we will conduct "an independent examination of the entire record[, viewing] all reasonable inferences that may be drawn from th[e] evidence" in the light most favorable to the prevailing party. *Green v. Virginia State Bar*, 278 Va. 162, 171, 677 S.E.2d 227, 231 (2009).

B. *Whether Northam Had Knowledge of Lewis's Disqualification*

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

Northam does not dispute that Lewis, his partner, was prohibited from representing Mr. Adams under Rules 1.6(a) and 1.7(a)(2). Rule 1.6(a) prohibits a lawyer from revealing "information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.7(a)(2) prohibits a lawyer from representing "a client

if the representation involves a concurrent conflict of interest[, which] exists if ... there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a third person." Lewis's disqualification under Rules 1.6(a) and 1.7(a)(2) from representing Mr. Adams was established by clear and convincing evidence and is not questioned by Northam on appeal.

Rather, Northam argues that the Board erred when it imputed Lewis's disqualification to him under Rule 1.10(a) without any evidence to support the conclusion Northam *knew* that the Rules of Professional Conduct prohibited Lewis from representing Mr. Adams. Northam contends that, because no evidence was presented to establish his knowledge of Lewis's disqualification under either Rule 1.6(a) or 1.7(a)(2), the Bar's determination that he violated Rule 1.10(a) could only be based on an application of strict liability to the Rule's requirements.

Additionally, Northam argues, because Rule 1.10(a) is not a strict liability rule, the Rule's requirement that the conduct be executed "knowingly" is essential to sustaining a violation. This requires a finding of fact establishing Northam's actual knowledge that Lewis was disqualified from representing Mr. Adams, thus imputing Lewis's disqualification to Northam.

The Bar responds that the Board did not apply strict liability when it determined that Northam violated Rule 1.10(a). According to the Bar, the conflict in representing Mr. Adams because of Lewis's receipt of confidential information from Ms. Adams was imputed to all of Lewis's law partners, including Northam. The Bar relies upon Comment [2] to Rule 1.10 that "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client." Thus, by imputing Lewis's knowledge that he had a conflict under Rules 1.6(a) and 1.7(a)(2) to Northam, Northam "knowingly" represented a client, Mr. Adams, who Lewis was prohibited from representing.

The Bar further contends that the Board based its conclusion on facts that allowed the Board to infer, based on the circumstances, that Northam knew Lewis was prohibited from representing Mr. Adams. The Bar argues that it did not err in imputing Lewis's disqualification to Northam because the only reasonable inference to draw from the Board's finding that Lewis "met" with Ms. Adams is that the meeting was for the purpose of representing her in legal proceedings involving her domestic dispute with Mr. Adams. Thus, the Bar contends that the factual finding that Lewis and Ms. Adams met was sufficient to impute Lewis's knowledge of his disqualification to Northam.

Rule 1.10(a) is not a rule of strict liability. The use of "knowingly" in Rule 1.10(a) is not without purpose, but is a separate and distinct element of the Rule that must be proven before a violation can be imposed. Northam

[737 S.E.2d 909]

must have had knowledge at the time he represented Mr. Adams that Lewis, his partner, was prohibited from doing so.

"Knowingly" is defined in Part 6 of the Rules of Court, Section II, Preamble, as "actual knowledge of the fact in question" and as encompassing knowledge that "may be inferred from the circumstances." Based on this definition, we agree with the Bar that the Board may in appropriate circumstances infer knowledge of a partner's disqualification from the circumstances of a particular case. We do not agree, however, that the findings of fact made upon the Board's review of the entire record, including the District Committee's findings of fact, support the Bar's argument that Northam had actual knowledge of Lewis's disqualification.

We have previously refused to affirm findings that an attorney violated the Rules of Professional Conduct "because the Board's 'Findings of Fact' d [id] not prove the ethical misconduct charged by clear and convincing evidence." *Pappas v. Virginia State Bar,* 271 Va. 580, 587, 628 S.E.2d 534, 538 (2006); *see also Rice v. Virginia State Bar,* 267 Va. 299, 300–01, 592 S.E.2d 643, 644–45 (2004).

The findings of fact included in the Board's disposition in the present matter state:

2. There is substantial evidence to sustain a violation of Rule 1.10 (Imputed Disqualification). The confidential information Ms. Adams provided to Respondent's partner, Lewis, was imputed to Respondent. *Respondent learned of his partner's meeting with Ms. Adams wherein she intended to engage his partner to represent her in a divorce, child custody and support matter, and her disclosure to Lewis of relevant confidential information was imputed to him.* Based on the confidential information Ms. Adams provided to Lewis, Lewis could not have represented Mr. Adams had Mr. Adams later sought his representation in the divorce. Lewis's meeting with Ms. Adams without first determining whether there was any conflict that would bar his representation of Ms. Adams had the effect of disqualifying Respondent from likewise representing Mr. Adams because of what Lewis had learned from Ms. Adams was imputed to Respondent. Respondent continued to represent Mr. Adams without requesting and obtaining an informed consent from Ms. Adams permitting his continued representation of her husband.

(Emphasis added.)

The finding that "Respondent learned of his partner's meeting with Ms. Adams" does not in itself support the conclusion that Northam *knew* that Lewis was disqualified from representing Mr. Adams in that Ms. Adams revealed information to Lewis that falls under the protection of Rule 1.6(a), or that Lewis's ability to represent Mr. Adams would have been "materially limited by [Lewis's] responsibilities" to Ms. Adams under Rule 1.7(a)(2). The Board's findings of fact leave out the crucial connection between Northam's knowledge of a meeting between Lewis and Ms. Adams and the inference that Northam "knew" of Lewis's disqualification.

The Bar argues that a review of the record in its entirety supports the inference that Northam knew Lewis declined to represent Ms. Adams because he was disqualified from representing either party. During the hearing before the District Committee, which the Board reviewed in its entirety, Lewis testified that he told Northam of his meeting with Ms. Adams and, after learning that Northam was representing Mr. Adams, stated "I think we have a problem and I'm getting out." Northam, however, testified before the District Committee as follows:

Q. Did he ever tell you that ... he had a meeting with Ms. Adams?

A. [I w]as contacted, I recalled. So, obviously, I knew [Lewis] had been contacted somehow by [Ms. Adams] because he wouldn't have asked the question unless there had been contact, but he didn't go into the details.

Q. But he didn't tell you that he had [previously] had a meeting, in-office consultation with her?

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A. No.

....

Q. You heard your partner's testimony about that discussion he had with you following this meeting with Ms. Adams, and he said ... something to the effect of either I've got a problem or we've got a problem and I've got to get out. Do you recall whether he said I or we?

A. The conversation concluded with my indicating that I was representing Mr. Adams. If he had indicated that we had a problem, I would have asked more questions, but that was not done. That would have given me some indication that I have to follow up on something and ask something else, but when I indicated that I was representing Mr. Adams, that concluded the very brief encounter and he left my office.

The District Committee could have resolved the factual inconsistency between the testimony of Lewis and that of Northam, or found that the context of the meetings or some other basis resulted in the inference that Northam knew about Lewis's disqualification, but it did not do so in its findings of fact. The District Committee's findings include:

4. On April 13, 2010, Ms. Adams returned to Respondent's firm and met with Mr. Lewis with the intention of hiring him to represent her in divorce, child custody and support matters. Ms. Adams provided Mr. Lewis with confidential information related to her marriage to Mr. Adams and the events leading to their separation, including Mr. Adams' alleged anger management issues and adultery. Ms. Adams shared with Mr. Lewis information not known to Mr. Adams, specifically, that Ms. Adams had proof of Mr. Adams' alleged adultery.

....

6. On April 14, 2010, *Respondent told Mr. Lewis that he was representing Mr. Adams and Mr. Lewis told Respondent that he had met with Respondent the day prior.*

(Emphasis added.)

The District Committee's findings establish only that Lewis and Ms. Adams met, that Ms. Adams disclosed confidential information to Lewis during their meeting, and that Lewis subsequently communicated to Northam that he met with Ms. Adams. While the Board could have concluded in its findings of fact that Northam had actual knowledge of Lewis's disqualification, or that such actual knowledge was inferred from the circumstances, that finding was not made. Because of the different possible conclusions that could be derived from the evidence, we decline to draw a conclusion or inference that the Board did not.

This analysis is wholly consistent with our holdings in *Pappas* and *Rice*. Although in both *Pappas* and *Rice* we ultimately found the evidence insufficient to support the Board's finding by clear and convincing evidence, these holdings must be viewed in the context of the basis for the results.

In *Pappas*, we concluded that only one of the Board's findings of fact could have been the basis for sustaining a violation of Rule 8.4(c). 271 Va. at 588, 628 S.E.2d at 539. That finding considered conflicts in testimony between the respondent attorney and other witnesses considered by the Board. We held that "this one finding is not sufficient to support the Board's determination that Pappas" violated Rule 8.4(c) because he "engaged 'in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on [Pappas'] fitness to practice law' by clear and convincing evidence." *Id.* at 588, 628 S.E.2d at 538–39.

The facts in *Rice* involved an alleged violation of Rule 8.1(c), which provides that an attorney "shall not fail to respond to a lawful demand for information from [a] disciplinary authority." 267 Va. at 300, 592 S.E.2d at 644. We recognized that, "[w]hile Rule 8.1(c) may be violated by failure to appear at a hearing before a disciplinary committee or

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Board, in this case, the Disciplinary Board's findings of fact do not support its conclusion that Rice violated the rule." *Id.* We explained that a summons to appear at a hearing may be considered a demand for information under Rule 8.1(c) if the Board finds that the hearing was for the purpose of gathering sworn testimony from the respondent, but *because* the Board failed to include a finding that the "committee was unable to gather information from Rice as a result of Rice's failure to appear," its determination was "by clear and convincing evidence unsubstantiated." *Id.* at 301, 592 S.E.2d at 644–45.

Neither *Pappas* nor *Rice* contains any discussion of the record beyond the explication of the Board's insufficient findings of fact. Both cases involved findings of fact that provided insufficient bases for the Board's conclusions that the respective rules were violated by clear and convincing evidence. The Board is delegated with the responsibility to resolve often complex and detailed disputed fact situations that may or may not constitute violations of professional responsibility. *See* Va. Sup.Ct. R., Part 6, § IV, ¶ 13–19(E). An attorney charged with a violation of professional responsibility is entitled to findings of fact that contain a clear statement of how the Board resolved disputed issues.

In the present case, the issue in dispute was whether Northam continued representing Mr. Adams when he "knew" that Lewis, his partner, was disqualified. Nothing in the Board's findings of fact resolves this issue. The Board was not required to establish that Northam knew why Lewis was disqualified, but the Board was required by the language of the Rule to establish by clear and convincing evidence that Northam's continued representation of Mr. Adams was with the knowledge that Lewis was disqualified from said representation. Had the Board made this determination, we would have reviewed the entire record for reasonable inferences in support of its determination, and viewed conflicts in the evidence in the light most favorable to the Bar as the prevailing party. But lacking *any* factual determination by the Board as to Northam's knowledge of disqualification, we will not inspect the record to determine facts required to establish a violation of the rule.

We therefore hold, based on the Board's findings of fact, that under the specific circumstances of this case we cannot affirm the Board's conclusion that Northam *knew* that Lewis was disqualified from representing Mr. Adams. Without this element of knowledge, a material element of Rule 1.10(a), we will not impute Lewis's disqualification to Northam and the order of the Board will be reversed.

C. *Waiver of Attorney–Client Privilege*

Northam also argues that the Board erred in upholding the District Committee's decision that permitted Ms. Adams' attorney to limit his testimony before the District Committee by exercising attorney-client privilege. We will not reach this Assignment of Error because our disposition as to Assignments of Error One and Two is dispositive.

III. Conclusion

The Board's findings of fact do not support its conclusion by clear and convincing evidence that Northam knowingly

represented Mr. Adams when Lewis, his partner, was prohibited from doing so under the Virginia Rules of Professional Conduct. Therefore, Lewis's disqualification could not be imputed to Northam under Rule 1.10(a). We will reverse the order of the Board and dismiss the charge of misconduct.

Reversed, vacated, and dismissed.

Justice POWELL, dissenting.

The majority holds that there is not enough evidence in the record for us to conclude that Northam knew that Lewis was disqualified from representing Mr. Adams. I respectfully disagree with the majority's conclusion that the factual findings of the Board were insufficient. Because the majority holds that the evidence is insufficient, it does not reach the issue of whether the trial court improperly excluded portions of Dix's testimony.

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I would further hold that any error in excluding the testimony of Ms. Adams' counsel, Thomas B. Dix, Jr., was harmless. Therefore, I would affirm the decision of the Virginia State Bar Disciplinary Committee.

A. Violation of Rule 1.10

The review of the entirety of the record shows that Ms. Adams met with Lewis to retain him to represent her in a divorce proceeding. While meeting with Lewis, she told him about evidence that she had that could be detrimental to Mr. Adams. After she told Lewis that evidence, he asked who was representing Mr. Adams. Ms. Adams responded "I believe it was a Northam something.... I don't know offhand." Lewis asked her "[i]s it a Tommy Northam?" and Ms. Adams stated "that sounds about right." At that point, Lewis informed her that he could not talk with her any longer until he "check[ed] notes and [saw] if [Mr. Adams] had spoken with Mr. Northam." Lewis immediately exited his meeting with Ms. Adams and asked Northam's secretary whether Northam had spoken with Mr. Adams. When the secretary indicated that Northam had, Lewis knew that he could not represent Ms. Adams. The next day, Lewis told Northam that he had interviewed Ms. Adams and Northam indicated that he was representing Mr. Adams. Lewis told Northam "I think we have or I have or I think we have a problem and I'm getting out." Lewis did not reveal anything that Ms. Adams told him to Northam or anyone. Northam told the Bar investigator that he did not withdraw because he did not believe that there was a conflict as he did not know any details about Lewis's meeting with Ms. Adams and because he felt that he had a duty to his client and the court to not withdraw.

The Virginia Rules of Professional Conduct prohibit an attorney from representing a client if that representation involves a concurrent conflict of interest. Rule 1.7(a). The Rule further states that a concurrent conflict of interest exists where "the representation of one client will be directly adverse to another client" or "there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Rule 1.7(b) This conflict may be waived by the written consent of all involved clients, if certain conditions are met. *Id.* "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by" Rule 1.7, among others. Rule 1.10(a).

Here, it is clear that no attorney-client relationship had formed between Ms. Adams and Lewis, but I believe that the expectation of privacy did because Lewis did not provide a disclaimer about confidentiality and Ms. Adams shared information that she believed

would be detrimental to her in the divorce proceeding were Mr. Adams to know that she possessed such information.

The majority concludes that because the Disciplinary Board did not make a specific factual finding as to whether Lewis communicated to Northam that he had a conflict or whether he only stated that he met with Ms. Adams, the evidence is insufficient to conclude that Northam knew that a conflict prevented Lewis from representing Mr. Adams. This narrow view, however, results in a reinterpretation of the law. Under this perspective, the majority is either saying 1) that this Court relies only on the specific factual findings made by the District Committee and no longer reviews the entire record for reasonable inferences, or 2) this Court continues to review the entire record but resolves conflicts in the evidence in favor of the losing party rather than the party that prevailed below. We have previously held that

> we conduct an independent examination of the record, considering the evidence *and all reasonable inferences therefrom in the light most favorable to the prevailing party below*, and we give the factual findings ... substantial weight, viewing them as prima facie correct.

Barrett v. Virginia State Bar, 272 Va. 260, 268–69, 634 S.E.2d 341, 345–46 (2006)(emphasis

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added). Our review of the record is not only to determine whether the inferences support each specific factual finding made by the Board, but is conducted to determine whether the evidence in the record and all the reasonable inferences drawn from that evidence support the result. Thus, either interpretation of the majority's position is a radical departure from the law.

In support of their position, the majority relies upon, *Pappas v. Virginia State Bar*, 271 Va. 580, 628 S.E.2d 534 (2006), and *Rice v. Virginia State Bar*, 267 Va. 299, 592 S.E.2d 643 (2004), two cases in which the record simply did not contain the evidence to support the findings or reasonable inferences therefrom. See *Pappas*, 271 Va. at 588–89, 628 S.E.2d at 539 ("the evidence was insufficient to find by clear and convincing evidence that [the attorney] violated [the] Rule"); *Rice*, 267 Va. at 301, 592 S.E.2d at 644–45 ("the Disciplinary Board's determination that the Bar proved a violation of Rule 8.1(c) by clear and convincing evidence is unsubstantiated"). By contrast, upon reviewing the entire record in the present case, I believe that there is sufficient evidence from which the District Committee and Disciplinary Board could have concluded that Northam knew that a conflict prevented Lewis from representing either Laura or Thomas Adams. Therefore, the facts of this case are clearly distinguishable. Here, the testimony of Lewis, Northam, and Ms. Adams is sufficient to establish that she told Lewis confidential information about what she knew about Mr. Adams' alleged affair, Lewis told Northam that he (Lewis) had met with Ms. Adams and believed that either he (Lewis) or both of them had a problem. Thus, based on what he learned, Lewis would have a concurrent conflict and could not represent Mr. Adams. Because Lewis and Northam were members of the same firm at that time, this conflict was imputed to Northam even though Northam was already representing Mr. Adams. *See*Rule 1.10. In light of the clear inferences to be drawn from the record, the fact that the Bar did not make this specific factual finding is too thin a reed upon which to decide this case. Therefore, I would affirm the Bar's admonition without terms.

B. Admissibility of Testimony from Wife's Attorney

Because I believe that the evidence was sufficient and would affirm the Bar as to

Northam's first four assignments of error, I would also reach his fifth assignment of error: "The Disciplinary Board improperly upheld the District Committee's error as a matter of law in limiting appellant's right to examine [Ms. Adams'] attorney after [Ms. Adams] had already testified as to her version of communications with her attorney."

During direct examination, Northam asked Dix, who represented Ms. Adams in the divorce proceedings and in proceedings related to Northam's representation of Mr. Adams, whether he had any discussions with Ms. Adams leading up to the mediation about Northam representing Mr. Adams. Dix declined to answer on the grounds that the information was subject to attorney-client privilege. Northam argued that Dix cannot now assert the privilege because Ms. Adams testified about her complaint against Northam and made representations about what Dix did or did not tell her, thus putting those matters in issue, and that it was up to Ms. Adams to assert the privilege. Northam argued that Ms. Adams "opened the door" because her testimony materially relied on conversations between herself and Dix. He maintained that this was the classic "sword and shield" situation, contending that permitting Dix to rely on the privilege as a basis to refuse to testify was "using the privilege as a shield" and was "not fair" given Ms. Adams' prior use of the privilege as a "sword" in her effort to establish a violation of the Rules. When Ms. Adams was asked if she would waive the privilege to allow Dix to testify, she stated that if he did not want to answer it, she was not going to waive the privilege. The committee ruled that Dix did not have to answer. Dix then testified that before the mediation, he did not tell any third parties that Ms. Adams did not want Northam to represent Mr. Adams.

"Under the doctrine of harmless error, we will affirm the circuit court's judgment when we can conclude that the error at issue could not have affected the court's result." *Forbes v. Rapp,* 269 Va. 374, 382, 611 S.E.2d 592, 597 (2005). While the District Committee ruled that Dix did not have to testify, he testified with regard to every point covered with Ms. Adams on cross-examination. Therefore, all of the evidence that related to statements made by Ms. Adams was covered in cross-examination of Dix. Thus, the Committee's ruling did not affect the result.

Northam also sought to elicit testimony about Ms. Adams' purpose for speaking with Lewis. Ms. Adams, however, did not testify as to why she sought to retain Lewis as her attorney. Therefore, she did not waive the attorney-client privilege as to this topic and I would hold that the Bar did not err in not allowing Dix to testify on this subject.

Thus, I believe there is sufficient evidence in the record to show that Northam violated Rule 1.10. I would further hold that the Bar did not err in not allowing Dix to testify about why Ms. Adams sought to retain Lewis, and to the extent the Bar erred in not admitting testimony from Dix, that error was harmless. Therefore, I would affirm Northam's admonition without terms for violating Rule 1.10.

Notes:

[*] We note that the language of the three assignments of error recited above and presented in the appellant's opening brief varies slightly from that appearing in the five assignments of error presented in the notice of appeal originally filed with the Disciplinary Board on August 31, 2012. It is well established that the Court will not consider assignments of error as modified by an appellant's opening brief, but only as granted by the Court. *White v. Commonwealth,* 267 Va. 96, 102–03, 591 S.E.2d 662, 665–66

[737 S.E.2d 914]

(2004). Even so, we have previously held that "[w]hile it is improper for an appellant to alter the wording of a [granted] assignment of error ... non-substantive changes to an assignment of error ... do not default the issue raised." *Dowdy v. Commonwealth,* 278 Va. 577, 590 n. 14, 686 S.E.2d 710, 717 n. 14 (2009) (citing *Allstate Ins. Co. v. Gauthier,* 273 Va. 416, 418, 641 S.E.2d 101 n. * (2007)). Because the changes involved here are non-substantive (substituting "Appellant's" for "Respondent's" and "Appellant" for "Respondent" in a few locations), and do not permit the appellant to argue a different issue on appeal, we may properly consider the modified assignments of error. *Id.; see also Hudson v. Pillow,* 261 Va. 296, 301–02, 541 S.E.2d 556, 560 (2001) (same). In addition, while the two assignments of error filed but not appearing in this brief under the heading "Assignments of Error" are waived, *Dowdy,* 278 Va. at 590 n. 14, 686 S.E.2d at 717 n. 14 (citing Rules 5:27 and 5:17(c)), we can nevertheless "reach the underlying issues raised in omitted assignments of error because [another] assignment of error encompasses the same issues and because [the appellant] briefed those issues." *See id.* Thus, to the extent that issues pertaining to appellant's omitted assignments of error are encompassed by the presented assignments of error and are sufficiently briefed, we may properly consider them.

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

VSB DOCKET NO.

ORDER OF >

THIS MATTER came on to be heard on <date>, before a panel of the Disciplinary Board consisting of > Chair, >, >, >, > Lay member. The Virginia State Bar (the "VSB") was represented by >, >,>,>,>, (the "Respondent"). appeared in person and was represented by >,. The Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. >, court reporter, <address>, <telephone number>, after being duly sworn, reported the hearing and transcribed the proceedings.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System ("Clerk") in the manner prescribed by the Rules of the Supreme Court of Virginia, Part Six, Section Iv, Paragraph 13-18 of the Rules of Court.

The matter came before the Board on the District Committee Determination for Certification by the < District Committee Section > pursuant to Part Six, § IV, ¶ 13-18 of the Rules of the Supreme Court of Virginia involving misconduct charges against the Respondent. Prior to the proceedings and at the final Pretrial Conference VSB Exhibits >,>,>, were admitted into evidence by the Chair, without objection from the Respondent. [Stipulations?].

The Board heard testimony from the following witnesses, who were sworn under oath: _____. The Board considered the exhibits introduced by the parties; heard arguments of counsel; and met in private to consider its decision.

I. FINDINGS OF FACT

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

1. At all times relevant hereto, >, hereinafter the Respondent, has been an attorney licensed to practice law in the Commonwealth of Virginia and his address of record with the Virginia State Bar has been >. The Respondent received proper notice of this proceeding as required by Part Six, § IV, ¶ 13-12 and 13-18 A. of the Rules of Virginia Supreme Court.

2. The Complainant, >, hereinafter referred to as ">", was

....

Etc

[Note - it may make more sense in some cases to combine the findings of fact and the rule violations under a unified heading "Misconduct" rather than repeating them first in Findings of Fact then again in Nature of Misconduct. In that case, the Order writer can put the relevant facts under separate sub-headings for each rule].

II. NATURE OF MISCONDUCT

The following conduct by Respondent constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

[Cite each rule proven]

A. Rules 1.8 – Conflict of Interest and Prohibited Transaction

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Respondent 's actions that violated this rule include, but are not limited to, the following:

1. [Recite the facts that support each violation]

2.

B. Rule 3.4 – Fairness to Opposing Party and Counsel
A lawyer shall not:
(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

Respondent 's actions that violated this rule include, but are not limited to, the following:

1.

2.

etc

III. IMPOSITION OF SANCTION

Thereafter, the Board received further evidence and argument in aggravation and mitigation from the Bar and Respondent, including Respondent 's prior disciplinary record. The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent. After due deliberation, the Board reconvened to announce the sanction imposed. The Chair announced the sanction as >.

Accordingly, it is ORDERED that the Respondent, <name >, <sanction> <effective date>.

It is further ORDERED that, as directed in the Board's <date>, Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the > of > license to practice law in the Commonwealth of Virginia, to all clients for whom > is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in > care in conformity with the wishes of > client. Respondent shall give such notice within 14 days of the effective date of the >, and make such arrangements as are required herein within 45 days of the effective date of the >. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the > that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of > , > shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Order by certified mail, Return receipt requested, to Respondent at his address of record with the Virginia State Bar, being >, with a copy by regular mail to <Respondent 's Counsel>, and hand-delivered to <Bar Counsel>, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219.

ENTERED this _____day of _____, _____.

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

<NAME>, Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTERS OF	**VSB Docket Nos. 16-060-104001**
NICHOLAS CARON SMITH	**16-060-104859**
	16-060-105281
	16-060-105911
	16-060-106252

ORDER OF SUSPENSION

THIS MATTER came to be heard on April 28, 2017, on the District Committee Determination for Certification by the Sixth District Committee, before a panel of the Virginia State Bar Disciplinary Board ("Board") consisting of Sandra L. Havrilak, Acting Chair, Sandra M. Rohrstaff, Nancy L. Bloom, Lay Member, R. Lucas Hobbs and Melissa W. Robinson. The Virginia State Bar (the "VSB") was represented by Prescott L. Prince ("Bar Counsel"). The Respondent Nicholas Caron Smith (hereinafter "the Respondent") was present and was represented by Jeffrey P. Matthews and James Calvin Breeden. Tracy J. Stroh, court reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

At the outset of the hearing, the Chair polled the members of the panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System ("Clerk") in the manner prescribed by the Rules of Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-18 of the Rules of Court.

Prior to the proceedings and at the final Prehearing Conference, VSB Exhibits 1-49 were admitted into evidence by the Chair, without objection from the Respondent. By agreement between the VSB and the Respondent, the Stipulations of Fact and Violated Rules of Professional Misconduct (hereinafter "Stipulation") was received as Exhibit 47. All of the

factual findings made by the Board were found to have been proven by clear and convincing evidence.

MISCONDUCT

Nicholas Caron Smith (hereinafter "the Respondent") was an attorney licensed to practice law in the Commonwealth of Virginia at all times relevant to the conduct set forth herein. The Respondent was employed in the private practice of law until approximately April of 2016, at which time he commenced employment as an Assistant Commonwealth's Attorney of the County of Northumberland, Virginia. The Respondent's employment as an Assistant Commonwealth's Attorney precluded his representation of private clients; and, he was therefore required to terminate his private practice and withdraw from any remaining cases. Based upon the evidence presented, including the Certification received into evidence as Exhibit 1 and the Stipulation received into evidence as Exhibit 47, and for the reasons more particularly set forth below, the Board finds, by clear and convincing evidence, that the Respondent's conduct, as set forth in the, constitutes misconduct in violation of Rules 1.3(a); 1.3(b); 1.4(a); 1.4(b); 1.15(a)(1); 1.15(b)(4); 1.15(b)(5); 1.15(c)(1); 1.15(c)(2); 1.15(c)(2)(i); 1.15(c)(2)(ii); 1.15(c)(3); 1.15(c)(4); 1.16(a)(1); 1.16(d); 4.1(a); 3.3(a)(1); 8.1(a); 8.1(c); 8.1(d); 8.4(c) .

Rule 1.3

The Board finds by clear and convincing evidence that the Respondent took actions in violation of Rules 1.3(a) and 1.3(b) in VSB Docket No. 16-060-104001 (hereinafter "the Hensley Case"), VSB Docket No. 16-060-105911 (hereinafter "the VSB Case"), and VSB Docket No. 16-060-105281 (hereinafter "the Burrell Case").

Pursuant to Rule 1.3(a) and Rule 1.3(b), a lawyer must act with reasonable diligence and promptness in representing his clients and must not intentionally fail to carry out a contract of employment entered into with a client for professional services. In the Hensley Case, the Respondent accepted a referral to represent Jason Hensley (hereinafter "Hensley") in his effort to recover his mobile home from real property from which he had been ejected after a foreclosure. After meeting with Hensley, the Respondent filed a Warrant in Detinue in Essex County Circuit

Court on August 21, 2014; however, he subsequently took no significant action to proceed with the lawsuit or obtain an agreement to remove or sell the mobile home. He essentially ignored Hensley's case and all requests from his client for information.

The Respondent took similar actions in the VSB Case. In 2016, the Respondent was appointed to represent William Edward Mullins (hereinafter "Mullins") by the Circuit Court of Westmoreland County on charges of rape and abduction with intent to defile. Mullins was convicted on both charges by a jury and was awarded a life sentence. Although the Respondent did not perceive any grounds for appeal, he noted an appeal. Nevertheless, he never filed a Petition for Appeal and failed to perfect the appeal, resulting in the appeal being dismissed due to procedural default on March 7, 2016.

In the Burrell Case, the Respondent was appointed on November 10, 2015 to represent Troy L. Burrell (hereinafter "Burrell") by the Essex County Circuit Court for appellate proceedings of Burrell's conviction on a charge of unlawful wounding. Subsequent to his filing of the Petition of Appeal to the Court of Appeals, the Respondent was hired to serve as Assistant Commonwealth's Attorney of Northumberland County, which caused a non-waivable conflict to his continued representation of Burrell. Although the Respondent filed a Motion to Withdraw as counsel, he neglected to specify that his position in the Commonwealth Attorney's office would ethically preclude him from carrying on his representation of Burrell, and the Motion was denied. The Respondent failed to effectively withdraw from his representation of Burrell upon being hired as an Assistant Commonwealth's Attorney; and, he took no action to pursue the appeal or otherwise protect the interests of his client. He merely ceased his representation of Burrell.

The Respondent's failure to take any action to move Hensley's case forward and his failure to properly perfect the appeal in the VSB Case constitute violations of Rule 1.3(a). Furthermore, the Board finds that the Respondent intentionally failed to effectively withdraw from his representation of Burrell or to follow up on the Supreme Court of Virginia's denial of his Motion to Withdraw to determine what actions were required in order to effectively withdraw

and/or take other action to protect his clients' rights, which constitutes a violation of both Rule 1.3(a) and Rule 1.3(b).

Rule 1.4

The Board finds by clear and convincing evidence that the Respondent violated Rules 1.4(a) and (b) of the Rules of Professional Conduct in both the Hensley Case and the VSB Case. Rule 1.4(a) requires a lawyer to keep a client reasonably informed about the status of his or her case and promptly comply with reasonable requests for information; and, Rule 1.4(b) imposes a duty upon a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions.

After the Respondent filed a Warrant in Detinue in the Hensley Case, Hensley made numerous attempts to contact the Respondent regarding his case. Hensley scheduled four office appointments, at all of which the Respondent failed to appear; and, he made multiple telephone calls to the Respondent, none of which were answered or returned. As a result, Hensley filed a complaint with the Virginia State Bar (hereinafter "VSB"); nevertheless, the Respondent continued to miss and reschedule appointments with Hensley. Furthermore, the Respondent failed to promptly inform Hensley of the existence of a conflict upon his acceptance of employment as an Assistant Commonwealth's Attorney and his need to withdraw from the matter.

In the VSB Case, following Mullins's convictions on charges of rape and abduction with intent to defile, the Respondent failed to maintain contact with Mullins to discuss the appeal and to keep him apprised of the status of the appeal. Moreover, after the appeal was dismissed on March 7, 2016, the Respondent failed to promptly notify Mullins of the dismissal and to inform him of his right to file a late appeal.

The Respondent's failure to maintain communication with Hensley and his failure to maintain contact with Mullins and to notify him that the appeal had been dismissed constitute violations of Rule 1.4(a). Moreover, the Respondent acted in violation of Rule 1.4(b) when he failed to inform Hensley of his need to withdraw from his case.

Rule 1.15

Rule 1.15 of the Rules of Professional Conduct pertains to the safekeeping of a client's property and the handling of a client's funds, including maintaining proper books and records. The Board finds that the Respondent violated numerous provisions of this Rule in VSB Docket No. 16-060-104859 (hereinafter "the Deaver Case"), VSB Docket No. 16-060-106252 (hereinafter "the Griner Case"), and VSB Docket No. 16-060-104001 (hereinafter "the Hensley Case").

Pursuant to Rule 1.15(b)(4), a lawyer must promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive. In July of 2015, the Respondent was retained to represent Michael Deaver (hereinafter "Deaver") on charges of forcible sodomy and aggravated sexual battery of victims under 13 years of age in Westmoreland and Hanover counties. In furtherance of the representation, the Respondent advised that he believed that a psychosexual evaluation of Deaver would be beneficial and recommended that such evaluation be performed by Evan Nelson, Ph.D. Dr. Nelson had informed the Respondent that his fee for such evaluation would be $3,000, to be paid in advance. The Respondent recommended to Deaver that the fee be paid to him and that he, in turn, would engage Dr. Nelson. Deaver's father, James Deaver, provided the Respondent with a check in the amount of $3,000 on August 25, 2015. The Respondent accepted the check and deposited it into his trust account; however, he did not forward the $3,000 to Dr. Nelson, despite the fact that both Deaver and Dr. Nelson made numerous inquiries regarding the funds. On November 18, 2015, the Respondent was notified that Deaver had retained substitute counsel, and he was again directed to forward the $3,000 to Dr. Nelson. The Respondent subsequently withdrew from the matters in Hanover and Westmoreland Circuit Courts; however, he still failed to forward the $3,000 to Dr. Nelson. The Respondent's holding of Deaver's funds for nearly three months, rather than properly delivering the funds to Dr. Nelson, constitutes a violation of Rule 1.15(b)(4).

Rule 1.15(a)(1) requires a lawyer or law firm to deposit funds held on behalf of a client into a trust account; and, Rule 1.15(b)(5) prohibits a lawyer from disbursing or converting funds of a client without the client's consent. Upon investigation by the Bar following a bar complaint filed by James Deaver, it was discovered that, subsequent to depositing the $3,000 into his trust account, the Respondent improperly transferred the funds to his operating account. Thereafter, the funds were seized by the Internal Revenue Service (IRS) for employment taxes that the Respondent had failed to pay, which prevented the Respondent from timely refunding the $3,000 to Deaver.

Likewise, in the Griner Case, the Respondent was retained in December 2015, to represent Brenda Griner (hereinafter "Griner") for a traffic matter in Westmoreland General District Court and was paid $800 in advance for legal fees; however, on the court date, the Respondent failed to appear. The Respondent subsequently explained to Griner that he was in another court during the trial and agreed to make a full refund of Griner's retainer. He further stated that he may be able to approach the court to have the matter reconsidered but that, in any event, he would refund some or all of the $800 paid. The Respondent never took any other action in furtherance of Griner's case and never provided a refund. Griner subsequently filed a bar complaint; and, upon investigation, the Respondent acknowledged that he had deposited the $800 into his operating account and never transferred them to his trust account. The Respondent's failure to properly deposit and maintain the funds of both Deaver and Griner in his trust account constitutes a violation of Rules 1.15(a)(1) and (b)(5).

Rule 1.15(c) further requires a lawyer to maintain certain minimum books and records demonstrating his or her compliance with the Rule's requirements regarding the safe-keeping of a client's property; and, in the Deaver Case and the Hensley Case, the Respondent failed to act in accordance with this Rule. In response to a subpoena *duces tecum* issued by the Bar in the Deaver Case, the Respondent was able to produce only portions of his trust account statements and failed to provide cash receipts journals, cash disbursements journals, or subsidiary ledgers related to the representation Deaver. Similarly, in the Hensley Case, the Respondent was unable

to produce any trust account records prior to August of 2015. The Respondent's failure to properly maintain his trust account records in these cases constitutes a violation of Rules 1.15(c)(1), 1.15(c)(2), 1.15(c)(2)(i), 1.15(c)(2)(ii), 1.15(c)(3), 1.15(c)(4).

Rule 1.16(a)(1) and (d)

The Board finds by clear and convincing evidence that the Respondent violated Rule 1.16(a)(1) in the Hensley Case and Rule 1.16(d) in the Deaver Case and Griner Case when he failed to properly terminate his representation.

Rule 1.16(a)(1) requires a lawyer to withdraw from representation of a client when the representation will result in a violation of the Rules of Professional Conduct. In the Hensley Case, the Respondent's employment as an Assistant Commonwealth's Attorney necessarily resulted in a conflict in his continued representation of Hensley. The Respondent's failure to withdraw from Hensley's case upon his acceptance of employment as an Assistant Commonwealth's Attorney thus constitutes a violation of Rule 1.16(a)(1).

In accordance with Rule 1.16(d), upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned, and properly handling records. Upon the Respondent's termination in the Deaver Case, he failed to forward the $3,000 received from Deaver for the psychosexual evaluation to Dr. Nelson, despite being asked numerous times to do so. Likewise, the Respondent refused to refund his client's funds in the Griner Case despite never appearing in court on the client's behalf and stating both to Griner and the Bar that the funds would be returned. These actions constitute violations of Rule 1.16(d).

Rule 3.3 and Rule 4.1

The Respondent violated Rule 3.3 and Rule 4.1 in the Deaver Case when he knowingly made false statements of fact to both his client and the Bar. On numerous occasions throughout his representation of Deaver, the Respondent stated that he had forwarded the client's funds to Dr. Nelson for the purpose of performing a psychosexual evaluation of Deaver. However, Dr.

Nelson never received the funds. During the Bar's investigation of the matter, a subpoena *duces tecum* was issued to the Respondent regarding the funds; and, the Respondent failed to comply with the subpoena in a timely manner. On June 21, 2016, Bar Counsel forwarded to the Respondent a Notice of Noncompliance and Request for Interim Suspension that stated, in pertinent part, that if the Respondent did not comply with the subpoenas *duces tecum* by or before July 1, 2016, Bar Counsel would request an interim suspension until the Respondent did comply with the subpoenas *duces tecum*. On August 26, 2016, a hearing was held before the Disciplinary Board, and the Respondent was asked if he had refunded the $3,000 to James Deaver. The Respondent stated that he had done so; however, the check was later dishonored due to insufficient funds as a result of the funds in the Respondent's operating account being seized by the IRS. The Respondent subsequently informed the Bar that he reissued a check to Deaver on August 25, 2016, yet Deaver has not received the check. The Board finds that the Respondent knew that he had not returned the funds to Deaver and that he had intentionally lied to the Board. These continued intentional misrepresentations to both James Deaver and the Bar regarding the status of the case and whether he had forwarded the funds to Dr. Nelson constitute violations of Rules 3.3(a) and 4.1(a).

Rule 8.1

Rule 8.1 of the Rules of Professional Conduct governs disciplinary matters before the Bar and prohibits lawyers from making false statements of material fact, failing to respond to demands for information, or otherwise obstructing an investigation be a disciplinary authority. As a result of his conduct as set forth herein, numerous bar complaints were filed against the Respondent; and, the Board finds that the Respondent intentionally failed to cooperate in resolving the complaints and intentionally obstructed the investigations in violation of Rule 8.1.

In the Deaver Case, the Respondent not only lied to Deaver and the Bar regarding the status of sending the client's funds to Dr. Nelson, but he also lied to the investigator assigned to investigate the complaint as well as Assistant Bar Counsel in stating that he had mailed the check. In doing so, the Respondent violated Rule 8.1(a).

Furthermore, in the Deaver, Griner, and VSB Cases, the Respondent was sent a letter by the Bar providing him with copies of the complaints and informing him of his duty to respond to the complaints and comply with the Bar's demands for information. Nevertheless, the Respondent refused to respond to the bar complaints, which the Board finds to be an intentional violation of Rule 8.1(c).

Following the Respondent's refusal to respond and during the course of the Bar's investigations of each of the bar complaints filed against the Respondent, numerous subpoenas *duces tecum* were issued summoning the Respondent to produce documents to the Bar regarding the incidents of misconduct alleged in the complaints against him. In the Deaver, Hensley, VSB, and Burrell Cases, the Respondent failed to respond to the subpoenas in a timely manner, which necessitated the scheduling of a hearing for consideration of the Bar's request that the Respondent's license to practice law be suspended until he complied with the subpoenas. Although the Respondent did produce documents prior to the hearing in each case, his responses were insufficient; and, in the Deaver Case, he testified at the hearing that he had not produced all the documents in his possession. The Respondent's intentional failure to respond to the subpoenas *duces tecum* in a timely manner, thereby necessitating the scheduling of hearings for consideration of a Request for Interim Suspension constitutes violations of Rule 8.1(d).

Rule 8.4(c)

The Board finds by clear and convincing evidence that the Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation adversely reflecting on his fitness to practice law in violation of Rule 8.4(c) in his representation of Mullins in the VSB Case. In the subpoena *duces tecum* issued by the Bar, the Respondent was asked to provide documentation pertaining to any communications with Mullins regarding whether he wished to continue the appeal after it was dismissed due to failure to file the petition for appeal and documentation of any notification to Mr. Mullins stating that the appeal was dismissed. In response to the subpoena, the Respondent produced two letters. The first letter, dated July 21, 2016, provided notice to Mullins that Respondent had missed the appeal and that Mullins had a

right to file a delayed appeal. The second letter purported to be a letter for Mullins to send to the Court of Appeals requesting new counsel to assist with his appeal. However, during the course of the investigation, Mullins stated that he never received such letters and, moreover, had received no communication whatsoever from the Respondent since January of 2016. The Respondent's assertion that he sent Mullins a letter dated July 21, 2016, informing him that the Respondent had failed to perfect his appeal when, in fact, no such letter was sent or received by Mullins constitutes a violation of Rule 8.4(c).

THE BOARD'S FINDINGS

Having received the Stipulations received into evidence as Exhibit 47 which admit the violations contained in the Certification received into evidence as Exhibit 1and having considered the testimony and evidence presented at the hearing, the Board recessed to deliberate; and, after due deliberation, reconvened and stated its finding that the VSB had proven, by clear and convincing evidence, each of the Rule violations charged. The Board then reconvened for the sanction phase of the hearing, as addressed herein.

SANCTION PHASE OF HEARING

After the Board announced its findings by clear and convincing evidence that the Respondent had committed the Rule violations charged in the Certification, it received further evidence regarding aggravating factors applicable to the appropriate sanction for the conduct of the Respondent underlying the Rule violations. The VSB relied upon Exhibit 48 concerning Respondent's prior disciplinary record, thereafter resting its case.

Subsequently, the Board heard evidence regarding mitigating factors applicable to the appropriate sanction. Respondent testified on his own behalf and also relied upon testimony from James Leffler, who qualified as an expert in the field of mental health and substance abuse relating to attorneys practicing in the Commonwealth of Virginia; and, Jane Wrightson,

Commonwealth Attorney for Northumberland County. The Respondent testified that, during the period in which each of these incidents of misconduct occurred, he was struggling with numerous personal issues. Not only did one of his clients overdose shortly after the Respondent negotiated his release from prison, but a close friend and mentor of the Respondent's also committed suicide, and the Respondent felt that he was, in part, to blame because he failed to notice that his friend was planning to do so. The Respondent also testified that, during this time, his father became a Commonwealth's Attorney and left him to run their firm on his own.

Following the Respondent's testimony, Mr. Leffler provided testimony regarding the Respondent's depression during the period in which the violations occurred. Mr. Leffler's testimony indicated that the Respondent met the criteria for major depression which, in his opinion, was brought on by several events, including the suicide of a close friend and the death of a client, among other incidents, all of which were compounded by the stress of running a small business.

The Respondent then called Commonwealth Attorney Jane Wrightson as his final witness, who provided testimony regarding her hiring of the Respondent and his efforts to address his misconduct. Ms. Wrightson testified that the Respondent was a good, smart lawyer and worked well with others. Respondent's Exhibits 1-3 were admitted into evidence, without objection, during this phase of the hearing.

DISPOSITION

At the conclusion of the evidence in the sanctions phase of this proceeding, the Board recessed to deliberate. After due deliberation and review of the foregoing findings of fact, upon review of Exhibits 1-49 presented by Bar Counsel on behalf of the VSB, upon review of Respondent's Exhibits 1-3, upon the testimony from the witness presented on behalf of the VSB and upon the testimony of witnesses presented by Respondent, the Board reconvened and stated

its finding that, when considered together, Respondent's pattern of violations over such a limited period of time, along with his prior disciplinary record, demonstrate a severe failure to uphold his duties to his clients and the profession. The Board's finding is mitigated by the Respondent's evidence regarding his personal and emotional problems during the period in which the violations occurred, as well as his relative inexperience in firm management as a solo practitioner, his demonstration of remorse, and his acknowledgement of the severity of his breach of duty to his clients during the timeframe in question. The Board also notes that the Respondent has taken action to rectify his conduct and prevent future violations, including attending counseling.

Therefore, upon consideration of the evidence and the nature of the misconduct committed by the Respondent, it is ORDERED, by majority vote of the Board, that the Respondent's license to practice law in the Commonwealth of Virginia is suspended for a period of two (2) years, effective April 28, 2017. The Respondent is also advised that he should continue counseling with Lawyers Helping Lawyers.

It is further ORDERED that, as directed in the Board's April 28, 2017 Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the two (2) year suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. Respondent shall give such notice within 14 days of the effective date of April 28, 2017 and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of April 28, 2017, the Respondent shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within 60 days of the effective day of the suspension. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Opinion and Order to Respondent, Nicholas Caron Smith, at his address of record with the Virginia State Bar, being P.O. Box 59, Mt. Holly, VA 22524, and his alternate address of record, being Northumberland Commonwealth Attorney's Office, 39 Judicial Place, Heathsville, VA 22473, by certified mail, return receipt requested; by regular mail to Respondent's Counsel, James C. Breeden and Jeffrey P. Matthews, at Breeden & Breeden, 265 Steamboat Road, Irvington, VA 22480; and by hand delivery to Prescott L. Prince, Assistant Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

This is Order is final.

ENTERED this 23 day of May, 2017.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Sandra L. Havrilak

Digitally signed by Sandra L. Havrilak
DN: cn=Sandra L. Havrilak, o, ou, email=slhavrilak@havrilaklaw.com, c=US
Date: 2017.05.23 15:57:05 -04'00'

Sandra L. Havrilak, Acting Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN RE: VSB DOCKET Choose an item. Click here to enter text.

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PRE-HEARING ORDER

In accordance with procedures adopted by the Board to facilitate presentation of evidence in matters before the Board, it is hereby

ORDERED that this matter shall be heard on Click here to enter a date. at Click here to enter text. a.m. in the Click here to enter text., at the Click here to enter text., Richmond, Virginia 23219.

It is further ORDERED that by Click here to enter a date., Counsel for the parties (and/or any pro se parties) shall file with the Clerk of the Disciplinary System ("Clerk") a list and all exhibits proposed to be introduced at the misconduct stage of the hearing. (This filing need not include exhibits which may be used for rebuttal or for impeachment.) Failure to comply with this paragraph in a timely fashion may be grounds, absent good cause shown, to bar introduction of the exhibits at the hearing of this matter.

It is further ORDERED that by Click here to enter a date., Counsel for the parties (and/or any pro se parties) shall file with the Clerk witness lists setting forth the name of each witness the party intends to call. This includes fact witnesses, character witnesses, expert witnesses and witnesses who may be called for the sanctions phase of the hearing if necessary. This includes witnesses who will be called in person as well as those whose testimony will be presented by affidavit, letter, deposition or report. Bear in mind that alternatives to live testimony may or may not be accepted by the Board. Failure to identify any witness in a timely fashion

may be grounds, absent good cause shown, to bar any such witness.

The parties are reminded that, in proceedings before this Board, the rules of evidence are not strictly applied. As a result, the Board may entertain evidence by letter, affidavit or via other documents containing hearsay, where the declarant is not subject to cross-examination, the evidence is offered on matters which are collateral to the central issues or cumulative, or the witness is beyond the Board's subpoena power. The parties should carefully consider and balance the need for live testimony versus the burden on the witness and the collateral nature of his or her testimony. At times, the parties may choose, and the Board has accepted, depositions and other forms of testimony taken and preserved in other proceedings even when that testimony does address central issues. Submitting any such alternative forms of evidence to the opposing party in advance of trial will minimize the chance of any claim of surprise and maximize the admissibility of the evidence. This type of evidence is given such weight as the Board determines is appropriate. Finally, notwithstanding the absence of discovery, the parties may agree to take depositions de bene esse of witnesses who are not available or for whom appearance at the hearing would be an undue burden when considering the nature of their testimony.

It is further ORDERED that by Click here to enter a date., Counsel for the parties (and/or any pro se parties) shall file with the Clerk any objections to exhibits filed hereunder. Exhibits not objected to in writing will be deemed admitted at the hearing. Objections shall be to particular numbers and must state the reason for the objection.

It is further ORDERED that the parties are strongly encouraged to meet and enter into stipulations of fact and/or disciplinary violations. Accordingly, the parties are directed to communicate regarding the proposed stipulations and file any agreed stipulations on or before Click here to enter a date.**Error! Reference source not found.**. In the event the

parties are unable to enter into any stipulations, each party or his counsel shall file with the Clerk a certification that they have exercised due diligence and made a good faith effort to enter into stipulations, but have been unable to do so. This certification shall be filed with the Clerk by the date set out above for the filing of stipulations.

It is further ORDERED that a Pre Hearing Conference call shall be held on this matter on Click here to enter a date., at Click here to enter text. a.m., with the participation of all parties and/or their counsel and the officer of the Board who will preside at the hearing. The purpose of this Pre Hearing Conference is to consider the extent to which the parties have complied with this order and the rules of the Supreme Court of Virginia and to consider any other motions either party wishes to make prior to the hearing. Any such pretrial motions shall be filed with the Clerk 3 days prior to the conference call.

Motions for continuances of any of the dates in this Order are strongly discouraged and are only granted under the most dire of circumstances. Any such motion shall be made promptly following first notice of the hearing date or the discovery of the circumstances giving rise to the motion or the motion will be denied. Motions heard less than 10 days prior to the hearing date are rarely granted.

Should additional days be needed to hear this matter, then those dates shall be set at the initial hearing. No party shall be precluded from offering probative, non-cumulative evidence should the hearing not be completed in one day. The parties, however, are urged to consider seriously pre-trial stipulations which will minimize hearing delays, help keep the hearing focused on the issues and minimize the inconvenience of the witnesses.

Any proposed agreed disposition reached by Counsel (and/or any pro se parties) shall be presented to the Board not later than the Friday next preceding the hearing; otherwise, the Board

will treat the agreed disposition as a stipulation of facts and misconduct.

For the purposes of this Order and any filings in this matter, filing with the Clerk shall be accomplished by filing electronically via email to clerk@vsb.org, hand delivery or first class mail. Electronic filings must be PDF files and shall be bookmarked according to each exhibit number in the exhibit list. The filer has the responsibility of ensuring that electronic filings have been received by the Clerk. When this Order specifies that an item be filed with the Clerk of the Disciplinary System by a certain date, that means that the item must be received by the Clerk by 4:45 p.m. on that date. All filings in this matter shall include a certification that Counsel for the parties (and/or any pro se parties) has served a full and accurate copy of the filing upon opposing counsel or pro se parties via hand delivery or first class mail.

It is further ORDERED that an attested copy of this Order be mailed to the Respondent by certified mail to Choose an item. Virginia State Bar address of record, at Click here to enter text., and a copy by regular mail to Click here to enter text., his counsel, at Click here to enter text., and a copy hand-delivered to Click here to enter text., Choose an item., Virginia State Bar**,** 1111 East Main Street, Suite 700, Richmond, VA 23219.

ENTERED this Click here to enter text. day of Click here to enter text., 20Click here to enter text.

Virginia State Bar Disciplinary Board

_____

Click here to enter text., Choose an item.

Revised 1/9/2018

Respondent:_____

Respondent's Counsel: _____

Bar Counsel: _____

Court Reporter: _____

VSB Docket No(s): _____

Date:_____

AGENDA FOR PRE-HEARING CONFERENCE

I. Convene pre-hearing conference In re_____

VSB Docket No. _____

A. Swear court reporter [1], or, if none, announce the hearing is being recorded.

B. Identification of participants:

Bar Counsel_____

Respondent/Counsel_____

Clerk's Office_____

C. Identify presiding officer and affirm that he/she does not have any personal or financial interest that would impair, or reasonably could be perceived to impair, his/her ability to be impartial.

II. Checklist.

A. Are all parties aware of the date, time, and location of the hearing?

B. Has a timely answer been filed?

C. [If the Subcommittee considered an Investigative Report when it set the Complaint for hearing before the District Committee or to certify the Complaint to the Board] Has Bar Counsel furnished a copy of the Investigative Report to the Respondent? [Pt. 6, § IV, Para. 13D] [2]

D. Have the witness lists and exhibits been timely filed under the Pre-Hearing Order?

---

[1] Do you swear or affirm that you will well and truly record the incidents of this pre-hearing conference call?

[2] Unless attached to or referenced in the Investigative Report, Bar Counsel is not required to produce any information/document obtained in confidence from any law enforcement or disciplinary agency or document protected by attorney-client privilege or work product doctrine.

E. Are there any objections to the witnesses or exhibits and if so, have the objections been timely filed?

(1) Unless the Respondent has filed an objection to the Bar's pre-filed exhibits, they will be admitted into evidence at the hearing.

(2) If the Respondent has not pre-filed exhibits and a witness list, exhibits and witnesses will not be received at the hearing except for good cause shown.

F. What is the status of proposed stipulations and what can be done to facilitate same?

G. Are there any prehearing motions to be heard?

H. Is there any reason the matter can't go forward to hearing on the date scheduled?

I. What is the status of any proposed agreed disposition?

J. Can the matter be heard in one day and do any special arrangements need to be made for the presentment of the case?

K. Opening statements shall be brief and confined to the parties expectation of evidence to be presented and shall not be used for purposes of argument or testimony.

DISQUALIFYING FACTORS FOR SUBCOMMITTEE, DISTRICT COMMITTEE, AND DISCIPLINARY BOARD MEMBERS

Edward L. Davis
Bar Counsel
October 28, 2009

1. Do you have any personal or financial interest that might affect or reasonably be perceived to affect your ability to be impartial in this matter? Paragraph 13-14 A, Part Six, Section IV, Rules of the Supreme Court of Virginia.

2. Have you, or any member of your firm, been involved in any significant way with the matter now before the subcommittee, district committee, or board? Paragraph 13-14 E.1.

3. (Disciplinary Board only) Have your, or any member of your firm, served on the District Committee that certified the matter to the Board, or otherwise acted on the matter? Paragraph 13-14 E.2.

4. Would you be required to withdraw from consideration of, or presiding over, this matter under the Canons of Judicial Conduct adopted by the Supreme Court of Virginia? Paragraph 13-14 E.3.[1]

5. Have you previously represented the Respondent? Paragraph 13-14 E.4.

6. Have you disqualified yourself from participation in this matter because you believe that you are unable to participate objectively in consideration of the matter, or for any other reason? Paragraph 13-14 E.5.

---

[1] See for example the following Canons of Judicial Conduct for the State of Virginia, Part Six, Section III, *Rules of the Supreme Court of Virginia:*

Canon 2 (B). A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify as a character witness.

Canon 3 (E) *Disqualification* (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to, instances where:

(a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has more than a de minimis interest that could be substantially affected by the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of the relationship to either of them, or the spouse of such person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;
(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(Comments to the Rule: The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.)

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge' household.

F. *Remittal of Disqualification.* – A judge who may be disqualified by the terms of Section 3E may ask, or have the clerk of court ask, the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. Written evidence of the agreement shall be incorporated in the record of the proceeding.

7. Additional Note: Paragraph 13-14.B, Part Six, Section IV of the Rules of Court, provides that upon referral to the district committee of a complaint against a district committee or Disciplinary Board member, the member shall be recused from any service on the district committee or Board until dismissal of the complaint without the imposition of any form of discipline. Paragraph 13.14.C provides further that upon the final disposition of a Private Reprimand, a Public Reprimand, an Admonition, a Suspension or Revocation against a district committee or Board member, the member shall automatically be terminated from membership or further service on the district committee or Board. Upon the final disposition of any other form of discipline, COLD shall have the sole discretion to determine whether the member shall be terminated from membership or further service on the district committee or Board.

DISCIPLINARY BOARD ORDERS

DO'S AND DON'TS

THE DO'S	THE DON'TS
Address all pertinent factual allegations on contested matters in the Findings of Fact.	Don't overelaborate detail or particularization of unnecessary facts.
Resolve material conflicts in the evidence in the Findings of Fact.[1]	Don't fail to reconcile material conflicts in the evidence.
Analyze all alleged rule violations in the Conclusions of Law and discuss whether the burden of proof was met.	Don't simply say: "The rule violations have been established by clear and convincing evidence."
You must connect the rule violations to the facts. The Conclusions of Law section must connect the factual findings and the specific rule violations.	Don't assume that, just because you made factual findings in the Findings of Fact, you don't need to connect those Findings of Fact to the Conclusions of Law.
Make proper Findings of Fact, e.g.: *Respondent failed to notify the Complainant of the trial date. *Respondent used money in his trust account to pay personal bills, including payment of his daughter's tuition bills.	Don't make defective Findings of Fact, e.g.: *Complainant testified that respondent told her when the case was scheduled for trial. *Respondent <u>may</u> have used money in his trust account to pay personal bills, including his daughter's tuition bills.
Make proper Conclusions of Law: *For example: "We find that the burden of proof was met by clear and convincing evidence that…"	Don't make defective Conclusions of Law, e.g.: *"There was evidence that …"[2]

[1] In *Northam v. Va. State Bar*, 285 Va. 429, 737 S.E.2d 905 (2013), the Court stated: "**An attorney charged with a violation of professional responsibility is entitled to findings of fact that contain a clear statement of how the Board resolved disputed issues**." 737 S.E.2d at 911 (emphasis added.)

[2] The burden of proof in VSB disciplinary cases is **clear and convincing evidence**. (Paragraph 13-1.1, Rules of Court, Part Six, §IV.) Simply stating "there was evidence" does not establish that the burden of proof was met. The Supreme Court will have a clear understanding of the basis for the holding if the opinion states, **e.g.**, "we find that the burden of proof was met by clear and convincing evidence that Respondent used money in his trust account to pay … in violation of Rule of Professional Conduct 1.15."

MORE ON *NORTHAM* AND ITS CONSEQUENCES

In *Northam v. Va. State Bar*, 285 Va. 429, 737 S.E.2d 905 (2013), the Court stated: "**An attorney charged with a violation of professional responsibility is entitled to findings of fact that contain a clear statement of how the Board resolved disputed issues**." 737 S.E.2d at 911.

In *Northam* the SCV ruled that "lacking any factual determination by the Board as to Northam's knowledge of disqualification, we will not inspect the record to determine facts required to establish a violation of the rule." The Court further concluded:

> The Board was not required to establish that Northam knew why Lewis was disqualified but the **Board was required by the language of the Rule to establish by clear and convincing evidence that Northam's continued representation of Mr. Adams was with the knowledge that Lewis was disqualified from said representation**. Had the Board made this determination, we would have reviewed the entire record for reasonable inferences in support of its determination, and viewed conflicts in the evidence in the light most favorable to the Bar as the prevailing party. [Emphasis added.]

737 S.E.2d at 911.

The Court reversed the decision of the Board and dismissed the charge of misconduct.

APPELLATE REVIEW PARAMETERS

The Supreme Court of Virginia said in *Zaug*:

> **When we review a lawyer discipline proceeding, "the State Bar has the burden of proving by clear and convincing evidence that the attorney violated the relevant Rules of Professional Conduct**." *Weatherbee v. Virginia State Bar*, 279 Va. 303, 306, 689 S.E.2d 753, 754 (2010) (citing *Barrett v. Virginia State Bar*, 272 Va. 260, 268 n. 4, 634 S.E.2d 341, 345 n. 4 (2006);….

737 S.E.2d at 916 (bf and underlining added).

The SCV makes an "independent examination of the whole record, giving the **factual findings of the Disciplinary Board substantial weight** and viewing them as prima facie correct." *Ekwalla v. VSB* (SCV, unpublished decision, 12/8/2016), citing *Blue v. Seventh Dist. Comm.*, 220 Va. 1056, 1061-62, 265 S.E.2d 753, 757 (1980).

The SCV "view(s) the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the Bar." *Green v. VSB ex rel Seventh Dist. Comm.*, 27 Va. 775, 783 (2007).

These findings are "not given the weight of a jury verdict" but **will be sustained unless it appears they are not justified by a reasonable view of the evidence or are contrary to law**." Id. at 1062, 265 S.E.2d at 757.

The interpretation of the Disciplinary Rules, however, is a question of law we review de novo. *Zaug v. Virginia State Bar ex rel. Fifth Dist.-Section III Comm.*, 285 VA. 457, 462, 737 S.E.2d 914, 916-17 (2013).

Disciplinary Board Decisions: Through the Appellate Mirror

What is entailed in a lawyer's right to a meaningful appeal?

In *Kuchinsky v. Virginia State Bar*, 287 Va. 491, 756 S.E.2d 475 (2014), appellant argued that he had been denied a meaningful appeal because he could not properly determine which facts the District Committee considered in making its decision because it stated under each rule violation: "Respondent's actions that violated this rule include, but are not limited to, the following." The SCV resolved this issue against Kuchinsky, holding:

1. The procedures outlined in Part Six ensure the integrity of the disciplinary process and protect the rights of the attorney, citing to *Pappas v. VSB*, 271 Va. 580, 628 S.E.2d 534 (2006). 756 S.E.2d at 479.
2. The District Committee's determination satisfied Part 6, § IV, ¶ 13-16 (Y) because it included findings of fact, **explained the nature of Kuchinsky's misconduct that was established by those facts**, and stated what sanction was to be imposed. The Court elaborated: "Part 6, § IV, ¶ 13-16 (Y) does not require that a District Committee list the specific facts relied upon in finding individual rule violations." 756 S.E.2d at 480.
3. Kuchinsky further argued he was denied a meaningful appeal because the three-judge panel could not ascertain what facts the District Committee considered in making its decision. The Court pointed out that the rules specifically state that the three-judge panel is to determine "whether there is substantial evidence *in the record* upon which the District Committee could reasonable have found as it did." *Id*.

Note in the *Kuchinsky* case that the district committee decision, relied upon by the three-judge panel in upholding the decision, **explained the nature of Kuchinsky's misconduct that was established by those facts**. *See Kuchinsky*, CL13-71, Memorandum Order at pg. 5-6:

> The District Committee further found that it based its findings of misconduct, in part, on the following facts:
> 1. Appellant continued ownership interest in the property and pursued a partition of the property pursuant to his interest as set forth in the deed.
> 2. Appellant failed to formally terminate his representation prior to

filing suit against Person in district court and circuit court.

3. Appellant disregarded the Admonition from the Virginia State Bar as he continued to pursue his ownership interest in Person's property after March 3, 2010.
4. Appellant did not divest himself of his ownership interest until one year after he received Person's complaint to the Virginia State Bar.
5. Appellant accepted and recorded the deed after receiving the Admonition.
6. Appellant filed suit to partition the property after receiving the Admonition, thereby using the court system to enforce the deeded interest he knew violated the Rules of Professional Conduct.

See pg 3-4 of the *Kuchinsky* district committee determination, VSB Docket No. 11-031-0852428 for the exact language used by the district committee**.**

What must opinion writers include in opinions to support rule violations if the Board resolves <u>disputed</u> issues?

In *Northam v. Va. State Bar*, 285 Va. 429, 737 S.E.2d 905 (2013), the Court stated: "**An attorney charged with a violation of professional responsibility is entitled to findings of fact that contain a clear statement of how the Board resolved disputed issues**." 737 S.E.2d at 911.

In *Northam* there was a finding that "lacking <u>any</u> factual determination by the Board as to Northam's knowledge of disqualification, we will not inspect the record to determine facts required to establish a violation of the rule." The Court further concluded:

> The Board was not required to establish that Northam knew why Lewis was disqualified but the **Board was required by the language of the Rule to establish by clear and convincing evidence that Northam's continued representation of Mr. Adams was with the knowledge that Lewis was disqualified from said representation**. Had the Board made this determination, we would have reviewed the entire record for reasonable inferences in support of its determination, and viewed conflicts in the evidence in the light most favorable to the Bar as the prevailing party. [Emphasis added.]

737 S.E.2d at 911.

VIRGINIA:

BEFORE THE CIRCUIT COURT FOR THE CITY OF COLONIAL HEIGHTS

AUG 19 2013

VIRGINIA STATE BAR EX REL
THIRD DISTRICT COMMITTEE,
Complainant,

v. Case No. CL13-71

NEIL KUCHINSKY,
Respondent

MEMORANDUM ORDER

This cause came to be heard on the 19th day of June 2013, before a Three-Judge Court duly impaneled pursuant to Section 54.1-3935 of the Court of Virginia, 1950, as amended, consisting of the Honorable Ann Hunter Simpson, Judge Designate, the Honorable Walter W. Stout, III, Judge Designate, and the Honorable Charles E. Poston, Chief Judge Designate. The Virginia State Bar appeared through its Assistant Bar Counsel Kara L. McGehee, and the Respondent/Appellant appeared in person and through his counsel, Melvin Yeamans.

The panel dismissed the Bar's Motion to Strike and/or Exclude Certain Items from the Appellate Record and to Strike Arguments Not Preserved Below, and overruled the Bar's Objection to Appellant's Statement of Facts and Exhibits. The panel considered the record, as well as the arguments contained in the briefs and oral arguments by counsel.

A. Standard of Review

The standard of review in an appeal from a District Committee determination is whether there is substantial evidence in the record upon which the District Committee

could reasonably have found as it did. See Part 6, §IV, Paragraph 13-19(E) of the Rules of the Supreme Court of Virginia.

B. The Proceedings

The transcript and record having been filed, and the matter having been briefed in accordance with the Rules of the Supreme Court of Virginia, the Panel proceeded to hear argument from Assistant Bar Counsel and Appellant's counsel.

The issue before the Panel is whether there is substantial evidence in the record to support the District Committee's findings that the Appellant's conduct violated the following Rules of Professional Conduct:

> Rule 1.8 - Conflict of Interest and Prohibited Transactions
> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> > (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
> > (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
> > (3) the client consents in writing thereto.
>
> Rule 3.4 - Fairness to Opposing Party and Counsel
> A lawyer shall not:
> (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.
>
> Rule 8.4 - Misconduct
> It is professional misconduct for a lawyer to:
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

C. The Record and Findings of Fact

The record indicates that the District Committee convened on October 18, 2012, and took testimony of the Respondent/Appellant, Neil Kuchinsky, and Virginia State Bar

Investigator Robert Heinzman. The District Committee also received Exhibits into evidence. The testimony of the witnesses, along with the exhibits admitted, provided a substantial evidentiary basis for the factual finding made by the District Committee. Those factual findings appear in the District Committee Determination and are quoted here in full:

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

2. Dillwyn Person ("Person") hired Respondent to represent him in an estate matter in March 2008. Person and Respondent entered into a contingency fee agreement wherein Respondent would get one third of the first $50,000 recovered, or its value, and one fourth of the value of anything recovered in excess of that amount. Person's father died intestate in 2007, and he had five children and numerous assets at the time of his death.

3. Respondent drafted and Person signed a "Quitclaim Deed" on June 27, 2008, giving Respondent a 25% interest in six specific parcels of land, "as well as 25% of any other real estate interest I may have that may appear of record." This deed was recorded in the Greensville County Clerk's office on September 3, 2008.

4. Person discharged Respondent in the summer of 2008, after Respondent had filed suit on his behalf and entered an appearance. Before Respondent formally withdrew or had new counsel substituted, Person re-hired him. Respondent and Person entered into a new "Retention Agreement" on November 3, 2008. That agreement acknowledged that Respondent had earned his "25% real estate quitclaim from Mr. Kuchinsky (sic.)"

5. On December 8, 2008, the Virginia State Bar received a Complaint

submitted by Clinton Person, Dillwyn Person's brother, against Mr. Kuchinsky. The Complaint concerned the Quitclaim Deed prepared by Respondent and signed by Dillwyn Person on June 27, 2008 (paragraph 3, above) A subcommittee of the Third District Committee, Section 1, found that Respondent had violated Rule 1.8(j) of the Rules of Professional Conduct by acquiring a proprietary interest in the cause of action or subject matter of litigation. It issued a Private Admonition without terms ("the Admonition") to Respondent. The Admonition was served on Respondent on March 3, 2010. Respondent informed Person of the Admonition during a later conversation.

6. An order was entered on March 24, 2010, in the matter of *Dillwyn Person v. Lyndia P. Ramsey, et als,* appointing C. Ridley Bain as Special Commissioner for the purpose of conveying certain property. On March 30, 2010, the commissioner executed a Special Commissioner's Deed, conveying 25% of the interest in two parcels of real estate to Respondent and 75% to Person. The deed was recorded on May 5, 2010.

7. Respondent continued to be Person's attorney of record for several months after the March 24, 2010 order was entered, although he did not make any additional court appearances on Person's behalf.

8. Respondent filed a Warrant in Debt in the Greensville General District Court on May 10, 2010. He obtained a default judgment against Person on June 8, 2010, in the amount of $2,896 in principal, $6,756 in attorney's fees, and $53 in court costs. He recorded the judgment as a lien against the jointly owned real estate (hereinafter, "the properties,") the same day.

9. Respondent filed a partition suit in the Greensville County Circuit Court on May 18, 2010, (*Kuchinsky v. Person*, CL2010-136). He did not serve Person

immediately, but attempted to negotiate an agreement with him wherein Person would pay Respondent for Respondent's interest in the properties. Prior to the completion of that transaction, Person filed the subject complaint with the Virginia State Bar. Person enclosed a copy of the March 30, 2010 deed with the complaint.

10. After being unable to resolve the matter by agreement, Respondent obtained service on Person in January 2011. The Greensville County Circuit Court referred the case to a Commissioner in Chancery, Charles G. Butts, Jr. Commissioner Butts conducted a hearing on May 25, 2011.

11. During that hearing, Respondent testified about his attempts to get Person to cooperate in determining a value for the properties and stated that the houses were both uninhabitable. Respondent and Person also testified that they had each made payments toward the cost of maintenance and taxes for the property.

12. In late 2011, Person and Respondent negotiated an agreement whereby Person was to sign a Promissory Note for fees and costs owed to Respondent under the Retainer Agreement dated November 3, 2008, secured by a deed of trust. On November 3, 2011, Respondent executed and recorded a deed conveying his 25% interest in the properties back to Person.

13. On December 8, 2011, the Circuit Court entered an order of nonsuit in *Kuchinsky v. Person*, CL2010-136, at Respondent's request.

The District Committee further found that it based its findings of misconduct, in part, on the following facts:

1. Appellant continued ownership interest in the property and pursued a partition of the property pursuant to his interest as set forth in the deed.

2. Appellant failed to formally terminate his representation prior to filing suit against Person in district court and circuit court.

3. Appellant disregarded the Admonition from the Virginia State Bar as he continued to pursue his ownership interest in Person's property after March 3, 2010.

4. Appellant did not divest himself of his ownership interest until one year after he received Person's complaint to the Virginia State Bar.

5. Appellant accepted and recorded the deed after receiving the Admonition.

6. Appellant filed suit to partition the property after receiving the Admonition, thereby using the court system to enforce the deeded interest he knew violated the Rules of Professional Conduct.

D. Decision

Upon completion of argument, the hearing was recessed to give the Panel the opportunity to further review the record and to deliberate. The Chief Judge announced that it was the unanimous decision of the Panel that there is substantial evidence in the record upon which the District Committee could reasonably found as it did. The District Committee's determination that Appellant's conduct violated Rules 1.8(a), 3.4(d), and 8.4(a) and its Public Reprimand of Respondent/Appellant are, therefore, affirmed.

It is FURTHER ORDERED that the Clerk of this Circuit Court shall send a copy *teste* of this Order to the Respondent by Certified Mail, at Kuchinsky & Yeamans, P.C., 200 Lakeview Ave., Suite B, Colonial Heights, Virginia 23834, the Respondent's last address of record with the Virginia State Bar, and send copies *teste,* by first class mail to Assistant Bar Counsel, Kara L. McGehee, Esquire, at 707 East Main Street, Suite 1500, Richmond, Virginia 23219, to Respondent's counsel, Melvin E. Yeamans, Jr., Esquire, at

Kuchinsky & Yeamans, P.C., 200 Lakeview Avenue, Suite B, Colonial Heights, Virginia 23834 and to Barbara Sayers Lanier, Clerk of the Disciplinary System, Virginia State Bar, at 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED: August 9, 2013

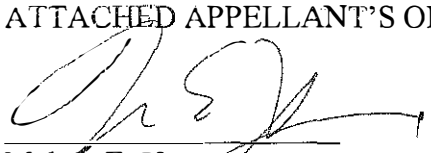
Charles E. Poston, Chief Judge

A COPY, TESTE:
STACY L. STAFFORD, CLERK
COLONIAL HEIGHTS CIRCUIT COURT
BY: Deputy Clerk

SEEN:

Kara L. McGehee, Assistant Bar Counsel
Virginia State Bar
707 East Main St., Ste. 1500
Richmond, VA 23219
804-775-0560

SEEN AND OBJECTED TO FOR THE REASONS SET FORTH IN THE ATTACHED APPELLANT'S OBJECTIONS:



Melvin E. Yeamans
Co nsel for Appellant
Kuchinsky and Yeamans, PC
200 La eview Ave., Ste. B
Colonial Heights, VA 23834-0125

OBJECTIONS OF RESPONDENT NEIL KUCHINSKY TO
MEMORANDUM ORDER IN CASE NUMBER CL 13-71

Respondent Neil Kuchinsky, by counsel, objects to the Memorandum Order of the Three-Judge Court (hereinafter, "the Panel"), for the following reasons:

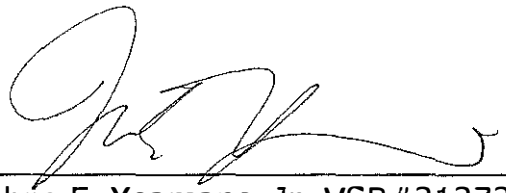
1. The Panel's Memorandum Order fails to include any of its own findings of fact and conclusions of law, much less all the relevant facts and conclusions of law (only what the VSB itself, *sua sponte*, added to this Order); it therefore fails to address the respondent's arguments set forth in its brief and before the panel, the most important fact being the *entirety* of the content of the second contract between the attorney and his client, which make clear his reasonable and bona fide efforts to comply with the very rule he stands charged with violating. Conclusions of law that merely state, in essence, 'it was all reasonable', do not provide a proper framework for appeal and for setting forth Assignments of Error to the Virginia Supreme Court.

2. It is not reasonable, as a matter of law, to expect the respondent to be able to meaningfully respond to or appeal from District Committee findings that include the words, "Respondent's actions that violated this rule include, *but are not limited to* the following..." (emphasis added), as in the alleged violations of Rule 3.4 and Rule 8.4; it is not reasonable to discipline an attorney "for failure to formally terminate his representation" prior to filing suit against the client, where nothing remains to be done in the underlying cases; to find (implicitly) that respondent's creation of a new contract with his client were not "steps taken in good faith" to comply with rules or the "ruling of a tribunal"; to find that the respondent "disregarded" the prior private admonition, when the new disciplinary action alleged a different violation of the

rules under the same underlying facts; it is unreasonable, and a blatant untruth, to find that the respondent "accepted and recorded" the deed in question, when in fact this was accomplished by way of a court order objected to by the respondent, and then drafted and recorded by a special commissioner under that order; to find that the respondent "knew" he violated the rules of professional conduct, when a cogent, unrebutted explanation was provided for his actions (i.e., drafting, in good faith, a new agreement with his client*); where the client in question could find no other attorney to represent him because he had no cash up front;* where the rule the respondent is now charged with violating offers precisely the roadmap counsel sought to use in cases where the alternative is that *the client would go unrepresented;* and where, despite all that has transpired, the respondent has still not been fully paid.

3. Furthermore, the record lacked "substantial evidence" upon which the District Committee could have reasonably found as it did.

WHEREFORE, the respondent, by Counsel, objects to the entry of the proposed Memorandum Order.



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287 Va. 491
756 S.E.2d 475

Neil KUCHINSKY
v.
VIRGINIA STATE BAR, ex rel. THIRD DISTRICT COMMITTEE.

Record No. 131656.

Supreme Court of Virginia.

April 17, 2014.

[756 S.E.2d 477]

Melvin Yeamans, Jr. (Kuchinsky & Yeamans, Colonial Heights, on briefs), for appellant.

Christy Warrington Monolo, Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General; Wesley G. Russell, Deputy Attorney General; Peter R. Messitt, Senior Assistant Attorney General & Chief, on brief), for appellee.

Present: All the Justices.

Opinion by Justice ELIZABETH A. McCLANAHAN.

In this appeal of right from an attorney disciplinary proceeding before a three-judge panel appointed pursuant to Code § 54.1–3935, we consider whether an attorney violated Rules 1.8(a), 3.4(d), and 8.4(a) of the Virginia Rules of Professional Conduct.

I. Facts and Proceedings

A. *Background and Prior Private Admonition*

Neil Kuchinsky is an attorney licensed to practice law in the Commonwealth. In March 2008, Dillwyn T. Person ("Person" or "Dillwyn") hired Kuchinsky to represent him in connection with Dillwyn's claim for a portion of his father's estate.[1] Person and Kuchinsky entered into a contingency fee agreement providing that Kuchinsky would receive one-third of the first $50,000 recovered, or its fair market value, and one-fourth of anything recovered in excess of that amount, or its fair market value. Kuchinsky then filed a partition suit on behalf of Person against Person's siblings in the Greensville County Circuit Court. After filing the partition suit, Kuchinsky drafted a quitclaim deed, which was executed by Person. The quitclaim deed granted Kuchinsky a 25% interest in any "right, title, and interest" Person may possess in the six parcels of land that were the subject matter of the partition suit against Person's siblings "as well as 25% of any other real estate interest [Person] may have that may appear of record." The quitclaim deed was recorded in the Greensville County Circuit Court.[2]

In December 2008, the Virginia State Bar ("VSB") received a complaint submitted by Dillwyn's brother, Clinton Person. The complaint alleged that Kuchinsky's acquisition of a 25% quitclaim interest in the subject matter of the underlying partition suit was a "clear conflict of interest." In an agreed-upon disposition, a subcommittee of the Third District Committee, Section I, of the VSB, found that Kuchinsky violated Rule 1.8(j) of the Virginia Rules of Professional Conduct by acquiring "a proprietary interest in the cause of action or subject matter of litigation." [3] As a result, Kuchinsky was issued a private admonition without terms on February 18, 2010.

B. *Events Occurring After the Private Admonition*

On March 24, 2010, an Order was entered in the partition suit between Person and his siblings appointing a Special Commissioner for the purpose of conveying the property that was subject to the suit. The Special Commissioner then executed a deed conveying to Kuchinsky a 25% interest and to Person a 75% interest in two specific parcels

of real estate, 211 Wadlow Street and 640 Clay Street in Emporia, Virginia. After the deed was issued, Kuchinsky wrote to the Special Commissioner and asked him to "[p]lease file

[756 S.E.2d 478]

'our' deed as soon as possible." [4] The Special Commissioner's Deed was then recorded in the Greensville County Circuit Court.

After the Special Commissioner's deed was recorded, Kuchinsky proceeded to file two actions against Person. First, Kuchinsky filed a Warrant in Debt against Person in the Greensville County General District Court. The court entered a default judgment against Person for $2,896 in principal, $6,756 in attorney's fees, and $53 in court costs. The same day, Kuchinsky recorded the default judgment as a lien against the jointly owned properties. Secondly, Kuchinsky filed a suit against Person in the Greensville County Circuit Court to partition the jointly owned properties.

Before serving Person in the partition suit, Kuchinsky sought to negotiate an agreement by which Person would pay Kuchinsky for his interest in the properties. Prior to the completion of that transaction, however, Person filed a complaint with the VSB in September 2010 alleging that Kuchinsky "took total advantage of my faith and ignorance in him for his self-interest." Subsequently, during the pendency of the VSB's investigation into Person's complaint, Kuchinsky served Person with notice of the partition suit. The case was referred to the Commissioner in Chancery for Greensville County, who conducted a hearing.[5]

In June 2012, the VSB filed a Charge of Misconduct against Kuchinsky pursuant to the Rules of the Virginia Supreme Court, Part 6, § IV, ¶ 13–16(A). Specifically, the VSB alleged that Kuchinsky violated Rules 1.8(a), 3.4(d), and 8.4(a)[6] through his conduct towards Person after the issuance of the prior admonition. After referral to the Third District Committee, which conducted a hearing, the Committee found, by clear and convincing evidence, that Kuchinsky had violated Rules 1.8(a), 3.4(d), and 8.4(a) of the Rules of Professional Conduct and issued Kuchinsky a public reprimand without terms. The District Committee then issued a Written Determination explaining its decision. In its Determination, the District Committee made several findings of fact. Then, in a section titled "Nature of Misconduct," the District Committee listed the rules that it found Kuchinsky had violated. Under each rule, the District Committee stated that "[r]espondent's actions that violated this rule include, but are not limited to, the following" and provided a non-exhaustive list of Kuchinsky's

[756 S.E.2d 479]

actions it found to be in violation of each rule.[7]

Kuchinsky filed a notice of appeal and demand for review of the District Committee's determination by a three-judge panel, pursuant to Code § 54.1–3935.[8] After each party submitted briefs, the panel heard argument and issued an Order holding that there was substantial evidence in the record to support the District Committee's decision. Subsequently, the panel issued a Memorandum Order incorporating the District Committee's findings of fact in full and affirming its decision.

Kuchinsky appeals.

II. Analysis

A. *Standard of Review*

To prove that an attorney violated the Rules of Professional Conduct, the VSB must present clear and convincing evidence of the violation. *Livingston v. Virginia State Bar,* 286 Va. 1, 10, 744 S.E.2d 220, 224 (2013).

When reviewing a disciplinary decision by a three-judge panel:

"[W]e will make an independent examination of the whole record, giving the factual findings ... substantial weight and viewing them as prima facie correct. While not given the weight of a jury verdict, those conclusions will be sustained unless it appears they are not justified by a reasonable view of the evidence or are contrary to law."

Green v. Virginia State Bar ex rel. Seventh Dist. Comm., 274 Va. 775, 783, 652 S.E.2d 118, 121 (2007) (quoting *El–Amin v. Virginia State Bar,* 257 Va. 608, 612, 514 S.E.2d 163, 165 (1999)). Furthermore, "[c]onsistent with well-established appellate principles, we view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the Bar, the prevailing party below." *Id.*

B. *Kuchinsky's "Right to a Meaningful Appeal"*

In his first assignment of error, Kuchinsky argues that he was deprived of his right to a meaningful appeal because the District Committee's Determination stated under each finding of a Rule violation: "Respondent's actions that violated this rule include, *but are not limited to,* the following." (Emphasis added.) Because the listings of facts which followed were not exhaustive, Kuchinsky asserts that the three-judge panel could not properly determine which facts the District Committee considered in making its decision.

An attorney subject to disciplinary proceedings is entitled to notice and the opportunity to be heard. *Pappas v. Virginia State Bar,* 271 Va. 580, 587, 628 S.E.2d 534, 538 (2006). In construing this right, we have held that "it is only necessary that the attorney be informed of the nature of the charge preferred against him and be given an opportunity to answer." *Moseley v. Virginia State Bar,* 280 Va. 1, 3, 694 S.E.2d 586, 589 (2010) (internal quotation marks omitted). Although we have not previously considered the extent of an attorney's due process rights in the context of an appeal, we have held that "[t]he procedures outlined in Part Six [of the Rules of the Supreme Court of Virginia] ensure the integrity of the disciplinary process and protect the rights of the attorney." *Pappas,* 271 Va. at 587, 628 S.E.2d at 538.

Part 6, § IV, ¶ 13–16(Y) of the Rules of Court establishes what a District Committee must include in its written determination. Specifically, the Rule states:

If a District Committee finds that the evidence shows the Respondent engaged in Misconduct by clear and convincing evidence, then the Chair shall issue the District Committee's Determination, in writing, setting forth the following:

[756 S.E.2d 480]

1. Brief findings of the facts established by the evidence;

2. The nature of the Misconduct shown by the facts so established, including the Disciplinary Rules violated by the Respondent; and

3. The sanctions imposed, if any, by the District Committee.

In the case at bar, the District Committee's Determination satisfied each of the three requirements. It included findings of fact, explained the nature of Kuchinsky's misconduct that was established by those facts, and stated what sanction was to be imposed. Part 6, § IV, ¶ 13–16(Y) does not require that a District Committee list the specific facts relied upon in finding individual rule violations. Therefore, the District

Committee did not err by failing to include an exhaustive list for each violation.

Furthermore, Kuchinsky's argument that the three-judge panel could not ascertain what facts the District Committee considered in making its decision lacks merit. A three-judge panel appointed pursuant to Code § 54.1–3935 reviews a District Committee determination to determine "whether there is substantial evidence *in the record* upon which the District Committee could reasonably have found as it did." Va. Sup.Ct. R., Part 6, § IV, ¶ 13–19(E) (emphasis added). Thus, in addition to the District Committee's findings of fact, a three-judge panel has the benefit of considering the entire record in reviewing a District Committee's Determination. Accordingly, we hold that Kuchinsky was not deprived of his right to a meaningful appeal in this case.

C. *Rule 1.8(a)*

Rule 1.8(a) of the Rules of Professional Conduct states that:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

The District Committee found that Kuchinsky violated Rule 1.8(a) through his "continued ownership interest in [Person's] property and his pursuit of a partition of the property pursuant to his interest as set forth in the deed" and through his "failure to formally terminate his representation prior to filing suit against Person in district court and circuit court."

1. Kuchinsky Acquired a 25% Interest in Two Specific Properties Through the Special Commissioner's Deed

Kuchinsky argues that his *continued* interest in Person's property was not an *acquisition* of an interest in the property. To violate Rule 1.8(a), an attorney must "knowingly *acquire* an ownership, possessory, security or other pecuniary interest adverse to a client." (Emphasis added.)

While the quitclaim deed gave Kuchinsky a 25% interest in Person's undivided ownership interests in the six properties at issue in the underlying partition suit against Person's siblings, the Special Commissioner partitioned, at Kuchinsky's request as counsel for Person, the various interests in those properties. The Special Commissioner's Deed then conveyed to Kuchinsky a 25% interest and to Person a 75% interest in two of the six properties—to the exclusion of Kuchinsky's other co-tenants' interests implicated by the execution of the quitclaim deed, and to the exclusion of Kuchinsky's interests in the other four properties. Accordingly, Kuchinsky and Person thereafter exclusively owned the two properties as tenants in common. Thus, only Kuchinsky and Person had the "right to possess, use and enjoy [these two] common propert[ies]," *City of Richmond v. SunTrust Bank*, 283 Va. 439, 443, 722 S.E.2d 268, 271 (2012) (quoting *Graham v. Pierce*, 60 Va. (19 Gratt.) 28, 38 (1869)). Moreover, although Kuchinsky initially objected to the Special Commissioner's Deed, he later wrote a letter

to the Special Commissioner encouraging him to record it; and Kuchinsky did not

[756 S.E.2d 481]

disclaim the deed after it was recorded. Through these actions, Kuchinsky "knowingly acquire[d]" an interest in Person's property for purposes of Rule 1.8(a).

2. The Common Law Exceptions to the Rules of Champerty and Maintenance do not apply to Rule 1.8(a)

Alternatively, Kuchinsky contends that his actions are protected by the common law exception to the doctrine of champerty and maintenance for aiding the indigent. *See* 3B Michie's Jurisprudence, *Champerty and Maintenance*, § 2 ("Aiding the indigent is one of the generally recognized exceptions to the law of maintenance."). Because Person could not afford to pay an attorney in advance, Kuchinsky argues that his fee arrangement with Person falls within the exception. We disagree.

In relevant part, Comment 16 to Rule 1.8 explains that " *Paragraph (j)* states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules." (Emphasis added.) However, unlike the earlier disciplinary proceeding against Kuchinsky, the case at bar does not involve a Rule 1.8(j) violation. There is no common law doctrine which permits an attorney to "knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" in violation of Rule 1.8(a) simply because the client is indigent.

3. Person was Still Kuchinsky's Client at the Time the Offending Conduct Occurred

Finally, Kuchinsky asserts that Person was no longer his client at the time the offending conduct took place because "nothing remained to be done in Person's case" and because Person allegedly informed Kuchinsky that he did not intend to pay Kuchinsky for his services. We reject this argument.

During the hearing before the District Committee, Kuchinsky testified that by the time he filed the partition suit against Person on May 18, 2010 " [t]here may have been some rents that remained to be divided, cash assets" from the underlying partition suit between Person and his siblings. Additionally, Kuchinsky acknowledges on brief that no final order had been entered in the underlying partition suit when he acquired the Special Commissioner's deed and filed his partition suit against Person. Finally, Kuchinsky took no steps to formally withdraw from his representation of Person in accordance with Rule 1.16(b) before engaging in the violative conduct. [9]

Therefore, Person was still Kuchinsky's client at the time he knowingly acquired an interest in Person's property, and we hold that the three-judge panel did not err in affirming the District Committee's finding that Kuchinsky violated Rule 1.8(a) of the Rules of Professional Conduct.

D. *Rule 8.4(a)*

Rule 8.4(a) of the Rules of Professional Conduct establishes that "[i]t is professional misconduct for a lawyer to ... violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

As we explained in Part II.C., *supra*, Kuchinsky violated Rule 1.8(a) by acquiring an interest in Person's property through the Special Commissioner's Deed, by asking that the Special Commissioner record the deed,

and by pursuing a partition of Person's property once the deed had been recorded. Therefore, he also committed professional misconduct under Rule 8.4(a) by violating the Rules of Professional Conduct, both through his own acts and through the acts of the Special Commissioner.

[756 S.E.2d 482]

However, Kuchinsky argues that we should reverse the three-judge panel's finding that he violated Rule 8.4(a) because "a redundancy of charges in disciplinary proceedings is disfavored." In support, Kuchinsky cites *Morrissey v. Virginia State Bar*, 248 Va. 334, 448 S.E.2d 615 (1994). In *Morrissey*, a three-judge panel found that Respondent violated DR 1–102(A)(4) of the former Virginia Rules of Professional Responsibility, which stated that "[a] lawyer shall not ... [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law." [10] *Id.* at 336, 448 S.E.2d at 616. On appeal, the VSB assigned as cross-error the panel's failure to also find that Respondent had violated former DR 1–102(A)(3), which established that "[a] lawyer shall not.... [c]ommit a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law." *Id.* at 334, 448 S.E.2d at 621. We rejected the VSB's argument and affirmed the panel's decision, holding that "[a]lthough Morrissey's concealments were deliberate and wrongful, we do not think that the language of DR 1–102(A)(3) indicates a clear intent to provide multiple punishment for such acts under the circumstances of this case." *Id.* (citing *Fitzgerald v. Commonwealth*, 223 Va. 615, 635, 292 S.E.2d 798, 810 (1982)).

In contrast to the rules at issue in *Morrissey*,Rule 8.4(a) clearly supports a finding that an attorney has committed professional misconduct under Rule 8.4(a)*in addition to* a finding that the attorney violated another underlying Rule of Professional Conduct. Rule 8.4(a) states that a violation or attempted violation of another rule is professional misconduct. This misconduct provision would be rendered meaningless if it did not provide for the imposition of a separate and additional violation. It is a "well established rule of construction that a statute ought to be interpreted in such manner that it may have effect, and not be found vain and elusive." *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952). We believe that the same principle applies to our interpretation of the Rules of Professional Conduct. Accordingly, we hold that the three-judge panel did not err in affirming the District Committee's finding that Kuchinsky violated Rule 8.4(a) of the Rules of Professional Conduct.

E. *Rule 3.4(d)*

In relevant part, Rule 3.4(d) of the Rules of Professional Conduct states that "[a] lawyer shall not ... [k]nowingly disobey ... a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling."

The District Committee found that Kuchinsky violated Rule 3.4(d) by "continu[ing] to pursue his ownership interest in Person's property" after receiving the prior admonition from the VSB and by failing to "divest himself of his ownership interest [in Person's property] until one year after he received Person's [bar] complaint." However, the admonition issued to Kuchinsky was a private admonition *without terms*. The admonition did not require that Kuchinsky divest himself of his interest in Person's property, nor did it indicate that he must refrain from taking additional steps to secure his interest. Rather, it merely stated that Kuchinsky violated Rule 1.8(j) by *acquiring* the original quitclaim deed from Person. Because the private admonition issued to Kuchinsky did not include terms requiring

that Kuchinsky either take or refrain from taking any action, he could not "knowingly disobey" the admonition. Accordingly, we hold that the three-judge panel erred in affirming the District Committee's finding that Kuchinsky violated Rule 3.4(d) of the Rules of Professional Conduct.[11]

[756 S.E.2d 483]

III. Conclusion

We affirm the three-judge panel's decision with regard to Rules 1.8(a) and 8.4(a), reverse its decision with regard to Rule 3.4(d), and remand the case for reconsideration of the sanction to be imposed.

Affirmed in part, reversed in part, and remanded.

Notes:

[1.] Person's father, Thomas McCoy Person, died intestate. At the time of his passing, Thomas Person owned several parcels of land in the City of Emporia and Greensville County, Virginia.

[2.] Sometime after the quitclaim deed was recorded, Person dismissed Kuchinsky as his counsel. However, later that year, Person re-employed Kuchinsky and executed a second fee agreement which stated that Person would pay Kuchinsky's attorney's fees for any unproven bar complaints lodged against Kuchinsky, reaffirmed that Kuchinsky had earned "all prior fees" (including the 25% quitclaim interest), and waived potential conflicts of interest in the renewed representation.

[3.] The subcommittee's determination was based on Kuchinsky's acquisition of the quitclaim deed from Person, as well as his acquisition of a similar interest from another client.

[4.] Initially, Kuchinsky had objected to the Special Commissioner's deed, stating that he intended his 25% quitclaim interest to be a "springing attorney's lien for legal work, not as a proprietary interest." Therefore, Kuchinsky argued, "conveyances and debts set forth by the Commissioner as transferable or payable to Neil Kuchinsky should be permitted to be converted to a deed of trust and note" between himself and Person.

[5.] Kuchinsky and Person eventually reached an agreement whereby Person signed a promissory note for fees and costs owed to Kuchinsky, secured by a deed of trust. Finally, in November 2011, Kuchinsky executed and recorded a deed conveying his 25% interest in the jointly owned properties back to Person. Subsequently, pursuant to Kuchinsky's request, the Greensville County Circuit Court issued an order of nonsuit in Kuchinsky's partition suit against Person.

[6.] In relevant part, the rules Kuchinsky was charged with violating, all of which appear in Part 6, § II of the Rules of Court, read as follows:

Rule 1.8—Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Rule 3.4—Fairness to Opposing Party and Counsel

A lawyer shall not:

....

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

Rule 8.4—Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

[7.] The Written Determination also noted that one member of the Committee dissented from the District Committee's finding that Kuchinsky violated Rule 3.4(d) by disregarding the VSB's prior admonition on the basis that the Committee member "did not believe that the Committee is a 'tribunal' within the contemplation of the rule."

[8.] On the same day, Kuchinsky also filed a Motion to Reconsider the District Committee's determination on the basis that one of the Committee members should have recused himself from the proceedings. The District Committee denied Kuchinsky's Motion to Reconsider, and the issue raised therein is not before this Court on appeal.

[9.] In relevant part, Comment 8 to Rule 1.16 states that "[a] lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs." Thus, although Person allegedly informed Kuchinsky that he would not honor their fee agreement, the representation continued absent Kuchinsky's withdrawal.

[10.] The panel also found that Respondent violated former DR 8–101, which prohibited a lawyer serving in public office from "[a]ccept[ing] anything of value" when the lawyer "knows or it is obvious that the offer is for the purpose of influencing his action as a public official." However, that portion of the opinion is not relevant to the issue presented

by the case at bar.

[11] The related issue of whether a disciplinary arm of the VSB constitutes a "tribunal" for purposes of Rule 3.4(d) is not before this Court on appeal.

737 S.E.2d 905

Thomas Long NORTHAM
v.
VIRGINIA STATE BAR.

Record No. 121623.

Supreme Court of Virginia.

Feb. 28, 2013.

[737 S.E.2d 906]

Bernard J. DiMuro, Alexandria (Michael S. Lieberman, Alexandria; Reeves W. Mahoney, Virginia Beach; DiMuroGinsberg; Poole Mahoney, on briefs), for appellant.

Mike F. Melis, Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General; Wesley G. Russell, Jr., Deputy Attorney General; Peter R. Messitt, Senior Assistant Attorney General, on brief), for appellee.

Present: All the Justices.

OPINION BY Justice LEROY F. MILLETTE, JR.

In this appeal of right from an order entered by the Virginia State Bar Disciplinary Board (Board), we consider whether an attorney violated Rule 1.10(a) of the Virginia Rules of Professional Conduct.

I. Background

Thomas Long Northam is an attorney licensed to practice law in Virginia. During the relevant time period, Northam was a partner in Poulson, Northam & Lewis, PLC (the Firm) in Accomac, Virginia. On April 7, 2010, Laura Ashley Adams (Ms. Adams) visited the Firm with the intention of employing Lynwood W. Lewis, Jr., (Lewis) as her attorney to represent her regarding matters of custody, support, separation, and divorce from her husband, Thomas James Adams (Mr. Adams). The Firm's receptionist arranged for an initial meeting between Ms. Adams and Lewis to be held on April 13, 2010.

On April 9, 2010, Northam, Lewis's partner, received a phone call from Mr. Adams. Mr. Adams indicated that he was seeking representation for a "domestic situation," which he described in some detail. Northam told Mr. Adams to "tell [him] when he got served and [they] would go from there."

When Ms. Adams returned to the Firm on April 13, 2010, she met with Lewis, recounted the events leading up to the separation, and informed him of her goals in the divorce proceedings. Lewis took approximately one page of notes during this initial interview before asking if Ms. Adams knew if Mr. Adams had retained an attorney. Ms. Adams answered that he had, and his name was "Northam something." Lewis stopped taking notes and terminated the interview.

The following day, Lewis spoke with Northam to inquire about Northam's alleged representation of Mr. Adams and to inform Northam that he had met with Ms. Adams. Following this conversation, the Firm's receptionist notified Ms. Adams that Lewis would not be able to represent her in her dispute with Mr. Adams. The receptionist told Ms. Adams that Lewis could not serve as her attorney because Lewis's partner, Northam, had already agreed to represent Mr. Adams in the matter. Ms. Adams

[737 S.E.2d 907]

sought alternative legal representation. Northam continued to represent Mr. Adams.

Ms. Adams filed a complaint with the Virginia State Bar (Bar). After receiving the complaint and conducting an initial

investigation, the Second District Committee of the Bar (District Committee) charged Northam with violations of Rules 1.7(a)(2) (Conflict of Interest), 1.10(a) (Imputed Disqualification), and 1.16(a)(1) (Declining or Terminating Representation) of the Rules of Professional Conduct. At the conclusion of a hearing before the District Committee, Northam was held to have violated Rules 1.7(a)(2), 1.10(a), and 1.16(a)(1), and the District Committee ordered a public admonition, with terms.

Northam appealed the decision to the Board. The Board reversed and dismissed the District Committee's determination that Northam had violated Rules 1.7(a)(2) and 1.16(a)(1), and affirmed the determination that Northam had violated Rule 1.10(a). The Board ordered an admonition, without terms.

Northam made a timely appeal to this Court, assigning three errors to the decision of the Board:

1) The Disciplinary Board erred when it failed to find that the District Committee misinterpreted and misapplied Rule 1.10 because Rule 1.10 is not a strict liability rule of professional conduct and instead requires that Respondent have knowledge that his partner could not ethically represent Appellant's client before imputing the partner's knowledge to [the] Appellant.

2) The Disciplinary Board erred because there was no finding of fact by the District Committee that Appellant knew that his partner had a conflict of interest and was prohibited from representing Appellant's client.

3) The Disciplinary Board improperly upheld the District Committee's error as a matter of law in limiting Appellant's right to examine Ms. Adams' attorney after Ms. Adams had already testified as to her version of communications with her attorney on the same subject.*

II. Discussion

A. *Standard of Review*

In reviewing the Board's decision in a disciplinary proceeding, the factual conclusions reached by the Board will be given "substantial weight and [we] view those findings as prima facie correct." *Pilli v. Virginia State Bar*, 269 Va. 391, 396, 611 S.E.2d 389, 391 (2005). These conclusions, "[w]hile not given the weight of a jury verdict, ... will be sustained unless they are not justified by the evidence or are contrary to law."

[737 S.E.2d 908]

Barrett v. Virginia State Bar, 277 Va. 412, 413, 675 S.E.2d 827, 828 (2009). In conducting this review, we will conduct "an independent examination of the entire record[, viewing] all reasonable inferences that may be drawn from th[e] evidence" in the light most favorable to the prevailing party. *Green v. Virginia State Bar*, 278 Va. 162, 171, 677 S.E.2d 227, 231 (2009).

B. *Whether Northam Had Knowledge of Lewis's Disqualification*

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

Northam does not dispute that Lewis, his partner, was prohibited from representing Mr. Adams under Rules 1.6(a) and 1.7(a)(2). Rule 1.6(a) prohibits a lawyer from revealing "information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.7(a)(2) prohibits a lawyer from representing "a client

if the representation involves a concurrent conflict of interest[, which] exists if ... there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a third person." Lewis's disqualification under Rules 1.6(a) and 1.7(a)(2) from representing Mr. Adams was established by clear and convincing evidence and is not questioned by Northam on appeal.

Rather, Northam argues that the Board erred when it imputed Lewis's disqualification to him under Rule 1.10(a) without any evidence to support the conclusion Northam *knew* that the Rules of Professional Conduct prohibited Lewis from representing Mr. Adams. Northam contends that, because no evidence was presented to establish his knowledge of Lewis's disqualification under either Rule 1.6(a) or 1.7(a)(2), the Bar's determination that he violated Rule 1.10(a) could only be based on an application of strict liability to the Rule's requirements.

Additionally, Northam argues, because Rule 1.10(a) is not a strict liability rule, the Rule's requirement that the conduct be executed "knowingly" is essential to sustaining a violation. This requires a finding of fact establishing Northam's actual knowledge that Lewis was disqualified from representing Mr. Adams, thus imputing Lewis's disqualification to Northam.

The Bar responds that the Board did not apply strict liability when it determined that Northam violated Rule 1.10(a). According to the Bar, the conflict in representing Mr. Adams because of Lewis's receipt of confidential information from Ms. Adams was imputed to all of Lewis's law partners, including Northam. The Bar relies upon Comment [2] to Rule 1.10 that "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client." Thus, by imputing Lewis's knowledge that he had a conflict under Rules 1.6(a) and 1.7(a)(2) to Northam, Northam "knowingly" represented a client, Mr. Adams, who Lewis was prohibited from representing.

The Bar further contends that the Board based its conclusion on facts that allowed the Board to infer, based on the circumstances, that Northam knew Lewis was prohibited from representing Mr. Adams. The Bar argues that it did not err in imputing Lewis's disqualification to Northam because the only reasonable inference to draw from the Board's finding that Lewis "met" with Ms. Adams is that the meeting was for the purpose of representing her in legal proceedings involving her domestic dispute with Mr. Adams. Thus, the Bar contends that the factual finding that Lewis and Ms. Adams met was sufficient to impute Lewis's knowledge of his disqualification to Northam.

Rule 1.10(a) is not a rule of strict liability. The use of "knowingly" in Rule 1.10(a) is not without purpose, but is a separate and distinct element of the Rule that must be proven before a violation can be imposed. Northam

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must have had knowledge at the time he represented Mr. Adams that Lewis, his partner, was prohibited from doing so.

"Knowingly" is defined in Part 6 of the Rules of Court, Section II, Preamble, as "actual knowledge of the fact in question" and as encompassing knowledge that "may be inferred from the circumstances." Based on this definition, we agree with the Bar that the Board may in appropriate circumstances infer knowledge of a partner's disqualification from the circumstances of a particular case. We do not agree, however, that the findings of fact made upon the Board's review of the entire record, including the District Committee's findings of fact, support the Bar's argument that Northam had actual knowledge of Lewis's disqualification.

We have previously refused to affirm findings that an attorney violated the Rules of Professional Conduct "because the Board's 'Findings of Fact' d [id] not prove the ethical misconduct charged by clear and convincing evidence." *Pappas v. Virginia State Bar,* 271 Va. 580, 587, 628 S.E.2d 534, 538 (2006); *see also Rice v. Virginia State Bar,* 267 Va. 299, 300–01, 592 S.E.2d 643, 644–45 (2004).

The findings of fact included in the Board's disposition in the present matter state:

2. There is substantial evidence to sustain a violation of Rule 1.10 (Imputed Disqualification). The confidential information Ms. Adams provided to Respondent's partner, Lewis, was imputed to Respondent. *Respondent learned of his partner's meeting with Ms. Adams wherein she intended to engage his partner to represent her in a divorce, child custody and support matter, and her disclosure to Lewis of relevant confidential information was imputed to him.* Based on the confidential information Ms. Adams provided to Lewis, Lewis could not have represented Mr. Adams had Mr. Adams later sought his representation in the divorce. Lewis's meeting with Ms. Adams without first determining whether there was any conflict that would bar his representation of Ms. Adams had the effect of disqualifying Respondent from likewise representing Mr. Adams because of what Lewis had learned from Ms. Adams was imputed to Respondent. Respondent continued to represent Mr. Adams without requesting and obtaining an informed consent from Ms. Adams permitting his continued representation of her husband.

(Emphasis added.)

The finding that "Respondent learned of his partner's meeting with Ms. Adams" does not in itself support the conclusion that Northam *knew* that Lewis was disqualified from representing Mr. Adams in that Ms. Adams revealed information to Lewis that falls under the protection of Rule 1.6(a), or that Lewis's ability to represent Mr. Adams would have been "materially limited by [Lewis's] responsibilities" to Ms. Adams under Rule 1.7(a)(2). The Board's findings of fact leave out the crucial connection between Northam's knowledge of a meeting between Lewis and Ms. Adams and the inference that Northam "knew" of Lewis's disqualification.

The Bar argues that a review of the record in its entirety supports the inference that Northam knew Lewis declined to represent Ms. Adams because he was disqualified from representing either party. During the hearing before the District Committee, which the Board reviewed in its entirety, Lewis testified that he told Northam of his meeting with Ms. Adams and, after learning that Northam was representing Mr. Adams, stated "I think we have a problem and I'm getting out." Northam, however, testified before the District Committee as follows:

Q. Did he ever tell you that ... he had a meeting with Ms. Adams?

A. [I w]as contacted, I recalled. So, obviously, I knew [Lewis] had been contacted somehow by [Ms. Adams] because he wouldn't have asked the question unless there had been contact, but he didn't go into the details.

Q. But he didn't tell you that he had [previously] had a meeting, in-office consultation with her?

[737 S.E.2d 910]

A. No.

....

Q. You heard your partner's testimony about that discussion he had with you following this meeting with Ms. Adams, and he said ... something to the effect of either I've got a problem or we've got a problem and I've got to get out. Do you recall whether he said I or we?

A. The conversation concluded with my indicating that I was representing Mr. Adams. If he had indicated that we had a problem, I would have asked more questions, but that was not done. That would have given me some indication that I have to follow up on something and ask something else, but when I indicated that I was representing Mr. Adams, that concluded the very brief encounter and he left my office.

The District Committee could have resolved the factual inconsistency between the testimony of Lewis and that of Northam, or found that the context of the meetings or some other basis resulted in the inference that Northam knew about Lewis's disqualification, but it did not do so in its findings of fact. The District Committee's findings include:

4. On April 13, 2010, Ms. Adams returned to Respondent's firm and met with Mr. Lewis with the intention of hiring him to represent her in divorce, child custody and support matters. Ms. Adams provided Mr. Lewis with confidential information related to her marriage to Mr. Adams and the events leading to their separation, including Mr. Adams' alleged anger management issues and adultery. Ms. Adams shared with Mr. Lewis information not known to Mr. Adams, specifically, that Ms. Adams had proof of Mr. Adams' alleged adultery.

....

6. On April 14, 2010, *Respondent told Mr. Lewis that he was representing Mr. Adams and Mr. Lewis told Respondent that he had met with Respondent the day prior.*

(Emphasis added.)

The District Committee's findings establish only that Lewis and Ms. Adams met, that Ms. Adams disclosed confidential information to Lewis during their meeting, and that Lewis subsequently communicated to Northam that he met with Ms. Adams. While the Board could have concluded in its findings of fact that Northam had actual knowledge of Lewis's disqualification, or that such actual knowledge was inferred from the circumstances, that finding was not made. Because of the different possible conclusions that could be derived from the evidence, we decline to draw a conclusion or inference that the Board did not.

This analysis is wholly consistent with our holdings in *Pappas* and *Rice*. Although in both *Pappas* and *Rice* we ultimately found the evidence insufficient to support the Board's finding by clear and convincing evidence, these holdings must be viewed in the context of the basis for the results.

In *Pappas*, we concluded that only one of the Board's findings of fact could have been the basis for sustaining a violation of Rule 8.4(c). 271 Va. at 588, 628 S.E.2d at 539. That finding considered conflicts in testimony between the respondent attorney and other witnesses considered by the Board. We held that "this one finding is not sufficient to support the Board's determination that Pappas" violated Rule 8.4(c) because he "engaged 'in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on [Pappas'] fitness to practice law' by clear and convincing evidence." *Id.* at 588, 628 S.E.2d at 538–39.

The facts in *Rice* involved an alleged violation of Rule 8.1(c), which provides that an attorney "shall not fail to respond to a lawful demand for information from [a] disciplinary authority." 267 Va. at 300, 592 S.E.2d at 644. We recognized that, "[w]hile Rule 8.1(c) may be violated by failure to appear at a hearing before a disciplinary committee or

[737 S.E.2d 911]

Board, in this case, the Disciplinary Board's findings of fact do not support its conclusion that Rice violated the rule." *Id.* We explained that a summons to appear at a hearing may be considered a demand for information under Rule 8.1(c) if the Board finds that the hearing was for the purpose of gathering sworn testimony from the respondent, but *because* the Board failed to include a finding that the "committee was unable to gather information from Rice as a result of Rice's failure to appear," its determination was "by clear and convincing evidence unsubstantiated." *Id.* at 301, 592 S.E.2d at 644–45.

Neither *Pappas* nor *Rice* contains any discussion of the record beyond the explication of the Board's insufficient findings of fact. Both cases involved findings of fact that provided insufficient bases for the Board's conclusions that the respective rules were violated by clear and convincing evidence. The Board is delegated with the responsibility to resolve often complex and detailed disputed fact situations that may or may not constitute violations of professional responsibility. *See* Va. Sup.Ct. R., Part 6, § IV, ¶ 13–19(E). An attorney charged with a violation of professional responsibility is entitled to findings of fact that contain a clear statement of how the Board resolved disputed issues.

In the present case, the issue in dispute was whether Northam continued representing Mr. Adams when he "knew" that Lewis, his partner, was disqualified. Nothing in the Board's findings of fact resolves this issue. The Board was not required to establish that Northam knew why Lewis was disqualified, but the Board was required by the language of the Rule to establish by clear and convincing evidence that Northam's continued representation of Mr. Adams was with the knowledge that Lewis was disqualified from said representation. Had the Board made this determination, we would have reviewed the entire record for reasonable inferences in support of its determination, and viewed conflicts in the evidence in the light most favorable to the Bar as the prevailing party. But lacking *any* factual determination by the Board as to Northam's knowledge of disqualification, we will not inspect the record to determine facts required to establish a violation of the rule.

We therefore hold, based on the Board's findings of fact, that under the specific circumstances of this case we cannot affirm the Board's conclusion that Northam *knew* that Lewis was disqualified from representing Mr. Adams. Without this element of knowledge, a material element of Rule 1.10(a), we will not impute Lewis's disqualification to Northam and the order of the Board will be reversed.

C. *Waiver of Attorney–Client Privilege*

Northam also argues that the Board erred in upholding the District Committee's decision that permitted Ms. Adams' attorney to limit his testimony before the District Committee by exercising attorney-client privilege. We will not reach this Assignment of Error because our disposition as to Assignments of Error One and Two is dispositive.

III. Conclusion

The Board's findings of fact do not support its conclusion by clear and convincing evidence that Northam knowingly

represented Mr. Adams when Lewis, his partner, was prohibited from doing so under the Virginia Rules of Professional Conduct. Therefore, Lewis's disqualification could not be imputed to Northam under Rule 1.10(a). We will reverse the order of the Board and dismiss the charge of misconduct.

Reversed, vacated, and dismissed.

Justice POWELL, dissenting.

The majority holds that there is not enough evidence in the record for us to conclude that Northam knew that Lewis was disqualified from representing Mr. Adams. I respectfully disagree with the majority's conclusion that the factual findings of the Board were insufficient. Because the majority holds that the evidence is insufficient, it does not reach the issue of whether the trial court improperly excluded portions of Dix's testimony.

[737 S.E.2d 912]

I would further hold that any error in excluding the testimony of Ms. Adams' counsel, Thomas B. Dix, Jr., was harmless. Therefore, I would affirm the decision of the Virginia State Bar Disciplinary Committee.

A. Violation of Rule 1.10

The review of the entirety of the record shows that Ms. Adams met with Lewis to retain him to represent her in a divorce proceeding. While meeting with Lewis, she told him about evidence that she had that could be detrimental to Mr. Adams. After she told Lewis that evidence, he asked who was representing Mr. Adams. Ms. Adams responded "I believe it was a Northam something.... I don't know offhand." Lewis asked her "[i]s it a Tommy Northam?" and Ms. Adams stated "that sounds about right." At that point, Lewis informed her that he could not talk with her any longer until he "check[ed] notes and [saw] if [Mr. Adams] had spoken with Mr. Northam." Lewis immediately exited his meeting with Ms. Adams and asked Northam's secretary whether Northam had spoken with Mr. Adams. When the secretary indicated that Northam had, Lewis knew that he could not represent Ms. Adams. The next day, Lewis told Northam that he had interviewed Ms. Adams and Northam indicated that he was representing Mr. Adams. Lewis told Northam "I think we have or I have or I think we have a problem and I'm getting out." Lewis did not reveal anything that Ms. Adams told him to Northam or anyone. Northam told the Bar investigator that he did not withdraw because he did not believe that there was a conflict as he did not know any details about Lewis's meeting with Ms. Adams and because he felt that he had a duty to his client and the court to not withdraw.

The Virginia Rules of Professional Conduct prohibit an attorney from representing a client if that representation involves a concurrent conflict of interest. Rule 1.7(a). The Rule further states that a concurrent conflict of interest exists where "the representation of one client will be directly adverse to another client" or "there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Rule 1.7(b) This conflict may be waived by the written consent of all involved clients, if certain conditions are met. *Id.* "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by" Rule 1.7, among others. Rule 1.10(a).

Here, it is clear that no attorney-client relationship had formed between Ms. Adams and Lewis, but I believe that the expectation of privacy did because Lewis did not provide a disclaimer about confidentiality and Ms. Adams shared information that she believed

would be detrimental to her in the divorce proceeding were Mr. Adams to know that she possessed such information.

The majority concludes that because the Disciplinary Board did not make a specific factual finding as to whether Lewis communicated to Northam that he had a conflict or whether he only stated that he met with Ms. Adams, the evidence is insufficient to conclude that Northam knew that a conflict prevented Lewis from representing Mr. Adams. This narrow view, however, results in a reinterpretation of the law. Under this perspective, the majority is either saying 1) that this Court relies only on the specific factual findings made by the District Committee and no longer reviews the entire record for reasonable inferences, or 2) this Court continues to review the entire record but resolves conflicts in the evidence in favor of the losing party rather than the party that prevailed below. We have previously held that

> we conduct an independent examination of the record, considering the evidence *and all reasonable inferences therefrom in the light most favorable to the prevailing party below*, and we give the factual findings ... substantial weight, viewing them as prima facie correct.

Barrett v. Virginia State Bar, 272 Va. 260, 268–69, 634 S.E.2d 341, 345–46 (2006)(emphasis

[737 S.E.2d 913]

added). Our review of the record is not only to determine whether the inferences support each specific factual finding made by the Board, but is conducted to determine whether the evidence in the record and all the reasonable inferences drawn from that evidence support the result. Thus, either interpretation of the majority's position is a radical departure from the law.

In support of their position, the majority relies upon, *Pappas v. Virginia State Bar*, 271 Va. 580, 628 S.E.2d 534 (2006), and *Rice v. Virginia State Bar*, 267 Va. 299, 592 S.E.2d 643 (2004), two cases in which the record simply did not contain the evidence to support the findings or reasonable inferences therefrom. See *Pappas*, 271 Va. at 588–89, 628 S.E.2d at 539 ("the evidence was insufficient to find by clear and convincing evidence that [the attorney] violated [the] Rule"); *Rice*, 267 Va. at 301, 592 S.E.2d at 644–45 ("the Disciplinary Board's determination that the Bar proved a violation of Rule 8.1(c) by clear and convincing evidence is unsubstantiated"). By contrast, upon reviewing the entire record in the present case, I believe that there is sufficient evidence from which the District Committee and Disciplinary Board could have concluded that Northam knew that a conflict prevented Lewis from representing either Laura or Thomas Adams. Therefore, the facts of this case are clearly distinguishable. Here, the testimony of Lewis, Northam, and Ms. Adams is sufficient to establish that she told Lewis confidential information about what she knew about Mr. Adams' alleged affair, Lewis told Northam that he (Lewis) had met with Ms. Adams and believed that either he (Lewis) or both of them had a problem. Thus, based on what he learned, Lewis would have a concurrent conflict and could not represent Mr. Adams. Because Lewis and Northam were members of the same firm at that time, this conflict was imputed to Northam even though Northam was already representing Mr. Adams. *See*Rule 1.10. In light of the clear inferences to be drawn from the record, the fact that the Bar did not make this specific factual finding is too thin a reed upon which to decide this case. Therefore, I would affirm the Bar's admonition without terms.

B. Admissibility of Testimony from Wife's Attorney

Because I believe that the evidence was sufficient and would affirm the Bar as to

Northam's first four assignments of error, I would also reach his fifth assignment of error: "The Disciplinary Board improperly upheld the District Committee's error as a matter of law in limiting appellant's right to examine [Ms. Adams'] attorney after [Ms. Adams] had already testified as to her version of communications with her attorney."

During direct examination, Northam asked Dix, who represented Ms. Adams in the divorce proceedings and in proceedings related to Northam's representation of Mr. Adams, whether he had any discussions with Ms. Adams leading up to the mediation about Northam representing Mr. Adams. Dix declined to answer on the grounds that the information was subject to attorney-client privilege. Northam argued that Dix cannot now assert the privilege because Ms. Adams testified about her complaint against Northam and made representations about what Dix did or did not tell her, thus putting those matters in issue, and that it was up to Ms. Adams to assert the privilege. Northam argued that Ms. Adams "opened the door" because her testimony materially relied on conversations between herself and Dix. He maintained that this was the classic "sword and shield" situation, contending that permitting Dix to rely on the privilege as a basis to refuse to testify was "using the privilege as a shield" and was "not fair" given Ms. Adams' prior use of the privilege as a "sword" in her effort to establish a violation of the Rules. When Ms. Adams was asked if she would waive the privilege to allow Dix to testify, she stated that if he did not want to answer it, she was not going to waive the privilege. The committee ruled that Dix did not have to answer. Dix then testified that before the mediation, he did not tell any third parties that Ms. Adams did not want Northam to represent Mr. Adams.

"Under the doctrine of harmless error, we will affirm the circuit court's judgment when we can conclude that the error at issue could not have affected the court's result." *Forbes v. Rapp,* 269 Va. 374, 382, 611 S.E.2d 592, 597 (2005). While the District Committee ruled that Dix did not have to testify, he testified with regard to every point covered with Ms. Adams on cross-examination. Therefore, all of the evidence that related to statements made by Ms. Adams was covered in cross-examination of Dix. Thus, the Committee's ruling did not affect the result.

Northam also sought to elicit testimony about Ms. Adams' purpose for speaking with Lewis. Ms. Adams, however, did not testify as to why she sought to retain Lewis as her attorney. Therefore, she did not waive the attorney-client privilege as to this topic and I would hold that the Bar did not err in not allowing Dix to testify on this subject.

Thus, I believe there is sufficient evidence in the record to show that Northam violated Rule 1.10. I would further hold that the Bar did not err in not allowing Dix to testify about why Ms. Adams sought to retain Lewis, and to the extent the Bar erred in not admitting testimony from Dix, that error was harmless. Therefore, I would affirm Northam's admonition without terms for violating Rule 1.10.

Notes:

[*] We note that the language of the three assignments of error recited above and presented in the appellant's opening brief varies slightly from that appearing in the five assignments of error presented in the notice of appeal originally filed with the Disciplinary Board on August 31, 2012. It is well established that the Court will not consider assignments of error as modified by an appellant's opening brief, but only as granted by the Court. *White v. Commonwealth,* 267 Va. 96, 102–03, 591 S.E.2d 662, 665–66

[737 S.E.2d 914]

(2004). Even so, we have previously held that "[w]hile it is improper for an appellant to alter the wording of a [granted] assignment of error ... non-substantive changes to an assignment of error ... do not default the issue raised." *Dowdy v. Commonwealth,* 278 Va. 577, 590 n. 14, 686 S.E.2d 710, 717 n. 14 (2009) (citing *Allstate Ins. Co. v. Gauthier,* 273 Va. 416, 418, 641 S.E.2d 101 n. * (2007)). Because the changes involved here are non-substantive (substituting "Appellant's" for "Respondent's" and "Appellant" for "Respondent" in a few locations), and do not permit the appellant to argue a different issue on appeal, we may properly consider the modified assignments of error. *Id.; see also Hudson v. Pillow,* 261 Va. 296, 301–02, 541 S.E.2d 556, 560 (2001) (same). In addition, while the two assignments of error filed but not appearing in this brief under the heading "Assignments of Error" are waived, *Dowdy,* 278 Va. at 590 n. 14, 686 S.E.2d at 717 n. 14 (citing Rules 5:27 and 5:17(c)), we can nevertheless "reach the underlying issues raised in omitted assignments of error because [another] assignment of error encompasses the same issues and because [the appellant] briefed those issues." *See id.* Thus, to the extent that issues pertaining to appellant's omitted assignments of error are encompassed by the presented assignments of error and are sufficiently briefed, we may properly consider them.

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

VSB DOCKET NO.

ORDER OF >

THIS MATTER came on to be heard on <date>, before a panel of the Disciplinary Board consisting of > Chair, >, >, >, > Lay member. The Virginia State Bar (the "VSB") was represented by >, >,>,>,>, (the "Respondent"). appeared in person and was represented by >,. The Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. >, court reporter, <address>, <telephone number>, after being duly sworn, reported the hearing and transcribed the proceedings.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System ("Clerk") in the manner prescribed by the Rules of the Supreme Court of Virginia, Part Six, Section Iv, Paragraph 13-18 of the Rules of Court.

The matter came before the Board on the District Committee Determination for Certification by the < District Committee Section > pursuant to Part Six, § IV, ¶ 13-18 of the Rules of the Supreme Court of Virginia involving misconduct charges against the Respondent. Prior to the proceedings and at the final Pretrial Conference VSB Exhibits >,>,>, were admitted into evidence by the Chair, without objection from the Respondent. [Stipulations?].

The Board heard testimony from the following witnesses, who were sworn under oath: _____. The Board considered the exhibits introduced by the parties; heard arguments of counsel; and met in private to consider its decision.

I. FINDINGS OF FACT

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

1. At all times relevant hereto, >, hereinafter the Respondent, has been an attorney licensed to practice law in the Commonwealth of Virginia and his address of record with the Virginia State Bar has been >. The Respondent received proper notice of this proceeding as required by Part Six, § IV, ¶ 13-12 and 13-18 A. of the Rules of Virginia Supreme Court.

2. The Complainant, >, hereinafter referred to as ">", was

....

Etc

[Note - it may make more sense in some cases to combine the findings of fact and the rule violations under a unified heading "Misconduct" rather than repeating them first in Findings of Fact then again in Nature of Misconduct. In that case, the Order writer can put the relevant facts under separate sub-headings for each rule].

II. NATURE OF MISCONDUCT

The following conduct by Respondent constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

[Cite each rule proven]

A. Rules 1.8 – Conflict of Interest and Prohibited Transaction

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Respondent 's actions that violated this rule include, but are not limited to, the following:

1. [Recite the facts that support each violation]

2.

B. Rule 3.4 – Fairness to Opposing Party and Counsel
A lawyer shall not:
(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

Respondent 's actions that violated this rule include, but are not limited to, the following:

1.

2.

etc

III. IMPOSITION OF SANCTION

Thereafter, the Board received further evidence and argument in aggravation and mitigation from the Bar and Respondent, including Respondent 's prior disciplinary record. The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent. After due deliberation, the Board reconvened to announce the sanction imposed. The Chair announced the sanction as >.

Accordingly, it is ORDERED that the Respondent, <name >, <sanction> <effective date>.

It is further ORDERED that, as directed in the Board's <date>, Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the > of > license to practice law in the Commonwealth of Virginia, to all clients for whom > is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in > care in conformity with the wishes of > client. Respondent shall give such notice within 14 days of the effective date of the >, and make such arrangements as are required herein within 45 days of the effective date of the >. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the > that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of > , > shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Order by certified mail, Return receipt requested, to Respondent at his address of record with the Virginia State Bar, being >, with a copy by regular mail to <Respondent 's Counsel>, and hand-delivered to <Bar Counsel>, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219.

ENTERED this _____day of _____, _____.

VIRGINIA STATE BAR DISCIPLINARY BOARD

_____

<NAME>, Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTERS OF	**VSB Docket Nos. 16-060-104001**
NICHOLAS CARON SMITH	**16-060-104859**
	16-060-105281
	16-060-105911
	16-060-106252

ORDER OF SUSPENSION

THIS MATTER came to be heard on April 28, 2017, on the District Committee Determination for Certification by the Sixth District Committee, before a panel of the Virginia State Bar Disciplinary Board ("Board") consisting of Sandra L. Havrilak, Acting Chair, Sandra M. Rohrstaff, Nancy L. Bloom, Lay Member, R. Lucas Hobbs and Melissa W. Robinson. The Virginia State Bar (the "VSB") was represented by Prescott L. Prince ("Bar Counsel"). The Respondent Nicholas Caron Smith (hereinafter "the Respondent") was present and was represented by Jeffrey P. Matthews and James Calvin Breeden. Tracy J. Stroh, court reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

At the outset of the hearing, the Chair polled the members of the panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System ("Clerk") in the manner prescribed by the Rules of Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-18 of the Rules of Court.

Prior to the proceedings and at the final Prehearing Conference, VSB Exhibits 1-49 were admitted into evidence by the Chair, without objection from the Respondent. By agreement between the VSB and the Respondent, the Stipulations of Fact and Violated Rules of Professional Misconduct (hereinafter "Stipulation") was received as Exhibit 47. All of the

factual findings made by the Board were found to have been proven by clear and convincing evidence.

MISCONDUCT

Nicholas Caron Smith (hereinafter "the Respondent") was an attorney licensed to practice law in the Commonwealth of Virginia at all times relevant to the conduct set forth herein. The Respondent was employed in the private practice of law until approximately April of 2016, at which time he commenced employment as an Assistant Commonwealth's Attorney of the County of Northumberland, Virginia. The Respondent's employment as an Assistant Commonwealth's Attorney precluded his representation of private clients; and, he was therefore required to terminate his private practice and withdraw from any remaining cases. Based upon the evidence presented, including the Certification received into evidence as Exhibit 1 and the Stipulation received into evidence as Exhibit 47, and for the reasons more particularly set forth below, the Board finds, by clear and convincing evidence, that the Respondent's conduct, as set forth in the, constitutes misconduct in violation of Rules 1.3(a); 1.3(b); 1.4(a); 1.4(b); 1.15(a)(1); 1.15(b)(4); 1.15(b)(5); 1.15(c)(1); 1.15(c)(2); 1.15(c)(2)(i); 1.15(c)(2)(ii); 1.15(c)(3); 1.15(c)(4); 1.16(a)(1); 1.16(d); 4.1(a); 3.3(a)(1); 8.1(a); 8.1(c); 8.1(d); 8.4(c) .

Rule 1.3

The Board finds by clear and convincing evidence that the Respondent took actions in violation of Rules 1.3(a) and 1.3(b) in VSB Docket No. 16-060-104001 (hereinafter "the Hensley Case"), VSB Docket No. 16-060-105911 (hereinafter "the VSB Case"), and VSB Docket No. 16-060-105281 (hereinafter "the Burrell Case").

Pursuant to Rule 1.3(a) and Rule 1.3(b), a lawyer must act with reasonable diligence and promptness in representing his clients and must not intentionally fail to carry out a contract of employment entered into with a client for professional services. In the Hensley Case, the Respondent accepted a referral to represent Jason Hensley (hereinafter "Hensley") in his effort to recover his mobile home from real property from which he had been ejected after a foreclosure. After meeting with Hensley, the Respondent filed a Warrant in Detinue in Essex County Circuit

Court on August 21, 2014; however, he subsequently took no significant action to proceed with the lawsuit or obtain an agreement to remove or sell the mobile home. He essentially ignored Hensley's case and all requests from his client for information.

The Respondent took similar actions in the VSB Case. In 2016, the Respondent was appointed to represent William Edward Mullins (hereinafter "Mullins") by the Circuit Court of Westmoreland County on charges of rape and abduction with intent to defile. Mullins was convicted on both charges by a jury and was awarded a life sentence. Although the Respondent did not perceive any grounds for appeal, he noted an appeal. Nevertheless, he never filed a Petition for Appeal and failed to perfect the appeal, resulting in the appeal being dismissed due to procedural default on March 7, 2016.

In the Burrell Case, the Respondent was appointed on November 10, 2015 to represent Troy L. Burrell (hereinafter "Burrell") by the Essex County Circuit Court for appellate proceedings of Burrell's conviction on a charge of unlawful wounding. Subsequent to his filing of the Petition of Appeal to the Court of Appeals, the Respondent was hired to serve as Assistant Commonwealth's Attorney of Northumberland County, which caused a non-waivable conflict to his continued representation of Burrell. Although the Respondent filed a Motion to Withdraw as counsel, he neglected to specify that his position in the Commonwealth Attorney's office would ethically preclude him from carrying on his representation of Burrell, and the Motion was denied. The Respondent failed to effectively withdraw from his representation of Burrell upon being hired as an Assistant Commonwealth's Attorney; and, he took no action to pursue the appeal or otherwise protect the interests of his client. He merely ceased his representation of Burrell.

The Respondent's failure to take any action to move Hensley's case forward and his failure to properly perfect the appeal in the VSB Case constitute violations of Rule 1.3(a). Furthermore, the Board finds that the Respondent intentionally failed to effectively withdraw from his representation of Burrell or to follow up on the Supreme Court of Virginia's denial of his Motion to Withdraw to determine what actions were required in order to effectively withdraw

and/or take other action to protect his clients' rights, which constitutes a violation of both Rule 1.3(a) and Rule 1.3(b).

Rule 1.4

The Board finds by clear and convincing evidence that the Respondent violated Rules 1.4(a) and (b) of the Rules of Professional Conduct in both the Hensley Case and the VSB Case. Rule 1.4(a) requires a lawyer to keep a client reasonably informed about the status of his or her case and promptly comply with reasonable requests for information; and, Rule 1.4(b) imposes a duty upon a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions.

After the Respondent filed a Warrant in Detinue in the Hensley Case, Hensley made numerous attempts to contact the Respondent regarding his case. Hensley scheduled four office appointments, at all of which the Respondent failed to appear; and, he made multiple telephone calls to the Respondent, none of which were answered or returned. As a result, Hensley filed a complaint with the Virginia State Bar (hereinafter "VSB"); nevertheless, the Respondent continued to miss and reschedule appointments with Hensley. Furthermore, the Respondent failed to promptly inform Hensley of the existence of a conflict upon his acceptance of employment as an Assistant Commonwealth's Attorney and his need to withdraw from the matter.

In the VSB Case, following Mullins's convictions on charges of rape and abduction with intent to defile, the Respondent failed to maintain contact with Mullins to discuss the appeal and to keep him apprised of the status of the appeal. Moreover, after the appeal was dismissed on March 7, 2016, the Respondent failed to promptly notify Mullins of the dismissal and to inform him of his right to file a late appeal.

The Respondent's failure to maintain communication with Hensley and his failure to maintain contact with Mullins and to notify him that the appeal had been dismissed constitute violations of Rule 1.4(a). Moreover, the Respondent acted in violation of Rule 1.4(b) when he failed to inform Hensley of his need to withdraw from his case.

Rule 1.15

Rule 1.15 of the Rules of Professional Conduct pertains to the safekeeping of a client's property and the handling of a client's funds, including maintaining proper books and records. The Board finds that the Respondent violated numerous provisions of this Rule in VSB Docket No. 16-060-104859 (hereinafter "the Deaver Case"), VSB Docket No. 16-060-106252 (hereinafter "the Griner Case"), and VSB Docket No. 16-060-104001 (hereinafter "the Hensley Case").

Pursuant to Rule 1.15(b)(4), a lawyer must promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive. In July of 2015, the Respondent was retained to represent Michael Deaver (hereinafter "Deaver") on charges of forcible sodomy and aggravated sexual battery of victims under 13 years of age in Westmoreland and Hanover counties. In furtherance of the representation, the Respondent advised that he believed that a psychosexual evaluation of Deaver would be beneficial and recommended that such evaluation be performed by Evan Nelson, Ph.D. Dr. Nelson had informed the Respondent that his fee for such evaluation would be $3,000, to be paid in advance. The Respondent recommended to Deaver that the fee be paid to him and that he, in turn, would engage Dr. Nelson. Deaver's father, James Deaver, provided the Respondent with a check in the amount of $3,000 on August 25, 2015. The Respondent accepted the check and deposited it into his trust account; however, he did not forward the $3,000 to Dr. Nelson, despite the fact that both Deaver and Dr. Nelson made numerous inquiries regarding the funds. On November 18, 2015, the Respondent was notified that Deaver had retained substitute counsel, and he was again directed to forward the $3,000 to Dr. Nelson. The Respondent subsequently withdrew from the matters in Hanover and Westmoreland Circuit Courts; however, he still failed to forward the $3,000 to Dr. Nelson. The Respondent's holding of Deaver's funds for nearly three months, rather than properly delivering the funds to Dr. Nelson, constitutes a violation of Rule 1.15(b)(4).

Rule 1.15(a)(1) requires a lawyer or law firm to deposit funds held on behalf of a client into a trust account; and, Rule 1.15(b)(5) prohibits a lawyer from disbursing or converting funds of a client without the client's consent. Upon investigation by the Bar following a bar complaint filed by James Deaver, it was discovered that, subsequent to depositing the $3,000 into his trust account, the Respondent improperly transferred the funds to his operating account. Thereafter, the funds were seized by the Internal Revenue Service (IRS) for employment taxes that the Respondent had failed to pay, which prevented the Respondent from timely refunding the $3,000 to Deaver.

Likewise, in the Griner Case, the Respondent was retained in December 2015, to represent Brenda Griner (hereinafter "Griner") for a traffic matter in Westmoreland General District Court and was paid $800 in advance for legal fees; however, on the court date, the Respondent failed to appear. The Respondent subsequently explained to Griner that he was in another court during the trial and agreed to make a full refund of Griner's retainer. He further stated that he may be able to approach the court to have the matter reconsidered but that, in any event, he would refund some or all of the $800 paid. The Respondent never took any other action in furtherance of Griner's case and never provided a refund. Griner subsequently filed a bar complaint; and, upon investigation, the Respondent acknowledged that he had deposited the $800 into his operating account and never transferred them to his trust account. The Respondent's failure to properly deposit and maintain the funds of both Deaver and Griner in his trust account constitutes a violation of Rules 1.15(a)(1) and (b)(5).

Rule 1.15(c) further requires a lawyer to maintain certain minimum books and records demonstrating his or her compliance with the Rule's requirements regarding the safe-keeping of a client's property; and, in the Deaver Case and the Hensley Case, the Respondent failed to act in accordance with this Rule. In response to a subpoena *duces tecum* issued by the Bar in the Deaver Case, the Respondent was able to produce only portions of his trust account statements and failed to provide cash receipts journals, cash disbursements journals, or subsidiary ledgers related to the representation Deaver. Similarly, in the Hensley Case, the Respondent was unable

to produce any trust account records prior to August of 2015. The Respondent's failure to properly maintain his trust account records in these cases constitutes a violation of Rules 1.15(c)(1), 1.15(c)(2), 1.15(c)(2)(i), 1.15(c)(2)(ii), 1.15(c)(3), 1.15(c)(4).

Rule 1.16(a)(1) and (d)

The Board finds by clear and convincing evidence that the Respondent violated Rule 1.16(a)(1) in the Hensley Case and Rule 1.16(d) in the Deaver Case and Griner Case when he failed to properly terminate his representation.

Rule 1.16(a)(1) requires a lawyer to withdraw from representation of a client when the representation will result in a violation of the Rules of Professional Conduct. In the Hensley Case, the Respondent's employment as an Assistant Commonwealth's Attorney necessarily resulted in a conflict in his continued representation of Hensley. The Respondent's failure to withdraw from Hensley's case upon his acceptance of employment as an Assistant Commonwealth's Attorney thus constitutes a violation of Rule 1.16(a)(1).

In accordance with Rule 1.16(d), upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned, and properly handling records. Upon the Respondent's termination in the Deaver Case, he failed to forward the $3,000 received from Deaver for the psychosexual evaluation to Dr. Nelson, despite being asked numerous times to do so. Likewise, the Respondent refused to refund his client's funds in the Griner Case despite never appearing in court on the client's behalf and stating both to Griner and the Bar that the funds would be returned. These actions constitute violations of Rule 1.16(d).

Rule 3.3 and Rule 4.1

The Respondent violated Rule 3.3 and Rule 4.1 in the Deaver Case when he knowingly made false statements of fact to both his client and the Bar. On numerous occasions throughout his representation of Deaver, the Respondent stated that he had forwarded the client's funds to Dr. Nelson for the purpose of performing a psychosexual evaluation of Deaver. However, Dr.

Nelson never received the funds. During the Bar's investigation of the matter, a subpoena *duces tecum* was issued to the Respondent regarding the funds; and, the Respondent failed to comply with the subpoena in a timely manner. On June 21, 2016, Bar Counsel forwarded to the Respondent a Notice of Noncompliance and Request for Interim Suspension that stated, in pertinent part, that if the Respondent did not comply with the subpoenas *duces tecum* by or before July 1, 2016, Bar Counsel would request an interim suspension until the Respondent did comply with the subpoenas *duces tecum*. On August 26, 2016, a hearing was held before the Disciplinary Board, and the Respondent was asked if he had refunded the $3,000 to James Deaver. The Respondent stated that he had done so; however, the check was later dishonored due to insufficient funds as a result of the funds in the Respondent's operating account being seized by the IRS. The Respondent subsequently informed the Bar that he reissued a check to Deaver on August 25, 2016, yet Deaver has not received the check. The Board finds that the Respondent knew that he had not returned the funds to Deaver and that he had intentionally lied to the Board. These continued intentional misrepresentations to both James Deaver and the Bar regarding the status of the case and whether he had forwarded the funds to Dr. Nelson constitute violations of Rules 3.3(a) and 4.1(a).

Rule 8.1

Rule 8.1 of the Rules of Professional Conduct governs disciplinary matters before the Bar and prohibits lawyers from making false statements of material fact, failing to respond to demands for information, or otherwise obstructing an investigation be a disciplinary authority. As a result of his conduct as set forth herein, numerous bar complaints were filed against the Respondent; and, the Board finds that the Respondent intentionally failed to cooperate in resolving the complaints and intentionally obstructed the investigations in violation of Rule 8.1.

In the Deaver Case, the Respondent not only lied to Deaver and the Bar regarding the status of sending the client's funds to Dr. Nelson, but he also lied to the investigator assigned to investigate the complaint as well as Assistant Bar Counsel in stating that he had mailed the check. In doing so, the Respondent violated Rule 8.1(a).

Furthermore, in the Deaver, Griner, and VSB Cases, the Respondent was sent a letter by the Bar providing him with copies of the complaints and informing him of his duty to respond to the complaints and comply with the Bar's demands for information. Nevertheless, the Respondent refused to respond to the bar complaints, which the Board finds to be an intentional violation of Rule 8.1(c).

Following the Respondent's refusal to respond and during the course of the Bar's investigations of each of the bar complaints filed against the Respondent, numerous subpoenas *duces tecum* were issued summoning the Respondent to produce documents to the Bar regarding the incidents of misconduct alleged in the complaints against him. In the Deaver, Hensley, VSB, and Burrell Cases, the Respondent failed to respond to the subpoenas in a timely manner, which necessitated the scheduling of a hearing for consideration of the Bar's request that the Respondent's license to practice law be suspended until he complied with the subpoenas. Although the Respondent did produce documents prior to the hearing in each case, his responses were insufficient; and, in the Deaver Case, he testified at the hearing that he had not produced all the documents in his possession. The Respondent's intentional failure to respond to the subpoenas *duces tecum* in a timely manner, thereby necessitating the scheduling of hearings for consideration of a Request for Interim Suspension constitutes violations of Rule 8.1(d).

Rule 8.4(c)

The Board finds by clear and convincing evidence that the Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation adversely reflecting on his fitness to practice law in violation of Rule 8.4(c) in his representation of Mullins in the VSB Case. In the subpoena *duces tecum* issued by the Bar, the Respondent was asked to provide documentation pertaining to any communications with Mullins regarding whether he wished to continue the appeal after it was dismissed due to failure to file the petition for appeal and documentation of any notification to Mr. Mullins stating that the appeal was dismissed. In response to the subpoena, the Respondent produced two letters. The first letter, dated July 21, 2016, provided notice to Mullins that Respondent had missed the appeal and that Mullins had a

right to file a delayed appeal. The second letter purported to be a letter for Mullins to send to the Court of Appeals requesting new counsel to assist with his appeal. However, during the course of the investigation, Mullins stated that he never received such letters and, moreover, had received no communication whatsoever from the Respondent since January of 2016. The Respondent's assertion that he sent Mullins a letter dated July 21, 2016, informing him that the Respondent had failed to perfect his appeal when, in fact, no such letter was sent or received by Mullins constitutes a violation of Rule 8.4(c).

THE BOARD'S FINDINGS

Having received the Stipulations received into evidence as Exhibit 47 which admit the violations contained in the Certification received into evidence as Exhibit 1and having considered the testimony and evidence presented at the hearing, the Board recessed to deliberate; and, after due deliberation, reconvened and stated its finding that the VSB had proven, by clear and convincing evidence, each of the Rule violations charged. The Board then reconvened for the sanction phase of the hearing, as addressed herein.

SANCTION PHASE OF HEARING

After the Board announced its findings by clear and convincing evidence that the Respondent had committed the Rule violations charged in the Certification, it received further evidence regarding aggravating factors applicable to the appropriate sanction for the conduct of the Respondent underlying the Rule violations. The VSB relied upon Exhibit 48 concerning Respondent's prior disciplinary record, thereafter resting its case.

Subsequently, the Board heard evidence regarding mitigating factors applicable to the appropriate sanction. Respondent testified on his own behalf and also relied upon testimony from James Leffler, who qualified as an expert in the field of mental health and substance abuse relating to attorneys practicing in the Commonwealth of Virginia; and, Jane Wrightson,

Commonwealth Attorney for Northumberland County. The Respondent testified that, during the period in which each of these incidents of misconduct occurred, he was struggling with numerous personal issues. Not only did one of his clients overdose shortly after the Respondent negotiated his release from prison, but a close friend and mentor of the Respondent's also committed suicide, and the Respondent felt that he was, in part, to blame because he failed to notice that his friend was planning to do so. The Respondent also testified that, during this time, his father became a Commonwealth's Attorney and left him to run their firm on his own.

Following the Respondent's testimony, Mr. Leffler provided testimony regarding the Respondent's depression during the period in which the violations occurred. Mr. Leffler's testimony indicated that the Respondent met the criteria for major depression which, in his opinion, was brought on by several events, including the suicide of a close friend and the death of a client, among other incidents, all of which were compounded by the stress of running a small business.

The Respondent then called Commonwealth Attorney Jane Wrightson as his final witness, who provided testimony regarding her hiring of the Respondent and his efforts to address his misconduct. Ms. Wrightson testified that the Respondent was a good, smart lawyer and worked well with others. Respondent's Exhibits 1-3 were admitted into evidence, without objection, during this phase of the hearing.

DISPOSITION

At the conclusion of the evidence in the sanctions phase of this proceeding, the Board recessed to deliberate. After due deliberation and review of the foregoing findings of fact, upon review of Exhibits 1-49 presented by Bar Counsel on behalf of the VSB, upon review of Respondent's Exhibits 1-3, upon the testimony from the witness presented on behalf of the VSB and upon the testimony of witnesses presented by Respondent, the Board reconvened and stated

its finding that, when considered together, Respondent's pattern of violations over such a limited period of time, along with his prior disciplinary record, demonstrate a severe failure to uphold his duties to his clients and the profession. The Board's finding is mitigated by the Respondent's evidence regarding his personal and emotional problems during the period in which the violations occurred, as well as his relative inexperience in firm management as a solo practitioner, his demonstration of remorse, and his acknowledgement of the severity of his breach of duty to his clients during the timeframe in question. The Board also notes that the Respondent has taken action to rectify his conduct and prevent future violations, including attending counseling.

Therefore, upon consideration of the evidence and the nature of the misconduct committed by the Respondent, it is ORDERED, by majority vote of the Board, that the Respondent's license to practice law in the Commonwealth of Virginia is suspended for a period of two (2) years, effective April 28, 2017. The Respondent is also advised that he should continue counseling with Lawyers Helping Lawyers.

It is further ORDERED that, as directed in the Board's April 28, 2017 Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the two (2) year suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. Respondent shall give such notice within 14 days of the effective date of April 28, 2017 and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of April 28, 2017, the Respondent shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within 60 days of the effective day of the suspension. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Opinion and Order to Respondent, Nicholas Caron Smith, at his address of record with the Virginia State Bar, being P.O. Box 59, Mt. Holly, VA 22524, and his alternate address of record, being Northumberland Commonwealth Attorney's Office, 39 Judicial Place, Heathsville, VA 22473, by certified mail, return receipt requested; by regular mail to Respondent's Counsel, James C. Breeden and Jeffrey P. Matthews, at Breeden & Breeden, 265 Steamboat Road, Irvington, VA 22480; and by hand delivery to Prescott L. Prince, Assistant Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

This is Order is final.

ENTERED this 23 day of May, 2017.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Sandra L. Havrilak

Digitally signed by Sandra L. Havrilak
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Sandra L. Havrilak, Acting Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
WILLIAM LEE ANDREWS, III

VSB Docket No. 13-080-095570

ORDER OF SUSPENSION

THIS MATTER came to be heard on February 16, 2018, on the District Committee Determination for Certification by the Eighth District Subcommittee, before a panel of the Virginia State Bar Disciplinary Board ("Board") consisting of Lisa A. Wilson, 1st Vice Chair, Melissa W. Robinson, Tambera D. Stephenson (Lay Member), Donita M. King, and Jeffrey L. Marks. The Virginia State Bar ("VSB") was represented by Assistant Bar Counsel Paulo E. Franco, Jr. Respondent William Lee Andrews, III ("Respondent") was present and was represented by Timothy J. Battle. Jennifer L. Hairfield, court reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

At the outset of the hearing, the Chair polled the members of the panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System ("Clerk") in the manner prescribed by the Rules of Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-18 of the Rules of Court.

Prior to the proceedings and at the final Prehearing Conference, VSB Exhibits 1-46 were admitted into evidence by the Chair, without objection. Respondent's Exhibits 1-2 were

admitted over objection. All of the factual findings made by the Board were found to have been proven by clear and convincing evidence.

THE BOARD'S FINDINGS

Having considered the certification of charges against the Respondent, the testimony and evidence presented at the hearing, the Board finds, by clear and convincing evidence, that the Respondent violated Rules 1.15(a)(1); 1.15(a)(2); 1.15(a)(3)(i); 1.15(a)(3)(ii); 1.15(b)(3); 1.15(b)(4); 1.15(b)(5); 1.15(c)(1); 1.15(c)(2)(i); 1.15(c)(2)(ii); 1.15(c)(3); 8.1(a); and 8.4(c). Similarly, after consideration of the testimony and evidence, the Board finds that the VSB has not proven, by clear and convincing evidence, that the Respondent violated Rules 1.15(b)(1); 1.15(b)(2); 4.1(a); 8.4(a); and 8.4(b).

FACTUAL FINDINGS

Respondent was admitted to practice law in the Commonwealth of Virginia on April 16, 1998. Since that time, he has held himself out as an attorney at law, licensed to practice in the Commonwealth of Virginia.

Complainant John Tatoian ("Complainant") is an attorney who resides in the State of Connecticut. Mr. Tatoian is not licensed to practice law in the Commonwealth of Virginia. Edward Glazebrook ("Glazebrook") and other alleged investors with Global Financing Solutions, LLC ("Global") entered into a joint venture agreement ("JVA") with Myra Heeg or Reliance Investment Group, LLC ("Reliance") on or about November 29, 2012. The purpose of the JVA was to provide initial financing, and in return, Global and Reliance could engage in financial instrument monetization transactions on bank instruments issued by financial institutions that would yield profits at a very high rate of return.

Complainant, Glazebrook, Anthony M. Junge ("Junge") and Global entered into a Loan Agreement on December 2, 2012, ("Loan Agreement") whereby the Complainant would loan on

a short term basis $325,800 to Glazebrook and Junge so that Global and Reliance could obtain monetized financial instruments. Glazebrook directed the Complainant to wire funds to the account of attorney Richard A. Schulenberg ("Schulenberg"), who agreed to be the initial escrow agent for the handling of the Complainant's funds. Schulenberg is not licensed to practice law in Virginia. Upon those directions and pursuant to the Loan Agreement, Complainant wired the sum of $325,800 to Schulenberg, who then withdrew from the transaction and claimed a fee of $19,870. After Schulenberg withdrew from the transaction, Respondent agreed to act as an escrow agent.

Reliance, another company called Carco, LLC ("Carco") and the Respondent entered into an Escrow Agreement dated December 16, 2012 ("Escrow Agreement"), whereby the Respondent agreed to serve as the escrow agent and/or paymaster to the transaction of obtaining the monetized financial instruments. Respondent is the registered agent for Carco.

Respondent did not have a trust account during the time relevant to these transactions, and he never held any of the funds he received in an escrow or trust account.

Respondent is also an owner of a Virginia corporation known as Black Ink of Virginia, Inc. ("Black Ink") and maintains a bank account in the name of Black Ink. Respondent used a company called Virginia Worldwide Group, LLC ("VWG") to receive the Complainant's investment funds from Schulenberg which were ostensibly to be held in escrow until the terms of the JVA were met.

Prior to disbursement by the Respondent, the SWIFT instrument that was part of the financial transactions of the JVA was supposed to be verified in the SWIFT system. Pursuant to the terms of the Escrow Agreement, Respondent agreed to immediately return the entirety of the escrowed funds in the event that Carco failed to cause the issuance of the SWIFT transmissions instrument within seven (7) banking days.

On December 17, 2012, Schulenberg wired the Complainant's funds minus Schulenberg's fees in the amount of $306,870 ("Funds") to an account in the name of VWG at Wells Fargo Bank. Prior to any of the terms or conditions of the JVA or Escrow Agreement being met, the Respondent, without authority and contrary to the terms of the JVA and Escrow Agreement, disbursed the Complainant's funds on December 18, 2012, as follows (the "Disbursements"):

- $4,000 to Black Ink
- $55,000 to a company called Affinity Capital Holdings, LLC ("Affinity"), an Illinois limited liability company that had already been administratively dissolved by the Illinois Secretary of State
- $55,000 to an individual named Kristie Eichenberg ("Eichenberg")
- $170,000 to Barnes Corporation, a Michigan Corporation ("Barnes")

Respondent testified that he received email instructions from Eichenberg on how to make the Disbursements, and that was the only way that he knew how to distribute the Funds. Respondent had not previously alleged the existence of this email.

Neither Black Ink, Affinity, Eichenberg nor Barnes had any connection to the JVA, and payment of the Complainant's funds to these parties was not related, in any way, to obtaining any of the financial documents to further the purpose of the JVA.

Approximately two (2) weeks after making the Disbursements, Respondent issued a letter to the parties of the JVA in which he advised that the credit transaction as set forth in the JVA had been initiated and that two (2) of the three (3) financial instruments necessary to authorize release of the Complainant's funds had been issued.

Respondent's various letters and status updates contained statements that were false and misleading. For example, on January 17, 2013, the Respondent wrote that both the receiving bank and sending banks had funds ready for disbursement. Respondent made these statements

despite the fact that he had already disbursed the majority of the funds to parties that had no dealings with the JVA. Contrary to Respondent's statements in that letter, no banks had issued any standby letter of credit ("SBLC"). Respondent did not receive authorization to release the Complainant's funds from Reliance until more than three (3) weeks after he had already disbursed the funds.

One (1) month after transferring the funds in a manner not in accordance with the Escrow Agreement, Respondent prepared a letter stating that the banks responsible for issuing the SBLC were working on the transaction. On February 1, 2013, the parties to the JVA forwarded to the Complainant a letter from Respondent stating that the issuing banks would be making payments on February 14, 2013.

On April 4, 2013, parties to the JVA forwarded to the Complainant a letter stating a payment of $3.5 million would be made around April 19, 2013, and that over the next ten (10) months payments totaling $250,000,000 would be made. The banks never made any payments. Despite his repeated assurances that the transaction was proceeding according to plan, Respondent has been unable to give a proper accounting of the monies with which he was entrusted. It is clear that the money did not go to monetizing the financial instruments that were contemplated under the JVA which Respondent and the other parties led the Complainant to believe were being secured. Respondent made two (2) disbursements of the funds that were to be used by the JVA to parties other than those contemplated in the Escrow Agreement or who had any connection to the JVA.

Complainant made numerous demands for information upon the Respondent as to the status of his funds. Despite having a vested interest in the funds, the Respondent refused to provide any accounting as to how the funds had been disbursed. In fact, Respondent continued to

cause VWG to make unauthorized transfers to Black Ink from the account that held the Complainant's funds from January 3, 2013 through May 3, 2013.

In the course of the investigation, the Respondent stated to the VSB's investigator Mary Beth Nash ("Nash") that he never acted in any legal capacity, nor did he act as counsel for Carco. Correspondence that Respondent made in the course of acting as the Trustee under the Escrow Agreement using VWG letterhead states that Respondent is an attorney licensed to practice law in the Commonwealth of Virginia. The VSB's investigator also testified regarding email correspondence in which Respondent held himself out as Carco's attorney. The Board finds that Respondent was acting as an attorney for Carco.

In responding to the Bar Complaint filed against him, Respondent had his lawyer file an answer in June of 2013 stating that events were still in progress that would lead to the Complainant being repaid. As of the date of the hearing, the Complainant has not been repaid, nor has any of the assurances that Respondent has given the Bar about a successful resolution of the JVA transaction of the funds promised to the Complainant come to fruition.

Rule 1.15

Rule 1.15 of the Rules of Professional Conduct pertains to the safekeeping of a client's property and the handling of a client's funds, including maintaining proper books and records. The Board finds that the Respondent violated numerous provisions of this Rule. Rules 1.15(a)(1), 1.15(a)(2), 1.15(a)(3)(i) and 1.15(a)(3)(ii) require a lawyer or law firm to deposit funds held on behalf of a client or a third party into a trust account.

Although the Respondent had a bank account with Wells Fargo entitled "William Lee Andrews, III, Esq. Trust Account," Respondent testified that it was not a trust account as set forth under the Rules. Indeed, the evidence was that this account was accessed by individuals other than him and contained non-law firm related transactions. Respondent also had related

bank accounts with Wells Fargo under the name of "Virginia Worldwide Group, LLC" and "Black Ink." Furthermore, the Funds were deposited into another account held by "Black Ink." In sum, Respondent did not have a trust account as required by the Rules of Professional Conduct in which client funds or funds held on behalf of a third party must be held. Respondent failed to deposit the funds entrusted to him by Complainant into a trust account as required by the Virginia Rules of Professional Conduct.

Rule 1.15(b)(3) requires a lawyer to maintain thorough records and an accounting of the trust account. In addition to the fact the Respondent did not have a trust account, he did not "maintain complete records" of the Funds and could not "render appropriate accountings." The Respondent's bank accounts had not been reconciled and were missing supporting documentation pertaining to deposits and disbursements.

Pursuant to Rule 1.15(b)(4), a lawyer must promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive. Beginning in January of 2014, the Complainant inquired of the Respondent as to the whereabouts of the $306,870 and also requested that the Funds be remitted back to him. Respondent never provided the Complainant with an accurate narrative as to the location of the Funds nor did the Respondent ever deliver the Funds to the Complainant. In fact, the Respondent had already disbursed the Funds without the authority or permission of the Complainant and in violation of the terms of the Escrow Agreement. In sum, the Respondent's transfer of much of the Funds to parties unrelated to the JVA, and his failure to promptly deliver them to the Complainant upon his request constitute a violation of Rule 1.15(b)(4).

Rule 1.15(b)(5) prohibits a lawyer from disbursing or converting funds of a client or a third party without their consent. The Bar's investigation revealed that within twenty-four (24)

hours of the $306,870 being deposited into the VWG Wells Fargo Account, the Respondent transferred $284,000 to four (4) different entities unrelated to the JVA. Respondent retained the remaining balance as a fee. Respondent's actions were done without the consent, instruction, or confirmation of the Complainant and in violation of the terms of the Escrow Agreement. Respondent's failure to properly deposit and maintain the Funds as instructed by the Complainant constitutes a violation of Rule 1.15(b)(5).

Rule 1.15(c) further requires a lawyer to maintain certain minimum books and records demonstrating his or her compliance with the Rule's requirements regarding the safe-keeping of a client's or a third party's property. Respondent was not able to produce and provide complete and accurate cash receipts journals, cash disbursements journals, or subsidiary ledgers related to the bank accounts for the Funds or, for that matter, any trust account. Respondent's failure to properly maintain his trust account records in these cases constitutes a violation of Rules 1.15(c)(1), 1.15(c)(2)(i), 1.15(c)(2)(ii) and 1.15(c)(3).

Rule 8.1(a)

Rule 8.1 of the Rules of Professional Conduct governs disciplinary matters before the Bar and prohibits lawyers from making false statements of material fact, failing to respond to demands for information, or otherwise obstructing an investigation by a disciplinary authority. For the reasons set out below, the Board finds that the Respondent intentionally failed to cooperate in resolving the complaints and intentionally obstructed the investigations in violation of Rule 8.1(a).

Respondent told Investigator Nash that he "followed instructions" when he disbursed the Funds on December 18, 2012. At the time of his interview, he was unable to provide any information on who provided those instructions or when and how they were provided. However, in his testimony before the Board, Respondent claimed that he received an email from

Eichenberg instructing him on how to make the Disbursements. Upon further inquiry, the Respondent testified that he could not produce a copy of the email. The Respondent also failed to disclose the existence of certain documents during his interview with Nash, including the Escrow Agreement. However, such documents were later produced or discovered on the hard-drive of the Respondent's computer. The Respondent's failure to respond properly to the VSB investigation and inquiries of Investigator Nash constitute a violation of Rule 8.1(a).

Rule 8.4(c)

The Board finds by clear and convincing evidence that the Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation adversely reflecting on his fitness to practice law in violation of Rule 8.4(c). The Respondent represented himself as an attorney in numerous situations (i.e., VSB Exhibit 10), yet did not have a trust account. One of the Respondent's bank accounts was entitled "Trust", but it was never used as a trust account. The Respondent identified himself as being admitted to practice law in the Commonwealth of Virginia when promoting the services of VWG, yet he breached duties set forth above required by virtue of his status as a licensed attorney in the Commonwealth of Virginia. Furthermore, the Respondent misrepresented the status of the Funds to the Complainant. The Respondent's deceit and misrepresentations adversely reflects on his fitness to practice law in violation of Rule 8.4(c).

SANCTION PHASE OF HEARING

After the Board announced its findings by clear and convincing evidence that the Respondent had committed the Rule violations as set forth herein, it received further evidence and testimony in aggravation and mitigation from the VSB and the Respondent

The Board then recessed to deliberate.

DISPOSITION

After due deliberation, the Board reconvened to announce the sanction imposed. In reaching its decision on the appropriate sanction, the Board considered as aggravating factors, Respondent's failure to maintain a trust account while representing himself as an attorney licensed in the Commonwealth of Virginia and his apparent lack of remorse over the Complainant's lost Funds. The Board considered as mitigating factors the Respondent's lack of a disciplinary record, his having taken remedial steps to remove references to his status as a licensed Virginia attorney from the VWG letterhead, and his posing minimal future risk of harm to the public.

Therefore, upon consideration of the evidence and the nature of the misconduct committed by the Respondent, it is ORDERED, by majority vote of the Board, that the Respondent's license to practice law in the Commonwealth of Virginia is suspended for a period of fourteen (14) months, effective February 16, 2018.

It is further ORDERED that, as directed in the Board's February 16, 2018, Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the fourteen (14) month suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. Respondent shall give such notice within fourteen (14) days of the effective date of February 16, 2018, and make such arrangements as are required herein within forty-five (45) days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty (60) days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of February 16, 2018, the Respondent shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within sixty (60) days of the effective day of the suspension. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Order of Suspension to Respondent, William Lee Andrews, III, at his address of record with the Virginia State Bar, being 5680 Castle View Lane, Roanoke, Virginia 24018, by certified mail, return receipt requested; by regular mail to Respondent's Counsel, Timothy J. Battle, at Law Office of Timothy J. Battle, P.O. Box 320593, Alexandria, Virginia 22320-4593; and by hand delivery to Paulo E. Franco, Jr., Assistant Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

ENTERED this 13th day of March, 2018.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Lisa A. Wilson

Lisa A. Wilson, 1st Vice Chair

MISCONDUCT

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF:

ROBERT DEAN EISEN

VSB DOCKET NUMBERS: 01-022-0845;
01-022-1356;
01-022-2414;
02-022-1800;
02-022-3844;
and 02-022-4096.

ORDER OF REVOCATION

On January 22, 2004, a hearing was convened before a duly appointed panel of the Board, consisting of Roscoe B. Stephenson, Chair, Robert E. Eicher, Joseph R. Lassiter, W. Jefferson O'Flaherty (lay member), and Janipher W. Robinson. The Clerk of the Disciplinary System sent all notices required by law.

The Virginia State Bar was represented by Richard E. Slaney, Assistant Bar Counsel.

The Respondent, Robert Dean Eisen, appeared in person and with his counsel, James A. Evans.

Tracy J. Stroh, Chandler & Halasz, P.O. Box 9349, Richmond, VA 23227, (804) 730-1222, having been duly sworn, reported the hearing.

The Chair polled the panel members to determine whether any member had a personal or financial interest in this matter that might affect or reasonably be perceived to affect his or her ability to be impartial in this proceeding. Each member, including the chair, verified that they had no conflicts.

These matters came before the Board pursuant two certifications of the Second, Section II District Subcommittee as follows: (i) VSB Docket Numbers: 01-022-0845, 01-022-1356, and 01-

022-2414, certified on June 7, 2002; and (ii) VSB Docket Numbers: 02-022-1800, 02-022-3844, and 02-022-4096, certified on December 17, 2002.

Bar Exhibits 1 through 36 were admitted in evidence, without objection, in VSB Docket Nos. 01-022-0845, 01-022-1356, and 01-022-2414. Bar Exhibits 1 through 28 were admitted in evidence, without objection, in VSB Docket Nos. 02-022-1800, 02-022-3844, and 02-022-4096. Respondent Ex. 1 (collectively) was admitted in evidence, without objection. Testimony ore tenus was received from witnesses called by the Bar, *viz.*, Tazewell Hubbard, Esq., William P. Robinson, Jr., Esq., and Bar investigators Eugene Reagan and Ronald Pohrivchak. The Respondent testified on his own behalf.

FINDINGS OF FACT

1. During all times relevant hereto, the Respondent, Robert Dean Eisen (hereinafter Respondent or Mr. Eisen) was an attorney licensed to practice law in the Commonwealth of Virginia.

Docket Number 01-022-0845

2. In mid and late 1990's, Mr. Eisen represented Raymond Caldeyro (Caldeyro) in a personal injury matter.

3. In 1997, Advanced Funding Corp. (Advanced Funding) loaned Caldeyro funds against the personal injury claim being handled by Mr. Eisen. Mr. Eisen signed a document acknowledging the loan in August, 1997.

4. In April, 2000, Mr. Eisen settled Caldeyro's claim for $4,500.00, which was deposited into Mr. Eisen's Trust Account (account number 8737-4358 at First Virginia Bank) (hereinafter the Trust Account and the Bank respectively) on April 5, 2000.

5. An unexecuted Settlement Statement produced by Mr. Eisen shows deductions of

$1,800.00 in attorney's fees and $546.00 in costs, for a net recovery of $2,154.00. Although the Settlement Statement shows that the $2,154.00 was to be paid to Advanced Funding, Mr. Eisen never paid Advanced Funding. Additionally, the subsidiary ledger maintained by Mr. Eisen for the Caldeyro case only shows $129.00 in costs. When interviewed by Ron Pohrivchak on October 19, 2001, Mr. Eisen could not explain the discrepancy between the subsidiary ledger and the Settlement Statement, why there were no check numbers listed in regard to the costs paid and why the expenses shown on the Settlement Statement were not shown on his disbursement journal. Mr. Eisen was also asked to produce documentation to back up the expenses listed on the Settlement Statement. Mr. Eisen indicated he would research these issues and advise Mr. Pohrivchak of his findings. Mr. Eisen has not provided any additional information or documentation on these issues.

6. After April 5, 2000, Mr. Eisen should have had at least $2,145.00 in his Trust Account for the benefit of Caldeyro and/or Advanced Funding. A review of the Trust Account bank statements for April, 2000, however, shows the balance in the Trust Account fell to $10.40 as of April 28, 2000.

7. When interviewed by Mr. Pohrivchak on March 16, 2001, Mr. Eisen acknowledged the competing interests of Caldeyro and Advanced Funding in the net proceeds from the settlement of Caldeyro's claim. Mr. Eisen indicated he would file an interpleader action regarding the net proceeds by April, 2001. No interpleader action had been filed as of May 15, 2001, and no interpleader action was filed subsequently.

Docket No. 01-022-1356

8. In November of 2000, the bank sent correspondence to the Bar indicating Mr. Eisen's Trust Account was overdrawn, although the bank had honored and paid the item which

caused the overdraft.

9. On November 30, 2000 and December 13, 2000, the Bar wrote Mr. Eisen and requested an explanation of the overdraft in his Trust Account. Mr. Eisen did not respond to either letter, and a complaint file was opened. Mr. Eisen also failed to respond to a January 4, 2001 letter from the Bar indicating a formal complaint file had been opened and requesting a response.

10. The check which caused Mr. Eisen to overdraw the Trust Account was check number 1360 in the amount of $3,654.00, payable to Mr. Eisen's client, John Hall, and representing Mr. Hall's share of the proceeds from a GEICO settlement check deposited into the Trust Account on October 26, 2000. On November 6, 2000, at the time check number 1360 was paid by the bank, the Trust Account was short $117.83. Additionally, at this time Mr. Eisen should still have had $2,154.00 in the Trust Account for the benefit of Caldeyro and/or Advance Funding.

11. A review of the activity in the Trust Account showed numerous irregularities, including:

a. On the disbursement journal there is noted a $6,000.00 loan from the Trust Account to an office account in January of 2000.

b. A subsidiary ledger card for "R. Sachs", Mr. Eisen's now deceased mother-in-law, which shows a $15,000.00 deposit to the Trust Account and various payments to Mr. Eisen and Jeanette Eisen, his mother. Mr. Eisen could not offer Pohrivchak an explanation, asked that the Bar not interview his mother about these funds and indicated he would research the matter and respond in writing. No such response has been received.

c. Checks of $4,000.00 and $5,000.00 were deposited into the Trust Account with the notation "S. Stein loan". Mr. Eisen told Pohrivchak these were reimbursements for repairs Mr. Eisen made to investment property owned by Mr. Eisen and Stein. It is unclear why such payments should be labeled as a loan or placed in the Trust Account.

Docket Number 01-022-2414

12. In 1998, Mr. Eisen represented Sandra Witham (Witham) in a matter regarding her ex-husband, Matthew Stavish (Stavish). The parties had agreed for Stavish to relinquish parental rights over their child, Alexandra. Stavish was represented by Tazewell Hubbard (Hubbard).

13. Stavish agreed to pay Witham's attorney's fees of $500.00, and did so in October 1998.

14. On June 2, 1999, Hubbard sent Mr. Eisen an Agreement terminating Stavish's parental rights in regard to Alexandra, which was fully executed by Stavish. Mr. Eisen sent the Agreement to Witham, who signed it and returned it to Mr. Eisen within days. Mr. Eisen, however, did not send the Agreement to Hubbard or otherwise act to effectuate the Agreement.

15. Hubbard began writing to Mr. Eisen concerning the status of the Agreement. Mr. Eisen, however, did not respond to Hubbard's letters of June 18, August 9, and November 22 (forwarded by Certified Mail).

16. On March 5, 2000, Witham wrote Mr. Eisen, indicating she had confirmed with Mr. Eisen's secretary that the signed Agreement was still in Mr. Eisen's file.

17. On March 15, 2000, Hubbard sent further correspondence to Mr. Eisen by Certified Mail. This letter indicated Witham attempted to contact Hubbard directly as Mr. Eisen

had not returned telephone messages she had previously left for him.

18. On March 31, 2000, Mr. Eisen sent Hubbard the Agreement which had been executed by the parties in 1999. Thereafter, a disagreement arose between the attorneys as to which one was to prepare the Petition to be filed in court terminating Stavish's parental rights. In a letter dated June 1, 2000, Hubbard agreed to prepare and file such a Petition, and on August 28, 2000, Hubbard sent Mr. Eisen such a Petition, which required Witham's signature.

19. Hubbard then corresponded with Mr. Eisen on September 22, November 9, and December 17, 2000, but never received a reply or any communication from Mr. Eisen as to the status of the Petition.

20. In late 2001, or early 2002, Witham retained another attorney to assist her.

21. Upon information, it is believed Stavish has been denied credit on several occasions due to the delay in termination of his parental rights, and Mr. Eisen failed to respond to inquiries by fax and telephone from a loan officer in early 2001 seeking to determine the status of the matter.

22. In April, 2001, Stavish filed his complaint with the Bar. The complaint was sent to Mr. Eisen by letter dated April 18, 2001. Mr. Eisen never responded to the complaint.

23. Pohrivchak, the Bar Investigator assigned to the case, experienced extreme difficulty in meeting with Mr. Eisen regarding the complaint. When they did meet on October 19, 2001, Mr. Eisen requested additional time to research the causes of the delay in the matter. Mr. Eisen did not provide additional information.

Docket Number 02-022-1800 (Gale B. Reid)

24. In mid-1999, Mr. Eisen and Complainant Gale B. Reid (Reid) discussed the Supreme Court's decision in *Commonwealth v. Baker*, 258 Va. 1 (1999), and its potential

applicability to a case involving Reid's son, Tiron Hutchins (Hutchins). A habeas corpus petition was envisioned alleging one or both of Hutchins' parents were not properly notified of a criminal proceeding against Hutchins.

25. Mr. Eisen quoted a $5,000.00 fee and indicated he needed at least $2,500.00 before he would begin work on the matter. Reid or members of her family paid Mr. Eisen the following amounts:

$1,500.00	on July 15, 1999;
$900.00	on July 16, 1999;
$400.00	on July 30, 1999;
$350.00	on August 1, 1999;
$350.00	on August 6, 1999;
$500.00	on August 30, 1999;
$400.00	on September 10, 1999;
$355.00	on October 29, 1999; and
$455.00	on November 12, 1999.

Mr. Eisen failed to deposit any of the funds into his trust account.

26. Mr. Eisen did little, if any, work on the case for Reid's son. At some point during 2000, Mr. Eisen told Reid that he had filed a pleading on her son's behalf. No pleading had been actually filed. Thereafter, Reid was unable to speak to or otherwise communicate with Mr. Eisen.

27. Subsequently, in September, 2001, the Virginia Supreme Court decided several cases which severely limited the effect of the *Baker* case and eliminated the grounds for the habeas corpus petition in Hutchins' case. Thereafter, Reid learned from various sources Mr. Eisen had not filed anything on her son's behalf.

28. Reid then approached another attorney, Alan Zaleski (Zaleski), to discuss what could be done to assist her son. Zaleski indicated he would assist Reid upon payment of a fee, and would approach Mr. Eisen about refunding a portion or all of the fee paid to him.

29. Mr. Eisen, through Zaleski, indicated he would refund a substantial portion of the

fee he had received, but no refund was made.

30. Reid filed a complaint against Mr. Eisen with the Bar in November, 2001. Mr. Eisen failed to respond to two letters from the Bar's Intake Department, and failed to respond to the complaint letter sent to him on January 2, 2002.

Docket Number 02-022-3844 (Lester L. Morris)

31. Complainant Lester L. Morris (Morris) was convicted of several crimes and sentenced on October 24, 2001.

32. Morris was dissatisfied with the services of his counsel at that time, and on the day he was sentenced, spoke to Mr. Eisen about representing him on appeal and in post-trial motions. Mr. Eisen indicated that he would review the matter for $1,500.00 and would undertake the appeal representation for an additional $5,000.00.

33. In late October, 2001, Mr. Eisen received $1.500.00 on Morris' behalf. Eventually, an additional $5,000.00 was paid to Mr. Eisen for Morris. None of these funds were deposited into Mr. Eisen's trust account.

34. Mr. Eisen did little or no work on Morris' case, and never entered an appearance on behalf of Morris. Then, Morris' trial counsel was appointed by the trial court to prosecute Morris' appeal. Said counsel undertook the appeal.

35. Mr. Eisen failed to communicate with Morris or members of Morris' family.

36. By letter dated February 27, 2002, Morris fired Mr. Eisen, requested a refund and return of his file materials. Despite repeated requests, Mr. Eisen never refunded any of the money he had received on Morris' behalf, and never returned Morris' file materials.

Docket Number 02-022-4096 (Dennis Rogers)

37. On January 2, 2001, the Complainant, Dennis Rogers (Rogers), paid Mr. Eisen

$2,100.00 by three money orders for representation of Rogers' brother, Edward Rogers, to assist Edward Rogers in obtaining post-conviction relief. The money orders were cashed the next day, but these funds were never deposited into Mr. Eisen's trust account.

38. Thereafter, Mr. Eisen performed little or no work on Edward Rogers' behalf. Mr. Eisen did not file a petition or motion. No post-conviction relief was sought by Mr. Eisen for Edward Rogers. On information, the post-conviction relief sought by Rogers is no longer available.

39. Dennis Rogers, Edward Rogers, and other family members experienced extreme difficulty communicating with Mr. Eisen.

40. Later, Dennis Rogers' wife, Carline Rogers, spoke with Mr. Eisen by telephone. Mr. Eisen promised a partial refund and an accounting of the work he performed to justify any portion of the fee not refunded. No accounting was provided, and no refund was received.

Upon receipt of all evidence presented as to the charges of misconduct, the Board heard argument, and then retired to deliberate what violations, if any, were shown by clear and convincing evidence. Following its deliberation the Board reconvened in open session and announced that it had unanimously found by clear and convincing evidence the following violations:

Docket Number 01-022-0845

In the case of Raymond Caldeyro, the Respondent committed violations of the following rules, *to wit:* Rule 1.3(a), Rule 1.15(c)(3), Rule 1.15(c)(4), Rule 1.15(e), Rule 8.1(c), and Rule 8.4(b).

RULE 1.3 Diligence

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

RULE 1.15 Safekeeping Property

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

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

(e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer", shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1:15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

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

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

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

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

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

relationship.

(2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:

(i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;

(ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under (i), above

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

RULE 8.1 Bar Admission And Disciplinary Matters

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

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

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

The Board did not find violations of the other rules charged under that docket number, *to wit:* Rule 1.15(a), Rule 1.15(c)(1), Rule 1.15(c)(2), Rule 1.15(f), and Rule 8.1(d).

Docket Number 01-22-1356

In the case of Raymond Caldeyro and the Trust Account, the Respondent committed violations of the following rules, *to wit:* Rule 1.15(a), Rule 1.15(c)(3), *quoted above*, Rule

1.15(c)(4), *quoted above*, Rule 1.15(d), Rule 1.15(e), *quoted above*, and Rule 8.1(c) *quoted above*.

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 . . .

(d) Funds, securities or other properties held by a lawyer or law firm as a fiduciary shall be maintained in separate fiduciary accounts, and the lawyer or law firm shall not commingle the assets of such fiduciary accounts in a common account (including a book-entry custody account), except in the following cases:

(1) funds may be maintained in a common escrow account subject to the provisions of Rule 1.15(a) and (c) in the following cases:

(i) funds that will likely be disbursed or distributed within thirty (30) days of deposit or receipt;

(ii) funds of $5,000.00 or less with respect to each trust or other fiduciary relationship;

(iii) funds held temporarily for the purposes of paying insurance premiums or held for appropriate administration of trusts otherwise funded solely by life insurance policies; or

(iv) trusts established pursuant to deeds of trust to which the provisions of Code of Virginia Section 55-58 through 55-67 are applicable;

(2) funds, securities, or other properties may be maintained in a common account:

(i) where a common account is authorized by a will or trust instrument;

(ii) where authorized by applicable state or federal laws or regulations or by order of a supervising court of competent jurisdiction; or

(iii) where (a) a computerized or manual accounting system is established with record-keeping, accounting, clerical and administrative procedures to compute and credit or change to each fiduciary interest its pro-rata share of common account income, expenses, receipts and disbursements and investment activities (requiring monthly balancing and reconciliation of such common accounts), (b) the fiduciary at all times shows upon its records the interests of each separate fiduciary interest in each fund, security or other property held in the common account, the totals of which assets reconcile with the totals of the common account, (c) all the assets

comprising the common account are titled or held in the name of the common account, and (d) no funds or property of the lawyer or law firm or funds or property held by the lawyer or the law firm other than as a fiduciary are held in the common account. For purposes of this Rule, the term "fiduciary" includes only personal representative, trustee, receiver, guardian, committee, custodian and attorney-in-fact.

The Board did not find violations of the other rules charged under that docket number, *to wit:* Rule 1.15(c)(1), Rule 1.15(c)(2), Rule 1.15(f), and Rule 8.1(d).

Docket Number 01-022-2414

In the case of Matthew Stavish/Sandra Witham, the Respondent committed violations of the following rules, *to wit:* Rule 1.3(a), *quoted above*, Rule 1.3(b), Rule 1.4(a), and Rule 8.1(d).

RULE 1.3 Diligence

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

RULE 1.4 Communication

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

RULE 8.1 Bar Admission And Disciplinary Matters

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

(d) obstruct a lawful investigation by an admissions or disciplinary authority.

The Board did not find violations of the other rules charged under that docket number, *to wit:* Rule 1.4(c) and Rule 8.1(c).

Docket Number 02-022-1800

In the case of Gale B. Reid, the Respondent committed violations of the following rules,

to wit: DR 6-101(B), DR 6-101(C), DR 7-101(A)(1), DR 7-101(A)(2), DR 9-102(A), DR 9-102(B)(3), DR 9-102(B)(4), Rule 1.3(a), *quoted above*, Rule 1.3(b), *quoted above*, Rule 1.4(a)[1], *quoted above*, Rule 1.15(c)(4), *quoted above*, Rule 1.16(d), and Rule 8.1(c), *quoted above*.

DR 6-101 Competence and Promptness

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

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

DR 7-101 Representing a Client Zealously

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B).

***

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-108, DR 5-102, and DR 5-105.

DR 9-102 Preserving Identity of Funds and Property of a Client

(A) All funds received or held by a lawyer or law firm on behalf of a client, estate or a ward, residing in this State or from a transaction arising in this State, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable trust accounts and, as to client funds, maintained at a financial institution in a state in which the lawyer maintains a law office, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the

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[1] The undersigned points out that the Certification erroneously enumerates this rule as "Rule 1.4(d)." Certification, page 4. At the hearing, and in reference to the Certification, the Board announced finding a violation of "Rule 1.4(d)." However, the violation is in fact a violation of Rule 1.4(a), the substance of that rule being set out verbatim in the Certification, but erroneously enumerated. The Rules of Professional Conduct contain no rule enumerated "Rule 1.4(d)."

lawyer or law firm must be withdrawn promptly after they are due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

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

RULE 1.16 Declining Or Terminating Representation

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

The Board did not find violations of the other rules charged under that docket number, *to wit:* DR 7-101(A)(3), DR 9-102(B)(2), and Rule 1.3(c). The allegation of a violation of Rule 8.4(c) was withdrawn by the Bar, and no violation was, therefore, found pursuant to that rule.

Docket Number 02-022-3844

In the case of Lester D. Morris, the Respondent committed violations of the following rules, *to wit:* Rule 1.3(a), Rule 1.3(b), Rule 1.4(a), Rule 1.15(a), Rule 1.15(c)(3), Rule 1.15(c)(4), and Rule 1.16(d), *all rules previously quoted above.*

The Board did not find violations of the other rules charged under that docket number, *to wit:* Rule 1.15(c)(2) and Rule 1.16(e).

Docket Number 02-022-4096

In the case of Dennis Rogers/Edward Rogers, the Respondent committed violations of the

following rules, *to wit:* Rule 1.3(a), Rule 1.3(b), Rule 1.4(a), Rule 1.15(a), Rule 1.15(c)(3), Rule 1.15(c)(4), and Rule 1.16(d), *all rules previously quoted above.*

The Board did not find violations of the other rules charged under that docket number, *to wit:* Rule 1.3(c) and Rule 1.15(c)(2).

CONSIDERATION OF SANCTION

After announcing its findings of misconduct the Board called for evidence in mitigation or in aggravation.

The Virginia State Bar introduced Bar Exhibit 1-A, which was received in evidence without objection, showing a prior disciplinary record of (1) a private reprimand from the Board in 1985 relating to controlled substances; and (2) a Second District Committee Dismissal with Terms relating to real estate settlement procedures.

The Respondent introduced Respondent's Exhibits 2 and 3, which were received in evidence, without objection. The Respondent also presented his testimony and that of his wife.

The gist of the Respondent's testimony was that he has a long history of depression; and that a chemical deficiency in his body resulted in a dependency on opiates, and, in turn, hospitalization and treatment for depression and drug abuse. He testified that, because of medication prescribed by a Florida physician, which he began in March or April of 2003, he is doing well toward a full recovery. His local physicians' letters, dated March 14, 2003, and October 8, 2003, speak to an excellent prognosis.

The Respondent's explanation for the misconduct was that his depression, coupled with his opiate dependency, left him inattentive, unfocused, and unable to cope except for "big" cases that stimulated him. His hospital progress notes on November 18, 2002, refer to his "higher

functioning when he has a big case - a big fee an [sic] lower functioning when business is slow." The misconduct did not occur with "big case" clients, yet the loyalty and diligence required of lawyers, as well as compliance with the disciplinary rules, do not vary from client to client.

However, the Respondent failed to produce any evidence from a physician or other expert establishing a cause and effect, or causal nexus, between his depression and the acts and omissions of his misconduct. Whether the Respondent's misconduct is tempered by depression, as he claims, is left to speculation in lieu of competent medical evidence. The Respondent failed to produce a letter from any physician after Dr. Goldman's conclusory letter of October 8, 2003, and failed to produce any letter from the Florida physician whose protocol the Respondent is following. This failure of Respondent's proof is fatal to his defense. The Respondent bears the affirmative burden of proof "[w]henever the existence of a Disability is alleged . . . in mitigation of Charges of Misconduct". Paragraph 13.I.6.a., Part Six, Section IV of the Rules of the Supreme Court of Virginia. The Board cannot base its findings on speculation. In the final analysis, the proof before us demonstrates that the Respondent engaged in an egregious pattern of misconduct over a considerable length of time resulting in harm to many clients. Respondent has failed to prove mitigation based on his conditions leading to his prior disability.

The Respondent testified to his doing "the right thing" in surrendering his law license for suspension in a disability hearing in the Circuit Court of the City of Norfolk, which was later restored. The Board notes that the Respondent did so only days before this Board was to convene a hearing on the disciplinary charges against him. In any event, this largely speaks to the issues of his disability suspension and later reinstatement, and not to the issues now before the Board.

The Respondent stated that he deeply regrets the harm he caused his clients, and that he

intends to refund all moneys wrongfully taken from clients. But he made it equally clear that he has made no attempt to reconcile or audit his trust account to determine what is missing, and thereby ought to be refunded.

We are left with only one conclusion. The Respondent's misconduct was egregious and unmitigated. It was fraught with dishonesty and neglect. His trust account was a misnomer. He repeatedly took money from clients for services he did not render. He used money that was not his. His conduct prejudiced clients. His conduct mocked a fiduciary relationship with his clients. He did so knowingly.

Upon receipt of all evidence presented in mitigation or aggravation of the findings of misconduct, the Board heard argument, and then retired to deliberate what sanction should be imposed. Following its deliberation the Board reconvened in open session and announced that it had unanimously found that the Respondent's license to practice law in the Commonwealth of Virginia should be revoked. Accordingly, it is ORDERED that the license of the Respondent, Robert Dean Eisen, to practice law in the Commonwealth of Virginia be and hereby is REVOKED effective January 22, 2004.

IT IS FURTHER ORDERED pursuant to Part Six, Section IV, Paragraph 13 (M) of the Rules of the Supreme Court of Virginia, the Respondent shall forthwith give notice by certified mail, return receipt requested, of the revocation of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the revocation, and make such arrangements as are required herein within 45 days of the effective

date of the revocation. The Respondent shall also furnish proof to the Bar within 60 days of the effective date of the revocation that such notices have been timely given and such arrangements made for the disposition of matters.

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

IT IS FURTHER ORDERED that an attested and true copy of this ORDER be mailed, return receipt requested, to Respondent Robert Dean Eisen, at ~~125 St. Paul's Boulevard, Suite 503, Norfolk~~ 2612 Ship's Watch Court, Virginia Beach, 23451, Virginia ~~23510,~~ his address of record with the Virginia State Bar, and also mailed to Respondent's counsel, James A. Evans, 2101 Parks Avenue, Suite 800, Virginia Beach, Virginia 23451-4160, and delivered by hand to Richard E. Slaney, Assistant Bar Counsel.

ENTERED, this 5th day of March, 2004.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: Roscoe B. Stephenson III
ROSCOE B. STEPHENSON, III, Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTERS OF
NICHOLAS CARON SMITH

VSB Docket Nos. 16-060-104001
16-060-104859
16-060-105281
16-060-105911
16-060-106252

ORDER OF SUSPENSION

THIS MATTER came to be heard on April 28, 2017, on the District Committee Determination for Certification by the Sixth District Committee, before a panel of the Virginia State Bar Disciplinary Board ("Board") consisting of Sandra L. Havrilak, Acting Chair, Sandra M. Rohrstaff, Nancy L. Bloom, Lay Member, R. Lucas Hobbs and Melissa W. Robinson. The Virginia State Bar (the "VSB") was represented by Prescott L. Prince ("Bar Counsel"). The Respondent Nicholas Caron Smith (hereinafter "the Respondent") was present and was represented by Jeffrey P. Matthews and James Calvin Breeden. Tracy J. Stroh, court reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

At the outset of the hearing, the Chair polled the members of the panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System ("Clerk") in the manner prescribed by the Rules of Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-18 of the Rules of Court.

Prior to the proceedings and at the final Prehearing Conference, VSB Exhibits 1-49 were admitted into evidence by the Chair, without objection from the Respondent. By agreement between the VSB and the Respondent, the Stipulations of Fact and Violated Rules of Professional Misconduct (hereinafter "Stipulation") was received as Exhibit 47. All of the

factual findings made by the Board were found to have been proven by clear and convincing evidence.

MISCONDUCT

Nicholas Caron Smith (hereinafter "the Respondent") was an attorney licensed to practice law in the Commonwealth of Virginia at all times relevant to the conduct set forth herein. The Respondent was employed in the private practice of law until approximately April of 2016, at which time he commenced employment as an Assistant Commonwealth's Attorney of the County of Northumberland, Virginia. The Respondent's employment as an Assistant Commonwealth's Attorney precluded his representation of private clients; and, he was therefore required to terminate his private practice and withdraw from any remaining cases. Based upon the evidence presented, including the Certification received into evidence as Exhibit 1 and the Stipulation received into evidence as Exhibit 47, and for the reasons more particularly set forth below, the Board finds, by clear and convincing evidence, that the Respondent's conduct, as set forth in the, constitutes misconduct in violation of Rules 1.3(a); 1.3(b); 1.4(a); 1.4(b); 1.15(a)(1); 1.15(b)(4); 1.15(b)(5); 1.15(c)(1); 1.15(c)(2); 1.15(c)(2)(i); 1.15(c)(2)(ii); 1.15(c)(3); 1.15(c)(4); 1.16(a)(1); 1.16(d); 4.1(a); 3.3(a)(1); 8.1(a); 8.1(c); 8.1(d); 8.4(c) .

Rule 1.3

The Board finds by clear and convincing evidence that the Respondent took actions in violation of Rules 1.3(a) and 1.3(b) in VSB Docket No. 16-060-104001 (hereinafter "the Hensley Case"), VSB Docket No. 16-060-105911 (hereinafter "the VSB Case"), and VSB Docket No. 16-060-105281 (hereinafter "the Burrell Case").

Pursuant to Rule 1.3(a) and Rule 1.3(b), a lawyer must act with reasonable diligence and promptness in representing his clients and must not intentionally fail to carry out a contract of employment entered into with a client for professional services. In the Hensley Case, the Respondent accepted a referral to represent Jason Hensley (hereinafter "Hensley") in his effort to recover his mobile home from real property from which he had been ejected after a foreclosure. After meeting with Hensley, the Respondent filed a Warrant in Detinue in Essex County Circuit

Court on August 21, 2014; however, he subsequently took no significant action to proceed with the lawsuit or obtain an agreement to remove or sell the mobile home. He essentially ignored Hensley's case and all requests from his client for information.

The Respondent took similar actions in the VSB Case. In 2016, the Respondent was appointed to represent William Edward Mullins (hereinafter "Mullins") by the Circuit Court of Westmoreland County on charges of rape and abduction with intent to defile. Mullins was convicted on both charges by a jury and was awarded a life sentence. Although the Respondent did not perceive any grounds for appeal, he noted an appeal. Nevertheless, he never filed a Petition for Appeal and failed to perfect the appeal, resulting in the appeal being dismissed due to procedural default on March 7, 2016.

In the Burrell Case, the Respondent was appointed on November 10, 2015 to represent Troy L. Burrell (hereinafter "Burrell") by the Essex County Circuit Court for appellate proceedings of Burrell's conviction on a charge of unlawful wounding. Subsequent to his filing of the Petition of Appeal to the Court of Appeals, the Respondent was hired to serve as Assistant Commonwealth's Attorney of Northumberland County, which caused a non-waivable conflict to his continued representation of Burrell. Although the Respondent filed a Motion to Withdraw as counsel, he neglected to specify that his position in the Commonwealth Attorney's office would ethically preclude him from carrying on his representation of Burrell, and the Motion was denied. The Respondent failed to effectively withdraw from his representation of Burrell upon being hired as an Assistant Commonwealth's Attorney; and, he took no action to pursue the appeal or otherwise protect the interests of his client. He merely ceased his representation of Burrell.

The Respondent's failure to take any action to move Hensley's case forward and his failure to properly perfect the appeal in the VSB Case constitute violations of Rule 1.3(a). Furthermore, the Board finds that the Respondent intentionally failed to effectively withdraw from his representation of Burrell or to follow up on the Supreme Court of Virginia's denial of his Motion to Withdraw to determine what actions were required in order to effectively withdraw

and/or take other action to protect his clients' rights, which constitutes a violation of both Rule 1.3(a) and Rule 1.3(b).

Rule 1.4

The Board finds by clear and convincing evidence that the Respondent violated Rules 1.4(a) and (b) of the Rules of Professional Conduct in both the Hensley Case and the VSB Case. Rule 1.4(a) requires a lawyer to keep a client reasonably informed about the status of his or her case and promptly comply with reasonable requests for information; and, Rule 1.4(b) imposes a duty upon a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions.

After the Respondent filed a Warrant in Detinue in the Hensley Case, Hensley made numerous attempts to contact the Respondent regarding his case. Hensley scheduled four office appointments, at all of which the Respondent failed to appear; and, he made multiple telephone calls to the Respondent, none of which were answered or returned. As a result, Hensley filed a complaint with the Virginia State Bar (hereinafter "VSB"); nevertheless, the Respondent continued to miss and reschedule appointments with Hensley. Furthermore, the Respondent failed to promptly inform Hensley of the existence of a conflict upon his acceptance of employment as an Assistant Commonwealth's Attorney and his need to withdraw from the matter.

In the VSB Case, following Mullins's convictions on charges of rape and abduction with intent to defile, the Respondent failed to maintain contact with Mullins to discuss the appeal and to keep him apprised of the status of the appeal. Moreover, after the appeal was dismissed on March 7, 2016, the Respondent failed to promptly notify Mullins of the dismissal and to inform him of his right to file a late appeal.

The Respondent's failure to maintain communication with Hensley and his failure to maintain contact with Mullins and to notify him that the appeal had been dismissed constitute violations of Rule 1.4(a). Moreover, the Respondent acted in violation of Rule 1.4(b) when he failed to inform Hensley of his need to withdraw from his case.

Rule 1.15

Rule 1.15 of the Rules of Professional Conduct pertains to the safekeeping of a client's property and the handling of a client's funds, including maintaining proper books and records. The Board finds that the Respondent violated numerous provisions of this Rule in VSB Docket No. 16-060-104859 (hereinafter "the Deaver Case"), VSB Docket No. 16-060-106252 (hereinafter "the Griner Case"), and VSB Docket No. 16-060-104001 (hereinafter "the Hensley Case").

Pursuant to Rule 1.15(b)(4), a lawyer must promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive. In July of 2015, the Respondent was retained to represent Michael Deaver (hereinafter "Deaver") on charges of forcible sodomy and aggravated sexual battery of victims under 13 years of age in Westmoreland and Hanover counties. In furtherance of the representation, the Respondent advised that he believed that a psychosexual evaluation of Deaver would be beneficial and recommended that such evaluation be performed by Evan Nelson, Ph.D. Dr. Nelson had informed the Respondent that his fee for such evaluation would be $3,000, to be paid in advance. The Respondent recommended to Deaver that the fee be paid to him and that he, in turn, would engage Dr. Nelson. Deaver's father, James Deaver, provided the Respondent with a check in the amount of $3,000 on August 25, 2015. The Respondent accepted the check and deposited it into his trust account; however, he did not forward the $3,000 to Dr. Nelson, despite the fact that both Deaver and Dr. Nelson made numerous inquiries regarding the funds. On November 18, 2015, the Respondent was notified that Deaver had retained substitute counsel, and he was again directed to forward the $3,000 to Dr. Nelson. The Respondent subsequently withdrew from the matters in Hanover and Westmoreland Circuit Courts; however, he still failed to forward the $3,000 to Dr. Nelson. The Respondent's holding of Deaver's funds for nearly three months, rather than properly delivering the funds to Dr. Nelson, constitutes a violation of Rule 1.15(b)(4).

Rule 1.15(a)(1) requires a lawyer or law firm to deposit funds held on behalf of a client into a trust account; and, Rule 1.15(b)(5) prohibits a lawyer from disbursing or converting funds of a client without the client's consent. Upon investigation by the Bar following a bar complaint filed by James Deaver, it was discovered that, subsequent to depositing the $3,000 into his trust account, the Respondent improperly transferred the funds to his operating account. Thereafter, the funds were seized by the Internal Revenue Service (IRS) for employment taxes that the Respondent had failed to pay, which prevented the Respondent from timely refunding the $3,000 to Deaver.

Likewise, in the Griner Case, the Respondent was retained in December 2015, to represent Brenda Griner (hereinafter "Griner") for a traffic matter in Westmoreland General District Court and was paid $800 in advance for legal fees; however, on the court date, the Respondent failed to appear. The Respondent subsequently explained to Griner that he was in another court during the trial and agreed to make a full refund of Griner's retainer. He further stated that he may be able to approach the court to have the matter reconsidered but that, in any event, he would refund some or all of the $800 paid. The Respondent never took any other action in furtherance of Griner's case and never provided a refund. Griner subsequently filed a bar complaint; and, upon investigation, the Respondent acknowledged that he had deposited the $800 into his operating account and never transferred them to his trust account. The Respondent's failure to properly deposit and maintain the funds of both Deaver and Griner in his trust account constitutes a violation of Rules 1.15(a)(1) and (b)(5).

Rule 1.15(c) further requires a lawyer to maintain certain minimum books and records demonstrating his or her compliance with the Rule's requirements regarding the safe-keeping of a client's property; and, in the Deaver Case and the Hensley Case, the Respondent failed to act in accordance with this Rule. In response to a subpoena *duces tecum* issued by the Bar in the Deaver Case, the Respondent was able to produce only portions of his trust account statements and failed to provide cash receipts journals, cash disbursements journals, or subsidiary ledgers related to the representation Deaver. Similarly, in the Hensley Case, the Respondent was unable

to produce any trust account records prior to August of 2015. The Respondent's failure to properly maintain his trust account records in these cases constitutes a violation of Rules 1.15(c)(1), 1.15(c)(2), 1.15(c)(2)(i), 1.15(c)(2)(ii), 1.15(c)(3), 1.15(c)(4).

Rule 1.16(a)(1) and (d)

The Board finds by clear and convincing evidence that the Respondent violated Rule 1.16(a)(1) in the Hensley Case and Rule 1.16(d) in the Deaver Case and Griner Case when he failed to properly terminate his representation.

Rule 1.16(a)(1) requires a lawyer to withdraw from representation of a client when the representation will result in a violation of the Rules of Professional Conduct. In the Hensley Case, the Respondent's employment as an Assistant Commonwealth's Attorney necessarily resulted in a conflict in his continued representation of Hensley. The Respondent's failure to withdraw from Hensley's case upon his acceptance of employment as an Assistant Commonwealth's Attorney thus constitutes a violation of Rule 1.16(a)(1).

In accordance with Rule 1.16(d), upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned, and properly handling records. Upon the Respondent's termination in the Deaver Case, he failed to forward the $3,000 received from Deaver for the psychosexual evaluation to Dr. Nelson, despite being asked numerous times to do so. Likewise, the Respondent refused to refund his client's funds in the Griner Case despite never appearing in court on the client's behalf and stating both to Griner and the Bar that the funds would be returned. These actions constitute violations of Rule 1.16(d).

Rule 3.3 and Rule 4.1

The Respondent violated Rule 3.3 and Rule 4.1 in the Deaver Case when he knowingly made false statements of fact to both his client and the Bar. On numerous occasions throughout his representation of Deaver, the Respondent stated that he had forwarded the client's funds to Dr. Nelson for the purpose of performing a psychosexual evaluation of Deaver. However, Dr.

Nelson never received the funds. During the Bar's investigation of the matter, a subpoena *duces tecum* was issued to the Respondent regarding the funds; and, the Respondent failed to comply with the subpoena in a timely manner. On June 21, 2016, Bar Counsel forwarded to the Respondent a Notice of Noncompliance and Request for Interim Suspension that stated, in pertinent part, that if the Respondent did not comply with the subpoenas *duces tecum* by or before July 1, 2016, Bar Counsel would request an interim suspension until the Respondent did comply with the subpoenas *duces tecum*. On August 26, 2016, a hearing was held before the Disciplinary Board, and the Respondent was asked if he had refunded the $3,000 to James Deaver. The Respondent stated that he had done so; however, the check was later dishonored due to insufficient funds as a result of the funds in the Respondent's operating account being seized by the IRS. The Respondent subsequently informed the Bar that he reissued a check to Deaver on August 25, 2016, yet Deaver has not received the check. The Board finds that the Respondent knew that he had not returned the funds to Deaver and that he had intentionally lied to the Board. These continued intentional misrepresentations to both James Deaver and the Bar regarding the status of the case and whether he had forwarded the funds to Dr. Nelson constitute violations of Rules 3.3(a) and 4.1(a).

Rule 8.1

Rule 8.1 of the Rules of Professional Conduct governs disciplinary matters before the Bar and prohibits lawyers from making false statements of material fact, failing to respond to demands for information, or otherwise obstructing an investigation be a disciplinary authority. As a result of his conduct as set forth herein, numerous bar complaints were filed against the Respondent; and, the Board finds that the Respondent intentionally failed to cooperate in resolving the complaints and intentionally obstructed the investigations in violation of Rule 8.1.

In the Deaver Case, the Respondent not only lied to Deaver and the Bar regarding the status of sending the client's funds to Dr. Nelson, but he also lied to the investigator assigned to investigate the complaint as well as Assistant Bar Counsel in stating that he had mailed the check. In doing so, the Respondent violated Rule 8.1(a).

Furthermore, in the Deaver, Griner, and VSB Cases, the Respondent was sent a letter by the Bar providing him with copies of the complaints and informing him of his duty to respond to the complaints and comply with the Bar's demands for information. Nevertheless, the Respondent refused to respond to the bar complaints, which the Board finds to be an intentional violation of Rule 8.1(c).

Following the Respondent's refusal to respond and during the course of the Bar's investigations of each of the bar complaints filed against the Respondent, numerous subpoenas *duces tecum* were issued summoning the Respondent to produce documents to the Bar regarding the incidents of misconduct alleged in the complaints against him. In the Deaver, Hensley, VSB, and Burrell Cases, the Respondent failed to respond to the subpoenas in a timely manner, which necessitated the scheduling of a hearing for consideration of the Bar's request that the Respondent's license to practice law be suspended until he complied with the subpoenas. Although the Respondent did produce documents prior to the hearing in each case, his responses were insufficient; and, in the Deaver Case, he testified at the hearing that he had not produced all the documents in his possession. The Respondent's intentional failure to respond to the subpoenas *duces tecum* in a timely manner, thereby necessitating the scheduling of hearings for consideration of a Request for Interim Suspension constitutes violations of Rule 8.1(d).

Rule 8.4(c)

The Board finds by clear and convincing evidence that the Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation adversely reflecting on his fitness to practice law in violation of Rule 8.4(c) in his representation of Mullins in the VSB Case. In the subpoena *duces tecum* issued by the Bar, the Respondent was asked to provide documentation pertaining to any communications with Mullins regarding whether he wished to continue the appeal after it was dismissed due to failure to file the petition for appeal and documentation of any notification to Mr. Mullins stating that the appeal was dismissed. In response to the subpoena, the Respondent produced two letters. The first letter, dated July 21, 2016, provided notice to Mullins that Respondent had missed the appeal and that Mullins had a

right to file a delayed appeal. The second letter purported to be a letter for Mullins to send to the Court of Appeals requesting new counsel to assist with his appeal. However, during the course of the investigation, Mullins stated that he never received such letters and, moreover, had received no communication whatsoever from the Respondent since January of 2016. The Respondent's assertion that he sent Mullins a letter dated July 21, 2016, informing him that the Respondent had failed to perfect his appeal when, in fact, no such letter was sent or received by Mullins constitutes a violation of Rule 8.4(c).

THE BOARD'S FINDINGS

Having received the Stipulations received into evidence as Exhibit 47 which admit the violations contained in the Certification received into evidence as Exhibit 1and having considered the testimony and evidence presented at the hearing, the Board recessed to deliberate; and, after due deliberation, reconvened and stated its finding that the VSB had proven, by clear and convincing evidence, each of the Rule violations charged. The Board then reconvened for the sanction phase of the hearing, as addressed herein.

SANCTION PHASE OF HEARING

After the Board announced its findings by clear and convincing evidence that the Respondent had committed the Rule violations charged in the Certification, it received further evidence regarding aggravating factors applicable to the appropriate sanction for the conduct of the Respondent underlying the Rule violations. The VSB relied upon Exhibit 48 concerning Respondent's prior disciplinary record, thereafter resting its case.

Subsequently, the Board heard evidence regarding mitigating factors applicable to the appropriate sanction. Respondent testified on his own behalf and also relied upon testimony from James Leffler, who qualified as an expert in the field of mental health and substance abuse relating to attorneys practicing in the Commonwealth of Virginia; and, Jane Wrightson,

Commonwealth Attorney for Northumberland County. The Respondent testified that, during the period in which each of these incidents of misconduct occurred, he was struggling with numerous personal issues. Not only did one of his clients overdose shortly after the Respondent negotiated his release from prison, but a close friend and mentor of the Respondent's also committed suicide, and the Respondent felt that he was, in part, to blame because he failed to notice that his friend was planning to do so. The Respondent also testified that, during this time, his father became a Commonwealth's Attorney and left him to run their firm on his own.

Following the Respondent's testimony, Mr. Leffler provided testimony regarding the Respondent's depression during the period in which the violations occurred. Mr. Leffler's testimony indicated that the Respondent met the criteria for major depression which, in his opinion, was brought on by several events, including the suicide of a close friend and the death of a client, among other incidents, all of which were compounded by the stress of running a small business.

The Respondent then called Commonwealth Attorney Jane Wrightson as his final witness, who provided testimony regarding her hiring of the Respondent and his efforts to address his misconduct. Ms. Wrightson testified that the Respondent was a good, smart lawyer and worked well with others. Respondent's Exhibits 1-3 were admitted into evidence, without objection, during this phase of the hearing.

DISPOSITION

At the conclusion of the evidence in the sanctions phase of this proceeding, the Board recessed to deliberate. After due deliberation and review of the foregoing findings of fact, upon review of Exhibits 1-49 presented by Bar Counsel on behalf of the VSB, upon review of Respondent's Exhibits 1-3, upon the testimony from the witness presented on behalf of the VSB and upon the testimony of witnesses presented by Respondent, the Board reconvened and stated

its finding that, when considered together, Respondent's pattern of violations over such a limited period of time, along with his prior disciplinary record, demonstrate a severe failure to uphold his duties to his clients and the profession. The Board's finding is mitigated by the Respondent's evidence regarding his personal and emotional problems during the period in which the violations occurred, as well as his relative inexperience in firm management as a solo practitioner, his demonstration of remorse, and his acknowledgement of the severity of his breach of duty to his clients during the timeframe in question. The Board also notes that the Respondent has taken action to rectify his conduct and prevent future violations, including attending counseling.

Therefore, upon consideration of the evidence and the nature of the misconduct committed by the Respondent, it is ORDERED, by majority vote of the Board, that the Respondent's license to practice law in the Commonwealth of Virginia is suspended for a period of two (2) years, effective April 28, 2017. The Respondent is also advised that he should continue counseling with Lawyers Helping Lawyers.

It is further ORDERED that, as directed in the Board's April 28, 2017 Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the two (2) year suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. Respondent shall give such notice within 14 days of the effective date of April 28, 2017 and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of April 28, 2017, the Respondent shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within 60 days of the effective day of the suspension. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Opinion and Order to Respondent, Nicholas Caron Smith, at his address of record with the Virginia State Bar, being P.O. Box 59, Mt. Holly, VA 22524, and his alternate address of record, being Northumberland Commonwealth Attorney's Office, 39 Judicial Place, Heathsville, VA 22473, by certified mail, return receipt requested; by regular mail to Respondent's Counsel, James C. Breeden and Jeffrey P. Matthews, at Breeden & Breeden, 265 Steamboat Road, Irvington, VA 22480; and by hand delivery to Prescott L. Prince, Assistant Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

This is Order is final.

ENTERED this 23 day of May, 2017.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Sandra L. Havrilak

Digitally signed by Sandra L. Havrilak
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Sandra L. Havrilak, Acting Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

In the matter of:
BRADLEY DOUGLAS WEIN

VSB DOCKET NUMBERS: 07-032-0903
08-032-073809
07-032-1855

ORDER OF SUSPENSION

These matters came to be heard before the Virginia State Bar Disciplinary Board (the "Board") on September 23 and 24, 2010, upon the following Certifications from the Third District Committee of the Virginia State Bar:

1. The Certification dated and sent to Respondent on November 30,2009, VSB Docket No: 07-032-0903 (referred to herein as the "Catlett matter");

2. The Certification dated and sent to Respondent on April 2, 2010, VSB Docket No: 08-032-073809 (the "Mountford matter"); and

3. The Certification dated and sent to Respondent on October 20, 2009 VSB Docket No: 07-032-1855 (the "Woodruff matter").

The hearing was held before the duly convened panel of the Board comprised of Attorney members Martha JP McQuade, 2nd Vice Chair and presiding (the "Chair"); Tyler E. Williams, III; Sandra L. Havrilak; and Raighne C. Delaney; and Lay Member Stephen A. Wamall. The Respondent Bradley Douglas Wein ("Respondent" or "Wein") was present and represented by Christopher J. Collins ("Respondents's Counsel"); Harry M. Hirsch appeared as Counsel for the Virginia State Bar in the Catlett matter and the Mountford matter; and Renu M. Brennan appeared as Counsel for the Virginia State Bar in the Woodruff matter. The proceedings were recorded and reported on September 23, 2010 by Jennifer L. Hairfield, a certified court reporter with Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, 804-730-1222; and on September 24, 2010 by Valarie L.S. May, a registered professional court reporter, also with Chandler & Halasz.. Both were duly sworn by the Chair.

The Chair opened the hearing by polling the Board members to ascertain whether any of them had any personal or financial interest or bias which would affect, or could reasonably be perceived to affect, their ability to hear the case fairly, and all, including the Chair, answered in the negative. The Chair explained the hearing process and Counsel agreed as to the presentation of evidence in these matters.

In the Catlett matter, in accordance with the pretrial conference ruling and as confirmed at the hearing, the Bar's Exhibits A 1-16 and Respondent's Exhibits A 1-5, 7-10 were admitted into

evidence, without objection. Respondent's Exhibit A-6 was withdrawn and Exhibit A-7 was admitted over the Bar's objection.

In the Mountford matter, in accordance with the pretrial conference and as confirmed at this hearing, the Bar's Exhibits B 1-40 and the Respondent's Exhibits B 1, 2, 4, 6, 7, 8, and 9 were admitted into evidence without objection; Respondent's Exhibit B 3, 5, 10 and 11 were withdrawn as duplicative.

In the Woodruff matter, in accordance with the pretrial conference and as confirmed at the hearing, the Bar's Exhibits C 1-27 were admitted into evidence without objection. The Respondent's Exhibit C-1 was not ruled on at the pretrial, nor received into evidence at the hearing; all other exhibits offered by the Respondent, specifically C 2-6, were either withdrawn or not admitted.

Bar Counsel called the following witnesses in the Catlett matter, each of whom testified on September 23, 2010: Kathy Catlett; Donald Lantagne; Cam Moffatt; and, Eddie Whitlock. Respondent also testified in his case.

In the Mountford matter, Bar Counsel called the following witnesses, each of whom testified on September 23, 2010: Frank T. Mountford, Cam Moffatt, and Amy Hatcher. Respondent called Brenda Wein.

In the Woodruff matter. Bar Counsel called the following witnesses, each of whom testified on September 24, 2010: Charles Butler Barrett; Brent Woodruff; William E. Woodruff, Jr; and, Marjorie Woodruff. The Respondent testified in his case.

I. FINDINGS OF FACT

1. At all relevant times Respondent has been an attorney duly licensed to practice law in the Commonwealth of Virginia and his address of record with the Bar is 3900 Westerre Parkway, Suite 300, Richmond, Virginia 23233. (VSB Exhibit A-3) According to Respondent, he has been practicing law for nineteen (19) years.

2. The Respondent was properly served with notice of these proceeding in accordance with Part 6, § IV ¶ 13-18 (C) of the Rules of Professional Conduct. (VSB Exhibit A-1; B-1; C-1)

A. The Catlett Matter (VSB Docket No. 07-032-0903)

1. At all times relevant hereto, Respondent Bradley Douglas Wein [Wein], has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. Wein represented Complainant Kathy Catlett [Catlett] in the appeal of a domestic relations case to the Virginia Court of Appeals [Court]. Wein utilized the services of Lantagne

Legal Printing in the process of preparing and filing pleadings with the Court. Lantagne Legal Printing submitted invoices to Wein for the services rendered as follows:

(a) Invoice number 40171, dated March 2, 2004, for, *inter alia*, copies of a brief of appellant and copies of a joint appendix; the initial amount billed was $5,251.49; the final version of this invoice reflected additional entries for "finance charges on overdue balance," and a payment by Wein of $250.00 on December 3, 2004; the final total amount due on said invoice was $6,165.91. (VSB Exhibit A-15)

(b) Invoice number 40306, dated March 26, 2004, for, *inter alia*, copies of a brief of appellee; the final version of this invoice reflected an additional entry for "finance charges on overdue balance;" the final total amount due on said invoice was $174.16. (VSB Exhibit A-15)

(c) Invoice number 40379, dated April 12, 2004, for, *inter alia*, copies of a reply brief of appellant; the final version of this invoice reflected an additional entry for "finance charges on overdue balance;" the final total amount due on said invoice was $152.09. (VSB Exhibit A-15)

(d) The final total amount due as billed on all three of said invoices was $6,492.16, including finance charges, but not including any future collection costs.

3. Catlett testified that Wein told her that she had to pay the Lantagne bill before they finalized the printing and filed the case in the Court of Appeals. On or about April 6, 2004, she delivered to Wein's law office a memo addressed to Wein and a check, both dated April 6, 2004. Since no one was at the office, Catlett slipped the memo and check under the door of Wein's law office. The check was number 8631, in the amount of $5,300.00, payable to Wein, on a Chase Manhattan Bank USA, N.A. account [Catlett check]. A notation on the Catlett check was the following, "Lantagne Legal Printing, Inv # 40170, $5,251.49." (VSB Exhibit A-6)

4. Catlett's memo referred, *inter alia*, to an attachment as follows: "A check in the amount of $5,300.00 for the Lantagne Legal Printing bill (the bill was for $5,251.49)." (VSB Exhibit A-6)

5. Wein presented bills for legal services and expenses to Catlett with regard to his representation. Said bills, *inter alia*, included entries for each of the three Lantagne Legal Printing invoices and the payment of $5,300.00 on April 6, 2004. (VSB Exhibit A-7)

6. Lantagne Legal Printing and its employees sought payment of the invoices from Wein. By letter dated October 12, 2004, addressed to Ms. May Ferafim at Lantagne Legal Printing, Wein stated, *inter alia*, the following:

> My client has unfortunately ignored my billings. This leaves me in the position of paying on the above bill. I need to speak with you about making payment arrangements. (VSB Exhibit A-8)

7. The above language falsely implied that Catlett had not paid any funds to Wein for the payment of the invoices. Wein admitted that this representation was not accurate.

8. According to Donald Lantagne, Wein made only one payment on the invoices, the $250.00 payment on or about December 3, 2004. Subsequently, the invoices were sent to an attorney for collection in May of 2005. Suit was filed with a return date of October 13, 2005, when Wein appeared to contest the matter and a trial date was set.

9. On October 15, 2005, Wein filed a Chapter 7 personal bankruptcy, case number 05-42568-DOT. In Schedule F, Creditors Holding Unsecured Nonpriority Claims, Wein listed Lantagne Legal Printing with a claim amount of $6,492.16. (VSB Exhibit A-9)

10. On October 31, 2005 the collection attorney, Edward Whitlock [Whitlock] wrote Catlett about the outstanding debt. (VSB-Exhibit A-10) According to Catlett, upon receiving the letter from the collection attorney she called Wein. Wein told her she had paid him for the printing costs, there had been some mistake and the printer was at fault and he would take care of the matter.

11. On November 3, 2005, an employee of Whitlock, Ms. Edwards, spoke with Wein. Wein advised her he had sent Lantagne Legal Printing a check for $5,200.00 which was never cashed and he wanted to replace the check. This representation was also false. Wein asked for a reduction of the amount owed.

12. By letter dated November 4, 2005, Wein wrote to Whitlock indicating, *inter alia*, that Catlett had no liability on the Lantagne Legal Printing account that "payment had been previously made but did not post." Wein stated he enclosed his check for $5,272.35 as payment in full on the Lantagne Legal Printing account. (VSB Exhibit A-12) The invoices actually totaled $6,492.16, not including collection costs; however, Whitlock testified that Lantagne Legal Printing wrote off the difference.

13. Mr. Lantagne testified that upon Wein's statement that he previously sent a check to Lantagne Legal Printing he investigated if one was ever received. Mr. Lantagne stated that he never received a check or letter from Wein regarding a payment before Wein actually sent the money to Whitlock. That was the payment made by Wein in the amount of $5,272.35 by check number 1476, dated November 5, 2005, on a Wachovia Bank, N.A. account captioned, "Bradley D. Wein, and P.C." (VSB Exhibit A-13)

14. During the Bar's investigation of this matter, a subpoena *duces tecum* was duly served upon Wein regarding his representation of Catlett, in which he was required to produce, *inter alia*, all trust account records. No trust account records were produced. (VSB Exhibit A-16)

15. Also, during the investigation of this matter, Wein was interviewed by Investigator Cam Moffatt [Moffatt]. Wein told Moffatt he believed the Catlett check would have

been deposited into his operating account. He also told Moffett, that his secretary deposited the money into his operating account.

16. According to Wein's Amended Response, dated October 6, 2006, "All receipts from Mrs. Catlett were deposited in Mr. Wein's operating account earned, because Mrs. Catlett ran an open balance with Mr. Wein."

17. Upon receipt of the Catlett check, Wein applied the funds to his then outstanding total running bill including fees and costs. Wein did not deposit the Catlett check into a trust account. Wein did not pay the funds of the Catlett check to Lantagne Legal Printing, except for $250.00, until on or about November 5, 2005.

18. Wein testified that the check was deposited into his operating account by his secretary Beth Christopher. He did not recall seeing the check or memo from Catlett. He admitted that it was wrong and the money should have gone into a trust account.

19. From April 6, 2004, until on or about November 5, 2005, when the remaining debt based upon the three invoices was finally paid, the funds of the Catlett check should have been held in a trust account, less an appropriate adjustment for the $250.00 payment by Wein.

20. Wein also testified that he did not know there was a problem until he was contacted by Whitlock. Wein stated he thought the Lantagne bill was paid because his secretary told him payment was made. He acknowledged his mistake and admitted the payment was not made.

21. Wein also testified that during this time he was in the middle of a contested and expensive divorce himself and he filed bankruptcy.

22. Wein admitted to sending the letter to Lantagne Printing (VSB Exhibit A-8) and that it was in error; and, even though he told Whitlock's assistant that he sent a check that did not post that, too, was in error.

23. While Wein stated he accepted responsibility for his actions, he still blamed his secretary for depositing the money in the operating account, not showing him the memo from Catlett, and sending the note to Lantagne, claiming he paid the bill, when in fact he did not.

B. The Mountford Matter (VSB Docket No. 08-032-073809)

1. At all times relevant hereto the Respondent, Bradley Douglas Wein [Wein] has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On or about December 18, 2006, Wein was court-appointed to represent Lankford in the Juvenile and Domestic Relations District Court of Chesterfield County [court] on two charges: malicious wounding, case number JA045016-03-00, and destruction of property, case

number JA045016-04-00. The appointment order recited the next hearing date in the Lankford matters of February 6, 2007, at 10:00 a.m. (VSB Exhibit B-4)

3. On December 28, 2006, a Motion for Bond was filed by David Hicks, Esq., [Hicks] who informed the court in a cover letter that his firm had been retained by Lankford. A hearing on bond was set for December 29, 2006 and on that date Lankford was released on bond. No order of substitution of counsel was entered. (VSB Exhibit B-6)

4. On February 6, 2007, Whitney Tymas, Esq. [Tymas] of Hicks Tymas, LLC appeared in court on behalf of Lankford, moved for a continuance, and the cases were continued to April 16, 2007. On April 16, 2007, the cases were again continued to May 23, 2007. On May 23, 2007, Hicks appeared with Lankford and she was found not guilty. (VSB Exhibit B-5)

5. During the Bar's investigation of this matter, Wein was interviewed by Investigator Cam Moffatt [Moffatt]. According to Moffatt, Wein indicated to Moffatt that when he was appointed to represent Lankford he was out of state visiting his ill father and between his appointment and the February 6, 2007, court date he spent a lot of time out of town with his father. Wein stated when he returned to Richmond in January, he looked at the statutes relating to the charges, read case law online and prepared a bond motion for filing on February 6, 2007, if needed. Wein said he went to court early on February 6, 2007, intending to speak with Lankford prior to the cases being called. However, when he got to court he learned that another attorney had been retained. When the cases were called another attorney appeared, and sought and obtained a continuance. Wein stated that during the hearing, he was in the courtroom with his assistant but he did not make an appearance. Wein did not speak to Lankford or her family.

6. Wein submitted to the court a List of Allowances [voucher] number 003952896 which he signed June 6, 2007, for his representation of Lankford [Lankford voucher]. (VSB Exhibit B-8)

7. Such a voucher is the means by which a court-appointed attorney certifies to the court the time and expenses per case which he or she claims for the purpose of obtaining the authorization of the court and approval of payment for his services as a court-appointed attorney. The certification which the attorney signs states the following:

> I certify that the above claim for fees and/or expenses is true and accurate and that no compensation for the time or services set forth has previously been received.

8. In the Lankford voucher, Wein certified to the court that the trial/service date was February 6, 2007. Regarding the destruction of property charge, he claimed one hour of court time and one hour of out of court time for a total amount claimed of $120.00. As to the malicious wounding charge, Wein claimed two hours of in court time and two hours of out of court time for a total amount claimed of $448.00. For both charges, Wein claimed a total of $568.00. The court authorized $240.00 the maximum amount permitted to Wein in the Lankford matters.

9. Subsequently, Lankford received notice of the assessment of costs associated with the malicious wounding and destruction of property charges including the $240.00 which the court had approved for payment to Wein. Lankford wrote the court by letter dated August 22, 2007, indicating she had never had any contact with Wein and neither she nor her family were aware of any services having been performed for Lankford in the case; and, that her family had retained the firm of Hicks instead. Lankford stated she was writing the court because she was being charged lawyer's fees by a lawyer that she had never used. (VSB Exhibit B-9)

10. Frank Mountford, Clerk of the Juvenile and Domestic Relations District Court of Chesterfield County [Mountford], testified that he contacted Lankford after receiving her letter. Mountford learned that Lankford's family attempted to contact Wein by telephone unsuccessfully and then retained Hicks; that Wein did contact her family after Hicks had been retained; and, was told his services were no longer needed.

11. Mountford received from Tymas a letter dated August 24, 2007, in which Tymas indicated her office represented Lankford at all court appearances during the pendency of the Lankford charges and she appeared with Lankford in court on February 6, 2007. Tymas further stated that no other counsel appeared with Lankford at that time. (VSB Exhibit B-11)

12. Because Lankford contested Wein's court-appointed attorney's fees, Mountford repeatedly sought from Wein an affidavit of time supporting the representations made in his Lankford voucher. Mountford wrote Wein by letter dated December 3, 2007, indicating the prior efforts to get Wein to submit an affidavit and asking Wein to provide an affidavit to the court. (VSB Exhibit B-12)

13. On December 17, 2007, Mountford received an undated sworn affidavit from Wein certifying the time he expended on the Lankford charges in case numbers JA-045016-03-00 and -04-00 was correct. The affidavit did not specifically refer to the representations made by Wein in the Lankford voucher. (VSB Exhibit B-13)

14. By letter to Wein dated January 30, 2008, Chief Judge Bonnie C. Davis of the Juvenile and Domestic Relations District Court of Chesterfield County informed Wein she was advised that the Lankford voucher had come into question. She stated, *inter alia*, "The overriding appearance is that you were reimbursed for expenses that were not justifiable. The purpose of this letter is to notify you of the judges' decision to remove you from the court's list of available court appointed counsel until this matter can be resolved." (VSB Exhibit B-14)

15. According to Moffatt, she asked Wein how he accounted for the time he included in the Lankford voucher. In response, Wein said his out of court time included preparation of a bond motion, letter to the court, some research and travel time. Wein stated he drove 72 miles round trip for the February 6, 2007 hearing date which he estimated took him at least two hours. Wein did not keep a time sheet in the Lankford representation. Moffatt also testified that she also drove the trip as described by Wein and the miles were about the same.

16. The bar issued a subpoena *duces tecum* to Wein for his file in the Lankford representation. In response, Wein produced a copy of the Lankford voucher, the appointment order, a copy of the front page of an arrest warrant for the malicious wounding charge, a copy of the statute applicable to each charge, and a one line unsigned motion for bond with unsigned cover letter dated February 6, 2007. (VSB Exhibits B-15,16)

17. According to Wein's calendar for February 6, 2007, he had two other clients whose cases were set for that date in the court: Cullum at 10:00 a.m., and Williams at 11:00 a.m.

18. On December 28, 2006, the court appointed Wein to represent Cullum in an assault and battery charge in case number JA 047087-01-00. The appointment order recites that the next hearing date and time in the matter was February 6, 2007, at 10:00 a.m. (VSB Exhibit B-18)

19. According to the warrant of arrest, on February 6, 2007, Cullum appeared along with the Commonwealth's Attorney, but without defense counsel. Cullum waived the right to be represented by a lawyer in the criminal case, and a *nolle prosequi* was ordered in the case on the motion of the Commonwealth. (VSB B-18, 19)

20. Wein submitted a List of Allowances, number 003952799, which Wein certified by his signature on February 6, 2007, and in which he indicated a trial/service date of February 6, 2007, in the Cullum case and thirty minutes of out of court time for a total amount claimed of $120.00. (VSB Exhibit B-21)

21. Amy Hatcher was the clerk in the courtroom on February 6, 2007. She testified that she would recognize Wein on sight. She did not recall seeing Wein or his assistant in court on that date or advising Wein that his client had retained counsel and he would not be needed. The court file in the Cullum case includes a February 7, 2006 handwritten note by Hatcher stating she called Wein and told his secretary that Cullum had waived an attorney, the case ended with a *nolle prosequi* and Wein needed to send the court his voucher. (VSB Exhibit B-22)

22. Wein submitted a second List of Allowances, number 003952798, in the same Cullum case, number JA 047087-01-00, which voucher Wein certified by his signature on April 18, 2007. In the voucher Wein indicated a trial/service date of February 6, 2007 and in court time of one hour, for a total amount claimed of $120.00. (VSB B-23)

23. By letter to Wein dated April 24, 2007, from Court Room Deputy Clerk Tammy Williams, the second Cullum voucher was enclosed and Wein was informed that he had already filed the first voucher in the case. (VSB Exhibit B-24) On April 25, 2007, Judge Bonnie C. Davis authorized $120.00 allowed to Wein in the Cullum case.

24. On September 27, 2006, the court appointed Wein to represent BJW. Wein represented Williams at hearing and sentencing was set for January 30, 2007. According to a January 30, 2007, e-mail in the court's file from a member of the staff, Wein called the court that

morning indicating he was sick and would not appear that day in the Williams case and the matter was continued to February 6, 2007. (VSB Exhibit B-25)

25. According to a February 5, 2007, e-mail in the court's file in the Williams case from a member of the staff, Wein was sick with the flu and may not be able to make it for his case the next day at 11:00 a.m. regarding BJW; he would be calling the next morning to let the court know whether he would in fact be coming in or not. (VSB Exhibit 26)

26. In a February 6, 2007, e-mail in the court's file from Cheryl Anderson to Tammy Williams and another, she stated the following:

> Bradley Wein is sick with the flu and will not be able to appear in court today, he has three cases: Lankford –BCD, Cullum –BCD and BJW –EAR. He apologizes and said if there is any way the cases could be carried over until Thursday or Friday, he should be able to appear. (VSB Exhibit B-27)

27. According to Mountford, the disposition order in the BJW case for February 6, 2007, indicated the case was continued on the motion of the defense with the notation, "Lawyer out sick." He also testified that Wein did not submit a voucher for February 6, 2007, in the DJW case.

28. Wein was required by the court to provide time and/or mileage records to support vouchers submitted regarding other court-appointments including Hermsen, Nichols, Jenkins and RWD.

29. Wein represented Hermsen in eight cases. Wein submitted to the court three vouchers, numbers 004724011, 004724012 and 004724013, each of which he certified by his signature on November 16, 2007, for the eight cases. In the vouchers, Wein indicated October 16, 2007, as the trial/service date in each case. Wein claimed in seven cases $445.00 for both in court and out of court time and total expenses of $38.98, for a total claimed in each of the seven cases of $483.98. In the eighth case, Wein claimed $445.00 for both in court and out of court time, total expenses of $50.73, for a total claimed in the eighth case of $495.73. (VSB Exhibit B-28)

30. By letter dated December 21, 2007, to Wein, Judge Edward A. Robbins, Jr. advised that approval of the Hermsen claim would require Wein to provide the Clerk with his time and mileage records by January 17, 2008. (VSB Exhibit B-29)

31. By letter dated January 17, 2008, Wein submitted to Mountford his time sheet for the Hermsen representation which showed, *inter alia*, total mileage of 639.6 miles. In his cover letter, Wein asked that his mileage be adjusted. (VSB Exhibit B-30)

32. By letter dated January 24, 2008, Judge Robbins wrote to Wein upon receipt of the Hermsen claim and Wein's time sheet. The court denied Wein's request for mileage reimbursement. (VSB Exhibit 31)

33. The court also noted in its January 24, 2008, letter that although Wein had claimed 87.6 miles in each of seven of the Hermsen cases and 114 miles in the eighth case, the court noted the distance from Wein's office to the courthouse was less than 20 miles and a round trip was less than 40 miles. The court noted there was an 88 mile discrepancy between the total mileage claimed (727.2) and the total mileage shown on the time sheet (639.6) and there was a discrepancy of 47 miles between the amount claimed and the actual distance in each of five trips to the courthouse.

34. In its January 24, 2008 letter, the court stated, *inter alia*, the following:

> The Court has significant reservations concerning the accuracy of the claimed hours set forth on both the voucher and timesheet. You are cautioned to be diligent and mindful of your obligation to maintain accurate time and expense records in each case. The Court will closely scrutinize your future claims for the foreseeable future...

35. The Court approved Wein's claim in the amount of $960.00 which was the maximum allowable total fee in the Hermsen cases based upon its determination that Wein had actual time in the cases which exceeded eleven hours.

36. On January 11, 2008, Wein certified by his signature voucher number 4881877 in which he claimed mileage, time and expenses regarding representation of Nichols. Judge Robbins wrote to Wein by letter dated January 17, 2008, indicating that Wein needed to submit to the Clerk his mileage records for the Nichols matter. (VSB Exhibit B-32)

37. On December 7, 2007, Wein certified by his signature voucher number 004724018 in which he claimed mileage and time regarding representation of Jenkins. (VSB Exhibit B-34)

38. By letter dated January 24, 2008, from Judge Robbins to Wein, the court indicated that Wein needed to provide the Clerk with his time and mileage records in the Jenkins cases by February 14, 2008. (VSB Exhibit B-35)

39. Wein submitted a letter dated January 31, 2008, addressed to Judge Robbins, which was stamped received by the court on January 31, 2008. The letter references the Hermsen, Nichols and Jenkins cases. In the letter, Wein took issue with the court's comments concerning the Hermsen cases. (VSB Exhibit 36)

40. Judge Robbins responded to Wein's January 31, 2008, letter indicating the court did not resolve the issue of the reasonableness of the total hours claimed by Wein but authorized

the maximum amount allowable for legal services provided. The court also noted the records provided regarding expenses were "inconsistent without explanation and requested payment for driving distances greater than the shortest travel distance." (VSB Exhibit B-37)

41. On January 31, 2008, Wein certified by his signature on voucher number 4881799 regarding representation of RWD. Wein submitted a voucher for services rendered on January 1, 2008 (VSB Exhibit B-38). By letter dated February 22, 2008, Mountford wrote Wein indicating that approval of the claim would require Wein's submission of his time and mileage records for the RWD case by March 14, 2008. (VSB Exhibit 39)

42. According to Brenda Wein, Wein's current wife and legal assistant at the time, on February 6, 2007, Wein was very sick. However, Wein went to court and she accompanied him. According to Mrs. Wein by the time the third case was called Wein was too sick to stay. They left the court and called the clerk to say he was too sick to stay. Mrs. Wein also testified that Mountford told them that Wein may submit mileage on his vouchers.

C. The Woodruff Matter (VSB Docket No. 07-032-1855)

1. At all times relevant hereto, Wein has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. Wein represented the late Mary B. Woodruff in the legal malpractice case of *Mary Woodruff v. Richard E. Railey and Railey and Railey, P.C.*, initially filed in the Circuit Court for the City of Richmond, and transferred as Case No. CL97-275, to the Circuit Court for the County of Southampton.

3. In the Motion for Judgment, prepared, signed, and filed by Wein, at Paragraph 16 he alleged as follows:

> "That the plaintiff's treating physician, Dr. Kenneth P. Brooks, noted that the plaintiff was suffering from a delusional disorder or depression which developed after, and was causally related to, her work injury. A copy of Dr. Brooks' letter is attached hereto as plaintiff's Exhibit 3, and is incorporated herein by reference."

4. Plaintiff's Exhibit 3 provides as follows:

> "She injured her wrist while working as a trimmer at Perdue Farms, Inc. She apparently had this surgery and recovered initially but than (*sic*) began developing related psychiatric complications. She would spend much of her time preoccupied by pain and "disability" in her wrist. She would think and talk about her hand for prolonged periods of time. She was unable to do her housework at home. She would sit looking at her hand, moving her fingers, saying that they "felt dead." She developed a marked

> sleep and appetite disturbance and severe dysfunction of her abilities to perform both at home and at work. She has had three hospitalizations at Tucker Pavilion between October of 1989 and February of 1990. On this last stay, she received a course of electroconvulsive therapy with dramatic improvement." (VSB Exhibit C-3)

5. According to Woodruff and the pleadings, Mrs. Woodruff suffered from depression, and she underwent shock therapy. Wein advised the Bar's investigator that he was unaware that Mrs. Woodruff had undergone shock treatment or that she was severely depressed despite the fact that he attached a letter attesting to that fact in the Motion for Judgment he prepared on Mrs. Woodruff's behalf. (VSB Exhibit C-27)

6. *Mary Woodruff v. Richard E. Railey and Railey and Railey, P.C.*, Case No. CL97-275, was settled and dismissed with prejudice June 6, 2002. According to Wein and Mr. William E. Woodruff, Jr. [Woodruff], Wein not only maintained contact with the Woodruffs after the settlement; he was their friend and confidant. Additionally, Woodruff believed he was his lawyer.

7. According to Woodruff, he suffered from a right frontal lobe brain injury when he was a child. He also testified that both he and his wife were on disability and limited means to live.

8. On September 1, 2003, after the dismissal of *Mary Woodruff v. Richard E. Railey and Railey and Railey, P.C.*, Case No. CL97-275, Wein borrowed $25,954.69 from the Woodruffs. At the time of the loan, the Woodruffs were on disability and had limited resources. (VSB Exhibit C-6) Wein testified that the Woodruffs never presented to him as having a difficult time financially.

9. The parties dispute the genesis of the loan. Woodruff testified that Wein inquired as to the interest rate provided by the institution which held Mrs. Woodruff's settlement funds. Woodruff stated that when his wife received her settlement they put the money in a certificate of deposit at BB&T Bank. Woodruff testified that Wein told them that he could get a better interest rate for them if they gave him the money to invest at Wachovia Bank.

10. Woodruff also testified that he did not ask questions of Wein, that he was their lawyer and friend. He trusted Wein. Woodruff testified that he never gave Wein a loan; Wein never told him it was a loan; and, Wein never discussed any conflict of interest, regarding the transaction.

11. Wein denied Woodruff's testimony and stated that after the malpractice case with Mary Woodruff was over he did not perform any services for the Woodruffs. According to Wein, the Woodruffs knew he was having marital difficulties and was in need of money and that they wanted to help him and graciously offered to lend him the money.

12. Wein prepared the promissory note pursuant to which he borrowed $25,954.69 from the Woodruffs. The promissory note states that "For Value Received, Bradley D. Wein, P.C. acknowledges receiving from William and Mary Woodruff the sum of $25,954.69, and promises to pay William and Mary Woodruff interest thereon in the amount of 4.75% per annum for a period of five years ($1,232.80 per year), interest payable quarterly in the amount of $308.20 beginning September 1, 2003 and to return the principal or renew the loan on June 1, 2008." The promissory note was not dated. (VSB Exhibit C-6) Apparently, Wein did not consider this transaction to be practicing law.

13. Wein admitted that he prepared the promissory note; that he made his law firm the borrower; and, the note was signed at his law office. Wein admitted that he never told the Woodruffs to consult independent counsel before entering into the transaction with him. Wein also testified that he was going to use the money to expand his law practice.

14. At or about the same time Wein borrowed the Woodruffs' money, Wein, as counsel for the Woodruffs, prepared a trust entitled the Woodruff Family Trust. According to Woodruff, he talked to Wein about creating a trust to protect his real property from creditors, due to mounting hospital bills. According to Wein, he created the Woodruff Family Trust to hold the Woodruffs' real estate, although he was unable to state why Woodruff wanted the trust. Wein has no writing which memorializes the Woodruff Family Trust.

15. At or about the same time that Wein created the Woodruff Family Trust, and at or about the same time Wein received the $25,954.69 from the Woodruffs, Wein prepared two Deeds of Gift pursuant to which the Woodruffs conveyed title to their real estate and residential property to Wein as trustee of the Woodruff Family Trust.

16. The Deeds of Gift are dated August 15, 2003, and were recorded September 5, 2003. (VSB Exhibit C-8,9)

17. Through the Deeds of Gift, Wein transferred title of the Woodruffs' property to himself as trustee of the Woodruff Family Trust.

18. Although Wein testified that he resigned as Trustee shortly after creating the trust, he failed to produce any documents to support that position.

19. On October 15, 2005, Wein filed a Chapter 7 Bankruptcy Petition. (VSB Exhibits C-10, 11). Wein had made few, if any, interest payments to the Woodruffs pursuant to the terms of the promissory note, and he still owed them the principal.

20. According to Woodruff, even though they were still in contact with Wein, Wein did not advise the Woodruffs that he filed for bankruptcy protection.

21. Wein's bankruptcy schedules only listed a debt of $10,000.00 to Buck Woodruff. Wein also listed an incorrect address for Woodruff in his bankruptcy schedules, and incorrectly spelled Woodruff as "Wudruff." (VSB Exhibit C-11)

22. As a result of Wein's failure to provide the Woodruffs' correct address or otherwise notify them of the bankruptcy proceedings, the Woodruffs never received notice of the bankruptcy proceedings. Woodruff confirmed that at no time did he know of the bankruptcy and Wein never told him about it. Wein admitted that he reviewed the bankruptcy pleadings before they were filed and never corrected them.

23. On January 29, 2006, Mrs. Woodruff passed away.

24. On February 7, 2006, unbeknownst to Woodruff, Wein's debts were discharged, including the debt listed to the Woodruffs in the alleged amount of $10,000.00. At no time did Wein ever provide an accounting, bank statement or other document reflecting the loan payments or any investment of funds to the Woodruffs. The record is unclear regarding what money, if any, Wein repaid on the promissory note. The Board did not find Wein's testimony to be credible on this issue.

25. According to Marjorie Woodruff, Woodruff's current wife, in April 2006 they went to Wein's office to get an accounting of the money and to find out what was going on regarding the money. Even though Woodruff consented to his wife being present, Wein refused to meet with her present. Mrs. Woodruff did not believe Wein gave her husband any money; and, knows Wein did not give him an accounting.

26. Subsequently in the Fall of 2006, Woodruff and his wife went to see Wein again. Wein inquired if he was alone and when he told him his wife was with him Wein refused to meet with them. At this time, the property tax bills were not being paid; Woodruff had hospital bills to be paid; and, when he tried to refinance his property he was told he could not do so because of the Deed of Gift and the property being held in trust. Throughout this time, Wein would not respond to Woodruff's request for information. In November 2006, Woodruff sent a certified package to Wein requesting information. The package was returned unclaimed.

27. In December 2006, Woodruff filed a bar complaint against Wein.

28. Woodruff subsequently hired C. Butler Barrett, Esq. [Barrett] to assist him with this matter. Barrett requested from Wein a copy of the Woodruff Family Trust and/or any documents relating to the Trust. (VSB Exhibit C-13) Barrett never received any documents from Wein.

29. On November 27, 2007, the Bar subpoenaed Wein to produce the Woodruff Family Trust and documentation related thereto, as well as all records relating to the Woodruffs' loan, including the creation and repayment of the loan. (VSB Exhibit C-19)

30. Wein did not produce any documents, either relating to the Woodruff Family Trust or the loan, or otherwise in response to the Bar's subpoena requesting trust documents. Rather, in a December 19, 2007 letter, Wein's counsel stated that Wein advised he had no documents responsive to the Bar's demand. Counsel further stated as follows: "Regarding the

loan from William and Mary Woodruff, Mr. Wein advises that Mr. and Mrs. Woodruff were listed as creditors in his bankruptcy petition and that the remaining balance due on the note was discharged." (VSB Exhibit C-20) Wein testified that he told the Woodruffs about the bankruptcy.

31. In March 2008, in his interview with the Bar's investigator, Wein stated for the first time that he had previously provided the trust documents to Mr. Woodruff and that he did not retain a copy. Woodruff asserts he was never provided a copy of any trust documents. Wein's testimony on this topic was inconsistent. He first stated that he gave a copy to Woodruff; then he remembered scanning it into his computer and giving a copy to Woodruff. He stated his computer crashed but that he did keep hard copies. However, he also testified that he and Woodruff took client records to the dump, including the Woodruff Family Trust and threw them away with Woodruff's consent. He claimed to have destroyed the only copy of the trust that existed, even though he was the sole trustee.

32. Wein never repaid the Woodruffs the sums owed them.

33. Wein blames his bankruptcy lawyer for telling him to discharge the loan even though his P.C. was the borrower; for providing the wrong spelling on the Woodruff name; and, providing their wrong address in the bankruptcy case.

34. After the filing of the bar complaint, Wein finally executed deeds prepared and sent to him by Barrett conveying the properties back to Woodruff.

II. MISCONDUCT

A. In the Catlett matter (VSB Docket No. 07-032-0903), the Certification charged Wein with violations of the following Rules of Professional Conduct:

RULE 1.15 Safekeeping Property

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

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

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

(c) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(2) identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

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

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and

knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyers fitness to practice law;

B. In the Mountford matter (VSB Docket No. 08-032-073809), the Certification charged the Respondent with violations of the following Rules of Professional Conduct:

RULE 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

RULE 4.1 Truthfulness In Statements To Others

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

(a) make a false statement of fact or law; or

(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyers fitness to practice law;

C. In the Woodruff matter (VSB Docket No. 07-032-1855), the Certification charged the Respondent with violations of the following Rules of Professional Conduct:

RULE 1.3 Diligence

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph 9(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

RULE 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

RULE 1.14 Client with Impairment

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

RULE 1.16 Declining or Terminating Representation

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

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

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

III. DISPOSITION

After considering the Exhibits admitted into evidence on behalf of the Bar and the Respondent, the testimony of witnesses presented on behalf of the Bar and upon evidence presented by Respondent in the form of his own testimony, and the argument of Counsel, the Board recessed to deliberate. After due deliberation the Board reconvened and stated its unanimous findings as follows:

In the Catlett matter (VSB Docket No. 07-032-0903): for all of the reasons stated above, the Board finds by clear and convincing evidence violations of Rules 1.15(a); 1.15(b); 1.15(c)(3); 1.15(c)(4); 5.3(a); 5.3(b); 5.3(c)(1); 5.3(c)(2); 8.4((b), and 8.4(c). The Board found the Bar failed to prove by clear and convincing evidence violations of Rules 1.15(c)(1); 1.15(c)(2) and dismissed those charges of misconduct.

In the Mountford matter (VSB Docket No.08-032-073809), the Board finds that the Bar failed to prove by clear and convincing evidence violations of Rules 3.3(a)(1); 3.3(a)(4); 4.1(a); 4.1(b); 8.4(b); 8.4(c) and dismissed the case.

In the Woodruff matter (VSB Docket No. 07-032-1855) on July 30, 2010 Bar counsel dismissed the alleged violation of Rule 1.14(a). Regarding the remaining violations, the Board finds that the Bar proved by clear and convincing evidence violations of Rules 1.3(c); 1.8(a); 1.7(a)(2), 1.16 (a) and 8.4(a)(b) and (c).

The Board received evidence of aggravation and mitigation from the Bar and Respondent, including the Respondent's prior disciplinary record. Wein had one prior disciplinary finding against him, that is in July 2007 Wein had a public admonition without terms for violating Rule 1.15(c)(3) concerning the safekeeping of client's property.

In mitigation, Wein testified that he was 49 years old and had a family that was relying on him to support, including 6 children and his wife. That his personal life was in turmoil and he was running a solo law practice. That at the time of these charges, he was going through a contentious divorce and had serious economic problems. Additionally, his father was very sick and living in Arizona and that he was the one responsible to care for his father. Wein admitted that he should have handled the Catlett matter differently. Regarding the Woodruffs, Wein testified that he never intended to hurt them, but acknowledged that he did indeed do so. He also stated that he was sorry for his actions.

After the argument of counsel, the Board recessed to deliberate what sanction to impose upon its findings of misconduct. In the Catlett matter the Board was particularly concerned about the Respondent's repeated misrepresentations to his client and third parties and his passing the blame on to his secretary. After due deliberation, the Board reconvened and the Chair announced the sanction to be imposed; that Respondent's license to practice law in the Commonwealth of Virginia be suspended for 6 months.

In the Woodruff matter the Board had a myriad of concerns regarding the misconduct violations. First, the Board did not find Respondent's testimony to be credible and was dismayed by his apparent failure to tell the truth. Second, he once again blamed others for his wrongdoing. Finally, and most importantly, Respondent violated his trust to people who were his clients and friends. He took advantage of them as their lawyer and friend; and, failed to tell them about discharging their debt in bankruptcy. He engaged in conduct involving dishonesty, fraud, deceit and misrepresentation and committed a deliberately wrongful act that reflects adversely on his honesty, trustworthiness and fitness to practice law. Accordingly, Respondent's license to practice law in the Commonwealth of Virginia be suspended for 4 years effective September 24, 2010.

It is therefore ORDERED that the license of the Respondent, Bradley Douglas Wein, to practice law in the Commonwealth of Virginia be and the same hereby is suspended for a period of six months in the Catlett matter (VSB: 07-032-0903) and 4 years in the Woodruff matter (VSB: 07-032-1855), effective September 24, 2010 to run concurrently.

It is further ORDERED that the Mountford matter (VSB: 08-032-073809) is dismissed.

It is further ORDERED that, as directed in the Board's September 24, 2010 Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of Respondent's license to practice law in the Commonwealth of Virginia, to all clients for whom Respondent is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in Respondent's care in conformity with the wishes of Respondent's client. Respondent shall give such notice within fourteen (14) days of the effective date of this order, and make such arrangements as are required herein within forty-five (45) days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty (60) days of the effective

day of this order that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of this order, Respondent shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9E of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Order to Respondent at his address of record with the Virginia State Bar, being Bradley D. Wein, Suite 300, 3900 Westerre Parkway, Richmond, VA 23233 by certified mail, return receipt requested, and by regular mail to Christopher J. Collins, Respondent's counsel, 304 East Main Street, Richmond, Virginia 23219 and to Harry M. Hirsch, Deputy Bar Counsel, and Renu M. Brennan, Assistant Bar Counsel, Virginia State Bar, Suite 1500, 707 East Main Street, Richmond VA 23219.

ENTERED this 8th day of December, 2010.

MARTHA JP McQUADE, 2nd Vice Chair, Presiding
Virginia State Bar Disciplinary Board

MISCONDUCT

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF JAY LAWRENCE PICKUS	)))	VSB Docket No. 09-033-076639

AMENDED
ORDER OF SUSPENSION

This matter came on to be heard on February 19, 2010, before a panel of the Virginia State Bar Disciplinary Board consisting of Sandra L. Havrilak, Acting Chair; John S. Barr; Pleasant S. Brodnax, III; David R. Schultz and Stephen A. Wannall, lay member [the "Board"].

The Virginia State Bar [the "Bar"] was represented by Edward L. Davis, Bar Counsel. Jay Lawrence Pickus [the "Respondent"], appeared in person and was represented by counsel, Christopher J. Collins and Matthew Geary. Tracy J. Johnson, a registered professional reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

The Chair opened the proceedings and polled the members of the Board as to whether any of them had any personal or financial interest, which would impair, or reasonably could be perceived to impair his or her ability to be impartial. Each member of the Board responded in the negative.

The matter came before the Board on the District Committee Determination for Certification by the Third District Committee of the Bar. The Certification was sent to Respondent on October 7, 2009.

At the commencement of the hearing, Bar Exhibits 1 through 10 were admitted without objection. Respondent Exhibits 1 through 25 were also admitted without objection. The parties entered into two separate stipulations regarding the expected testimony of Shelly Ottenbrite and

Barbara Grasso. Their expected testimonies were admitted as one exhibit, VSB Exhibit 11, without objection. The Respondent also testified.

This Amended Order of Suspension is to correct the record reflecting that neither Mr. Geary nor the Bar Investigator testified during any part of this hearing.

The Board conducted the evidentiary hearing with respect to the alleged misconduct. Following the evidentiary hearing, the Board recessed to consider whether the Bar had presented evidence demonstrating that Respondent committed the charged ethical misconduct. The Board made the following findings of fact on the basis of clear and convincing evidence:

I. EVIDENTIARY HEARING

Findings of Facts:

1. At all times relevant hereto, Respondent has been an attorney licensed to practice law in the Commonwealth of Virginia. The Respondent received proper notice of this proceeding as required by Part Six, § IV, ¶ 13(C) and 13(A) of the Rules of Virginia Supreme Court.

2. During October 2004, Shelly Ottenbrite hired Respondent to defend her against a lawsuit filed by Barbara Grasso in the United States District Court, Richmond Division, on September 14, 2004.

3. Ms. Ottenbrite paid Respondent a flat fee of four thousand dollars ($4,000.00) cash to cover the first twenty (20) hours of work.

4. Respondent explained that his plan was to "get the case going," answer the complaint, negotiate with Grasso and conduct research.

5. Respondent admitted that he did not deposit any of the fees into an attorney escrow account.

6. According to Respondent, he told Ms. Ottenbrite that he would not accept her case without a non-refundable fee (VSB Exhibit 10). He testified that it was a mistake to state that it was non refundable and claims he misspoke and never stated that, despite his letter to Mr. Davis acknowledging the statement.

7. On November 23, 2004, Ms. Grasso filed a motion for partial summary

judgment against Ms. Ottenbrite seeking possession of the dog that was the subject of the lawsuit. Ms. Grasso certified that she hand-delivered a copy of the motion to Respondent, who had eleven (11) days to respond under Local Civil Rule 7(F) (1) of the United States District Court.

8. Respondent did not file a response to the motion, feeling that his client had no defense. Respondent did not advise his client in advance about this decision or obtain her consent not to file a responsive pleading.

9. Respondent explained to the Virginia State Bar that his client had not provided him with pertinent information, that she had left the area, and that he could not reach her. Ms. Ottenbrite, on the other hand, is adamant that she assisted Respondent in the case and that the only time during which he could not contact her was a brief period when she was out of the country, a time during which Respondent took care of Ms. Ottenbrite's puppy.

10. During December 2004, Respondent informed Ms. Ottenbrite that he required an additional two thousand five hundred dollars ($2,500.00) to continue representing her, which Ms. Ottenbrite paid to Respondent in cash.

11. Respondent admitted that he did not deposit any of these funds into an attorney escrow account.

12. No response having been filed to the motion for partial summary judgment, on February 18, 2005, the court entered an order granting partial summary judgment and awarding possession of the dog and puppies to Ms. Grasso. (VSB Exhibit 4) The court preserved the issue of damages for trial, and specifically noted that:

> *The defendant has completely and without excuse failed to offer any defense or set forth any facts that create a genuine issue for trial on the issue of the material breach of the contract. Therefore, summary judgment is appropriate in favor of the plaintiff.*

13. As a result of this development, Ms. Ottenbrite terminated Respondent, and on March 1, 2005, the court granted a motion allowing Respondent to withdraw.

14. Also on February 25, 2005, Ms. Ottenbrite filed for bankruptcy protection and hired successor counsel, Deborah Corcoran.

15. On March 23, 2005, Ms. Corcoran filed a motion to set aside the order of partial summary judgment and proceeded to defend Ms. Ottenbrite in the matter. Eventually,

on October 2, 2007, the court dismissed Ms. Grasso's case for failure of the parties to prosecute in a timely manner.

16. On October 26, 2007, Ms. Ottenbrite filed a malpractice action against Respondent in the Circuit Court for the City of Richmond. (VSB Exhibit 7)

17. In a request for production of documents, Ms. Ottenbrite's counsel asked Respondent to provide any and all ledgers showing any and all sums paid or advanced to him by or on behalf of Ms. Ottenbrite. (VSB Exhibit 8)

18. In response, Respondent stated that no such records were available, and that Ms. Ottenbrite paid him four thousand dollars ($4,000.00) to represent her for the first twenty (20) hours and later paid him an additional two thousand five hundred dollars ($2,500.00). (VSB Exhibit 8)

19. Request for Production Number 3 requested a copy of all trust account statements showing any money that was held in trust for the benefit of Ms. Ottenbrite. (VSB Exhibit 8)

20. Respondent answered that none were available (he subsequently acknowledged to the Bar that he did not place the funds in trust). (VSB Exhibit 10)

21. Request for Production Number 6 requested detailed time sheets for services provided to Ms. Ottenbrite.

22. Respondent answered that none were available.

23. Respondent explained to the Bar he was certain that he had earned the money at the time that he received it from Ms. Ottenbrite, that he kept a record of money received and time spent on all of his cases, and that he maintained these records in the file jackets of his cases.

24. Respondent explained further that he turned this case file over to Ms. Ottenbrite's successor counsel, Ms. Corcoran, so he did not have a record of when he received the cash payments from Ms. Ottenbrite or the amount of time that he devoted to her case.

25. On February 24, 2009, the Virginia State Bar issued Respondent a subpoena *duces tecum* for:

> *Copies of all trust account records for the period July 2004 through June 2005, including cancelled checks, cash receipts journals, cash disbursements journals, subsidiary ledgers, bank statements, deposit*

tickets and evidence of reconciliations, in your possession, custody or control, and including any records related to disposition of funds paid to you by Shelley A. Ottenbrite. (VSB Exhibit 9)

26. Respondent asked for an extension of the deadline to March 31, 2009, in order to obtain records from his bank.

27. Unable to provide any records by March 31, 2009, the Bar allowed Respondent a second extension to April 10, 2009.

28. Respondent still did not provide any records and by letter, dated April 27, 2009, the Bar demanded production of the records by May 7, 2009.

29. Respondent answered the request on May 8, 2009, by providing copies of his attorney escrow account bank statements and cancelled checks for the time period requested. Respondent explained that he had to obtain the records from his bank because he had not maintained them himself. He furnished the Bar with his original cancelled checks. (VSB Exhibit 10)

30. Respondent had no other escrow account records of any nature to furnish to the Bar in response to the subpoena duces tecum, although less than five (5) years had elapsed since the time period in question. Respondent claimed he did not know that he was required to keep the records for five (5) years.

31. Respondent explained that his "prior trust account reconciliations consisted of using the bank's statements and concomitant reconciliation form." He provided no other information concerning periodic trial balances, reconciliations, or client ledgers, or any other maintenance of his attorney trust account, and had no reconciliations to furnish to the Bar.

32. Other than copies of the bank statements and cancelled checks, Respondent had no other trust account records required under Rule 1.15 of the Rules of Professional Conduct to furnish to the Virginia State Bar. Specifically, he had no cash receipts journals, cash disbursements journals, client subsidiary ledgers, or reconciliations and supporting records, all required under Rule 1.15 of the Rules of Professional Conduct.

33. Respondent furnished the Bar with eighty-nine (89) cancelled checks from his attorney escrow account. (VSB Exhibit 10)

34. Of those, fourteen (14) bore annotations indicating the purpose of the checks or the case to which they related.[1] None of the other seventy-five (75) checks bore any annotations as to the cases to which they related or the purpose.

35. Sixty-two (62) of the cancelled escrow account checks were made payable to Respondent with no annotations indicating the purpose.

36. Eleven (11) of the cancelled checks were made payable to "cash" and endorsed by persons other than Respondent. Four (4) of those checks made to "cash," in amounts ranging from one hundred fifty dollars ($150.00) to three hundred dollars ($300.00), bore the endorsement of Broad Street Seafood Company, as did a fifth check, number 1750, in the amount of two hundred fifty dollars ($250.00), made payable to Awful Arthur's.

37. On April 15, 2005, the bank issued a check to Comcast Cable Communications in the amount of one hundred fifty dollars ($150.00), drawn on Respondent's escrow account, at the direction of Respondent.

38. Respondent's escrow account bank statements also reflect two (2) automated debits to HSBC MRTG SRVCS (HSBC Mortgage Services), each in the amount of one thousand one hundred forty-nine dollars and 97/100 ($1,149.97), on March 17, 2005 and April 19, 2005.

39. Respondent had no escrow account records reflecting the purpose of any of these checks and debits or the cases, if any, to which they related.

40. Respondent explained to the Virginia State Bar investigator (1) that the checks made payable to him were fees earned, (2) that the checks made out to cash, including those made to Awful Arthur's or negotiated by Broad Street Seafood, were fees earned, (3) that the check to Comcast cable was his personal expense, paid with fees earned, (4) and that the two (2) mortgage payments were his personal expenses.

41. On May 10, 2005, Respondent's escrow account became overdrawn in the amount of two hundred eight dollars and 15/100 ($208.15) and remained overdrawn until

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[1] Specifically, check numbers 1737, 1738 and 1814 were made payable to named persons and bore the annotation, "P.I. Settlement." Check numbers 1736, 1740, 1741, 1743, 1751 and 1761 were made payable to Mr. Pickus with annotations stating that they were for attorney fees relating to those three personal injury clients. Check numbers 1739, 1745, 1765 and 1772 were made payable to Mr. Pickus with annotations stating that they were for attorneys fees. Check number 1753 in the amount of $2.50 indicates that it was for an incident report. (VSB Exhibit 10)

June 6, 2005 when he deposited sixty thousand dollars ($60,000.00) from one of his personal injury cases.

II. NATURE OF MISCONDUCT

The Certification alleged that Respondent engaged in the following acts of misconduct and the Board finds as more specifically set forth below:

RULE 1.3 Diligence

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

The panel finds that the Bar proved by clear and convincing evidence a violation of Rule 1.3(a).

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.

The panel finds that the Bar proved by clear and convincing evidence violations of Rules 1.4(a)(b) and (c).

RULE 1.5 Fees

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

The panel finds that the Bar failed to proved by clear and convincing evidence violations of Rules 1.5(a)1-8

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

The panel finds that the Bar proved by clear and convincing evidence violation of Rule 1.5(b).

RULE 1.15 Safekeeping Property

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

The panel finds that the Bar failed to prove by clear and convincing evidence a violation of Rule 1.15(a)(1).

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The panel finds that the Bar proved by clear and convincing evidence a violation of Rule 1.15(a)(2).

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.

The panel finds that the Bar proved by clear and convincing evidence a violation of Rule 1.15(c)(3).

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

The panel finds that the Bar failed to prove by clear and convincing evidence a violation of Rule 1.15(c)(4).

(e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c).

Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

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

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

(iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained.

The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

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

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

The panel finds that the Bar proved by clear and convincing evidence violations of Rule 1.15(e)(1)(i)(ii)(iii)(iv)(v).

> **(f) Required Escrow Accounting Procedures.** The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.
>
> (2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;
>
> (3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;
> (4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.
>
> (i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and
>
> (ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.
>
> (5) Reconciliations.
>
> (i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;
>
> (ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;
>
> (iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.
>
> (6) Receipts and disbursements explained. The purpose of all receipts and disbursements of escrow funds reported in the escrow journals and subsidiary ledgers shall be fully explained and supported by adequate records.

The panel finds that the Bar proved by clear and convincing evidence violations of Rules 1.15(f)(2)(3)(4)(i)(ii)(5)(i)(ii)(iii)(6).

III. SANCTIONS HEARING

After considering the written testimony of the witnesses (Joint Exhibit 11), the testimony of the Respondent, and after reviewing all exhibits introduced by the Bar and the Respondent, and having heard argument, the Board recessed to deliberate. After due deliberation the Board reconvened and stated its findings as set forth above.

Following the hearing on the disciplinary matter, the Board received further evidence of aggravation and mitigation from the Bar and Respondent, including Respondent's prior disciplinary record.

The Board received Respondent's prior disciplinary record that included the following:

1) Third District Committee Letter of Private Reprimand in VSB Docket No. 80-032-0544; effective February 4, 1981.

2) Disciplinary Board one (1) year suspension in VSB Docket Nos. 81-031-0608 and 82-31-0192; effective November 1, 1986.

3) Third District Committee, Section II, Dismissal with Terms in VSB Docket No. 91-032-1100; effective October 13, 1992. Complied with terms on April 8, 1993.

4) Circuit Court for Chesterfield County, Public Reprimand in VSB Docket No. 94-031-0925; effective October 23, 1997.

5) Third District, Section III, Subcommittee Public Reprimand in VSB Docket No. 02-033-0698; effective November 20, 2002.

6) Third District, Section III, Subcommittee Public Reprimand with Terms in VSB Docket No. 02-033-3001; effective November 20, 2002. Complied with terms on February 24, 2003.

(VSB Exhibit 12)

The 2002 Public Reprimand with terms specifically found the Respondent violated Rule 1.15(e)(VI)(v), *inter alia*, that requires an attorney to preserve bank records for

at least five (5) full calendar years following the termination of the fiduciary relationship. Therefore, Respondent's testimony in this case is simply not truthful.

The Respondent offered the testimony of Gerald Strong, who is his tax preparer. Mr. Strong testified that he is familiar with the Virginia State Bar's escrow rules and counseled Respondent on them. He told Respondent that it is a mistake to write any personal checks from his escrow account. He acknowledged that he does not do an audit of Respondent's account, but merely inputs the data in the tax return as provided to him by Respondent.

The Respondent testified that he has been practicing law for thirty-three (33) years, since 1981. He acknowledged that he should not have written third party checks out of his escrow account and apologized for it. He also testified that in January 2005 he had four to five (4-5) checks written out of his operating account that were not authorized and he claimed he was the victim of identity theft. Nevertheless, he did not close his operating account and instead used his escrow accounts to write personal checks. The Board found Respondent's testimony to be incredible. The Board also found the testimony provided by the Respondent throughout the case to be less than truthful.

IV. IMPOSITION OF SANCTIONS

The Board heard argument on what sanction should be imposed. The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent. After due deliberation taking into consideration the evidence and testimony presented, Respondent's lack of credibility, lack of contrition or apology and the fact that the Respondent did not appear to adequately or accurately comprehend the seriousness or gravamen of his behavior and misrepresentation of his client. The Board reconvened and the

Chair announced the sanction to be imposed as a four (4) year suspension of Respondent's license to practice law, effective February 19, 2010.

Accordingly, it is ORDERED that the Respondent, Jay Lawrence Pickus, be suspended from the practice of law for a period of four (4) years, effective February 19, 2010.

It is further ORDERED that, as directed in the Board's February 19, 2010, Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of Respondent's license to practice law in the Commonwealth of Virginia, to all clients for whom Respondent is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in Respondent's care in conformity with the wishes of Respondent's client. Respondent shall give such notice within fourteen (14) days of the effective date of this order, and make such arrangements as are required herein within forty-five (45) days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty (60) days of the effective day of this order that such notices have been timely given and such arrangements made for the disposition of matters.

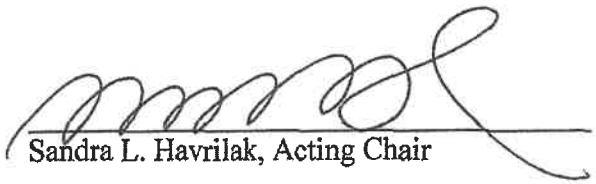
It is further ORDERED that if the Respondent is not handling any client matters on the effective date of this order, Respondent shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements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

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9E of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to Respondent Jay Lawrence Pickus, at his address of record with the Virginia State Bar, by certified mail, return receipt requested. The Clerk of the Disciplinary System shall also mail an attested copy of this order, by regular mail, to Christopher Collins, 304 East Main Street, Richmond, Virginia 23219-3820, Matthew P. Geary, Chucker & Reibach, 1 ½ North Robinson Street, Richmond, Virginia 23220 and Edward L. Davis, Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 19 day of April, 2010.

VIRGINIA STATE BAR DISCIPLINARY BOARD



Sandra L. Havrilak, Acting Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
SHELLY RENEE COLLETTE **VSB DOCKET NO.: 18-000-111181**

ORDER OF SUSPENSION

THIS MATTER came on to be heard on February 16, 2018, before a panel of the Virginia State Bar Disciplinary Board (hereinafter referred to as "the Board") consisting of Sandra L. Havrilak, Second Vice Chair; Yvonne S. Gibney; Michael J. Sobey; Thomas R. Scott, Jr.; and, Stephen A. Wannall, lay member. The Virginia State Bar (hereinafter referred to as "the VSB") was represented by Kathryn R. Montgomery, Deputy Bar Counsel (hereinafter referred to as "Bar Counsel"). Shelly Renee Collette (hereinafter referred to as "the Respondent") appeared *pro se,* along with William H. Atwill, Jr., Guardian *ad Litem* (hereinafter referred to as "the GAL"), duly appointed by the VSB to assist the Respondent. Tracy J. Stroh, court reporter of Chandler and Halasz, P. O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn in by the Chair, reported the hearing and transcribed the proceedings.

At the outset of the hearing, the Chair inquired of each member of the Board whether any of them had any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel. All members of the Board, including the Chair, responded in the negative. All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System (hereinafter referred to as "the Clerk") in the manner prescribed by the *Rules of Supreme Court of Virginia* (hereinafter referred to as the "*Rule(s)*"), Part Six, § IV, ¶ 13-18.

This matter came before the Board on the Rule to Show Cause and Order of Summary Suspension and Hearing entered on December 27, 2017 (hereinafter "the Summary Order") in

accordance with Part Six, § IV, ¶ 13-22 of the *Rules*. Upon receiving written notification from the Circuit Court for the City of Winchester that the Respondent had entered into a plea wherein the facts found by the court would justify a finding of guilt, the Board entered the Rule to Show Cause and Summary Order, pursuant to the *Rules*. The Summary Order summarily suspended the Respondent's license to practice law in the Commonwealth of Virginia and ordered her to show cause as to why her license should not be further suspended or revoked. The Summary Order and written notification were served upon the Respondent in accordance with the *Rules*, and the Respondent argued a preliminary Motion to Dismiss.

MISCONDUCT

The Respondent was an attorney licensed to practice law in the Commonwealth of Virginia at all times relevant to the conduct set forth herein. Between December 20, 2015 and January 8, 2016, the Respondent took three (3) checks totaling in excess of one thousand six hundred dollars ($1,600.00) from the business of her then boyfriend, David Wilds (hereinafter referred to as "Wilds"). The Respondent testified that, at the time that she took the money, Wilds was not supporting their child. The Respondent took the checks, which were made out to Wilds's business, to a nearby bank and requested that the teller deposit the checks into the Respondent's joint checking account with Wilds. However, the teller refused to deposit the checks as they were not made out to the Respondent. Thereafter, the Respondent went to a different bank branch and used an ATM to deposit the checks into her joint checking account with Wilds.

On February 24, 2016, the Respondent was arrested on a charge of larceny of checks in violation of § 18.2-98 of the 1950 Code of Virginia. On December 5, 2017, the Respondent entered into a Plea Agreement and Agreed Disposition with the Commonwealth, wherein she agreed to plead guilty to the felony charge of larceny; and, the Circuit Court for the City of

Winchester found that the facts were sufficient to sustain a finding of guilt in that matter. The Court then deferred the case for a period of two years during which time the Respondent must complete fifty hours of community service and be placed on supervised probation for a period of one year followed by one year of unsupervised probation. In accordance with the Plea Agreement, upon the successful completion of the two-year deferral period, the Respondent's conviction will be reduced to a misdemeanor.

RULING

Although the Respondent conceded she had entered a plea of guilty to a felony, in support of her Motion to Dismiss the Respondent argued that under the *Rules* the Board had no authority to suspend her license to practice law or issue a Rule to Show Cause because she had not yet been convicted of a felony. Part Six, § IV, ¶ 13-22(A) of the *Rules* provides:

> Whenever the Clerk of the Disciplinary System receives written notification from any court of competent jurisdiction stating that an Attorney (the "Respondent") has been found guilty or convicted of a Crime by a Judge or jury, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt, irrespective of whether sentencing has occurred, a member of the Board shall forthwith and summarily enter an order of Suspension requiring the Respondent to appear at a specified time and place for a hearing before the Board to show cause why the Respondent's License to practice law should not be further suspended or revoked.

Thus, the fact that the Respondent may only be convicted of a misdemeanor upon the completion of the deferral period is immaterial. The Board finds that the Respondent's plea of guilty and the Court's finding that the facts would justify a finding of guilt were sufficient to issue the Summary Order in accordance with the provisions of Part Six, § IV, ¶ 13-22 of the *Rules*.

The Respondent bears the burden of proving why her license should not be further suspended or revoked.[1] After considering the evidence and hearing arguments from Bar Counsel and the Respondent, the Board found that the Respondent had entered into a plea wherein the

[1] R. of Sup. Ct. of Va., pt. 6, § IV, 13-22(D).

facts found by the court would justify a finding of guilt; and, the Respondent failed to prove by clear and convincing evidence why her license to practice law should not be further suspended or revoked.

SANCTION PHASE OF HEARING

After the Board announced its findings, the Board heard testimony and received evidence regarding aggravating and mitigating factors applicable to the appropriate sanction to be imposed; and, the Board considered the *ABA Annotated Standards for Imposing Lawyer Sanctions*[2] in reaching its decision.

The Respondent has refused to acknowledge the wrongful nature of her conduct in this matter. Rather, she testified that she was merely guilty of "being in a bad relationship" and "being a bad girlfriend." Furthermore, in preparation for her hearing before the Board, the Respondent drafted and requested that Wilds sign a statement claiming that he had requested that the prosecutors dismiss the larceny of checks charges against the Respondent.[3] Wilds refused to sign the document; and, according to the testimony of Kristen Zalenski, Attorney at Law, Special Prosecutor for City of Winchester (hereinafter referred to as "Zalenski"), Wilds never asked her to drop the charges against the Respondent. The Board finds the Respondent's refusal to acknowledge the wrongful nature of her conduct and her attempt to submit false evidence in this proceeding to be aggravating factors.

Moreover, the Respondent's prior disciplinary record consists of a Public Reprimand Without Terms,[4] which she received on January 14, 2015, as a result of her actions in a case in which she represented defendants in a civil lawsuit then pending in the Circuit Court for the County of Arlington. During the pendency of the case, the Respondent arranged the deposition

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[2] ABA, *Annotated Standards for Imposing Lawyer Sanctions* (2015).
[3] VSB Ex. 2, 3.
[4] VSB Ex. 4.

of a co-defendant and hired a friend and convicted felon to be the court reporter to take the deposition despite knowing that a convicted felon is not eligible for a notary commission. The Respondent never advised any of the parties present at the deposition that her friend was a convicted felon, was not a notary public, and could not administer the oath. The Respondent was subsequently sanctioned by the Court for her conduct, but failed to pay the sanction. As a result of her conduct, the Respondent was found to have violated *Rules* 1.1, 1.3(a), 3.4(b), and 8.4(c) of the *Rules of Professional Conduct* and received a Public Reprimand Without Terms.

The Board finds that the Respondent's actions in this matter reflect adversely on her ability to practice law, and the commission of a felony is a *per se* violation of *Rule* 8.4 of the *Rules of Professional Conduct*. Although the *ABA Annotated Standards for Imposing Lawyer Sanctions* recommends revocation for such conduct,[5] the Board was persuaded by several mitigating factors.

In its consideration of mitigating factors, the Board found that the checking account into which the checks were deposited was in both the Respondent and Wilds's name, that Wilds received all of the funds from the checks, and that the Respondent kept none for herself. This evidence was confirmed by Zalenski, who testified that Wilds did receive all of the money from the Respondent.

In her testimony on Respondent's behalf Detective Marti Ivins (hereinafter referred to as "Ivins"), who was assigned to investigate this matter, admitted that she had not checked with the State Corporation Commission to determine whether the Respondent was the Registered Agent for Wilds's business. During the hearing before the Board, with permission of the Respondent and Bar Counsel, the Board retrieved the State Corporation Commission's records. They

[5] ABA, *Annotated Standards for Imposing Lawyer Sanctions* 220 (2015).

reflected that, at the time of the events at issue, the Respondent was, in fact, the Registered Agent for Wilds's business.

In addition to investigating the larceny charge, Ivans testified she had also been assigned to investigate an allegation of rape made by the Respondent against Wilds. Ivins admitted that the Respondent had reported the rape allegation to the Winchester City Police Department, but no arrest was made, as the matter was not investigated. Instead, Ivins charged the Respondent with filing a false police report against Wilds. That charge was later dismissed, and the Respondent filed a complaint against Ivins; however, nothing came of it.

Additionally, the Respondent, testifying on her own behalf, informed the Board that she had been suspended from practicing law since September 14, 2017, based upon an impairment.[6] On that day the Respondent appeared before the Disciplinary Board of the Virginia State Bar and consented to the entry of an order suspending her license to practice law in the Commonwealth of Virginia on the basis that she had an Impairment as that term is defined in Part Six, § IV, ¶ 13 of the *Rules*.[7] At that time, the Board issued an Order suspending the Respondent's license to practice law indefinitely due to her Impairment; and the Board ordered that she should remain suspended until it was established that she no longer suffered from such impairment.[8] The Respondent remains under suspension due to her impairment, and the Board received limited information during the hearing as to the nature of Respondent's impairment. The Respondent did testify that she currently takes Adderall and Suboxone. The Respondent acknowledged she had not completed the treatment plan that she had told the Board she was going to participate in as a result of the impairment hearing. It should be noted that throughout this case the

[6] VSB Ex. 4.
[7] *Id.*
[8] *Id.*

Respondent represented herself, presented evidence, and argued her case without any apparent impairment issue.

DISPOSITION

At the conclusion of the evidence, the Respondent requested that the Board impose a period of suspension from the date of the Summary Order to the date of the instant hearing on February 16, 2018. Bar Counsel requested revocation.

After recessing to deliberate the appropriate sanction, the Board reconvened and announced its decision. Having considered the testimony and evidence presented, the argument of counsel, the Respondent, the Respondent's Guardian *ad litem* and the papers previously filed herein, it is ORDERED that the Respondent's license to practice law in the Commonwealth be, and it hereby is, suspended for a period of one year and one day (hereinafter referred to as "the Suspension"), which suspension will not become effective until the Respondent's current impairment suspension is terminated.[9]

It is further ORDERED, that as directed in the Board's December 27, 2017 Summary Order in this matter, the Respondent must comply with the requirements of Part Six, Section IV, Paragraph 13-29 of the *Rules*. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the Suspension of her license to practice law in the Commonwealth of Virginia, to all clients for whom she is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall give such notice within fourteen (14) days of the effective date of the Suspension. The Respondent shall also furnish proof to the Bar within sixty (60) days of the effective date of the Suspension that such notices have been timely given and such arrangements made for the disposition of matters.

[9] It is the intention of the Board, as memorialized in this Order, that the suspension imposed herein shall run consecutive to the Respondent's impairment suspension and shall commence immediately upon termination of that suspension.

It is further ORDERED that if the Respondent is not handling any client matters as of the date the Suspension imposed herein commences, she shall submit an affidavit to that effect to the Clerk within sixty (60) days of the effective date of the Suspension. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph. [10]

It is further ORDERED that pursuant to Part Six, Section IV, Paragraph 13-9(E) of the *Rules of Supreme Court of Virginia*, the Clerk shall assess all costs against the Respondent.

It is further ORDERED that the Clerk shall mail an attested copy of this Order to the Respondent, Shelly Renee Collette, at her address of record with the Virginia State Bar, which is 215 Sharp Street, Apartment A, Winchester, Virginia 22601, by certified mail, return receipt requested; by regular mail to William H. Atwill, Jr., GAL, at his address, Atwill, Troxell & Leigh, P.C., 50 Catoctin Circle NE, Suite 303, Leesburg, Virginia 20176; and by hand delivery to Kathryn R. Montgomery, Deputy Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

Entered: March 16, 2018.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Sandra L. Havrilak

Digitally signed by Sandra L. Havrilak
DN: cn=Sandra L. Havrilak, o, ou, email=slhavrilak@havrilaklaw.com, c=US
Date: 2018.03.16 14:15:56 -04'00'

By: _____
Sandra L. Havrilak, Second Vice Chair
Signed Electronically

[10] The Respondent should not be handling any client matters at this time or the time the Suspension commences because she is currently under an impairment suspension and will remain suspended until that suspension is terminated. The Suspension imposed herein becomes effective immediately upon termination of her impairment suspension.

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF MICHAEL MITRY HADEED, JR.

VSB DOCKET NO. 10-000-077606

ORDER OF SUSPENSION

THIS MATTER came before the Virginia State Bar Disciplinary Board (the "Board") for hearing on August 27, 2010, upon the Rule to Show Cause and Order of Suspension and Hearing (the "Rule") which was dated and mailed to the Respondent on May 27, 2010. Pursuant to Part 6, Section IV, Paragraph 13-22A of the Rules of the Supreme Court of Virginia, the Respondent's license had been summarily suspended upon the Board's notification that he had been convicted of a felony. The purpose of the hearing was to determine whether, in fact, he had been convicted and, if so, whether the Board should further suspend or revoke his license to practice law.

The hearing was held before the duly convened panel of the Board consisting of attorney members Martha JP McQuade, 2nd Vice Chair and presiding (the "Chair"), Paul M. Black, Raighne C. Delaney and Tyler E. Williams, III, and lay member Rev. W. Ray Inscoe. The Virginia State Bar ("VSB") was represented at the hearing by Assistant Bar Counsel Kathleen M. Uston (the "Bar"). The Respondent Michael Mitry Hadeed, Jr. (hereinafter "Respondent" or "Mr. Hadeed") was present and represented by Gregory M. Wade (hereinafter "Respondent's Counsel"), assisted by Matthew T. Sutter. The proceedings were recorded and reported by Tracy J. Stroh, a registered professional reporter with Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, 804-730-1222, after she was duly sworn by the Chair.

The Chair opened the hearing by polling the Board members to ascertain whether any of them had any personal or financial interest or bias which would affect, or could reasonably be perceived to affect, their ability to hear the case fairly, and all, including the Chair, answered in the negative.

I. MISCONDUCT PHASE

The Bar made an opening statement and, without objection, introduced into evidence Bar Exhibit 1, consisting of documents 1 through 9. These demonstrated, inter alia, that, on February 13, 2009, the Respondent had been convicted of the federal crimes of conspiring to commit immigration fraud under 18 U.S.C. Section 371 and having made a material false statement in an immigration application in violation of 28 U.S.C. Section 1001; the conviction was upheld on appeal; and the Respondent was thereafter expelled from practice before the Board of Immigration Appeals, the Immigration Courts and the Department of Homeland Security. The Bar also showed that the Respondent notified the Bar of his indictment and had voluntarily ceased practicing law at that time (which amounted to a period of at least 18 months preceding the instant hearing) and had been particularly cooperative with the Bar's investigation in the instant matter.

In his opening statement, Respondent's Counsel conceded that Mr. Hadeed had been convicted as set forth in the Bar's Exhibit.

Accordingly, the Chair announced that, without deliberation, the Board would adopt the determination that Mr. Hadeed, in fact, and based upon clear and convincing evidence, had been convicted as set forth in the Rule, and would proceed to hear evidence with respect to sanctions.

The Chair further announced that, pursuant to the Rule, the burden remained with the Respondent to show cause why his license should not be further suspended or revoked.

II. SANCTIONS PHASE

The Bar made a further statement and, without objection, introduced into evidence Bar Exhibit 2, the Respondent's disciplinary record consisting of a 2008 dismissal *de minimus* for failing to communicate with a client.

Respondent's Counsel then presented a number of witnesses including, inter alia:

* Attorney William B. Cummings, who represented Mr. Hadeed in the criminal case and who testified as to the lengths to which he felt the government went to pursue Mr. Hadeed and the limited overt acts which he was found to have committed in furtherance of the conspiracy of which he was convicted.

* Attorney Scott Sexauer, Mr. Hadeed's law partner of the past 20 years, who testified that: Should the Respondent be permitted to practice law in the future, he would be happy to work with him again; In his view, Respondent was a good attorney and has good moral character; and The law firm's staff hopes that the Respondent will return to the practice of law one day.

* Attorney Michael Chamowitz, who testified that the Respondent's reputation over the past 25 years was excellent and that if the Board permitted Respondent to practice law in the future, he would continue to refer cases to him.

* The Respondent who testified, inter alia, that his family came to America in 1905 to escape the persecution of Christians abroad; he was born in America and is a native

Alexandrian; he felt he was targeted in the federal investigation because of his Palestinian heritage; he should have used a professional interpreter to interview his non English speaking clients rather than the employer who would benefit from their successful immigration application, who later testified against him at trial and, as a result, received a lesser sentence with regard to charges of immigration fraud against him; Respondent should not have taken on such a heavy immigration caseload which caused him to have less personal involvement in the immigration application preparation than he should have had; he recognized that the jury found him guilty and accepted their judgement but said he believes himself to be innocent of the charges.

Further, and without objection, Respondent's Counsel introduced into evidence Respondent's Exhibit 1, consisting of documents 1 through 23, including, inter alia, the following:

* A transcript of the May 29, 2009 sentencing hearing during which the Judge: spoke of the respect and esteem in which the Respondent had been held during his many years of practice before the Court and, while declining to overturn the conviction, stated that "the nature of this case, while serious, [is] not nearly as egregious as other cases I've had against other attorneys involving this type of immigration fraud – in fact, I was surprised that the government, which I understand had been investigating this case for so long, had so little evidence, and as you know, I acquitted you on two of the four counts. And so, it's not the world's strongest case, and I think the sentence has to properly reflect those factors"; sentenced Respondent to three months of home incarceration, two years' probation and a $2,000 fine; stated that "In terms of

deterrence, there is no question that I would be absolutely amazed if there was ever going to be a problem in your behavior again"; also stated that "[A]nother attorney perhaps thinking about how to structure an immigration practice or handle certain clients within a practice would think twice about it when the word is out that there are ramifications for what happens, and so your conviction alone and the administrative consequences, in my view, are sufficiently general deterrence in this particular case."

* Approximately 65 letters in support of the Respondent from lawyers, clients, family members and friends. Some of the letters gave specific examples of the kind of ethical conduct taken in the past by Mr. Hadeed which made it hard for the writer to believe he had done what he was convicted of doing.

In closing arguments, both the Bar and Respondent's Counsel cited the American Bar Association's Standards for Imposing Lawyer Sanctions, especially as they relate to factors in aggravation and mitigation of misconduct.

The Board then recessed to deliberate the case.

III. AGGRAVATING AND MITIGATING FACTORS

In its deliberations, the Board found the following to be aggravating, mitigating or neutral factors in this case (Other factors were not applicable):

Although Mr. Hadeed's record is acknowledged, it is not found to be either an aggravating nor a mitigating factor.

Because the Respondent was not working for free and intended, from the outset, to be paid in the matters upon which his conviction was based, the Board found dishonest or selfish motive to be an aggravating factor.

With respect to the Respondent's refusal to acknowledge the wrongful nature of his conduct: The Board declines to question the basis of Mr. Hadeed's conviction. For purposes of this hearing, there is no question that he was convicted. Moreover, the Board sees particular steps that the Respondent could have taken to prevent his being in the position that led to his conviction. Indeed, the Judge, at sentencing, referenced the issue of "how to structure an immigration practice or handle certain clients within a practice" that might have led the Respondent to a different result and indeed could lead others to avoid such a result. However, Mr. Hadeed sincerely clings to his claim that he did not "knowingly" participate in a fraud, as found by the jury. His counsel's argument that his actions were "reckless," rather than intentional, are also noted. On balance, the Board finds that his refusal to acknowledge the wrongful nature of his conduct is neither an aggravating nor a mitigating factor.

The victim's vulnerability is an aggravating factor. The victim in this case is the United States immigration system. It necessarily relies on attorneys to act with the utmost care to ensure that applications for lawful entry and stays in this country are entirely truthful and meet the statutory requirements. The possible consequences of false statements to the officials operating the system are readily apparent.

The Respondent's level of experience was substantial and this is found to be an aggravating factor.

With respect to the Respondent's cooperative attitude with the Bar's investigation, it is a mitigating factor.

With respect to the Respondent's character and reputation, apparently, it remains excellent within his local legal community.

With respect to the imposition of other penalties or sanctions, the Board considered both the Respondent's sentence in the criminal court and the fact that he was "expelled" from practice before the federal immigration authorities. These are not mitigating factors, however, because the loss of the Respondent's ability to practice law, on a permanent or at least temporary basis, was repeatedly offered by the Respondent to the District Court as an argument towards a lighter sentence than might otherwise have been the case.

IV. BOARD's DETERMINATION

The Board's responsibility, in any case before it, is to hear the evidence and decide upon an appropriate sanction. In exercising this responsibility, the Board is obligated to consider the evidence presented in any particular case and the interests of the Bar, the Respondent and, most importantly, the public. In determining an appropriate sanction, the Board is mindful of the benefits of attempting to be consistent with sanctions imposed in other and similar cases. In its effort to be consistent, the Board looks to the ABA Standards for Imposing Lawyer Sanctions and to other cases decided by the Board.

According to the ABA standards, revocation of a license is not automatic upon the entry of a criminal conviction. As ABA Standard 5.11 states:

"Disbarment is generally appropriate when:

a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, . . . or conspiracy or solicitation of another to commit any of these offenses; or

b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

On the other hand, ABA Standard 5.12 states:

> "Suspension is generally appropriate when the lawyer knowingly engages in criminal conduct which does not contain the elements listed in standard 5.11 and that seriously adversely reflect on the lawyer's fitness to practice."

In cases similar in terms of the nature of the misconduct, the Board has imposed a suspension of one to five years. For example, in *In the Matter of Calonge*, VSB No. 08-000-73258, the respondent filed similar immigration forms that asserted the alien was a caregiver, when, in fact, the alien was a casino dealer. In that case, the District Court imprisoned the respondent for 30 days and fined her $5,000. Ms. Calonge admitted her guilt, had no prior disciplinary record and she cooperated with the Bar's investigation. The Board suspended her license for two years. *See also In the Matter of Eskovitz*, VSB 96-000-0778, (four year suspension for making false statements to a financial institution); *In the Matter of Saul*, VSB No. 93-000-2308 (five year suspension for bank fraud), and *In the Matter of McClenny*, VSB Docket No. 91-000-0911 (three year suspension for obtaining money by false pretenses).

The Bar's interest is in the fair application of discipline against its members, including revocation when appropriate. However, the ABA guidelines, the pertinent rules of the Supreme Court of Virginia and the Board's own precedent do not establish a *per se* rule of revocation

upon criminal conviction. The Public's interest is that the Board protects the public from incompetent or dishonest attorneys. The Respondent's interest is that the Board takes into account the facts in his individual case, and weigh the facts with an eye toward prior precedent.

In this case, revocation of the Respondent's license does not seem fair. While the charges in the two cases are styled differently, the Respondent essentially was convicted of committing the same violation as Ms. Calonge, namely the submission of one alien's false employment history. The misrepresentation was not made to a court or tribunal. A review of the aggravating and mitigating factors does not lead the Board to believe that it should treat the Respondent any more severely than it treated Ms. Calonge. Thus, after due deliberation, the Board announced its sanction as suspension of Respondent's license to practice law for two (2) years, effective August 27, 2010. Although the Respondent's Counsel had requested that the suspension be entered *nunc pro tunc* to May 29, 2009, the Board declined to do so. Further the Board noted that, because the Respondent's license has been suspended for more than one year, his license shall not be reinstated unless and until he fully complies with the provisions of Part Six, Section IV, Paragraph 13-25H of the Rules of the Supreme Court.

V. DISPOSITION

ACCORDINGLY, it is ORDERED that the Respondent, Michael Mitry Hadeed, Jr., be, and hereby is, suspended from the practice of law for a period of two (2) years, effective August 27, 2010.

It is further ORDERED that Respondent must comply with the requirements of Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia. The Respondent

shall forthwith give notice by certified mail, return receipt requested, of the suspension of Respondent's license to practice law in the Commonwealth of Virginia, to all clients for whom Respondent is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in Respondent's care in conformity with the wishes of Respondent's client. Respondent shall give such notice within fourteen (14) days of the effective date of this order, and make such arrangements as are required herein within forty-five (45) days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty (60) days of the effective day of this order that such notices have been timely given and such arrangements made for the disposition of matters.

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

It is further ORDERED that pursuant to Part Six, Section IV, Paragraph 13-9E of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Order to Respondent, Michael Mitry Hadeed, Jr., at his address of record with the

Virginia State Bar, 607 Oakley Place, Alexandria, VA 22302, by certified mail, return receipt requested. The Clerk of the Disciplinary System shall also hand deliver a copy of this Order to Kathleen M. Uston, Assistant Bar Counsel, 707 East Main Street, Suite 1500, Richmond, Virginia 23219, and by regular mail to Gregory M. Wade, Esquire and Matthew T. Sutter, Esq. at Wade, Friedman & Sutter, P.C., 616 North Washington Street, Alexandria, VA 22314.

ENTERED THIS 30th DAY OF September, 2010.
VIRGINIA STATE BAR DISCIPLINARY BOARD

Martha JP McQuade
Second Vice Chair, Presiding

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
ERIN MARIE WEBBER AKA
ERIN WEBBER ANDERSON

VSB Docket No.: 12-000-090627

ORDER OF REVOCATION

This matter came to be heard on Friday, April 27, 2012, before a duly convened panel of the Virginia State Bar Disciplinary Board pursuant to Notice in Courtroom A of the Worker's Compensation Commission of the Commonwealth of Virginia in Richmond, Virginia. Pleasant S. Brodnax, III, chaired the proceedings with Timothy A. Coyle, Michael S. Mulkey, Whitney G. Saunders and Robert W. Carter, lay member, comprising the remaining members of the panel.

The Virginia State Bar (the "Bar") was represented by Kathleen M. Uston, Assistant Bar Counsel. Erin Marie Webber, aka Erin Webber Anderson, (the "Respondent"), appeared in person and was represented by Michael Rigsby. Jennifer L. Hairfield, court reporter of Chandler & Halasz, P.O. Box 9349, Richmond, Virginia, 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

All legal notices of the date and place of the hearing were timely sent by the Clerk of the Disciplinary System in the manner prescribed by law.

The Chair opened the hearing by polling the members of the panel to ascertain if any member had a personal or financial interest that might affect or reasonably be perceived to affect his ability to be impartial in the matters before the panel. Each member, including the Chair, verified that he had no such interest.

The matter came before the Disciplinary Board pursuant to a Rule to Show Cause and Order for Suspension and Hearing ("the Show Cause Order") entered January 23, 2011 by Richard J. Colton, Chair designate of the Virginia State Bar Disciplinary Board. The Show Cause Order being issued after the Clerk of the Disciplinary System received written notification that the Respondent had been convicted of a "crime" as defined by the Rules of Virginia Supreme Court (the "Rules"), Part Six, § IV, ¶ 13-22A. The Show Cause Order summarily suspended the Respondent's license to practice law pursuant to Rules, Part Six, § IV, ¶ 13-22A.

The Show Cause Order was modified by an Order entered March 2, 2012 continuing the hearing on the Show Cause Order until April 27, 2012.

The Chair explained the process to be followed in the hearing. The Chair stated to the Respondent that the Show Cause Order filed by the Bar and served upon the Respondent required the Respondent to Show Cause, if she could, why the summary suspension of her license should not be continued or her license revoked as a result of her conviction of a felony in the Circuit Court of Fairfax County on or about January 20, 2012. The Respondent, therefore, had the burden of proof by clear and convincing evidence that the summary suspension should not be continued or, alternately, that she should not have her license to practice law in Virginia revoked. The Chair also informed the Bar that it would have the opportunity to present evidence in rebuttal.

The Chair inquired whether Counsel for the Respondent or Counsel for the Bar had any questions with regard to procedure. Neither counsel having questions, a rule to exclude witnesses was made and granted. The witnesses in the courtroom were sworn. All witnesses were admonished not to discuss the case and then sent out of the courtroom.

The Bar offered an Affidavit of Membership from the Virginia State Bar dated March 12, 2012 certifying Erin Marie Webber as an active member of the Virginia State Bar not in good standing. The Chair accepted the Affidavit. The Bar submitted that Erin Marie Webber, also known as Erin Marie Anderson, had entered a guilty plea pursuant to *North Carolina v. Alford,* 400 U.S. 25, to the crime of embezzlement in the Circuit Court of Fairfax County on January 20, 2012, for which she was sentenced to four years of incarceration with the Virginia Department of Corrections. The term of incarceration was suspended and she was placed on supervised probation and ordered to make restitution in the amount of $275,140.28.

The Bar asked that the panel accept the finding of guilt before the Circuit Court for Fairfax County as a finding of guilt of a "crime" as defined by the Rules of Court, Part 6, Section IV, Paragraphs 13-22A. Mr. Rigsby, Counsel for the Respondent, agreed that the Respondent was convicted of embezzlement as represented by the Bar and stipulated that the conviction of embezzlement before the Circuit Court of Fairfax County does constitute a "crime" under the above referenced paragraphs of the Rules.

Michael Rigsby, on behalf of the Respondent, made an opening statement which was followed by an opening statement presented on behalf of the Bar by Kathleen Ulston. Mr. Rigsby

called his first witness, Dennis Dean Kirk. Mr. Kirk testified that he was an attorney in practice in Northern Virginia where he represented the interests of Mildred Bailey ("Ms. Bailey") and William ("Robbie") Robertson ("Mr. Robertson"). Mr. Kirk accepted a position as Counsel for the Department of the Army and on or about 2005, with the concurrence of Ms. Bailey and Mr. Robertson, he transferred his representation of Ms. Bailey and Mr. Robertson to the Respondent. Mr. Kirk further testified that Ms. Bailey and Mr. Robertson had decided to employ the Respondent due to their prior familiarity with her.

Mr. Rigsby then called the Respondent as his next witness. Mr. Rigsby introduced the Respondent's résumé, to which exhibit the Bar had no objection and it was admitted into evidence as Respondent's Exhibit No. 1. The Respondent testified that she was diagnosed with depression in 1999 and that she had recovered by the time she began representation of Ms. Bailey and Mr. Robertson. She stated that her depression reoccurred in 2006, after her appointment in January 2005, as Conservator and Guardian for Ms. Bailey and Mr. Robertson. The Respondent stated that she discussed the financial arrangement for her service as Guardian and Conservator with Ms. Bailey and Mr. Robertson and at that time stated clearly that she would be paid $250 per hour for the work she performed on behalf of Ms. Bailey and Mr. Robertson. As a result of her duties as Conservator, the Respondent testified that she filed an inventory and first accounting with the Commissioner of Accounts, John H. Rust, Jr. Mr. Rigsby asked the Respondent to identify the letter of John H. Rust, Jr., Commissioner of Accounts dated April 21, 2009 and the Commissioner's Report attached to that letter, which he asked that the Chair mark and accept into evidence as Respondent's Exhibit No. 2. Mr. Rigsby also asked that the Respondent identify the letter of John H. Rust, Jr., Commissioner of Accounts, dated June 26, 2009 and the supplemental Commissioner's Report attached to that letter, which he asked that the Chair mark and accept into evidence as Respondent's Exhibit No. 3. There being no objection, Respondent's Exhibits No. 2 and 3 were admitted into evidence. The Respondent stated that she did not file the second or third accounting for Ms. Bailey or Mr. Robertson due to the complexity of the accounting process. She further testified that she sought separate Counsel to aid her in completion of this task.

On cross examination, the Bar asked the Respondent to examine the Commissioner of Accounts fee schedule for Guardians and Conservators. The Respondent conceded that the fee schedule would not approve the fees which she had paid herself as Guardian and Conservator

and that she did not ask for an increase in her fees which could have been granted by the Commissioner of Accounts upon proof of "exceptional circumstances". The Bar asked the Respondent to identify a fiduciary acknowledgement form, in which she confirmed her obligation to provide accountings for the Estate of Mildred Bailey. The Respondent acknowledged receipt of this form and acknowledged her signature upon it.

The Bar also presented the Respondent with copies of the Orders appointing her as Guardian and Conservator for William Robertson and Mildred Bailey, each being dated January 28, 2005 and entered into the records of the Circuit Court of Fairfax County. The Bar asked that Virginia State Bar Exhibits 4, 5 and 7 be admitted into evidence by the Chair. The Order of the Circuit Court of Fairfax County appointing the Respondent as Guardian and Conservator for William Robertson was marked as VSB Exhibit No. 4. The Order appointing the Respondent as Guardian and Conservator for Mildred Bailey was marked as VSB Exhibit No. 5. The Fiduciary Acknowledgement before the Circuit Court of Fairfax County in which the Respondent acknowledged the general responsibilities as Conservator, was marked as VSB Exhibit No. 7. There being no objection, these exhibits were admitted into evidence by the Chair.

Upon further cross examination, the Respondent acknowledged a hearing before the Commissioner of Accounts for Fairfax County in which the issue of the appropriateness of the fees which she had charged Ms. Bailey's and Mr. Robertson's estates was at issue. The Respondent testified that she had no knowledge that her fees would be at issue until this hearing. The billing records of the Respondent, with her cover letter of March 31, 2006, were submitted as Respondent's Exhibit No. 4 and placed in evidence without objection. A letter from Roy Tucker, III, Accounts Analyst for the Commissioner of Accounts, dated November 8, 2007, which asked for additional documentation for completion of the First Accounting of the William B. Robertson Conservatorship and which also noted that the Second Accounting for this Conservatorship was delinquent, was also identified by the Respondent and was admitted into evidence as Respondent's Exhibit No. 5 without objection.

The Bar presented the Respondent with a copy of the Petition for Appointment of a new Guardian and Conservator which was filed in the Circuit Court of Fairfax County on March 19, 2008. Upon cross examination, the Respondent admitted that the Petition does raise issues with regard to her compensation prior to the hearing before the Commissioner of Accounts on November 11, 2008. The Bar introduced the Petition for Appointment of a New Guardian and

Conservator which was accepted into evidence without objection and marked as VSB Exhibit No. 8.

Mr. Rigsby recalled the Respondent and rested. The Bar called James McConville as its first witness and Mr. McConville testified that on March 28, 2008 he was appointed by the Circuit Court of Fairfax County as Guardian and Conservator of the Estate of William Robertson and as Executor of the Estate of Mildred Bailey, Mildred Bailey having died in 2006. The Bar asked Mr. McConville to identify Virginia Code Sections 37.2-1022, 37.2-1020, 37.2-1023, and 37.2-1011. The Bar requested that the Chair take judicial notice of these sections of the Virginia Code and that they be admitted into evidence. There being no objection, the Chair admitted Virginia Code Sections 37.2-1022, 37.2-1020 and 37.2-1023 as VSB Exhibit No. 1 and Virginia Code Section 37.2-1011 as VSB Exhibit No. 2. The Bar further requested that Mr. McConville identify and provide explanation of the means of compensation for Conservators as explained on Page 11 and 12 of the Instruction Handbook provided by the County of Fairfax Commissioner of Accounts office to all individuals appointed as fiduciaries. The Bar introduced pages 11 and 12 of the Commissioner of Accounts office Handbook as VSB Exhibit No. 3, which was admitted into record by the Chair without objection.

The Bar called detective Richard Downham, Criminal Investigator for the Fairfax County Police Department as its next witness. The Bar asked Detective Downham to identify a series of pages entitled "Checks Deposited into Erin Anderson's Bank Account", as evidence of payments made by the Respondent to herself for her services as Conservator for Mildred Bailey and William Robertson. Detective Downham confirmed that the list submitted was an accurate reflection of checks deposited into Erin Anderson's bank accounts from the funds of Ms. Bailey and Mr. Robertson. The Bar requested that the pages entitled "Checks Deposited into Erin Anderson's Bank Account" be admitted into evidence and there being no objection the Chair admitted them as VSB Exhibit No. 6.

As its last witness, the Bar called Judith York, who identified herself as a friend of Mildred Bailey and William Robertson who lives in an apartment at Skyline House where Ms. Bailey and Mr. Robertson resided. Ms. York identified Ms. Bailey and Mr. Robertson as very frugal and exceedingly unlikely to allow anyone to be paid a sum as great as $250.00 an hour for non-legal services to be provided to them. The Board found Ms. York's testimony to be particularly credible.

At the conclusion of its case, the Bar rested and closing argument was presented on behalf of the Respondent and then on behalf of the Bar. The Board retired for deliberation and upon its return, the Chair reported a unanimous opinion that upon the Show Cause, the Respondent had failed to establish, by clear and convincing evidence, that the temporary suspension of her license should not be terminated or to give a basis upon which her license should not be revoked, pursuant to the Rules of the Virginia Supreme Court.

The Chair announced that the Board was bound by the rule which defined the felony of embezzlement as a crime requiring the suspension and possible revocation of the Respondent's License. The Board could not retry the criminal case, which resulted, regardless of the nature of the plea entered into by the Respondent thereto, in a conviction of a felony involving the misappropriation of monies from those for whom she was appointed Conservator. The Board found from the evidence presented and the exhibits received that the Respondent failed to show cause why her license should not be revoked. The Respondent stands convicted of a crime that directly impacts upon her honestly and integrity as a member of the Bar and that conviction was not explained or justified by the Respondent. Therefore, pursuant to a unanimous decision of this panel of the Board, it is ORDERED that the license of Erin Marie Webber, aka Erin Webber Anderson, to practice law in Virginia should be, and is hereby, revoked effective April 27, 2012.

It is further ORDERED, that, as directed in the Board's April 27,2012 Summary Order that the Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested of the revocation of her license to practice law in the Commonwealth of Virginia, to all clients to whom Respondent is currently handling matters and to all opposing attorneys and presiding Judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in Respondent's care in conformity with the wishes of Respondent's clients. Respondent shall give such notice within fourteen (14) days of the effective date of the revocation, and make such arrangements as are required herein within forty-five (45) days of the effective days of the revocation. The Respondent shall also furnish proof to the Bar within sixty (60) days of the effective date of the revocation that such notices have been timely given and such arrangements made for the disposition of all client matters. It is further ORDERED that if the Respondent is not handling any client matters on the effective date of this Order, Respondent shall submit an affidavit to that effect to the Clerk of the Disciplinary

System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request before a three Judge court.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9E of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Order to Respondent Erin Marie Webber, aka Erin Webber Anderson, at her address of record with the Virginia State Bar, 6221 Home Spun Lane, Falls Church, Virginia 22044, by certified mail, return receipt requested. The Clerk of the Disciplinary System shall also mail an attested copy of this Order by regular mail to Kathleen M. Ulston, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED THE 5th DAY OF June, 2012

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: Pleasant S Brodnax III
Pleasant S. Brodnax, III, Second Vice Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN RE RONALD MARC COHEN VSB DOCKET NO. 09-000-075107

ORDER OF REVOCATION

This matter came on to be heard on November 21, 2008, at 9:00 a.m., in Courtroom A of the Virginia State Corporation Commission before a panel of the Virginia State Bar Disciplinary Board. The members of the panel were Timothy A. Coyle, Thomas R. Scott, Jr., Arthur Green McGowan, Dr. Theodore Smith, lay member, and Robert E. Eicher, Chair.

The hearing was transcribed by Tracy J. Johnson, a registered professional reporter, Chandler & Halasz, Post Office Box 9349, (804) 730-1222, Richmond, Virginia 23227, who was duly sworn by the Chair.

The Chair inquired of each member of the panel whether he had any personal or financial interest that would preclude, or reasonably could be perceived to preclude, his hearing this matter impartially. Each member and the Chair answered in the negative.

Respondent was not present. His counsel, Bernard J. DiMuro, was present. The Virginia State Bar (the "Bar") was represented by Kathleen Uston, Assistant Bar Counsel. Respondent's counsel renewed his pre-hearing motion for a continuance until a date after Respondent's release from incarceration in March of 2009. Respondent's pre-hearing motion for such continuance had been overruled by the Chair and affirmed by the Supreme Court of Virginia on Respondent's appeal. The Chair overruled Respondent's renewed motion for a continuance of the hearing.

This matter came on for a hearing upon the Bar's Rule to Show Cause and Order of Suspension and Hearing ("Rule to Show Cause") with an attached (i) Plea Memorandum, (ii) a conviction order for Attempted Indecent Liberties, (iii) a conviction order for Internet Solicitation of a Minor, and (iv) the Bar's forms for compliance with Rules of Court, Part Six, § IV, ¶ 13.M. The Rule to Show Cause, with attachments, and all legal notices of the date, time, and place of hearing were timely served on Respondent in the manner prescribed by the Rules of Court, Part Six, § IV. Respondent filed a Response to the Bar's Rule to Show Cause in which he states that he "does not deny his culpability, nor that his actions have harmed his community, and that his conduct does not reflect well upon the legal profession. . . ."

Following opening statements by Bar Counsel and Respondent's counsel, Bar Counsel offered the Bar's Rule to Show Cause and attachments therewith as VSB Exhibit 1 and the transcript of the Arlington Circuit Court's hearing of June 17, 2008, on Respondent's plea of guilty to the indictments as VSB Exhibit 2. The Chair admitted VSB Exhibit 1 and VSB Exhibit 2 into evidence without objection. Bar Counsel and Respondent's counsel stipulated that under a plea agreement, Respondent was sentenced to incarceration for five (5) years on each of the two convictions, with four (4) years of each sentence suspended, to run concurrently, and that, with time already served, Respondent was expected to be released on probation in mid-March 2009.

The Bar rested. Respondent presented no evidence with respect to Respondent's guilty pleas to and conviction of felonies. The Board retired to deliberate in closed session. The Board reconvened in open session, and the Chair announced the Board's finding that Respondent had pled guilty to and been convicted of crimes as defined in Part Six, §IV, ¶13 of the Rules.

Respondent's counsel presented without objection a copy of 14 cases for the Board's consideration of a sanction. Respondent's counsel presented without objection the *de bene esse*

video deposition testimony of Respondent. Respondent's counsel offered Respondent's Exhibits B, C, and D, respectively, and each was admitted into evidence without objection.

Bar Counsel argued aggravating factors contained in Section 9.22 of the ABA's Standards for Imposing Lawyer Sanctions (the "ABA Standards"). Bar counsel stressed the vulnerability of the victim, whom Respondent believed was a 13 year old girl. Respondent's counsel argued mitigating factors contained in Section 9.32 of the ABA Standards. Respondent's counsel stressed Respondent's remorse, absence of a disciplinary record, community activities, and reputation.

Respondent's counsel also argued that Respondent did not meet the criteria in Section 5.11 of the ABA Standards for revocation of his license. The Board notes the commentary to Section 5.11, as follows: "In imposing final discipline in such cases, most courts impose disbarment on lawyers who are convicted of serious felonies. . . ."

Respondent pled guilty to and was convicted of serious felonies. The indictment in VSB Exhibit 2 points up the seriousness of the crimes. Respondent's contemplated, and articulated, sexual activities with a 13 year old girl are simply beyond the pale of decency. That Respondent went to the shopping center to meet a 13 year old girl and, according to him, only have dinner with her is not an exoneration of him. Dinner was but a prelude to his intended sexual activity with her. A 57 year old lawyer having dinner with a 13 year old girl he met on the Internet is but a predatory step illustrative of a moral deficit in his character.

Respondent's counsel observed that Respondent's crimes occurred outside his practice of law. It is true but unavailing. See Maddy v. First District Committee of the Virginia State Bar, 205 Va. 652, 658 (1964); Norfolk & Portsmouth Bar Ass'n. v. Drewry, 161 Va. 833, 838 (1939). He was a lawyer in all events.

Bar Counsel recommended revocation. Respondent's counsel recommended a suspension up to two years. In arriving at a sanction, the Board is mindful of the Virginia Supreme Court's admonition that precedents are of little aid, and that each case is largely governed by its particular facts. Maddy at 658. The Board is mindful, too, of the instruction in Drewry, at 842:

> Proceedings to discipline lawyers are not set on foot to punish them, but to protect the public. It is want of character which is important and not the place where that is made manifest. . . .

The sanction imposed is to deter others and to demonstrate to the public that the VSB will require lawyers' adherence to professional ethics in their conduct. See Morrisey v. Virginia State Bar, 260 Va. 472, 480 (2007).

In this case the convictions upon guilty pleas exhibit an egregious want of character. The integrity of the legal profession and public confidence in it are ill-served by permitting Respondent to hold a license.

DISPOSITION

After due deliberation in closed session, the Board reconvened in open session to announce the sanctions imposed.

Upon consideration of the guilty pleas to and convictions of the crimes, the evidence in aggravation and mitigation, and argument of counsel, it is ORDERED that the Respondent's license to practice law in the Commonwealth of Virginia be and hereby is REVOKED effective November 21, 2008.

It is FURTHER ORDERED that the Respondent comply with the requirements of Part 6, Section IV, paragraph 13(M) of the Rules of the Supreme Court of Virginia. He shall forthwith give notice of the revocation of his license to practice law in the Commonwealth of Virginia by

certified mail, return receipt requested, to all clients for whom he is handling matters and to all opposing attorneys and presiding judges in pending litigation. He shall also make appropriate arrangements for the disposition of matters currently in his care in conformity with the wishes of each client. He shall give such notice within fourteen (14) days of the effective date of the revocation and make such arrangements as are required within forty-five (45) days of the effective date of revocation. Within sixty (60) days of the effective date of the revocation, he shall also furnish proof to the Bar that such notices have been timely given and such arrangements made for the disposition of matters. If the Respondent is not handling any client matters on the effective date of his revocation, he must submit an affidavit to that effect to the Clerk of the Disciplinary System.

It is FURTHER ORDERED that all issues concerning the adequacy of the notice and arrangements required by Paragraph 13(M) shall be determined by the Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is FURTHER ORDERED that the Respondent's license shall not be reinstated unless and until the Respondent shall have fully complied with the provisions of Part 6, Section IV, Paragraph 13.1.8.b of the Rules of the Supreme Court.

It is FURTHER ORDERED that pursuant to Part 6, Section IV, Paragraph 13.B.8(c) of the Rules, the Clerk of the Disciplinary System shall assess all costs in this matter against the Respondent; and

The Clerk of the Disciplinary System shall mail an attested copy of this Order, by certified mail, to the Respondent, care of his counsel, Bernard J. DiMuro, Esq., DiMuroGinsbergPC, 908 King Street, Suite 200, Alexandria, Virginia 22314, and shall also mail a copy to Kathleen Uston,

Esq., Assistant Bar Counsel, Virginia State Bar, Suite 310, 100 North Pitt Street, Alexandria Virginia 22314-3133.

ENTERED this 19th day of December, 2008.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Robert E. Eicher, Chair

1694475v2

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

VIRGINIA STATE BAR, EX REL
THIRD DISTRICT COMMITTEE
VSB Docket No. 14-032-097791

Complainant

v.

Case No. 14-2778-6

KENNETH WAYNE PACIOCCO

Respondent

MEMORANDUM ORDER OF SUSPENSION

On August 29, 2014, this matter came before a Three-Judge Court sitting by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to Section 54.1-3935 of the Code of Virginia 1950, as amended, consisting of the Honorable Charles E. Poston, Retired Judge of the Fourth Judicial Circuit, the Honorable Charles J. Strauss, Retired Judge of the Twenty-Second Judicial Circuit, and the Honorable Cheryl V. Higgins, Judge of the Sixteenth Judicial Circuit, designated Chief Judge. Renu M. Brennan, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar, and Respondent Kenneth Wayne Paciocco (hereafter "Respondent") appeared in person and through his counsel. Michael L. Rigsby.

WHEREUPON, a hearing was conducted on whether Respondent violated the Rules of Professional Conduct as alleged in the Complaint and Petition for Expedited Relief.

The Chief Judge swore the Court Reporter and polled the members of the Court to determine whether any member had a personal or financial interest that might affect or

reasonably be perceived to affect his or her ability to be impartial in these matters. Each member, including the Chief Judge, verified that he/she had no such interest.

In accordance with the Prehearing Order, the Court admitted into evidence, without objection, the Bar's pre-filed Exhibits 2-6. 9-15. 17, 20-70, and 72-89. At the pretrial conference, the Bar withdrew its Exhibit 1. The Court marked for identification and subsequently admitted into evidence, without objection, the Bar's pre-filed Exhibits 7, 8, 16, 18, and 19. Bar Exh. 16 was a recording of a voicemail from Respondent. Ms. Garnett played the actual voicemail from her phone during her direct examination, and the voicemail was admitted without objection.

Respondent filed an Answer to the Petition for Expedited Relief and Complaint. The Petition for Expedited Relief and Complaint and Respondent's Answer are part of the record in this matter. Respondent did not introduce any exhibits.

Respondent admitted that he has not maintained his trust account consistent with Virginia Rule of Professional Conduct 1.15. (Answer, ¶32).

Prior to the Bar's presentation of its case, Respondent stipulated that from February 6, 2012, to January 15, 2013. Respondent deposited personal funds into his trust account in violation of Va. Rule of Prof. Resp. 1.15(a)(3). Respondent further stipulated that between September 20, 2011. and February 14. 2014. Respondent did not reconcile his trust account in violation of Va. Rule of Prof. Resp. 1.15(d)(3). Finally, Respondent stipulated that Respondent failed to notify his client Complainant Ashli Garnett of the receipt of medical pay funds due Ms. Garnett in the amount of $15,000.00 in violation of Va. Rule of Prof. Resp. 1.15(b)(4).

The Bar called the following witnesses: Leila Garnett, Robert Garnett, Ashli

Garnett, Shelia Richardson, and Cam Moffatt. Respondent testified in his case.

Upon the evidence presented and arguments of counsel and the stipulations of Respondent, the Court unanimously finds the Virginia State Bar has proved by clear and convincing evidence the following facts:

I. FINDINGS OF FACT

1. At all times referenced herein Respondent Kenneth Wayne Paciocco (Respondent) was an attorney licensed to practice law in the Commonwealth of Virginia. Respondent has practiced law for thirty-one years.

ASHLI GARNETT

2. In October 2010 Ashli Garnett (Ms. Garnett) sustained injuries when struck by a vehicle while crossing the street. (Admitted in Answer. ¶1).

3. In October 2010 Ms. Garnett's mother. Leila Garnett. learned from her automobile insurance carrier that Ms. Garnett had $15,000 in Medical Expense Benefits (MEB) coverage. referred to herein as "med pay," and the carrier forwarded to her information and the form to file a claim. (Admitted in Answer. ¶2).

4. On December 15, 2010 Ms. Garnett and her parents, Robert and Leila Garnett, met with Respondent, and Ms. Garnett retained Respondent to represent her in her personal injury claims. Respondent and Ms. Garnett entered into a Representation Agreement. (Admitted in Answer, ¶2; Bar Exhs. 4, 10, and 11).

5. In the December 15, 2010 meeting. the Garnetts provided Respondent with the information from their carrier regarding med pay coverage. Respondent told the Garnetts that he would send the carrier a letter of representation. (Testimony of Robert and Leila Garnett. Admitted in Answer, ¶2, however Respondent testified at hearing that he did not receive this information in the first meeting.).

6. By letter dated August 16, 2011, Respondent advised the Garnetts' carrier of his representation of Ashli Garnett, and he requested that the carrier process Ms. Garnett's claim under the med pay provisions of the Garnetts' auto insurance policy and forward the check to him. (Admitted in Answer, ¶2; Bar Exhs. 4 and 12).

7. The carrier mailed Respondent a check dated September 27, 2011 in the amount of $15,000 payable to Respondent and Ms. Garnett. (Admitted in Answer, ¶2; Bar Exhs. 4 and 13).

8. Although Respondent had a duty to notify Ms. Garnett upon receipt of the funds, at no time did he notify Ms. Garnett or her parents that he received the check. Respondent admitted that he did not inform Ms. Garnett of the receipt of the funds, and he so stipulated at the hearing. (Answer, ¶3; Bar Exh. 4; Testimony of Robert. Leila, and Ashli Garnett).

9. There was no Power of Attorney by which Ashli Garnett authorized Respondent to endorse the med pay check or any funds or checks received on her behalf and to deposit the funds into his trust account. The Representation Agreement between Respondent and Ms. Garnett, admitted without objection as Exhibit 10, did not contain any provision allowing Respondent to endorse checks on Ms. Garnett's behalf. Ashli Garnett, Leila Garnett, and Robert Garnett testified that Ashli Garnett did not authorize Respondent to endorse checks on her behalf. (Bar Exhs. 3, 5, 7, 10).

10. In responses to the Bar complaint, Respondent admitted he had no independent recollection of requesting and receiving authorization to sign the check from Ms. Garnett, but he stated that he was certain he did so in accordance with his practice. Respondent testified that it was his practice and custom to sign his and his client's names to checks he received and to then photocopy the checks so that his clients could pick up the proceeds. (Bar Exhs. 4, 6).

11. On September 30, 2011, without Ms. Garnett's knowledge or express authorization, Respondent negotiated the settlement check, signing both his name and Ms. Garnett's name to the check, and deposited the $15,000 in his trust account. (Answer, ¶5. Stipulated by Respondent that he did not inform the Garnetts of the deposit of Ms. Garnett's med pay funds into his trust account. Bar Exhs. 4, 13, 14, 17, 18, 19, 29).

12. Ms. Garnett testified that on September 30. 2011, the date Respondent deposited the $15,000 in med pay funds in her account, Ms. Garnett had a baby. Respondent conceded in testimony that his notes reflect that he was aware that on September 30. 2011, Ms. Garnett had a baby. (Bar Exh. 11, "Sept 30, 2011 had a Baby Girl Avianna").

13. After Respondent deposited the $15,000 into his trust account on September 30, 2011, the balance in his trust account was $35,291.10. (Bar Exh. 18).

14. By October 14, 2011, just two weeks after Respondent deposited Ms. Garnett's med pay funds in his trust account, Respondent's trust account balance dropped to $2,960.78. (Bar Exh. 18. Bar Exh. 17, Respondent's trust

account ledger, reflects that between October 5, 2011. and October 19, 2011, the balance dipped to $2,960.78).

15. As there were no disbursements to or on behalf of Ms. Garnett as of October 14, 2011, Respondent was required to preserve the entire $15.000.00 in trust. As stated above, Respondent did not preserve the $15,000 in trust. Rather, within two weeks of receipt of Ms. Garnett's funds, Respondent's trust account balance dipped to $2,960.78. (Answer, ¶7, Respondent admits he did not disburse any funds to Ms. Garnett as of October 14, 2011; Answer, ¶18, Respondent admits only disbursement to Ms. Garnett was in December 2013, after she filed the Bar complaint: Bar Exh. 4, Response to Bar Complaint, "The undisputed facts are as follows. I received the medpay money on or about September 27, 2011, and I disbursed the medpay money to my client on or about December 17. 2013." Bar Exhs. 17-19).

16. Respondent's trust account balance dipped below $15.000 several times between September 30, 2011. and December 17, 2013. The trust account balance was below $15,000 from October 25, 2011 to November 14, 2011: November 30, 2011 to December 22, 2011; May 14, 2012 to June 6, 2012: July 17. 2012 to August 3, 2012; August 8, 2012 to August 17, 2012; December 20, 2012 to December 28, 2012; February 1, 2013 to May 20, 2013: and June 5, 2013 to July 1, 2013. (Bar Exh. 18).

17. The Garnetts testified that throughout the representation they repeatedly asked Respondent about the status of the med pay claim, and Respondent stated that he would look into the matter.

18. In July 2013 Ashli Garnett's personal injury claim was arbitrated, and Ms. Garnett was denied recovery due to contributory negligence. (Admitted in Answer, ¶ 9).

19. After the arbitration Leila Garnett testified that she left Respondent messages regarding the status of the med pay claim, but Respondent did not return her calls. (Bar Exh. 4, Response to Bar Complaint, Respondent admits Mrs. Garnett called him shortly after the arbitration to inquire about the med pay claim.)

20. On September 3, 2013, Leila Garnett testified that she contacted her carrier about the med pay claim at which time she learned, contrary to Respondent's representations, that almost two years prior the carrier had mailed Respondent a $15,000 check payable to Respondent and Ms. Garnett, and the check had cleared October 3, 2011. (Bar Exhs. 3 & 15).

21. The Garnetts subsequently requested and obtained their daughter's file from Respondent. (Admitted in Answer, ¶ 12; Testimony of Robert and Leila Garnett).

22. On October 16, 2013, the Garnetts' carrier sent the Garnetts a copy of Respondent's August 16, 2011 letter of representation and the September 27, 2011 check. (Bar Exhs. 12 & 13).

23. In late October 2013, Mr. Garnett met with Respondent and told him he was aware the carrier sent Respondent the med pay in September 2011, and the check cleared October 3, 2011. (Admitted in Answer, ¶ 14; Testimony of Robert Garnett).

24. Robert Garnett testified that in the October 2013 meeting Respondent conceded to Mr. Garnett that he did not have a Power of Attorney nor did he have any authority to endorse checks on behalf of Ms. Garnett.

25. Respondent denied receiving the check stating that he would have remembered receiving the med pay. (Admitted in Answer, ¶ 16; Testimony of Robert Garnett).

26. Respondent advised Mr. Garnett that he would follow up with the carrier and contact Mr. Garnett. This was Mr. Garnett's last communication with Respondent. (Admitted in Answer, ¶ 16; Testimony of Robert Garnett).

27. On November 8, 2013, Respondent left Ms. Garnett a voicemail stating that he had a check for her. (Admitted in Answer, ¶ 17; Bar Exh. 16).

28. On December 17, 2013, the date Respondent responded to the Bar complaint, Respondent mailed Ms. Garnett a check for the $15,000, which she received December 20, 2013, over two years after Respondent received the funds from the carrier. (Admitted in Answer, ¶ 18).

29. In his response to the Bar complaint, Respondent conceded that he "signed her name and (his) name to the check, and deposited it in (his) trust account. The money sat there until (he) recently forwarded it to Ashli Garnett." (Bar Exh. 4).

SHELIA RICHARDSON

30. As part of the Bar's investigation of Ms. Garnett's complaint, the Bar audited Respondent's trust account for the time period of September 2011 to February 2014. (Admitted in Answer, ¶ 21 that Bar investigator reviewed Respondent's financial records; Testimony of Cam Moffatt; Bar Exhs. 17-58).

31. In reviewing Respondent's trust account records and associated files, the Bar's investigator discovered that in November 2011 Respondent received a $2,000.00 check for med pay funds on behalf of his then client in a personal

injury matter, Shelia Richardson. (Testimony of Cam Moffatt; Bar Exhs. 17-19, 31, 66-67).

32. The check, admitted without objection as Exhibit 66 of the Bar's exhibits, and dated November 8, 2011, was issued by GEICO General Insurance Co. and was made payable to the order of Sheila Richardson in the amount of $2,000.00.

33. Although Respondent had a duty to notify Ms. Richardson upon receipt of the funds, he did not notify Ms. Richardson that he received the check. (Testimony of Shelia Richardson).

34. Without Ms. Richardson's knowledge or express authorization, Respondent signed Ms. Richardson's name on the back of the check and deposited the $2.000.00 into his trust account on November 10, 2011. (Testimony of Shelia Richardson and Cam Moffatt; Bar Exhs. 17-19, 31, 66-67).

35. As of the date of the Bar investigator's audit in April 2014, there was no record that Respondent had ever disbursed the $2,000.00 to Ms. Richardson. (Testimony of Cam Moffatt; Bar Exhs. 17-19, 31, 66-67).

36. On or about May 12, 2014, the Bar's investigator requested Respondent provide her with Ms. Richardson's contact information. (Testimony of Cam Moffatt).

37. On May 14, 2014, Respondent contacted Ms. Richardson and advised her that he had $2,000 in funds for her. (Testimony of Shelia Richardson).

38. On May 15, 2014, Ms. Richardson received a check for $2,000.00 from Respondent. (Testimony of Shelia Richardson).

39. On May 15, 2014, Respondent provided the Bar's investigator with Ms. Richardson's contact information. (Testimony of Cam Moffatt).

40. Ms. Richardson testified that Respondent represented her in 2011 for injuries she sustained in a car accident on December 28, 2010. Ms. Richardson further testified that Respondent advised Ms. Richardson that he would seek med pay benefits on her behalf from the insurer.

41. Ms. Richardson's matter settled in the fall of 2011, and by check dated October 3, 2011, Respondent disbursed the net settlement proceeds to Ms. Richardson, as reflected on the check admitted as part of Exhibit 30. (Testimony of Shelia Richardson; Exh. 17-19, 30).

42. Respondent did not contact Ms. Richardson after disbursing her settlement proceeds to her in October 2011. (Testimony of Shelia Richardson).

43. On November 10, 2011 within one month of settling Ms. Richardson's case, Respondent deposited into his trust account the $2,000 in med pay funds made payable to Ms. Richardson. (Testimony of Cam Moffatt; Bar Exhs. 17-19, 31, 66-67).

44. Respondent did not notify Ms. Richardson of the receipt of the med pay funds and did not contact Ms. Richardson from October 2011 to May 2014. (Testimony of Shelia Richardson).

45. Ms. Richardson did not authorize Respondent to sign her name to any checks. (Testimony of Shelia Richardson).

46. Respondent did not present as an exhibit any written authorization to endorse Ms. Richardson's name to her med pay check and to deposit the funds in his trust account.

47. As set forth, Respondent testified that it was his custom and practice to sign his client's names to their checks and deposit their funds in his trust account and to then photocopy the checks so that they could come pick up the proceeds.

48. Respondent did not maintain Ms. Richardson's $2,000 in his trust account from September 30, 2011 to December 17, 2013. As reflected in Respondent's trust account ledger and the Bar's ledger, the balance in Respondent's trust account dipped below $2,000 on several occasions between November 10, 2011, the date Respondent deposited Ms. Richardson's $2,000 in his trust account and May 2014 when Respondent returned the $2,000 to Ms. Richardson. Respondent's trust account balance dipped below $2,000 on December 16, 2011; June 4, 2012; July 17, 2012; August 3, 2012; December 28, 2012; March 7, 2013; April 2, 2013; April 22, 2013; and June 13, 2013 to July 1, 2013. (Bar Exh. 18).

TRUST ACCOUNT AUDIT

49. Respondent conceded to the Bar's investigator that he does not reconcile his trust account. (Respondent stipulated that between September 20, 2011, and February 14, 2014, Respondent did not reconcile his trust account in violation of Va. Rule of Prof. Resp. 1.15(d)(3); Admitted in Answer, ¶ 22).

50. As part of the Bar's investigation, the Bar subpoenaed from Respondent his cash receipts journals, cash disbursements journals, and subsidiary ledgers.

51. Respondent produced, his trust account ledger for the time period of September 3, 2011, to December 30, 2013. Respondent's trust account ledger, Bar Exhibit 17, was admitted without objection.

52. Respondent did not maintain or produce cash receipts or cash disbursements journals. (Testimony of Cam Moffatt).

53. In order to audit Respondent's trust account. the Bar's investigator created a spreadsheet of Respondent's trust account records from September 2011 to February 2014. (Testimony of Cam Moffatt, Bar Exh. 18).

54. In order to audit Respondent's trust account, the Bar's investigator had to create subsidiary ledgers, as Respondent only maintained settlement disbursement statements. which did not always accurately reflect the receipts or disbursements. (Testimony of Cam Moffatt; Bar Exh 19).

55. Respondent also produced his bank statements with cancelled checks attached. These bank statements and the cancelled checks were admitted without objection as Bar Exhibits 30 to 58.

56. The investigator's analysis also included review of deposited items from BB&T where Respondent maintained his trust account. (Testimony of Cam Moffatt; Bar Exhs. 18-19).

57. A lawyer who receives client funds has a fiduciary duty to keep the client's funds separate from his own and to preserve and safeguard them for the benefit of the client. (Admitted in Answer, ¶ 24).

58. The audit revealed that Respondent commingled client and personal funds from September 2011 to February 2014, the entire 2 years and 4 months of the audit and that during that time period Respondent treated his trust account as his personal bank account, and that Respondent did not preserve or safeguard client funds. (Respondent stipulated that from February 6. 2012, to January 15, 2013, Respondent deposited personal funds into his trust account; Testimony of Cam Moffatt; Bar Exhs. 17-58).

59. Respondent used his trust account, which admittedly contained client funds, for his personal use. including repayments to his assistant for a personal loan, alimony payments to his ex-wife. payments to colleges for his children's tuition. rent payments. auto loan payments, advertising payments, and payments to a jewelry store, as well as his church and recreational club. (Bar Exhs. 17. 18, 29-58).

    a. During the time period of the bar's audit, Respondent paid himself $59,723.14 from his trust account. Respondent did not maintain records to reflect that these sums paid to him constituted earned fees or reimbursement of costs. The vast bulk of payments to Respondent were in round numbers. (Bar Exhs. 18. 19. 29-58).

b. During the time period of the bar's audit of Respondent's trust account, from September 2011 to February 2014, Respondent paid his firm $274,686.34. Respondent did not maintain records to reflect that these sums paid to his firm constituted earned fees or reimbursement for costs. The vast bulk of payments to Respondent were in round numbers. (Bar Exhs. 18.19, 29-58).

c. During the time period of the bar's audit of Respondent's trust account, from September 2011 to February 2014, Respondent paid his ex-wife at least $63,568.63 in monthly alimony and other payments from his trust account. (Bar Exhs. 18,19. 33-35. 39. 41-44, 47, 50. 51, 3, 54-58).

d. During the time period of the bar's audit of Respondent's trust account, from September 2011 to February 2014, Respondent paid his legal assistant/secretary $40,577.00 out of his trust account. (Bar Exhs. 18,19, 32, 33. 34, 36. 40. 42, 43. 44, 46. 48, 49, 50, 51, 54, 56, 57, 58).

60. Upon settlement of personal injury cases, and upon disbursement of funds to his clients, Respondent did not timely or contemporaneously disburse his attorneys' fees from his trust account to his operating account. Moreover, Respondent's bank records do not contain checks from trust to operating for the amounts identified as his legal fees on his disbursement statements. Rather, Respondent transferred sums in round amounts from his trust account to his operating account. During the time period of the audit, of the approximate 70 checks written by Respondent from his trust account to his operating account. all checks were in round numbers except for one (Bar Exhs. 17-19, 29-58, 63, 69. 72. 81. 84, 87, and 88).

61. Respondent deposited personal funds such as life insurance proceeds and proceeds from the sale of his marital home into his trust account at least in part to replenish client funds. (Bar Exhs. 17, 18. 20-58).

62. Respondent deposited personal funds into his trust account as follows:

a. On February 7, 2012, Respondent deposited in his trust account a check for $55,253.68, admitted as Bar Exhibit 20 without objection. Bar Exhibit 22 is the deposit slip into Respondent's trust account, also admitted without objection. These funds represented proceeds from the sale of Respondent's marital home. (Bar Exhs. 17, 18, 20, 22, 34).

b. On February 7, 2012, Respondent deposited in his trust account a check for $15,000 made payable to George Wills, admitted as Bar Exhibit 21 without objection. Bar Exhibit 22 is the deposit slip into

Respondent's trust account. According to Respondent, this check was for marital debt. (Bar Exhs. 17, 18. 21, 22, 34).

c. On April 13. 2012, Respondent deposited a check for $19,967.57 from Western Reserve Life Assurance Co. into his trust account. Bar Exhibits 23&24, the check and deposit slip, were admitted without objection. This sum represented Respondent's portion of IRA proceeds, and no portion of this sum constituted client funds. (Bar Exhs. 17. 18, 23, 24. 36).

d. On April 25, 2012, Respondent deposited $25,000 in "loan proceeds from George B. Wills" in his trust account. Bar Exhibits 25 & 26 are the debit from Mr. Wills' account and the credit to Respondent's trust account. both admitted without objection. (Bar Exhs. 17, 18. 25, 26, 36).

e. On January 15, 2013, Respondent deposited $52,911.18, which represented Respondent's life insurance proceeds, into his trust account. No portion of this sum constituted client funds. Bar Exhibits 27 & 28 are the check and deposit slip into Respondent's trust account, both admitted without objection. (Bar Exhs. 17, 18, 27, 28, 45).

f. The balance in Respondent's trust account on January 15, 2013, when he deposited the $52,911.18 of personal funds into his trust account, was $1.089.84. (Bar Exhs. 17-18). At this time, Respondent owed sums to at least two clients, Clients "A" and "B" as follows:

g. On September 18, 2012, Respondent deposited a $16,500 insurance check made payable to him and "Client A" in his trust account. Per Respondent's disbursements of settlement statement, Client A was entitled to $10,947.50 as of September 18, 2012. Respondent did not disburse any funds to Client A until January 15, 2013, when Respondent deposited his life insurance proceeds into his trust account. (Bar Exhs. 17-19, 41, 45, 59).

h. Likewise. on December 5, 2012, Respondent deposited an insurance check in the amount of $30,000 for "Client B" in his trust account; however, Respondent did not disburse any funds to "Client "B" until after he deposited his life insurance proceeds in his trust account. (Bar Exhs. 17-19, 44. 45, 60).

i. It was not until January 2013. after Respondent deposited his life insurance proceeds into his trust account, that Respondent was able to disburse $10,947.50 to "Client A" and $19,914.71 to "Client B". (Bar Exhs. 17-19, 41, 45, 59).

63. Respondent did not properly handle settlement funds received on behalf of clients. Respondent did not preserve settlement funds until he disbursed the funds to clients:

a. Client C

1. On October 4, 2012, Respondent deposited an insurance check in the amount of $76,500 made payable to Respondent and "Client C" in his trust account. (Bar Exhs. 17-19, 42, 64, 65).

2. In Respondent's disbursements of settlement statement, Respondent represented to "Client C" that Respondent would receive $25,500 as his fee and $328 for costs and that "Client C" was to receive $38,564.30. The remainder in excess of $10,000 was to be paid toward liens (e.g. Medicaid lien of $9,505.20), doctors' bills, and the arbitrator's fee ($330.00). (Bar Exh. 63).

3. On November 13, 2012 Respondent disbursed $38,564.30 to "Client C". (Bar Exhs. 17-19, 43, 63).

4. On November 27, 2012 Respondent paid the arbitrator's fee of $330.00. (Bar Exhs. 18-19, 43).

5. Notwithstanding his written representation in his disbursements of settlement statement as of the date of the bar investigator's review of Respondent's trust account, Respondent had not disbursed the balance of the monies on behalf of "Client C". (Bar Exhs. 17-19).

6. Respondent did not preserve the $9,505.20 in trust. Respondent's trust account balance dipped below $9,505.20 as of December 20, 2012, and to $1,089.84 by December 28, 2012. (Exhs. 17, 18).

b. Client D

1. On June 8, 2012, Respondent negotiated a check dated June 4, 2012, made payable to "Client D" and Respondent in the amount of $25,000. The $25,000 represented full and final settlement funds from "Client H's" carrier, USAA. Respondent deposited the $25,000 in his trust account. (Bar Exhs. 17-19, 38, 74, 75).

2. On June 19, 2012, Respondent deposited $15,000.00 in settlement funds for "Client D" in his trust account. (Bar Exhs. 17-19, 38, 76).

3. Thus, as of June 19, 2012, Respondent had deposited $40,000 of "Client D's" settlement funds in trust. (Bar Exhs. 17-19, 38, 74-76).

4. Respondent did not preserve "Client D's" settlement funds in trust. On July 3, 2012, Respondent withdrew $3,850.00 as an alimony payment bringing his trust account balance to $38,513.06. below the $40,000 in "Client D's" settlement funds which Respondent was obligated to preserve in trust until such funds were disbursed to "Client D." (Bar Exhs. 17-19, 39).

5. On July 10, 2012. Respondent deposited $423.00 on behalf of "Client D" in his trust account. (Bar Exhs. 17-19, 39, 77).

6. Accordingly, as of July 10. 2012. Respondent should have held $40,423.00 in trust on "Client D's" behalf. He did not. Respondent's trust account balance was $27,093.05 as of July 10, 2012 per the Bar's ledger, Bar Exh. 18, and $26,317.69 per Respondent's trust account ledger. Bar Exh. 17.

7. Respondent's final disbursement statement reflects that $26,181.92 was due "Client D;" Respondent's fee was $13,333.33; and the funds due lienholders were $23.00, $38.75. and $423.00 to the City of Fredericksburg. (Bar Exh. 72).

8. By check dated July 16, which cleared Respondent's trust account July 17. Respondent disbursed $26.181.92 to "Client D." (Bar Exh. 39).

9. Respondent did not preserve Client D's funds in trust from July 3 to July 17, 2012. (Bar Exhs. 17, 18).

64. Respondent's disbursements of settlement statements reflect that Respondent withheld funds from clients for payment of liens, which he did not pay, and Respondent did not return the funds to his clients. (Bar Exhs. 17-19, 29-58. 63, 72, 81. 84. 87. and 88).

a. Client E

On September 7, 2011, Respondent deposited $20,000 in funds received on behalf of "Client E" in his trust account. (Bar Exhs. 17-19, 29, 81).

1. Respondent's disbursements of settlement statement reflects that Respondent's fees were $6,666.67; his "power of attorney fee" was $75.00; and he advanced costs of $49.14. The settlement statement further reflects that there were five liens which totaled $4,781.41. "Client E" was to receive $8.427.78. (Bar Exh. 81).

2. By check dated September 26. 2011, Respondent disbursed $8,427.78 to "Client E." (Bar Exh. 29).

3. As of October 14, 2011, and prior to disbursing any money for liens, Respondent's trust account balance dipped below $4,781.41 to $2.960.78. (Bar Exhs. 17, 18).

65. Additionally, as Respondent admitted in his Answer at ¶ 30. Respondent is unaware of the nature of deposits into and checks written on his trust account as follows:

a. Gatestone

Respondent was unable to identify a September 4, 2013 payment in the amount of $10.000 to Gatestone, and he did not know to which client the payment was associated.

b. Credit Memo of $25,000 to Trust Account

Respondent could not identify a $25,000 credit memo. According to documents received from the bank the $25,000 credit memo references "Deposit of loan proceeds from George B. Wills."

II. NATURE OF MISCONDUCT

RULE 1.4 Communication

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

RULE 1.15 Safekeeping Property

(a) Depositing Funds.

(3) No funds belonging to the lawyer or law firm shall be deposited or maintained therein except as follows:

(i) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution or to maintain a required minimum balance to avoid the imposition of service fees, provided the funds deposited are no more than necessary to do so; or

(ii) funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests. Any portion finally determined to belong to the lawyer or law firm shall be withdrawn promptly from the trust account.

(b) Specific Duties. A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;

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

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Cash receipts and disbursements journals for each trust account, including entries for receipts, disbursements, and transfers, and also including, at a minimum: an identification of the client matter; the date of the transaction: the name of the payor or payee; and the manner in which trust funds were received, disbursed, or transferred from an account.

(2) A subsidiary ledger containing a separate entry for each client, other person, or entity from whom money has been received in trust.

The ledger should clearly identify:

(i) the client or matter, including the date of the transaction and the payor or payee and the means or methods by which trust funds were received, disbursed or transferred; and

(ii) any unexpended balance.

(d) Required Trust Accounting Procedures. In addition to the requirements set forth in Rule 1.15 (a) through (c), the following minimum trust accounting procedures are applicable to all trust accounts.

(3) Reconciliations.

(i) At least quarterly a reconciliation shall be made that reflects the trust account balance for each client, person or other entity.

(ii) A monthly reconciliation shall be made of the cash balance that is derived from the cash receipts journal, cash disbursements journal, the trust account checkbook balance and the trust account bank statement balance.

(iii) At least quarterly, a reconciliation shall be made that reconciles the cash balance from (d)(3)(ii) above and the subsidiary ledger balance from (d)(3)(i).

(iv) Reconciliations must be approved by a lawyer in the law firm.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

III. SANCTION

Following the announcement of its decision on the Rule violations, the Court received into evidence that Respondent had no prior disciplinary record. Respondent testified on his own behalf and presented character witnesses. The Bar and Respondent presented arguments on the type of sanction to be imposed.

The Court retired to deliberate, and thereafter, based on the evidence presented and the arguments of counsel. ORDERED that Respondent's license be SUSPENDED for a period of THREE YEARS, effective September 15, 2014

IT IS FURTHER ORDERED that, as directed in the Court's Summary Order entered August 29, 2014, and in the Amended Summary Order entered September 15, 2014, *nunc pro tunc* August 29, 2014, Respondent shall comply with the requirements of Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the Suspension of Respondent's license to practice law in the Commonwealth of Virginia, to

all clients for whom the Respondent is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in the Respondent's care in conformity with the wishes of his or her clients. Respondent shall give such notice within 14 days of the effective date of the Suspension, and make such arrangements as are required herein within 45 days of the effective date of the Suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective date of the Suspension that such notices have been timely given and such arrangements made for the disposition of matters. If the Respondent is not handling any client matters on the effective date of the Suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge Circuit Court.

IT IS FURTHER ORDERED that Respondent shall maintain professional malpractice insurance during the time for which he is licensed to practice law in the Commonwealth pursuant to Va. Code Section 54.1-3935(D). Respondent shall certify to the Virginia State Bar that he has the required insurance and shall provide the name of the insurance carrier and the policy number.

IT IS FURTHER ORDERED that costs shall be assessed by the Clerk of the Disciplinary System pursuant to Paragraph 13-9.E. of the Rules.

IT IS FURTHER ORDERED that the Clerk of the Disciplinary System shall comply with the public notice requirements of Paragraph 13-9.G. of the Rules.

IT IS FURTHER ORDERED that the Clerk of the Circuit Court shall mail a copy teste of this Order by certified mail to the Respondent, Kenneth Wayne Paciocco, at his last address of record with the Virginia State Bar, Kenneth W. Paciocco, P.C., Suite 301, 5905 West Broad Street, Richmond. Virginia 23230, and by regular mail to the counsel of record, and the Clerk of the Disciplinary System, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond. Virginia 23219-3565.

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

ENTERED: 10-20-14

Chief Judge Designate

SEEN AND AGREED:

Assistant Bar Counsel
Renu M. Brennan

SEEN:

Counsel for Respondent Kenneth W. Paciocco
Michael Rigsby, Esq.

OBJECTIONS: The evidence of record does not meet the evidentiary standard for a finding that Mr. Paciocco engaged in conduct in violation of Rule of Professional Conduct 8.4(c).

Copy
Teste: EDWARD F. JEWETT, CLERK
BY: D.C.

VIRGINIA: BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF DARRYL ARTHUR PARKER
VSB Docket No.: 15-032-102633

MEMORANDUM ORDER

This matter came to be heard on August 28, 2015, before a panel of the Virginia State Bar Disciplinary Board (the "Board") comprised of Michael A. Beverly, Stephen A. Wannall, Jeffrey L. Marks, Lisa A. Wilson, and William H. Atwill, Jr., First Vice Chair (presiding).

The Virginia State Bar ("the Bar") was represented by Renu M. Brennan, Assistant Bar Counsel ("Bar Counsel"). Darryl Arthur Parker (the "Respondent") failed to appear in person or by counsel. Jennifer L. Hairfield, Registered Professional Reporter of Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804-730-1222), having been duly sworn, reported the hearing.

The Chair opened the hearing by calling the case in the hearing room and causing the Assistant Clerk to call Respondent's name three times in the adjacent hall. The Respondent did not answer or appear. The Chair inquired of the members of the panel whether any of them had a personal or financial interest, or any bias, which would preclude, or could be perceived to preclude, their hearing the matter fairly and impartially. Each member of the panel answered the inquiry in the negative.

The matter came before the Board on a Petition for Expedited Hearing pursuant to Part 6, Section IV, Paragraph 13-18.D. of the Rules of the Supreme Court of Virginia. All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System (Clerk) in the manner prescribed by the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-20 of the Rules of Court. In the misconduct phase the Bar's exhibits 1-40 were admitted without objection. After being sworn to faithfully and accurately translate the

testimony of the witness, Manuela G. Crisp, acted as the translator for the Complainant and Bar witness, Martha Ventura. Valerie Harris, Nathaly Ventura, Alan B. Knapp, attorney for the Richmond School Board, and Cam Moffett, Investigator for the Bar, all testified as witnesses for the Bar.

The Petition charged a 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.

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

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

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

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

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

RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

RULE 1.15 Safekeeping Property

(a) Depositing Funds.

(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

(2) For lawyers or law firms located in Virginia, a lawyer trust account shall be maintained only at a financial institution approved by the Virginia State Bar, unless otherwise expressly directed in writing by the client for whom the funds are being held.

(3) No funds belonging to the lawyer or law firm shall be deposited or maintained therein except as follows:

(i) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution or to maintain a required minimum balance to avoid the imposition of service fees, provided the funds deposited are no more than necessary to do so; or

(ii) funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests. Any portion finally determined to belong to the lawyer or law firm shall be withdrawn promptly from the trust account.

(b) Specific Duties. A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(2) identify and label securities and properties of a client, or those held by a lawyer as a fiduciary, promptly upon receipt;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;

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

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

(d) Required Trust Accounting Procedures. In addition to the requirements set forth in Rule 1.15 (a) through (c), the following minimum trust accounting procedures are applicable to all trust accounts.

(1) Insufficient Fund Reporting. All accounts are subject to the requirements governing insufficient fund check reporting as set forth in the Virginia State Bar Approved Financial Institution Agreement.

(2) Deposits. All trust funds received shall be deposited intact. Mixed trust and non-trust funds shall be deposited intact into the trust fund and the non-trust portion shall be withdrawn upon the clearing of the mixed fund deposit instrument. All such deposits should include a detailed deposit slip or record that sufficiently identifies each item.

RULE 1.16 Declining Or Terminating Representation

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

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

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

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

RULE 4.1 Truthfulness In Statements To Others

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

(a) make a false statement of fact or law;

RULE 8.1 Bar Admission And Disciplinary Matters

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

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

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter;

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

(d) obstruct a lawful investigation by an admissions or disciplinary authority.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

FINDINGS OF FACT

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

1. At all times referenced herein Respondent, Darryl Arthur Parker, was an attorney licensed to practice law in the Commonwealth of Virginia.

2. On May 8, 2013, Jesus Irizarry, then a minor child age 16, was injured while attending Amelia Street School, a Richmond City School.

3. According to a Special Needs Trust made for the benefit of Jesus Irizarry, he is a disabled person as defined in the Social Security Act Section 1614(a)(3),42 U.S.C. section 1382(c)(a)(3). According to medical documentation, Jesus Irizarry is autistic.

4. Jesus Irizarry has Dandy-Walker syndrome, which is defined as a congenital brain malformation involving the cerebellum, marked by complete absence of the part of the brain between the two cerebellar hemispheres.

5. Jesus Irizarry's mother, Martha Ventura, does not speak English.

6. On May 10, 2013, Martha Ventura retained Respondent for legal representation arising out of the assault and battery of her son, Jesus Irizarry. Respondent charged a 1/3 contingency fee of any amount recovered.

7. On behalf of Jesus Irizarry, a minor by his next friend, Respondent filed an action against the Richmond School Board in the Circuit Court of the City of Richmond.

8. The case was settled for the sum of $60,000.00.

9. By letter dated June 6, 2014, counsel for the Richmond School Board requested information from Respondent to complete the settlement documents, and counsel advised Respondent that the settlement would require court approval and further that his clients required a release of all claims and indemnification agreement. Counsel also asked Respondent whether Respondent believed a guardian ad litem (GAL) should be retained and whether a Special Needs Trust was needed.

10. On June 24, 2014, Respondent filed a Petition in the Circuit Court of the City of Richmond requesting that the Court approve the parties' settlement of $60,000.00, which

included reimbursement of Jesus Irizarry's medical expenses in the amount of $3,457.70 as well as $20,000.00 for Respondent's legal fee, and $46.14 for legal costs.

11. Counsel for the Richmond School Board filed an Answer to the Petition joining the Respondent's request to approve the settlement.

12. On July 14, 2014, Respondent noticed a hearing on this Petition for August 1, 2014. Respondent did not serve the GAL for Jesus Irizarry.

13. Because the GAL was not served with and could not attend the August 1, 2014, hearing, counsel for the Richmond School Board re-noticed the hearing for October 10, 2014.

14. By letter dated August 29, 2014, Respondent advised counsel for the Richmond School Board as follows:

> Please be advised that in accordance to our telephone conversation on August 28, 2014, I am confirming the fact that Jesus Irizarry will be 18 Years old on August 29, 2014 and a Special Needs trust has been drafted on his behalf by Attorney Rajendra Raval.

15. Accordingly, and in response to Respondent, by letter that same day counsel for the Richmond School Board left for the Respondent to pick up that same day, the settlement check, a release, Medicare forms and a letter stating as follows: "This will follow up on your request to proceed with the settlement with a Release of All Claims and a Dismissal Order, without a court approval hearing, whereas you informed that Jesus Irizarry turns eighteen years old on August 29, 2014 (or August 28, 2014) and has not been declared as an 'incapacitated person' by a Court. You also informed that subject to the settlement that a trust has been created for the proceeds/funds from the settlement for the benefit of Jesus Irizarry. Therefore, pursuant to your request and our discussion of August 28, 2014, and the terms of the settlement as confirmed in my correspondence of June 6, 2014, I enclose a settlement check for and on behalf of Jesus Irizarry in the amount of $60,000 as made payable to 'Martha Ventura as mother and

next friend of Jesus Irizarry a minor and her attorney Darryl A. Parker, Esquire.'...As also discussed, please hold the enclosed settlement check in escrow until the enclosed Release of All Claims has been forwarded to the Court with a request for attested copies of the Dismissal Order to be forwarded to all counsel of record upon entry."

16. On August 29, 2014, Respondent collected the check and then called Martha Ventura and requested that she endorse the check. Respondent represented to Mrs. Ventura that he was going to deposit the check in his bank account after which it would take 10-13 days for him to pay to her the amount to which her son was entitled.

17. On September 2, 2014, Respondent deposited the $60,000 in his trust account. Prior to the deposit of the $60,000 Respondent had a balance of $20.02. In July and August 2014, Respondent's trust account was overdrawn on various occasions. The overdrafts were not reported to the Bar as required by Rule 1.15.

18. Despite his representations to Mrs. Ventura and his obligation to provide settlement funds to her, and notwithstanding the instructions from counsel for the Richmond School Board, Respondent did not provide any funds to Mrs. Ventura.

19. When Respondent failed to tender the settlement funds to Mrs. Ventura within the 10-13 days, the Venturas contacted Respondent who stated that they had to wait until a Special Needs Trust was created.

20. An audit of Respondent's trust account revealed that he spent the $60,000 on personal and other expenses from September 2, 2014, to January 20, 2015, at which time the trust account balance was $203.29.

21. According to the Petition Respondent filed on June 24, 2014, his fee was $20,000; legal costs were $46.15; and Jesus Irizarry's medical expenses were $3,457.70. An unexecuted

settlement disbursement statement in Respondent's file added $1,500 to the costs for the expense of preparing the Special Needs Trust. According to this Settlement Statement, Jesus Irizarry was entitled to at least $34,996.16. As of September 22, 2014, less than one month after Respondent deposited the settlement funds in his trust account, the trust account balance was below the amount owed to Jesus Irizarry.

22. By letter dated October 2, 2014, counsel for the Richmond School Board asked Respondent to advise as to the status of the settlement documents and as to whether the parties needed to proceed with the October 10, 2014 settlement hearing.

23. The Special Needs Trust was not created until December 2014, and it was not executed until February 6, 2015. Respondent's representations to counsel for the Richmond School Board that the Trust had been created as of August 2014 were thus false.

24. After the Special Needs Trust was executed, Respondent represented to the Venturas that a court hearing was scheduled for April 1, 2015, at which time they would get the settlement check.

25. The night before the hearing Respondent contacted Mrs. Ventura at 10 p.m. and stated that she did not need to appear in Court. Respondent instructed Mrs. Ventura to meet him at his office at 10 a.m., at which time he would give her the check. Mrs. Ventura took off work and appeared at Respondent's officer at 10 a.m. Respondent was not there. He then communicated to the Venturas that he would provide the money later that day, but he did not return their subsequent phone calls.

26. Mrs. Ventura filed a bar complaint which was received on April 28, 2015.

27. In his May 21, 2015, response to the bar complaint, Respondent advised that it took a significant amount of time for the Special Needs Trust to be created, and that the Trust

was not yet approved by the Department of Social Services. Respondent further represented that "(d)espite Social Services lack of approval, I have advised Mrs. Ventura that we can disburse the settlement proceeds now that Jesus Irizarry is now over the age of 18 years old. Mrs. Ventura after numerous telephone messages has refused to sign the necessary documents and come to the office to pick up the settlement proceeds."

28. The Bar referred the matter for investigation and issued subpoenas to Respondent and the bank where he maintains his trust account to review the records.

29. Cam Moffett, the Bar's investigator, testified on behalf of the Bar regarding her review of the Respondent's trust account records.

30. Moffett also testified that on June 16, 2015, the Respondent failed to appear at a meeting at his office agreed upon between the two.

31. Notwithstanding the instruction to hold the settlement funds in his trust account pending execution of the release and his client's requests and desires, Respondent converted the funds of the settlement for his personal use.

32. On July 16, 2015, a hearing was scheduled in Circuit Court for the City of Richmond for the entry of a final order. Respondent did not appear at the hearing.

33. As of the date of the hearing on the Petition for Expedited hearing that is the subject of this Order, the Respondent is under a four-month disciplinary suspension. His license was suspended effective May 20, 2015, because he failed to perform services, and he failed to return sums owing to a client until the eve of the disciplinary hearing, in violation of the rules regarding the safekeeping of funds (Rule 1.15, Rule 8.1 and Rule 8.4).

34. Pursuant to the Rules of the Supreme Court, Part Six, Section IV, Paragraph 13-29, Respondent was obligated to give notice to his clients, opposing counsel, and the Courts of

his suspension within 14 days of his suspension or by June 4, 2015, and he was to make arrangements for his clients' cases within 45 days of his suspension.

35. Respondent did not advise his clients or opposing counsel of his suspension in accordance with this requirement.

36. Respondent misrepresented facts to Mrs. Ventura and opposing counsel to obtain $60,000 in settlement funds and converted the funds for his own use.

37. In sum, and in accordance with Rule 13-l8(D), Bar Counsel has borne its burden of proving by clear and convincing evidence that Respondent is engaging in misconduct that is likely to result in injury to, or loss of property of, one or more of Respondent's clients and that the continued practice of law by the Respondent poses an imminent danger to the public.

MISCONDUCT

The following violations were withdrawn by Renu M. Brennan, Assistant Bar Counsel: Rules 1.15(a)(2), 1.15(b)(1), 1.15(b)(2), 1.15(d)(1), and 1.15(d)(2).

After due deliberation, the Board did not find by clear and convincing evidencea violation by the Respondent Darryl Arthur Parker of Rules 1.4(c), 1.5(a), 1.15(a)(1), and 1.15(a)(3)(i). The Board found by clear and convincing evidence violations by the Respondent Darryl Arthur Parker of the provisions of the following Rules of Professional Conduct, as charged by the Bar:

RULE 1.3 Diligence

> (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
>
> (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

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

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

RULE 1.15 Safekeeping Property

(a)(3)(ii) funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests. Any portion finally determined to belong to the lawyer or law firm shall be withdrawn promptly from the trust account.

(b) Specific Duties. A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;

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

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

RULE 1.16 Declining Or Terminating Representation

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

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

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

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

RULE 4.1 Truthfulness in Statements to Others

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

(a) make a false statement of fact or law; or

RULE 8.1 Bar Admissions and Disciplinary Matters

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

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

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter;

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

(d) obstruct a lawful investigation by an admissions or disciplinary authority.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b)commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c)engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

SANCTION

Thereafter, the Board received evidence of aggravation and mitigation from the Bar, including the Respondent's prior disciplinary record. After due deliberation, the Board announced the appropriate sanction as REVOCATION.

Accordingly, by this Memorandum Order it is ORDERED that the license of the Respondent DARRYL ARTHUR PARKER is REVOKED effective August 28, 2015.

It is further ORDERED that Respondent must comply with the requirements of Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the Revocation of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the Revocation, and make such arrangements as are required herein within 45 days of the effective date of the Revocation. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the Revocation that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of August 28, 2015, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13- 29 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further ORDERED that, pursuant to Part 6, Section IV, Paragraph 13- 9(E) of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall send an attested copy of this Order, by certified mail, return receipt requested to Respondent at his last address of record with the Virginia State Bar, that being Darryl Arthur Parker, 3113 W. Marshall St., Suite 2A, Richmond, Virginia 23230, and a copy by hand-delivery to Renu M. Brennan, Assistant Bar Counsel, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026

ENTERED THIS 1st DAY OF October, 2015

VIRGINIA STATE BAR DISCIPLINARY BOARD

William H. Atwill, Jr.

Digitally signed by William H. Atwill, Jr.
DN: cn=William H. Atwill, Jr., o=Atwill, Troxell & Leigh, PC, ou, email=batwill@atandlpc.com, c=US
Date: 2015.10.01 17:18:15 -04'00'

William H. Atwill, Jr., 1st Vice Chair

EXPEDITED PETITION

VIRGINIA:

BEFORE THE DISCIPLINARY BOARD
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
MARY MEADE

VSB Docket No. 07-052-2135 and 07-052-064794

ORDER OF REVOCATION

THIS MATTER came on to be heard at 9:00 a.m. on November 18, 2011, in the Tweed Court Room on the fourth floor of the Lewis F. Powell, Jr., U.S. District Courthouse, Tenth & Main Street, Richmond, Virginia, before a panel of the Virginia State Bar Disciplinary Board ("Board") consisting of Paul M. Black, Acting Chair, Dr. Theodore Smith, lay member, Bruce T. Clark, John A. Dezio, and Peter A. Dingman. The Virginia State Bar was represented by Seth M. Guggenheim, Senior Assistant Bar Counsel. The Respondent, Mary Meade, did not appear.

Jennifer L. Hairfield, Court Reporter, of Chandler & Halasz, P.O. Box 9349, Richmond, Virginia, 23227, (804) 730-1222, after being duly sworn, reported the hearing.

The Chair polled the members of the panel as to whether they had any personal or financial interest which would impair, or reasonably could be perceived to impair, any of them from impartially hearing this matter and serving on the panel, to which inquiry each member and the Chair responded in the negative.

These matters came before the Board pursuant to a Petition for Expedited Hearing (the "Petition") pursuant to Part Six, Section IV, Paragraphs 13 – 18.D., Rules of the Supreme Court of Virginia, filed in the Clerk's Office on October 18, 2011, and served

on Respondent via Certified Mail on October 17, 2011. The Clerk's Office sent to Respondent, also by Certified Mail, at her address of record, on October 20, 2011, a Notice of Expedited Hearing, with an Order directing Respondent to appear before the Board on the date, at the time and in the location above set out. As noted above, Respondent did not appear when the Hearing convened as scheduled. The Chair requested the Assistant Clerk, Louann Weakland, to call Respondent's name three times in the hallway, which was done with no response.

The Board was presented with a pleading styled: Motion to Dismiss; Objection of Respondent, Mary Meade, to the Panel's [sic] Hearing Any Evidence; and Objection to the Abuse of Process, Bias, Conflict of Interest and Misconduct of Bar Counsel, Seth Guggenheim ("Respondent's Motion"). A cover letter, signed with Respondent's name, stated that she would also have copies of Respondent's Motion delivered to the Tweed Courtroom, which were received by the Board. Respondent's cover letter further stated that she could not attend the hearing in person as she believed doing so "would cause me to participate in misconduct and because I think that this hearing is violative of the rules given Mr. Guggenheim's actions."

After considering Respondent's Motion, her cover letter and an e-mail sent to Ms. Weakland asserting that Respondent could not attend the hearing because she had to meet her former attorney in Arlington Circuit Court for entry of an order in this matter, and upon the representation by Mr. Guggenheim that there was, to his knowledge, no proceeding in this matter pending in Arlington Circuit Court beyond entry of a consent order, the Board denied Respondent's Motion and proceeded to hear evidence on the Petition.

The Petition alleged that Respondent violated certain specified Rules under the Virginia Rules of Professional Conduct ("Rules") and that the Respondent's "continued presence on the roll of attorneys in this Commonwealth would result in imminent further injury to, and loss of property of, her clients and other persons." The Rules alleged to have been violated were Rules 1.5, 1.15, 3.3, 5.4, 8.1 and 8.4.

Summary of Evidence Presented to the Board

Mr. Guggenheim then made an opening statement on behalf of the Bar and moved into evidence Bar Exhibit #1, an affidavit of Diana L. Balch, Custodian of Membership Records, Virginia State Bar, which, among other things, advised the Board that Respondent was, as of November 17, 2011, an active member of the Virginia State Bar, having been admitted to practice on October 2, 1984; Exhibit #2, a certified copy of Respondent's disciplinary record; and Exhibit #3, the transcript ("Transcript" or "Trp") of an earlier hearing in this matter (the "August Hearing"), held on August 26, 2011, before another panel of the Board.

The Transcript set out extensive testimony by Respondent, under oath. She was asked by her counsel whether she had attempted to comply with the request of Bar Counsel in investigating the complaints in this matter. She responded, in part, "I had determined I could no longer cooperate with the Bar because of the abuses that had occurred." Trp, p. 18, L 2-4. She further said, "I haven't had a trust account since the '90s. I do not hold funds for clients." Trp. P. 19, L19-20. In response to a question from her counsel regarding "Marriage and Family Recovery Programs, Incorporated," Respondent stated "that's my faith based marriage recovery program and it's a totally separate entity." Trp. P. 19, L 10 – 11. Under cross-examination by Mr. Guggenheim,

Respondent reiterated that she had no trust account, had not maintained a trust account since the late '90s, and in the past 10 years had not received advanced fees or costs from a client. Trp. p. 40, L 17 – 25, p. 41, L 1 – 20.

Respondent repeated that the Marriage and Family Recovery Programs were a "completely separate entity." Trp. p. 42, L 8 – 15. She did testify that her law firm shared office space and an employee with the Marriage and Family Recovery Programs, Inc. Trp. p. 49, L 25 – p. 50, L 1-3. Respondent said she is the sole lawyer in Mary Meade & Associates and is an officer and director, but not a shareholder of Marriage and Family Recovery Programs, Inc. Trp. p. 51, L 18 – 25. Respondent further testified that the Bar had requested, via subpoena, her bank records. She asserted that her own copies of such records were lost, but that she had not requested copies from the bank, nor would she "voluntarily"[1] produce those records if found, because she felt the Bar's request had not been properly explained. Trp. p. 54, L 5 – 25. Respondent offered an alternative reason for her failure to comply with the subpoena requesting "operating account records depicting monies received from Laura Straub." "Well, maybe it's a term thing. We just had one general account. So we didn't have specific trust or operating accounts." Trp. p. 58, L 18 – 25. In any event, she would not "cooperate" (by complying with the subpoena) because she believed Mr. Guggenheim and Mr. Sterling, the Bar's investigator, were themselves guilty of misconduct[2].

Caroline Elizabeth Palke, a client of Respondent, also testified at the August Hearing. Ms. Palke testified she hired Respondent as her attorney in a custody dispute in

[1] Respondent appears to view compliance with a subpoena to be "voluntary" production.

[2] The misconduct asserted by Respondent arose from Mr. Guggenheim seeking Respondent's medical records and an alleged "assault" against Respondent by Mr. Sterling. Mr. Guggenheim advised the Board that the Bar had sought medical records to verify Respondent's stated reason for continuance of a matter, and Mr. Sterling denied any assault, testifying he approached Respondent to obtain signatures on a release form and did not touch, menace or physically threaten her.

October, 2008, paying Respondent approximately $12,000, "up-front." This payment was based upon Respondent's estimate as to what the representation would cost and was exhausted over a period of months. Trp. p. 67, L 6 – 23 and p. 68, L 13 – p. 69, L 3.

The Transcript (Exhibit #3) and Exhibits #1 & #2 were received in evidence by the Board, and Mr. Guggenheim called William H. Sterling, the Bar investigator. Mr. Sterling testified he had attempted to investigate a complaint against Respondent and scheduled a series of interviews with her. A subpoena was issued for her bank records, but those records were not produced. Respondent told him her bank statements were on a computer and a back-up device, both of which had been stolen. At a third interview, Respondent appeared, read a statement and terminated the interview. He obtained a copy of Laura Straub's "Retainer Agreement" with Respondent, which was received as Exhibit #4. That Agreement provided for a "**non-refundable retainer**" (bold font in the document) of $10,000, with hourly fees to be charged "after the depletion" of the "retainer". Respondent reserved the right to require a "retainer" after the initial sum was "exhausted." The Agreement is dated September 8, 2005. Mr. Sterling also obtained an invoice issued to Laura Straub by Respondent for services in September 2005. This invoice was received as Exhibit #5. It reflects charges for legal services at the agreed rate totaling approximately $3,825.00, as of September 8, 2005, the date the "retainer" was paid, per the Agreement. By month's end, the "retainer" was used up.

The Bar then called Thanh Tho "Tammy" Nguyen, who hired Respondent for a divorce, custody and child support dispute on June 20, 2008. Ms. Nguyen met Respondent at St. Michael's Church. She and Respondent executed a "Retainer Agreement" which called for the client to pay "in advance a flat fee" of $12,500, plus a

$250 "Administrative Application Fee." The Agreement states, "This fee constitutes and [sic] advance payment for all legal services in my case for twelve months from this date .... . The entire fee must be paid in advance to reserve the attorney's time and is a **non-refundable retainer** [bold font in original]." The Agreement then provides for a fees "after the expiration of the first twelve months" at a "limited monthly rate" of $1500 per month.

Despite those contract provisions, in the fall of 2008, respondent billed Ms. Nguyen for additional fees, made necessary because Respondent had worked weekends on Ms. Nguyen's case. Ms. Nguyen paid an additional $2600 to Respondent by check dated November 5, 2008. A copy of that check was received as Exhibit #7. The next month an additional payment of $4500 was demanded from Ms. Nguyen. She was told that failure to pay would result in Respondent moving to withdraw as her counsel. Some of these demands for payment were purportedly sent by "Father Joseph" of the Marriage & Family Recovery Programs. Ms. Nguyen testified she never met Father Joseph, never spoke with him on the phone and, now, doubts his existence. Nevertheless, in a string of e-mails (copies of which were received as Exhibit #8) dated December 15, 2008, "Father Joseph" demanded that Ms. Nguyen wire money to the account of Marriage & Family Recovery Programs, an account at the same bank and bearing same account number as the account to which the November check payable to Respondent (Exhibit #7) was deposited. "Father Joseph" both cajoled Ms. Nguyen, extolling all "we" were doing to help Ms. Nguyen, and threatening her with the filing of a motion to withdraw. Ms. Nguyen sought additional time to pay due to her father's hospitalization, but "Father Joseph" was unrelenting "I will need you to have the money wired to our account first

thing Wednesday morning since the Board meets at 11:00 and so the money MUST be WIRED to our account by no later than 11:00 a.m." Ms. Nguyen did wire $4500 to the requested account on December 15, 2008, as reflected in Exhibits #9 & #10.

Ms. Nguyen stated that Respondent never obtained any of the relief she sought, nor did Respondent ever provide her with an accounting or a refund.

Travis Schultz was referred to Respondent through Respondent's husband (a co-worker) in July 2008. Respondent represented Mr. Shultz and obtained a divorce on his behalf for a "flat fee" of $7000. At the inception of the representation, Mr. Shultz was given a document (Exhibit #11) which was on the letter head of the Marriage & Family Recovery Programs, showing the same address as Respondent's law office in McLean, Virginia. This document purported to be an "excepted report" of a meeting of the "Advisory Board Selection Committee." It quotes Respondent as asking this committee for authorization to proceed with a divorce action for an individual identified as "T.S. 708-122," a person known to Respondent. Permission is supposedly sought because "we" normally do not under take divorce without attempt to save the marriage. Respondent is also quoted as requesting permission to charge a flat fee of $7000, "[e]ven though the committee raised this flat fee to $16000 last year ... ." Respondent is related to have described the circumstances of the client's marriage as justification for proceeding with divorce. "Father Joseph" is described as the chair of the meeting. Mr. Schultz never met Father Joseph nor spoke with him on the phone. Mr. Schultz did not at any time authorize Respondent to discuss his case with any committee of the Marriage & Family Recovery Programs. He was given a document (Exhibit #12) best described as a rate sheet showing fee options for The Law Offices of Mary S. Meade & Associates.

That document shows one option as "Flat Fee for Divorce Litigation Without Children for a Year" @ $7000. On July 30, 2008, Mr. Schultz wired $7000 to the same account Ms. Nguyen was to wire her fees to. Copies of (i) the wiring instructions given to Mr. Schultz, showing the account as belonging to Marriage & Family Recovery Programs, Mr. Schultz that same day; (ii) fund transfer confirmations from Mr. Schultz bank; and (iii) his check were received as Exhibit #13.

Melissa Ricks testified that she was referred to the Marriage & Family Recovery Programs in September, 2005, by her parish priest after she told him she was having problems in her marriage, but was appalled by the thought of divorce. The priest identified Respondent as someone he thought was doing good work counseling people in similar situations. During September and October, 2005, Ms. Ricks had several meetings and other communications with Respondent, not realizing Respondent was a lawyer. She said Respondent advised her as to how to comport herself in her marriage. Ms. Ricks meanwhile had contacted divorce lawyers and was waiting for the one she preferred to become available. The selected lawyer had advised Ms. Ricks his case load was too full to permit him to take on a new client, but if she could wait, he would represent her after completing some of his current work. Ms. Ricks continued to consult with Respondent as a counselor.

On October 30, 2005, Ms. Ricks met with Respondent at a restaurant where they had met previously. Respondent at that time revealed that she was an attorney and advised Ms. Ricks to immediately pack up her children and leave her husband. Ms. Ricks was surprised to learn that respondent was a lawyer, but was persuaded to hire her when Respondent explained that Ms. Ricks would receive a 25% discount on fees as a

client of the Marriage & Family recovery Programs and would receive a $25,000 "scholarship" toward her fees. Ms. Ricks, who had been reluctant to hire Respondent, agreed to sign a Retainer Agreement after Respondent hand wrote additions to it reflecting the discount and scholarship. Because they were meeting at a restaurant, Ms. Ricks did not then receive a copy of the Agreement. Months later after she switched counsel and was pursued by Respondent for claimed unpaid fees, Ms. Ricks obtained a copy of the Agreement which was missing page 3. The copy she received did not have the hand written provisions Ms. Ricks saw the Respondent add to the Agreement on October 30, 2005. This copy was received as Exhibit #14. Ms. Ricks paid Respondent $1000.

Melissa Ricks changed counsel in February 2006, because she felt Respondent was taking a more militant and inflexible approach to the case than the one Ms. Ricks wanted to pursue. An Advisory Board Action Report, this one on the letterhead of Respondent's law office, was sent to Ms. Ricks. It runs to six pages, single paced typing and purports to be the minutes of a "Meeting of the Advisory Board's Financial Committee" on February 10, 2006. Said to be in attendance, besides Respondent, were "Father Joseph," "Father Johnson," "Dr. Smith," "Mr. Williams," and "Sister Mary Joseph." Ms. Ricks never met any of these people and never authorized Respondent to discuss her case with any one or all of them. The document portrays Respondent as advocating on behalf of a client named as "Mrs. M" to persuade the Financial Committee to postpone "reporting the matter to the collection agency." The Report was received in evidence as Exhibit #16.

Subsequently, Ms. Ricks received correspondence from Your Collections

Solutions, Inc., demanding payment of $39,000, for services rendered by Respondent to Ms. Ricks. Although Ms. Ricks did not hire Respondent until October 30, 2005 (and testified she did not know Respondent was a lawyer prior to that time) she received an invoice for services allegedly rendered in September 2005. This invoice was received as Exhibit #15. The Board also received in evidence (as Exhibit #17) a copy of a letter from Peter W. Buchbauer, Esq., to Respondent, advising Respondent that a reasonable fee for the benefits obtained for Ms. Ricks during Respondent's tenure as her attorney would be $2500, based on what an "average professional would have charged in this area.... ."

SUMMARY OF BOARD'S FINDINGS

Having presented this evidence the Bar rested its case and made closing argument. The Board retired to consider the evidence and the violations charged. After deliberation and considering the testimony of the witnesses presented and the exhibits received, the hearing was reconvened and the Chair announced the unanimous decision of the Board as follows:

As to Rule 1.5(a), **A lawyer's fee shall be reasonable.**

The Bar proved by clear and convincing evidence that Respondent's fees were not reasonable when measured against the criteria set forth in subparts (1) – (8) of this Rule. The Board notes Ms. Nguyen's testimony that she paid fees of nearly $20,000 in a period of a few months without obtaining any relief. Ms. Ricks was billed $39,000, again for representation for a brief period with no substantial relief.

As to Rule 1.5(b), **The Lawyer's fee shall be adequately explained to the**

client.

The Bar proved by clear and convincing evidence that Respondent's fees were not adequately explained. Ms. Nguyen agreed to a fee of $12,500 to cover representation for a full year, but within less than six months, Respondent demanded additional payments, because she worked weekends. Ms. Ricks was billed $39,000, but was unable to obtain invoices or even a copy of her fee agreement.

As to Rule 1.15 (a), **All funds received or held by a lawyer ... shall be deposited in one or more identifiable escrow accounts ... .**

The Bar proved by clear and convincing evidence that Respondent failed to maintain an escrow account. Respondent testified at the August Hearing that she had not had a trust account since the '90s. The evidence showed that advance fees from clients were directed to an account titled to the Marriage & Family Recovery Programs, which respondent asserted was a separate entity from her law firm. She identified that account as a "general account."

As to Rule 1.15(c)(3), **A lawyer shall: maintain complete records of all funds, securities, and properties of a client coming into possession of the lawyer and render appropriate accounts to the client regarding them ... .**

The Bar proved by clear and convincing evidence that Respondent did not account to Ms. Nguyen, Mr. Schultz, Ms. Palke or Ms. Ricks (until demanded by a replacement attorney) for monies received from her clients. Respondent further testified that her records were on a computer and back-up device that was stolen from her, but that she had taken no steps to obtain account statements from her bank to allow her to reconstitute an appropriate account ledger.

As to Rule 3.3(a)(1), **A lawyer shall not knowingly: make a false statement of fact or law to a tribunal[.]**

The Bar proved by clear and convincing evidence that respondent lied to the Board at the August Hearing when she said that she had not in the preceding 10 years received advanced fees or costs from a client. The Retainer Agreements for Ms. Straub, Ms. Nguyen, and Mr. Schultz all plainly called for payment of advance fees to be earned by work done after the date of receipt. The fees were described as advance payments in writing and the circumstances in each of those cases made clear that the fee was not fully earned when received.

As to Rule 5.4(a), **A lawyer or law firm shall not share legal fees with a non-lawyer ... .**

The Bar established by clear and convincing evidence that client fees directed to Respondent were deposited to an account in the name of the Marriage & Family Recovery Programs. Respondent testified that her law practice shared a "general" account with that entity. Ms. Nguyen's check, payable to Respondent was deposited to that account and her subsequent fees were wired to it after she received demands from an individual purporting to be someone other than Respondent. Mr. Schultz was also directed to wire his "flat fee" to that account.

Ms. Ricks was apparently referred to the Marriage & Family Recovery Programs by her parish priest. Respondent testified that the Marriage & Family Recovery Programs, Inc., shared office space and at least one volunteer employee with Respondent's law practice. Ms. Nguyen received e-mail messages purporting to be from "Father Joseph" on behalf of the Marriage & Family Recovery Programs. Mr. Schultz

was furnished an "Action Report" from the "Advisory Board selection Committee" of the Marriage & Family Recovery Programs approving his "flat fee" arrangement.

The Board could not find that the Marriage & Family Recovery Programs were, in fact, a separate legal entity, nor was the Board convinced of the existence of Father Joseph, but the Board concluded that Respondent, at the least, had established the Marriage & Family Recovery Programs as a business distinct from her law practice and as such a "non-lawyer" for purposes of this Rule. The Bar proved by clear and convincing evidence that client fee monies were deposited to a "general" account shared by Respondent's law practice and the Marriage & Family Recovery Programs.

As to Rule 8.1, **... a lawyer ... in connection with a disciplinary matter, shall not:**

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

The Bar proved by clear and convincing evidence that Respondent made a false statement, under oath, at the August Hearing when she testified that she had in the past 10 years not received any advance fees or costs. Ms. Palke testified at the August Hearing that she paid Respondent "up-front what we estimated it would cost at that time." Ms. Nguyen's "Retainer Agreement" (Exhibit #6), signed by Respondent on June 20, 2008, has the client "agree to pay in advance a flat fee of $12,500 .... ." It continues "[t]his fee constitutes and advance payment for all legal services entailed in my case for twelve months from this date, ..." The Board noted that these provision were sufficiently focused upon that Ms. Nguyen initialed the change of the word "and" to "and."

(d) **obstruct a lawful investigation by an admissions or disciplinary authority**

... [.]

The Bar proved by clear and convincing evidence that Respondent obstructed the investigation of the complaint in this matter by failing to comply with a subpoena properly served upon her. The subpoena sought, among other things, bank statements for any accounts into which client fee and cost monies were deposited. Respondent alleged that her lap top computer and a back-up device were stolen from her in an incident she did not report to the police. She asserted that she did not keep paper records of her bank statements, relying on digital files from her bank. She did not, however, obtain replacement records from the bank, and she further testified that her law practice had only the general account shared with the Marriage & Family Recovery Programs. As noted, client fee monies were wired to that account and client fee checks deposited to it. Respondent stated she would not produce records of that account even if she could because the Marriage & Family Recovery Programs was a separate entity.

As to Rule 8.4, **It is professional misconduct for a lawyer to:**

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law[.]

The Board could not determine whether Father Joseph, Father Johnson, Sister Mary Joseph, Dr. Smith and/or Mr. Williams exist, nor whether if they exist any of them sits on an advisory board either for the Marriage & Family Recovery Programs or Respondent's law practice. The Bar did prove that Mr. Schultz was encouraged to wire his flat fee by receipt of an "Advisory Board Selection Committee Action Report" (Exhibit #11) which recited Respondent's successful effort to convince the supposed Committee to permit her to charge a fee of $7000 ("a very reduced fee"), rather than

$16,000. This "Report" also advised Mr. Schultz he must act quickly as "many are wait-listed" for this program. The "Report" was printed on letter head of the Marriage & Family Recovery Programs although it related to Respondent's representation of Mr. Schultz in divorce litigation.

Ms. Nguyen, who had paid, in advance, for legal services for a year from June 20, 2008, received e-mails purporting to be from "Father Joseph" demanding immediate payment of additional fees in December, 2008. Ms. Nguyen never met Father Joseph, never authorized discussion of her case with third parties and was a client of Respondent's law practice. The e-mails were sent with an attached motion to withdraw as counsel. Father Joseph's e-mail account was in the same domain, "marriagerecovery.com", as Respondent's e-mail address. These e-mails successfully prompted Ms. Nguyen to wire an additional $4500 to the shared general account of Respondent's law practice and the Marriage & Family Recovery Programs.

Ms. Ricks was referred to Respondent as a counselor and was unaware until October 30, 2005, the date of her Retainer Agreement, that Respondent was an attorney. Respondent subsequently attempted to obtain payments for legal services allegedly rendered in September of 2005. After Ms. Ricks sent a letter informing Respondent she was hiring a different attorney, in February 2006, Ms. Ricks was sent an "Advisory Board Action Report", this one on the letter head of Respondent's law practice (Exhibit #16). The "Report" asserted that Respondent had invested hundreds of hours of volunteer or *pro bono* time on Ms. Ricks behalf, but that there remained a large overdue balance (supposedly $39,000) in unpaid fees. The "Report" portrayed Respondent as interceding on Ms. Ricks' behalf against a more militant Financial Committee of the

Advisory Board. Ultimately, Respondent is reported as prevailing on the group to hold off on referring the case for collection because Respondent believed Ms. Ricks would obtain a loan and pay her bill before paying her new lawyer. Ms. Ricks never authorized Respondent to discuss her case with third parties, not did she ever meet any of Father Joseph, Father Johnson, Dr. Smith, Mr. Williams and/or Sister Mary Joseph.

Ms. Ricks was persuaded to hire Respondent, in part, by promises she would receive a 25% discount because she had been a participant in the Marriage & Family Recovery Program plus a $25,000 "scholarship" toward her fees. Ms. Ricks insisted these provisions be hand written in the Retainer Agreement; she watched the changes made on the document. When she finally obtained a copy of the Agreement, it was missing one page and the hand written changes were not to be found.

The Bar proved by clear and convincing evidence that Respondent engaged in conduct involving deceit and reflecting adversely on her fitness to practice law.

SANCTION

The Board then heard argument by the Bar as to the appropriate sanction to be imposed upon the findings of rule violations recited above. The Bar had previously submitted Exhibit #2, a certified compilation of Respondent's disciplinary record showing one Private Dismissal with terms (which terms were complied with), a Public Reprimand, a four month Suspension and a thirteen month Suspension. It was noted that the thirteen month Suspension arose from a case in which Respondent was found to have

obstructed the investigation and to have presented a forged document as exculpatory evidence. The four month Suspension arose from one matter in which Respondent was found to have filed with the Court as a true copy a letter which was in fact substantially different from the one sent to opposing counsel, and another matter in which Respondent asserted that she had filed a motion which could not be found in the Court's records. It was implied that opposing counsel had removed the motion from the Court file, a felony. The Court found that the motion was not in fact filed. In both Suspension matters the Respondent was found to have violated Rule 8.4(c) by deceitful conduct. The Bar advocated revocation as a sanction.

The Board retired to consider the proper sanction. After deliberation, the hearing was reconvened and the Chair announced the unanimous decision of the Board. Respondent's license was REVOKED effective immediately. A Summary Order was promptly entered and the hearing adjourned.

It is ORDERED that, as directed in the Board's November 18, 2011 Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the revocation of her license to practice law in the Commonwealth of Virginia, to all clients for whom she is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in her care in conformity with the wishes of her client(s). Respondent shall give such notice within 14 days of the effective date of the revocation, and make such arrangements as are required herein within 45 days of the effective date of the

revocation. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the revocation that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the revocation, she shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to respondent at her address of record with the Virginia State Bar, being Law Offices of Mary Meade, Suite 360, 11325 Random Hills Road, Fairfax, VA 22030-3126 by certified mail and by regular mail to Seth M. Guggenheim, Senior Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Entered this 19th day of December, 2011
VIRGNIA STATE BAR DISCIPLINARY BOARD

PAUL M. BLACK, Acting Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
JAMES ALEXANDER BABER III **VSB DOCKET NO. 09-000-079610**

ORDER

THIS MATTER came on to be heard on the 31st day of July, 2009, before a panel of the Disciplinary Board consisting of William H. Monroe, Jr., Chair, Peter A. Dingman, Randall G. Johnson, Jr., Michael S. Mulkey, and Dr. Theodore Smith, Lay member. The Virginia State Bar was represented by Kathryn R. Montgomery. The Respondent, James Alexander Baber, III, appeared both personally and by his attorney, Michael L. Rigsby. The Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. Jennifer L. Hairfield, court reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

A request for a Continuance was denied and this matter was conducted as a Private Hearing on the question of whether the Respondent currently suffers from an "impairment" as defined in Part 6, Section IV, paragraph 13 of the Rules of the Supreme Court of Virginia.

The Bar introduced the de bene esse depositions of James Levenson, M.D., on the medical/psychiatric/psychological condition of the Respondent. The Bar also called Michael Powell, a private investigator, as well as Mr. Jeffery Everhart, a former partner of the Respondent with whom he now shares office space.

At the conclusion of the Bar's evidence the Respondent made a Motion to Strike the evidence which was taken under consideration. The Respondent testified on his own behalf. At

the conclusion of all the evidence the Motion to Strike the evidence of the Bar was renewed and denied.

Taken into consideration was the opinion of the expert witness tendered by deposition, the evidence from the witnesses and their credibility, questions by the Board and argument of Counsel. In discussing the disposition of this matter the Board took special note of the Respondent's long history of practice before the Bar and the high quality of representation given by the Respondent to his clients.

The Board finds by clear and convincing evidence that the Respondent has a physical or mental condition that materially impairs his fitness to practice law and as a result thereof is "materially impaired". His license to practice law is suspended under paragraph 13(I)(6) for an indefinite period of time. The Respondent was advised of his right to further proceeding.

It is further ORDERED, pursuant to the provisions of Part Six, §IV: ¶13-29 of the Rules of the Supreme Court of Virginia, that the Respondent shall forthwith give notice by certified mail, return receipt requested, of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Attorney shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. The Attorney shall give such notice within fourteen (14) days of the effective date of the suspension order, and make such arrangements as are required herein within forty-five (45) days of the effective date of the order. The Attorney shall furnish proof to the bar within sixty (60) days of the effective date of the order that such notices have been timely given and such arrangement for the disposition of matters made. Issues concerning the adequacy of the notice and arrangements required herein

shall be determined by the Disciplinary Board, which may impose a sanction of revocation or suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that James Alexander Baber III shall furnish true copies of all of the notice letters sent to all persons notified of the Administrative Suspension, with the original return receipts for said notice letters, to the Clerk of the Disciplinary System, on or before September 29, 2009.

It is further ORDERED that an attested copy of this Order be mailed to the Respondent, James Alexander Baber III, by certified mail, return receipt requested, to his Virginia State Bar address of record, at Rice, Everhart & Baber, Courthouse Commons, 4100 East Parham Road, Suite C, Richmond, VA 23228 and by regular mail to Michael L. Rigsby, counsel for the Respondent, by regular first-class mail, at Carrell Rice & Rigsby, Forest Plaza II, Suite 310, 7275 Glen Forest Drive, Richmond, VA 23226, and by hand delivery to Kathryn R. Montgomery, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA.

ENTERED THIS 24th DAY OF AUGUST, 2009

VIRGINIA STATE BAR DISCIPLINARY BOARD

William H. Monroe, Jr., Chair

VIRGINIA: BEFORE THE STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF [redacted]

VSB DOCKET NO. 16-000-105835

ORDER

On February 17, 2017, the above-referenced matter was heard by the Virginia State Bar Disciplinary Board (the Board) pursuant to Notice served upon the Respondent, [redacted] (Respondent), in the manner provided by the Rules of the Supreme Court of Virginia. A duly convened panel of the Board consisting of William H. Atwill, Jr., Chair, Anderson Wade Douthat, IV, Lay Member, Whitney G. Saunders, Thomas R. Scott, Jr., and Lisa A. Wilson (the Panel) heard the matter. The Virginia State Bar was represented by Edward James Dillon, Senior Assistant Bar Counsel (Bar Counsel). Respondent's Guardian *ad Litem*, Matthew W. Greene (GAL), appeared on [redacted] behalf. The Respondent did not appear. The court reporter for the proceeding, Jennifer L. Hairfield, Chandler & Halasz, P. O. Box 9349, Richmond, VA 23227, telephone 804-730-1222, was sworn by the Chair. The Chair polled the members of the Panel to determine whether any member had a personal or financial interest that might affect or reasonably be perceived to affect his or her ability to be impartial in these matters. Each member, including the Chair, verified he or she had no such interests.

WHEREFORE, upon consideration of the testimony of the GAL and the representations of Bar counsel in his opening statement, and for good cause shown in furtherance of the Bar Impairment investigation, it is

ORDERED that:

1. Respondent shall provide Bar Counsel, within twenty (20) days of the entry of the Summary Order entered on February 17, 2017, with a list of the names and addresses of each health care provider, including, but not limited to, psychiatrists, psychologists and/or medical doctors, that Respondent has seen in the past three years.

2. Respondent shall execute, if [redacted] has not already done so, within twenty (20) days of the entry of the Summary Order releases authorizing each of the aforesaid health care providers to release their records on Respondent to the Virginia State Bar (VSB), the Board, Bar Counsel, and any health care professionals, including, but not limited to, Lawyers Helping Lawyers, engaged by or otherwise assisting the VSB in this Impairment investigation, and/or any subsequent Impairment proceedings.

3. Respondent shall, within thirty (30) days from the date of entry of the Summary Order, or within such other times as Bar Counsel may agree, submit to a mental health evaluation by Lawyers Helping Lawyers as may be required for the purpose of determining whether Respondent suffers from an Impairment. Respondent shall provide the health care provider(s) with such information as may be needed to perform a full and meaningful examination into Respondent's capacity to practice law, including access to records from any and all health care providers and/or facilities from whom [redacted] has received medical or psychiatric treatment within the past five (5) years. Respondent shall cooperate with Lawyers Helping Lawyers to include attending such appointments it believes necessary to conduct the mental health evaluation, with the understanding that such evaluation(s) shall be scheduled at times reasonably convenient to both Lawyers

Helping Lawyers and Respondent. Any reports and records generated as a result of the examination may be provided to the Office of Bar Counsel and the Disciplinary Board; and

(4) Bar Counsel may distribute any mental health evaluations of Respondent to the Board and any health care providers with whom Bar Counsel elects to consult.

The terms of this Order shall be enforced as stated in Paragraph 13-23(J) of the Rules of the Supreme Court of Virginia, Part IV, Section 6.

It is further ORDERED that a copy *teste* of this Order shall be mailed by Certified Mail to Respondent at [redacted] last address of record with the Virginia State Bar at [redacted], and a copy by regular mail to Matthew W. Greene, Esq., Guardian *ad Litem* for Respondent, at Matthew W. Greene, Esq., of the Greene Law Group, PLLC, 3977 Chain Bridge Road, Suite 1, Fairfax, VA 22030, and hand delivered to Edward James Dillon, Senior Assistant Bar Counsel, at Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-0026.

ENTERED THE 14th DAY OF March, 2017

VIRGINIA STATE BAR DISCIPLINARY BOARD

William H. Atwill

Digitally signed by William H. Atwill
DN: cn=William H. Atwill, o=Virginia State Bar, ou=Disciplinary Board, email=batwill@atandlpc.com, c=US
Date: 2017.03.14 17:19:48 -04'00'

William H. Atwill, Jr., Chair

VIRGINIA: BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
SHARON ANN FITZGERALD VSB DOCKET NO. 16-000-104263

ORDER

This matter came before the Board on the Petition for Termination of Suspension for Impairment filed by the Petitioner, Sharon Ann Fitzgerald ("Petitioner"). On December 11, 2015, the matter was heard before a duly convened panel of the Virginia State Bar Disciplinary Board consisting of Whitney G. Saunders, Chair, Thomas O. Bondurant, Jr., Sandra W. Montgomery, Lay Member, Tony H. Pham and Bretta Z. Lewis. Kathryn Montgomery, Deputy Bar Counsel, appeared on behalf of the Virginia State Bar. The Petitioner appeared in person and was represented by her attorney, Joshua Parrett. The court reporter for the proceeding, Angela N. Sidener, Chandler and Halasz, P. 0. Box 9349, Richmond, Virginia 23227, telephone number 804- 730-1222, after being duly sworn, reported the hearing.

The Chair opened the Hearing by polling the Board members to ascertain whether any member had any personal or financial interest or bias that would interfere with or influence his or her determination, and each member responded that there were no such conflicts.

The Petitioner's license to practice law in the Commonwealth of Virginia was suspended indefinitely by the Board, effective March 21, 2014, on the basis of impairment. The Petitioner has petitioned the Board to terminate her suspension on the basis that she no longer suffers from the impairment previously determined, pursuant to Rules of the Supreme Court of Virginia, Part 6, §IV, 13-23.

With her Petition, the Petitioner submitted medical reports from her health care providers. At the hearing, Ms. Fitzgerald's colleagues and those in her support system offered oral testimony the Board found credible and persuasive as to the Petitioner's skill as a legal practitioner, her efforts to overcome her impairment, the strength of her support system and her level of commitment to her recovery. The Bar stipulated that Lawyers Helping Lawyers has assisted Ms. Fitzgerald and remains active in support of her recovery and her returning to the practice of law. Ms. Fitzgerald also testified credibly as to the heavy toll her impairment has taken on her as well as her earnest efforts to recover and to remain in recovery so that she may once again be an asset to the public through legal service.

The Bar took no position regarding termination of the impairment suspension and presented no evidence. Upon consideration of the evidence presented, the Board finds that the Petitioner has met the requisite burden of proof that her impairment is terminated and the Board grants the Petition.

It is ORDERED, pursuant to Part 6, §IV, ¶ 13-23(E)(2) of the Rules of the Supreme Court of Virginia, that the indefinite Impairment Suspension of the license to practice law in Virginia of Sharon Ann Fitzgerald is hereby terminated, effective December 11, 2015. The Board also advises the Petitioner to continue to work closely with Lawyers Helping Lawyers as well as her other healthcare providers and the other members of her support system.

It is further ORDERED that a true copy of this Order shall be mailed by certified mail, return receipt requested, to the Petitioner, Sharon Ann Fitzgerald, at her address of record, at 1806 Aisquith Road, Richmond, VA 23229, by regular mail to her counsel, Joshua Parrett, at Parrett Law, LLC, Po Box 1137, Stafford, Virginia 22555, and by hand-delivery to Kathryn R.

Montgomery, Deputy Bar Counsel, at 1111 East Main Street, Suite 700, Richmond, Virginia 23219-3565.

ENTERED this 29th day of December 2015.

Virginia State Bar Disciplinary Board

Whitney G. Saunders, Chair

VIRGINIA: BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
JOHNDA DENISE SCOTT VSB DOCKET NO. 18-000-110744

ORDER

This matter came before the Board on the Petition for Termination of Suspension for Impairment filed by the Petitioner, Johnda Denise Scott ("Petitioner") on October 16, 2017. On April 27, 2018, this matter was heard before a duly convened panel of the Virginia State Bar Disciplinary Board consisting of Lisa A. Wilson, 1st Vice Chair, Bretta Marie Zimmer Lewis, Tony H. Pham, Melissa W. Robinson, and Stephen A. Wannall, Lay Member. Edward J. Dillon, Jr., Sr. Assistant Bar Counsel, appeared on behalf of the Virginia State Bar. The Petitioner appeared pro se. The court reporter for the proceeding, Jennifer L. Hairfield, Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone number 804-730-1222, after being duly sworn, reported the hearing.

The Chair opened the Hearing by polling the Board members to ascertain whether any member had any personal or financial interest or bias that would interfere with or influence his or her determination, and each member responded that there were no such conflicts.

The Petitioner's license to practice law in the Commonwealth of Virginia was suspended indefinitely by the Board, effective April 21, 2015, on the basis of impairment. The Petitioner consented to the impairment suspension. The Petitioner has petitioned the Board to terminate her suspension on the basis that she no longer suffers from the impairment previously determined, pursuant to Rules of the Supreme Court of Virginia, Part 6, §IV, paragraph 13-23.

With her Petition, the Petitioner submitted medical reports from her healthcare providers. The Virginia State Bar's evidence (exhibits 1 through 6) were admitted collectively. The evidence, as admitted, established that the Petitioner no longer suffered an impairment which was the basis for the original suspension of her law license and is fit to practice law.

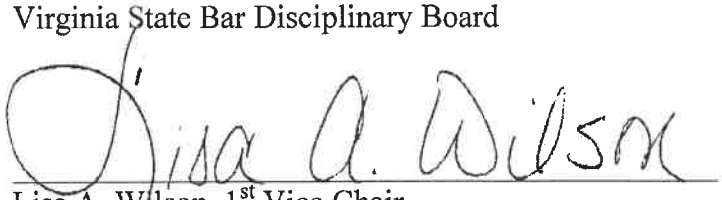
The Bar did not object to the termination of the impairment suspension. Upon consideration of the evidence presented, the Board finds that the Petitioner has met the requisite burden of proof by clear and convincing evidence, that her impairment suspension should be terminated and the Board hereby grants the Petition.

It is ORDERED, pursuant to Part 6, §IV, ¶ 13-23(E)(2) of the Rules of the Supreme Court of Virginia, that the indefinite Impairment Suspension of the license to practice law in Virginia of Johnda Denise Scottis is hereby terminated, effective April 27, 2018.

It is further ORDERED that a true copy of this Order shall be mailed by certified mail, return receipt requested, to the Petitioner, Johnda Denise Scott, at her address of record, at 14943 Slippery Elm Ct., Woodbridge, VA 22193 and by hand-delivery to Edward J. Dillon, Jr., Sr. Assistant Bar Counsel, at 1111 East Main Street, Suite 700, Richmond, Virginia 23219-3565.

ENTERED this 15th day of April 2018.

Virginia State Bar Disciplinary Board



Lisa A. Wilson, 1st Vice Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
THOMAS HUNT ROBERTS

VSB Docket No. 16-031-106233

ORDER AFFIRMING DISTRICT COMMITTEE'S DETERMINATION

This matter was heard on October 27, 2017, before a panel of the Virginia State Bar Disciplinary Board consisting of John A. C. Keith, Chair; R. Lucas Hobbs; Donita M. King; Sandra M. Rohrstaff; and Stephen A. Wannall, Lay Member (collectively, the "Panel"). The Virginia State Bar was represented by Kathryn R. Montgomery, Deputy Bar Counsel (the "Bar"). The Appellant, Thomas Hunt Roberts (hereinafter the "Appellant"), appeared in person and was represented by Andrew T. Bodoh.

The matter came before the Board on the Appellant's timely filed appeal, in accordance with Part 6, Section IV, Paragraph 13-17(A) of the Rules of the Supreme Court of Virginia, of a determination by the Third District Committee, Section I, issued on May 6, 2017, finding that the Virginia State Bar had proved by clear and convincing evidence that Appellant had violated Rules 1.15(a)(3)(ii) [1] and 1.15(b)(5)[2] of the Rules of Professional Conduct, and imposed a Public Reprimand with Terms. The Clerk of the Disciplinary System stayed imposition of the sanction, in accordance with Paragraph 13-17(B).

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[1] No funds belonging to the lawyer or law firm shall be deposited or maintained therein except as follows; ... (ii) funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests. Any portion finally determined to belong to the lawyer or law firm shall be promptly withdrawn from the trust account.

[2] A lawyer shall ... not disburse funds or use property of a client or third party without their consent or convert or convert funds or property of a client or third party, except as directed by a tribunal.

Tracy J. Stroh, CCR, court reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227 (804-730-1222), after being duly sworn, reported the hearing and transcribed the proceedings.

The Chair opened the hearing by polling the members of the Board Panel to ascertain whether any member had any personal or financial interest or bias that might affect, or could reasonably be perceived to affect, his or her ability to be impartial in this matter. Each Panel member responded to this inquiry in the negative.

Prior to argument, Counsel for Appellant presented argument in support of his Motion to Strike portions of the Bar's Brief that included argument supporting a theory that had been rejected by the District Committee. The Motion to Strike and the Bar's response thereto were included as part of the document provided to the Panel. Upon considering argument of Counsel for Appellant and the Bar, the Chair denied the motion.

The transcript and record having been filed, and the matter having been briefed in accordance with the Rules of the Supreme Court, the Board then proceeded to hear argument and consider the appeal.

After the Panel retired to deliberate, the Chair and the Panel were informed that during the argument one member recalled that she had mediated a case some years ago in which the Appellant was involved; she had no specific recollection of that interaction. After deliberations, the Chair reconvened the hearing, and the panel member disclosed her recollection and affirmed that she did not believe that past encounter would affect her ability to be impartial in this matter. Counsel for the parties each waived any objection to the Board's proceeding with the hearing.

A. Standard of Review

The Standard of Review in an appeal from a District Committee Determination is, to wit:

"In reviewing a District Committee Determination, the Board shall ascertain whether there is substantial evidence in the record upon which the District Committee could reasonably have found as it did." See Va. Sup. Ct. R., Pt. 6, §IV, ,r13-19(E). Upon its review of the record in its entirety, the charge of misconduct is to be dismissed if the Board finds that the District Committee's Determination "is contrary to the law or is not supported by substantial evidence." See Va. Sup. Ct. R., Pt. 6, §IV,,I13-19(G)(l).

B. Discussion

Background

The record indicates that the Third District Committee, Section I, convened on May 16, 2017 and heard testimony of witnesses on behalf of the Bar and the Appellant. The testimony of the witnesses, along with the exhibits of the parties, provide a substantial evidentiary basis for the factual findings made by the District Committee. Those factual findings appear in the District Committee Determination filed in the Clerk's Office of the Virginia State Bar on June 12, 2017.

The Misconduct Finding

The issue before the Board was to determine whether the District Committee's factual findings of misconduct were supported by substantial evidence and whether such conclusion was contrary to the law. Specifically, the District Committee found that the Appellant's conduct violated Rules l.15(a)(3)(ii) and l.lS(b)(S) regarding the safekeeping of a client's property, which read as follows:

A. Rule 1.15 Safekeeping Property

(a) Depositing Funds

(3) No funds belonging to the lawyer or law firm shall be deposited or maintained therein except as follows:

(ii) funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust until the dispute is resolved and there is an accounting and
severance of their interests. Any portion finally determined to belong to the lawyer or law firm shall be withdrawn promptly from the trust account.

B. Rule 1.15 Safekeeping Property

(b) Specific Duties. A lawyer shall:

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

The Panel reviewed and considered the entire record from the District Committee hearing, including the testimony of the witnesses, documents received as evidence at that hearing and arguments made by counsel. In addition to the factual findings that formed the basis of the determination of the District Committee, the Panel received and considered the briefs filed by the parties and argument of counsel.

Position of Appellant

Appellant argued that the District Committee's findings that Rule 1.15(a)(3)(ii) and 1.1 5(b)(5) had been violated were contrary to law and not supported by substantial evidence. Appellant contended that he was entitled, by his client's written consent contained in the Representation Agreement, to disburse monies from his trust account to his operating account in order to partially satisfy his quantum meruit claim for the value of legal services he had provided to his client. In addition, Appellant argued that finding of a violation of Rule 1 .15(a)(3)(ii) was improper as it is unconstitutionally vague.

Position of the Bar

The Bar argued that there was substantial evidence in the record upon which the District Committee could reasonably have found the Appellant committed misconduct and

that such finding was not contrary to the law. Furthermore, it argued there was substantial evidence to support the District Committee's conclusion that Appellant's Due Process rights had been satisfied and that the Rule is not void for vagueness.

C. Analysis

The Panel unanimously concluded that the Third District Committee, Section I, properly found that Appellant committed misconduct in violation of 1.15(a)(3){ii) and 1.15(b)(5). There was substantial evidence to support the District Committee's conclusion that Appellant's client did not consent to the withdrawal of the funds from Appellant's trust account (nor had a tribunal directed such disbursement). A majority of the Panel determined that even if the client's signature on the Representation Agreement constituted her agreement to such a withdrawal at that time (a determination not made by the Panel), her actions after terminating the Appellant's representation were sufficient to evince her withdrawal of any approval that could have been inferred from her signature on the Representation Agreement.

Furthermore, the requirement of Rule 1.15(a)(3)(ii) of an accounting and severance of the parties' interest before disputed funds are released depends on the resolution of the dispute. Here, the dispute between the Appellant and his client had not been resolved at the time he withdrew the funds from his trust account, and he had no authority to withdraw the funds. Absent resolution of the dispute, there was no determination of the amount of a quantum meruit fee, if any, to which Appellant was entitled.

Based on its review of the record and argument of counsel, the Panel found no violation of Appellant's Constitutional rights.

D. Sanction

Under Part 6, Section IV, Paragraph 13-19 (G)(2) of the Rules of the Supreme Court, once the Board affirms the District Committee Determination, it "may impose the same or any lesser sanction as that imposed by the District Committee."

The sanction imposed by the District Committee was a Public Reprimand with

Terms.[3] After considering the record and after hearing argument, the Panel determined this to be an appropriate sanction.

E. Conclusion

At the conclusion of the proceedings on October 27, 2017, the Panel entered a Summary Order affirming the District Committee's Determination of violation of Rules 1.15(a)(3)(ii) and 1 .15(b)(5), and imposed a sanction of a Public Reprimand with Terms. By this Memorandum Order, we confirm the Summary Order.

It is further ORDERED that, pursuant to Part 6, §IV, ,I13-9 (E)(l) of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against the Appellant.

It is further ORDERED that the Clerk of the Disciplinary System shall send an attested copy of this Order by Certified Mail, Return Receipt Requested, to Appellant at his last address of record with the Virginia State Bar, Thomas Hunt Roberts, Thomas H. Roberts & Associates, P.C., 105 South First Street, Richmond, Virginia 23219, and to Andrew T. Bodoh, Esquire, Counsel for Appellant, Thomas H. Roberts & Associates, P.C., 105 South First Street, Richmond, Virginia 23219; and a copy to Kathryn R. Montgomery, Deputy Bar Counsel, 1111 East Main Street, Richmond, Virginia 23219.

ENTERED this 28th day of November, 2017.
VIRGINIA STATE BAR DISCIPLINARY BOARD

John A. C. Keith, Chair

3 The parties stipulated that the Appellant had fully complied with the Terms imposed by the District Committee.

V I R G I N I A:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
GERALDINE SUE MILLER **VSB DOCKET NO. 18-000-109954**

RECIPROCAL MEMORANDUM ORDER

THIS MATTER came to be heard on October 27, 2017, on the Rule to Show Cause and Order of Summary Suspension and Hearing entered on September 29, 2017, (the "Rule to Show Cause") to which was appended the Final Judgment and Order of the Supreme Court of Arizona, dated December 22, 2016, suspending for 30 days the Respondent's license to practice law in the State of Arizona, before a panel of the Disciplinary Board ("Board Panel") consisting of Lisa A. Wilson, 1st Vice Chair, Richard J. Colten, Bretta Marie Zimmer Lewis, Melissa W. Robinson, and Nancy L. Bloom, Lay Member. The Virginia State Bar was represented by Assistant Bar Counsel Paulo E. Franco, Jr., ("Bar Counsel"). The Respondent was not represented by counsel and did not appear at the proceedings; however, the Respondent had previously communicated that she did not contest the 30-day reciprocal suspension. The Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. Jennifer L. Hairfield, court reporter, P.O. Box 9349, Richmond, VA, 23227, phone number 804-730-1222 after being duly sworn, reported the hearing and transcribed the proceedings.

All required notices were timely sent by the Clerk of the Disciplinary System ("Clerk"), to the Respondent by Certified Mail, in the manner prescribed by law.

Findings of Fact

The Board finds by clear and convincing evidence that:

1. The Supreme Court of Arizona is a "jurisdiction" or a "state jurisdiction" under Paragraph 13-24 A of the Rules of the Supreme Court of Virginia, and that its Final Judgment and Order dated December 22, 2016, suspending the license of the Respondent to practice law has become final.

2. The 1st Vice Chair of the Board, in response thereto, entered a Rule to Show Cause and Order of Summary Suspension and Hearing dated September 29, 2017 (the "Board Order"), in accordance with paragraph 13-24 B.

3. The Respondent has not filed a timely written response under paragraph 13-24 C. However, the Respondent sent an email to the Clerk's Office, dated October 26, 2017, stating that she did not contest the 30-day reciprocal suspension. This email was introduced into evidence and marked as Board Exhibit # 2.

After considering the argument of Bar Counsel, the Rule to Show Cause and its attachments, the Final Judgment and Order of suspension from the Arizona Supreme Court and its attachments, all of which were introduced into evidence as Board Exhibit #1, and the email from the Respondent dated October 26, 2017 (Board Exhibit #2), the Board recessed and duly deliberated on this matter. Upon returning to the courtroom, the Board announced that it found that Respondent had failed to show by clear and convincing evidence why the Board should not impose the same discipline imposed by the Supreme Court of Arizona.

Accordingly, the license of the Respondent to practice law in the Commonwealth of Virginia should be and is hereby SUSPENDED for a period of 30 days, which suspension is effective October 6, 2017. Thereafter, Respondent's suspension shall continue until she provides proper evidence of her reinstatement to practice law by the Arizona disciplinary authorities. Further, the Respondent shall comply with all other requirements and conditions imposed by the

Arizona disciplinary authorities and shall provide proof of compliance to Virginia State Bar Counsel.

It is further ORDERED that, as directed in the Board's October 27, 2017 Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the 30-day suspension of her license to practice law in the Commonwealth of Virginia, to all clients for whom she is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in her care in conformity with the wishes of her client. Respondent shall give such notice within 14 days of the date of this hearing and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the Order, she shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within 60 days of the effective day of the suspension. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to Respondent at her address of record with the Virginia State Bar, being Geraldine Sue Miller, LLC, P.O. Box 10050, Fort Mohave, AZ, 86427, by certified mail, return receipt requested, and by hand delivery to Assistant Bar Counsel, Paulo E. Franco, Jr., Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

ENTERED this 7th day of November, 2017.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Lisa A. Wilson

Lisa A. Wilson, 1st Vice Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

JAMES ALOYSIUS POWERS **VSB DOCKET NO.: 18-000-110175**

RECIPROCAL MEMORANDUM ORDER

THIS MATTER came on to be heard on November 17, 2017, on the Rule to Show Cause and Order of Summary Suspension and Hearing entered on October 19, 2017 (the "Rule to Show Cause") to which was appended the order of the Court of Appeals of Maryland dated July 10, 2017, suspending indefinitely the Respondent's license to practice law in the State of Maryland, before a panel of the Disciplinary Board ("Board") consisting of Lisa A. Wilson, Ist Vice Chair, Richard J. Colten, Bretta M.Z. Lewis, Michael J. Sobey, and Anderson Wade Douthat IV, Lay member. The Virginia State Bar was represented by Laura Ann Booberg, ("Bar Counsel"). The Respondent was present and was not represented by counsel. The Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. Jennifer L. Hairfield,, court reporter, P.O. Box 9349, Richmond, VA 23227, telephone number 804-730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

All required notices were timely sent by the Clerk of the Disciplinary System ("Clerk") to the Respondent by Certified Mail, in the manner prescribed by law.

Findings of Fact

The Board finds by clear and convincing evidence that:

1. Maryland is a "state jurisdiction" under Paragraph 13-24.A of the Rules of the Supreme Court of Virginia, and that its order dated July 10, 2017 suspending the license of the Respondent to practice law has become final.

2. The 1st Vice Chair of the Board, in response thereto, entered a Rule to Show Cause and Order of Summary Suspension and Hearing dated October 19, 2017 (the "Board Order"), in accordance with paragraph 13-24 B.

3. The Respondent has not filed a timely written response under paragraph 13-24 C.

4. The parties were advised and acknowledged that they understood the nature of the proceedings in that the hearing was to provide the Respondent with an opportunity to show cause, by clear and convincing evidence, why the same discipline that was imposed upon him in the Court of Appeals of Maryland should not be imposed by this Board.

5. The Board took judicial notice of the proceedings in the State of Maryland which were duly served on the Respondent. The Rule to Show Cause and Order of Summary Suspension dated October 19, 2017, the notice of suspension from the Clerk of the Court of Appeals of Maryland, the Opinion and Order of the Court of Appeals of Maryland with the Petitioner's Proposed Findings of Fact and Conclusions of Law, the Order of the Circuit Court of Montgomery County, Maryland and the Petition for Disciplinary or Remedial Action, and the Virginia State Bar certified letter notifying Respondent of these proceedings were collectively admitted into evidence as Board Exhibit 1. The Board accepted the Maryland orders as conclusive to the panel.

6. All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System (The Clerk) in the manner prescribed by Part 6, Section IV, Paragraphs 13-18 of the Rules of the Supreme Court of Virginia.

7. Having made no response, the Chair inquired if the Respondent intended to make a proffer of evidence pursuant to Rule 13-24 C of the Virginia Rules of Professional Conduct. Respondent replied in the affirmative and began a proffer. After a brief proffer and questioning by the Board, Respondent withdrew his request to make a proffer and indicated he would agree to imposition of the same discipline as imposed upon him by the Court of Appeals of Maryland.

After considering the argument of Bar Counsel wherein Bar Counsel requested that the Board impose the same discipline as imposed by the Court of Appeals of Maryland based on the final order, which has been taken as conclusive, and the agreement of the Respondent to accept such discipline, the Board recessed and duly deliberated on this matter. Upon returning to the courtroom, the Board announced that it found that Respondent had failed to show by clear and convincing evidence why the Board should not impose the same discipline imposed by the Court of Appeals of Maryland and that the license of the Respondent to practice law in the Commonwealth of Virginia should be and is hereby SUSPENDED, which is effective as of October 26, 2017, for an indefinite period. Respondent must comply with all conditions and requirements of the Maryland disciplinary authorities. Reinstatement in Virginia will be contingent upon Respondent's reinstatement in Maryland and Respondent complying with all requirements as set forth in the Virginia Disciplinary Rules.

It is further ORDERED that, as directed in the Board's October 19, 2017, Summary Suspension Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also

make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the suspension, and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

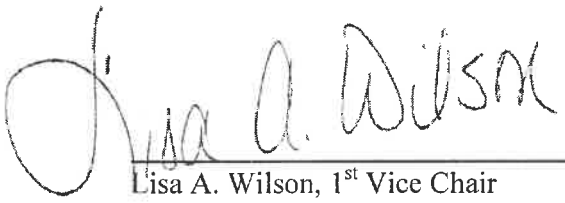
It is further ORDERED that if the Respondent is not handling any client matters on the effective date of suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within 60 days of the effective day of the suspension. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to respondent at his address of record with the Virginia State Bar, being 21630 Ridgetop Circle, Suite 120, Sterling, VA 20160, by certified mail, return receipt requested, and by hand delivery to Laura Ann Booberg, Assistant Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

ENTERED this 18th day of December, 2017.

VIRGINIA STATE BAR DISCIPLINARY BOARD



Lisa A. Wilson, 1st Vice Chair

REINSTATEMENT

VIRGINIA: BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
CATHERINE ANN LEE **VSB DOCKET No. 16-000-105373**

ORDER OF RECOMMENDATION

This matter came on to be heard on September 23, 2016, upon the Petition for Reinstatement of Catherine Ann Lee to practice law in the Commonwealth of Virginia.

A duly convened panel of the Board consisting of John A.C. Keith, 2nd Vice Chair, Nancy L. Bloom, Lay Member, R. Lucas Hobbs, Jeffrey L. Marks, and Lisa A. Wilson (the Board) heard the matter. Paulo E. Franco, Jr., Assistant Bar Counsel, appeared as counsel for the Virginia State Bar. The Petitioner, Catherine Ann Lee (Petitioner) appeared in person and was represented by Lawrence A. Drombetta, III. The court reporter for the proceeding, Tracy J. Stroh, Chandler & Halasz, P.O. Box 9349, Richmond, VA 23227, telephone 804-730-1222, was sworn by the Chair. The Chair polled the members of the Panel to determine whether any member had a personal or financial interest that might affect or reasonably be perceived to affect his or her ability to be impartial in these matters. Each member, including the Chair, responded in the negative.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System (Clerk) in the manner prescribed by the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-25 of the Rules of Court.

The Chair advised the parties on how the hearing would proceed. Ms. Lee was advised that she had the burden of proving by clear and convincing evidence that she is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law.

Both parties were given the opportunity to make opening statements. In its opening statement, the Bar conceded that Ms. Lee had complied with all the threshold requirements for Reinstatement after Revocation as outlined in Paragraph 13-25(F) of the Rules of Court. The Bar further stated that it did not oppose the Petition for Reinstatement.

In addition to the evidence presented in Petitioner's case-in-chief, the Panel considered the following documents:

VSB Docket No. 07-000-1918 (Record of the Revocation Proceedings)

1. Virginia State Bar Disciplinary Board "Rule to Show Cause and Order of Suspension and Hearing" entered on January 4, 2007, with attachments
2. Certified letter dated January 5, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing an attested copy of a "Rule to Show Cause and Order of Suspension and Hearing", entered on January 4, 2007
3. Certified letter dated January 5, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing an attested copy of a "Rule to Show Cause and Order of Suspension and Hearing", entered on January 4, 2007, returned by the United States Postal Service marked "Refused"
4. Virginia State Bar Disciplinary Board Order entered January 21, 2007
5. Certified letter dated January 24, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing an attested copy of an Order of the Virginia State Bar Disciplinary Board Order entered January 21, 2007
6. Certified letter dated January 24, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing an attested copy of an Order

of the Virginia State Bar Disciplinary Board Order entered January 21, 2007, returned by the United States Postal Service marked "Refused"

7. Letter dated February 5, 2007, from Elliott P. Park, Respondent's counsel, to Ms. Barbara S. Lanier enclosing the Respondent's *Memorandum of Points and Authorities,* with enclosures
8. Letter dated February 6, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Peter A. Dingman, Chair, enclosing the Respondent's *Memorandum of Points and Authorities,* without enclosures
9. Letter dated February 9, 2007, from Paulo E. Franco, Jr., Assistant Bar Counsel, to Barbara S. Lanier, Clerk of the Disciplinary System, enclosing the Bar's *Memorandum of Points and Authorities,* with attachments
10. Original transcript of the conference call held on February 14, 2007 (transcript filed under separate cover)
11. Virginia State Bar Disciplinary Board Order entered February 16, 2007
12. Certified letter dated February 20, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing an attested copy of an Order of the Virginia State Bar Disciplinary Board Order entered February 16, 2007
13. Letter dated March 9, 2007, from Paulo E. Franco, Jr., Assistant Bar Counsel, to Barbara S. Lanier, Clerk of the Disciplinary System, enclosing the Virginia State Bar's List of Exhibits and Witnesses and Exhibits 1-35 (Exhibits filed under separate cover)
14. Letter dated March 9, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary

System, to the Virginia State Bar Disciplinary Board Panel Members, without enclosures

15. Respondent's Exhibit List received in the Clerk's Office March 12, 2007
16. Respondent's Witness List received in the Clerk's Office March 12, 2007
17. Letter dated March 13, 2007, from Paulo E. Franco, Jr., Assistant Bar Counsel, to Barbara S. Lanier, Clerk of the Disciplinary System, enclosing the Bar's "Objections to Respondent's List of Exhibits"
18. Virginia State Bar Disciplinary Board Order entered March 14, 2007
19. Certified letter dated March 15, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing Virginia State Bar Order entered March 14, 2007
20. Letter dated March 15, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to the Virginia State Bar Disciplinary Board Panel Members, without enclosures
21. Subpoena Duces Tecum issued by Elliott P. Park, Respondent's Counsel and filed with the Virginia State Bar Clerk's Office on March 16, 2007
22. Letter dated March 20, 2007, from Thomas Coates, III, to Barbara Sayers Lanier, Clerk of the Disciplinary System, enclosing a Motion to Quash, with attachments
23. Letter dated March 21, 2007, from Paulo E. Franco, Jr., Assistant Bar Counsel, to Barbara S. Lanier, Clerk of the Disciplinary System, enclosing additional Exhibits for the Virginia State Bar (Nos. 36-38) (Exhibits filed under separate cover)
24. Letter dated March 21, 2007, from Paulo E. Franco, Jr., Assistant Bar Counsel, to

Barbara S. Lanier, Clerk of the Disciplinary System, enclosing the Bar's Motion to Quash Subpoena Duces Tecum issued by Respondent, with Exhibits A, B, C and D

25. Subpoenas for Witnesses received by the Virginia State Bar Clerk's Office on March 21, 2007
26. Letter dated March 21, 2007, from Elliott P. Park, Respondent's counsel, to Ms. Barbara S. Lanier enclosing the Respondent's Restated List of Exhibits, with attachments
27. Letter dated March 22, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to the Virginia State Bar Disciplinary Board Panel Members, without attachments
28. Letter dated March 22, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to the Virginia State Bar Disciplinary Board Panel Members, without attachments
29. Original transcript of the conference call held on March 22, 2007 (Transcript filed under separate cover)
30. Virginia State Bar Disciplinary Board "Summary Order", entered March 23, 2007
31. Original transcript of the proceedings held on March 23, 2007 (Transcript filed under separate cover)
32. Certified letter dated March 26, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing an attested copy of the "Summary Order" entered on March 23, 2007

33. Virginia State Bar Disciplinary Board "Order of Revocation" entered April 24, 2007
34. Certified letter dated April 26, 2007, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing an attested copy of the "Order of Revocation" entered on April 24, 2007
35. Letter dated May 25, 2007, from Catherine A. Lee, to the Clerk of the Court, Supreme Court of Virginia, enclosing a Notice of Appeal ad Assignments of Error, certified on May 25, 2007, and filed with the Virginia State Bar Clerk's Office on May 29, 2007

VSB Docket No. 16-000-105373 (Petition for Reinstatement)

1. Petition for Reinstatement
2. Letter dated April 1, 2016, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee acknowledging receipt of petition
3. Virginia State Bar's Request for Bill of Particulars filed with the Virginia State Bar Clerk's Office on April 7, 2016
4. Letter dated April 20, 2016, from Catherine A. Lee, to Barbara S. Lanier, Clerk of the Disciplinary System, enclosing Petitioner's Answers to the Bill of Particulars
5. Letter dated June 10, 2016, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing the Notice of Reinstatement Hearing
6. Letters dated July 28, 2016, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to various recipients, enclosing notice of the Reinstatement Petition
7. Advertising Affidavit filed with the Virginia State Bar Clerk's Office on August

4, 2016

8. Letter dated August 22, 2016, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing correspondence concerning the Petition for Reinstatement
9. Letter dated August 29, 2016, from Lawrence A. Drombetta, III, to Barbara Sayers Lanier, Clerk of the Disciplinary System, entering his appearance as counsel for Catherine Ann Lee
36. Letter dated September 7, 2016, from Lawrence A. Drombetta, III, to Barbara Sayers Lanier, Clerk of the Disciplinary System, enclosing the Petitioner's List of Witnesses
10. Letter dated September 9, 2016, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing additional correspondence concerning the Petition for Reinstatement
11. Letter dated September 21, 2016, from Barbara Sayers Lanier, Clerk of the Disciplinary System, to Catherine Ann Lee enclosing additional correspondence concerning the Petition for Reinstatement
12. Letter dated September 22, 2016, from Larry A. Pochucha, to Barbara Sayers Lanier, Clerk of the Disciplinary System, in support of the Petition for Reinstatement
13. Email dated September 22, 2016, from Rhonda L. Earhart, to the Members of the Disciplinary Board, in support of the Petition for Reinstatement

PETITIONER'S CASE-IN-CHIEF

Following opening arguments, Ms. Lee presented her case-in-chief, petitioning for reinstatement of her Bar license which was revoked by the Board on March 23, 2007. Ms. Lee presented the following witnesses in support of her Petition for Reinstatement:

1. Michele Chiocca (Richmond, Virginia)
2. Milton K. Brown, Jr. (Richmond, Virginia)
3. Dena Rosenkrantz (Richmond, Virginia)
4. Teri Lovelace (Richmond, Virginia)
5. James E. Leffler, MS LPC (Virginia Lawyers Helping Lawyers)
6. Catherine Ann Lee (Richmond, Virginia)

Upon conclusion of the Petitioner's case, the Bar offered no testimony or exhibits. Both the Bar and Petitioner made closing arguments in favor of the reinstatement of Ms. Lee's license to practice.

FINDINGS OF FACT

Based upon the review of the records of the Revocation proceedings, the Petition for Reinstatement, Answers to Bill of Particulars, witness testimony and letters submitted on Ms. Lee's behalf, the Panel makes the following findings of fact:

1. Catherine Ann Lee was licensed to practice law in the Commonwealth of Virginia in 1990.

2. Ms. Lee served as staff attorney for the United States District Court for the Eastern District of Virginia in Richmond. After her term expired, Ms. Lee worked as a litigation associate for the law firm of McGuire Woods at its Richmond office.

3. In 1994 and 1995, Ms. Lee worked as a solo practitioner handling primarily personal injury, elder law and contract disputes. During that time, she was appointed as legal guardian and conservator for two elderly women, Bessie Little (Little) and Dinah Saunders (Saunders) by the Richmond Circuit Court.

4. In December of 1995, Milton K. Brown, Jr., of the law firm of Coates & Davenport ("C&D") hired Ms. Lee as a litigation associate. The primary focus of Ms. Lee's practice was personal injury, contract disputes and elder law. Her elder law practice included guardian ad litem appointments, adult competency proceedings and fiduciary disputes.

5. Ms. Lee continued to serve as guardian for Little and Saunders while employed by C&D until the women passed away in 1999 and 2005, respectively. All fees and expenses that she incurred, paid and received during her employment were processed by a legal assistant through C&D's billing system. Ms. Lee paid all costs (i.e. photocopies, postage, etc.) owing to C&D from the guardianships and she retained all guardian and conservator fees she earned for Little and Saunders.

6. Ms. Lee's associate contract with C&D ended in 1999. However, she remained employed by the firm as a lawyer with no written agreement defining the terms of her employment.

7. Ms. Lee suffered from an alcohol dependency that predated her employment with C&D. She relapsed in January of 2002. Prior to that time, she had been sober for approximately seven (7) years. During this same time, Ms. Lee also began abusing prescription medications.

8. In May of 2001, Ms. Lee was appointed a legal guardian and conservator for Lola Pierce ("Pierce") by the Richmond Circuit Court. Ms. Lee posted a personal bond for the guardianship and was responsible for Pierce's personal care and medical needs. As Conservator, Ms. Lee paid

regular bills for Pierce's personal care and coordinated with Pierce's professional financial manager. During the guardianship, Ms. Lee discovered that Pierce's estate had a legal claim against Sun Trust Bank and her prior fiduciaries. Ms. Lee and Pierce's son filed suit on behalf of Pierce in the Richmond Circuit Court. The suit resulted in a settlement to Pierce's estate of more than $1 million dollars. Ms. Lee properly delivered the funds to Pierce's professional financial managers.

9. In separate proceedings, the Richmond Circuit Court approved legal fees and costs arising from the Pierce lawsuit of approximately $107,000 and guardian and conservator fees of $26,025.37.

10. Ms. Lee paid the approximately $107,000 in legal fees and costs to C & D. She deposited the $26,025.37 in guardian and conservator fees into her personal account. She reimbursed C&D for the firm's costs that were attributable to her work on the Pierce lawsuit ($2,688.87). She also paid her legal assistant for bookkeeping work on the Pierce guardianship (approximately $2,000). Ms. Lee retained the remaining $23,336.50 in guardian and conservator fees.

11. In November of 2004, C & D terminated Ms. Lee's employment. The termination was precipitated by Ms. Lee's continued denial of her escalating substance abuse issues and her failure to deposit the $26,025.37 in Pierce guardian and conservator fees into the firm's trust account.

12. On December 6, 2004, C&D filed a complaint against Ms. Lee with the Virginia State Bar alleging (i) impairment and (ii) failure to pay C&D the guardian and conservator fees arising from the Pierce matter.

13. On January 17, 2005, Ms. Lee filed her answer to the Bar complaint. She admitted

retaining the Pierce guardian fee but denied having an impairment.

14. On August 26, 2005, Ms. Lee's license to practice in Virginia was suspended indefinitely for impairment.

5. On October 31, 2006, Ms. Lee pleaded guilty to driving under the influence in Hanover County. She paid all fines and successfully completed all court requirements arising from the offense.

16. On May 8, 2006, Ms. Lee was indicted for felony embezzlement stemming from her failure to pay the Pierce guardianship fees to C&D.

17. On November 1, 2006, Ms. Lee appeared before the Henrico County Circuit Court and entered a guilty plea to the felony indictment pursuant to Alford v. North Carolina, 400 U.S. 25 (1970). She was subsequently sentenced to a prison term of twenty years, with all twenty years suspended for twenty years, conditioned upon her keeping the peace and complying with all regulations imposed by her Probation Officer.

18. On November 7, 2006, C&D filed a civil complaint against Ms. Lee in the Hanover County Circuit Court seeking repayment of the Pierce guardianship fees. The complaint was later dismissed.

19. By order dated January 16, 2007, the Henrico County Circuit modified its original sentence in the felony case to include restitution to C&D in the amount of $23,334.50.

20. On March 23, 2007, the Virginia State Bar Disciplinary Board revoked Ms. Lee's license to practice law in the Commonwealth of Virginia due to her felony conviction.

21. On or about July 9, 2008, the Henrico County Circuit Court issued a show cause against Ms. Lee for failure to pay restitution. The show cause was dismissed on February 25, 2009.

22. Ms. Lee filed a civil complaint against C&D in the Henrico County Circuit Court seeking unpaid wages and fees. In 2012, the complaint was dismissed with prejudice by the Honorable Gary A. Hicks.

23. Ms. Lee filed a similar civil complaint against C&D in the Richmond Circuit Court. The complaint was subsequently dismissed for lack of prosecution.

ANALYSIS

Pursuant to Paragraph 13-25(G)(6)(b) of the Rules of Court, the Board considered the following factors in determining whether Ms. Lee met her burden of proof as to her good character and fitness to practice law.

1. **The severity of the Petitioner's Misconduct, including, but not limited to, the nature and circumstances of the Misconduct.**

   The Board considered Ms. Lee's retention of the Pierce guardianship fees and her subsequent guilty plea to felony embezzlement which resulted in a twenty year suspended sentence. The Board also considered her failure to acknowledge her substance abuse problems. The Board finds the misconduct to be severe.

2. **The Petitioner's character, maturity, and experience at the time of her Revocation.**

   Ms. Lee had been practicing for seventeen (17) years at the time of her revocation. Ms. Lee testified that at the time of her revocation, both her physical state and mental state were in severe decline due to her alcoholism and prescription drug abuse.

3. **The time elapsed since the Petitioner's Revocation.**

   The Board considered the fact that Ms. Lee's license to practice had been suspended effective August 26, 2005 for impairment and that the suspension was still in effect at the

time of her revocation. Ms. Lee's revocation became effective on March 23, 2007. At the time of the hearing on her Petition for Reinstatement, Ms. Lee's license had been suspended and/or revoked for over eleven years.

4. **Restitution to the clients and/or the Bar.**

Ms. Lee has paid full restitution to C&D in accordance with the sentence she received from the Richmond Circuit Court. The Petitioner and the Bar stipulated that she has reimbursed the Bar for all costs previously assessed against her.

5. **The Petitioner's activities since Revocation, including, but not limited to, her conduct and attitude during that period of time.**

Ms. Lee testified that she has been active in her local community. Her civil rights were restored in September of 2015. She has maintained steady employment in quasi-legal fields. She taught paralegal studies at Centura College in Chesterfield, Virginia from 2008 to 2012. She has been employed on a part-time basis as a paralegal/law clerk for the Virginia Education Association (VEA) since November of 2009. Two of Ms. Lee's witnesses testified that she is employed on a case-by-case basis and that her duties include performing legal research and writing, drafting pleadings, and preparing cases for civil hearings. Ms. Lee works under the supervision of licensed attorneys. Both witnesses described her attitude and work product as excellent. Ms. Rosenkrantz testified that she would recommend Ms. Lee for full-time employment as a staff attorney if her license to practice is reinstated.

Ms. Lee testified that she has been fully committed to addressing her alcoholism and substance abuse issues since 2014. She describes herself as being "in recovery" since that time. She is an active participant in Alcoholics Anonymous and currently sponsors two

other women in the program. She has been under contract (monitoring agreement) with Lawyer's Helping Lawyers (LHL) since July of 2014. Despite still being under contract, Ms. Lee was asked to serve as a mentor to other program participants. James Leffler, LHL Director, testified that Ms. Lee's attitude, physical condition and mental state have undergone a "180-degree" improvement since he first met her in 2004.

Of some concern to the Board were the two civil complaints brought by the Petitioner against C&D, particularly the complaint filed in the Hanover County Circuit Court. Ms. Lee testified that she filed both complaints prior to her involvement with AA and LHL. The Board was impressed by the testimony from Ms. Lee and Mr. Leffler regarding the meeting between Ms. Lee and Mr. Coates of C&D. During what was described as a difficult and emotional meeting, Ms. Lee acknowledged her wrongdoings, accepted responsibility for her earlier conduct and apologized for violating the firm's trust. The Board notes that it did not receive testimony or letters from C&D opposing Ms. Lee's Petition.

6. **The Petitioner's present reputation and standing in the community.**

The Board heard testimony and received numerous letters in support of Ms. Lee's Petition for Reinstatement. The Board did not receive any testimony or letters in opposition to the Petition for Reinstatement.

7. **The Petitioner's familiarity with the Virginia Rules of Professional Conduct and her current proficiency in the law.**

Within the five years preceding the filing of the Petition, Ms. Lee completed 78 hours of continuing legal education of which 18 hours were in the areas of legal ethics or professionalism. Also, Ms. Lee submitted her scaled test score of 104 from the Multistate

Professional Examination taken in 2014.

8. **The sufficiency of the punishment undergone by the Petitioner.**

   Ms. Lee completed nine years of supervised probation. She will remain on unsupervised probation with the Richmond Circuit Court for approximately eleven more years. Should she violate the general good behavior condition of her probation during that period, she will be subject to the twenty-year sentence suspended by the court in 2006. The Board believes that Ms. Lee has been sufficiently punished for her misconduct.

9. **The Petitioner's sincerity, frankness and truthfulness in presenting and discussing factors related to her Revocation and Reinstatement.**

   A majority of the Board found Ms. Lee to be sincere, frank, and truthful as evidenced by her candid and emotional testimony at the hearing.

10. **The impact upon public confidence in the administration of justice if the Petitioner's license to practice law is restored.**

    The Board does not believe that the public's confidence in the administration of justice would be undermined if Ms. Lee's license were restored. It has been nearly ten years since her license was revoked and the felony for which she was convicted did not involve theft from a client.

RECOMMENDATION

Accordingly, by majority vote, the Board finds that the Petitioner has proven by clear and convincing evidence that she is a person of honest demeanor and good moral character and that she possesses the requisite fitness to practice law. Therefore, the Board respectfully recommends to the Supreme Court of Virginia that the Petition to reinstate the license of Catherine Ann Lee

be granted.

As required by Part Six, Section IV, Paragraph 13-25 6.e.ii, of the Rules of the Supreme Court, the Board finds that the costs of this proceeding are as follows:

Court Reporter Fees:	$ 625.42
Mailing Fees:	$ 15.65
Legal Notice (Richmond Times-Dispatch):	$ 363.80
Administrative Fee:	$ 1500.00
Total:	$ 2504.87

A refund is due to the Petitioner in the amount of $2,495.13.

It is further **ORDERED** that the Clerk forward this Order of Recommendation and the record to the Supreme Court of Virginia for its consideration and disposition.

It is further **ORDERED** that the Clerk shall mail an attested copy of this Order to Petitioner, Catherine Ann Lee, by certified mail, return receipt requested, at her address of record with the Virginia State Bar, 9113 Fox Hill Race Court, Mechanicsville, VA 23116 and by regular mail to Lawrence A. Drombetta, III, Counsel for Petitioner, 9387 Horse Castle Court, #810, Glen Allen, VA 23060, and hand delivered to Paulo E. Franco, Jr., Assistant Bar Counsel, Virginia State Bar, Bank of America Building, 1111 East Main Street, Richmond, VA 23219-0026.

ENTERED THE 21st DAY OF October, 2016

VIRGINIA STATE BAR DISCIPLINARY BOARD

John A. C. Keith

Digitally signed by John A. C. Keith
DN: cn=John A. C. Keith, o=Users, ou=DN, email=jkeith@bklawva.com, c=US
Date: 2016.10.21 14:27:58 -04'00'

John A.C. Keith 2nd Vice Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
ANNE MARSTON LYNCH (WILBUR) VSB DOCKET No. 17-000-108403

ORDER OF RECOMMENDATION

This matter came on to be heard on December 8, 2017, upon the petition for reinstatement of Anne Marston Lynch (hereinafter "Lynch") to practice law in the Commonwealth of Virginia. A duly convened panel of the board consisting of Sandra L. Havrilak, Chair, Richard J. Colten, Donita M. King, Michael J. Sobey, and Anderson W. Douthat, IV, lay member, heard the matter. Deputy Bar Counsel, Kathryn R. Montgomery, appeared as counsel for the Virginia State Bar. The Petitioner, Anne Marston Lynch, appeared in person and was represented by Michael L. Rigby. The Chair swore in the court reporter for the proceeding, Tracy J. Stroh, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227; telephone number (804) 730-1222.[1] The Chair then polled the members of the Board as to whether any of them were aware of any personal or financial interest or bias which would interfere with or influence that member's determination of the matter and from fairly hearing this matter. Each member, including the Chair, responded in the negative.

The Clerk of the Disciplinary System timely sent all legal notices of the date and place in the manner prescribed by the Virginia Rules of Professional Conduct (hereinafter "Rules") Section IV, Paragraph 13-25.

The Chair advised the parties on how the hearing would proceed. Lynch was advised that she had the burden of proving by clear and convincing evidence that she is a person of honest

[1] Hearing transcript (hereinafter "TR") refers to the transcript dated December 8, 2017.

demeanor, good moral character, and possesses the requisite fitness to practice law. Both Lynch and her counsel, as well as Bar counsel stated that they understood the proceedings.

Prior to the Board hearing, the Clerk of the Disciplinary System provided notice to all interested parties by mail and press release as required in Section IV, Paragraph 13-25(G)(4) of the Rules.. In response to that notice, the Board received six (6) letters in support of Lynch's reinstatement and ten (10) letters in opposition for reinstatement. It was stipulated that Lynch had complied with all of the requirements for reinstatement after revocation as outlined in paragraph 13-25(F) of the Rules. Lynch testified on her own behalf at the hearing. Additionally, the Board heard from Alana Hollings, John Rowe, Krista McAninley, Anna Irvine, and Benjamin P. Lynch, Jr. Those witnesses were offered as Lynch's character witnesses.

The Bar presented the testimony of the Bar investigator, Ronald Pohrivchak.

In accordance with the Rules, the Bar received a request by James E. Lauck, who wished to be heard.

The panel considered Lynch's Petition for Reinstatement with exhibits A, A-1, A-2, A-3, B, C, and D attached, Lynch's exhibit 1, and the Bar's exhibits 1-11, all admitted into evidence without objection. Lynch's exhibit 1 included six (6) letters in favor of Lynch's reinstatement. Lynch's exhibits A, A-1, A-2, A-3, B, C, and D included: a letter to the Virginia State Bar Disciplinary Board; the May 15, 2009 Order of Suspension; the Affidavit of Lynch declaring consent to revocation of her license; the Trial Order and Plea Agreement; the list of Continuing Legal Education (CLE) courses Lynch attended; the Multistate Professional Responsibility Exam (MPRE) results; and, the Termination of Costs Order of Suspension. The Bar's exhibits included: Lynch's Petition for Reinstatement filed on February 9, 2017; the certification of Lynch's disciplinary record; the Affidavit of Gale M. Cartwright, Director of Member

Compliance of the Virginia State Bar, dated November 28, 2017 (regarding Lynch's current membership status, her address of record, and prior cause suspension); Affidavit of DaVida M. Davis, Clerk of the Disciplinary System, dated November 21, 2017 (listing docket numbers of bar complaints pending at the time of Lynch's revocation); record from the Circuit Court for the City of Suffolk in *Commonwealth v. Lynch* (including the grand jury indictment, plea agreement, trial order, and sentencing order); Lynch's response to the Bar's request for Bill of Particulars, filed April 3, 2017, without attachments; e-mail from Lynch and her counsel to the Bar regarding Lynch's Sale of Stock in June 2007 to repay funds Lynch's embezzled in October 2006, with attached brokerage statements (account numbers redacted); memorandum of Lynch describing her community involvement prior to 2009; report of investigation dated June 12, 2017, prepared by Ronald Pohrivchak, Virginia State Bar Investigator, with exhibits; the Court of Appeals' certificate and Order of February 3, 2009, suspending Lynch from appearing before that court; and, letters in opposition to Lynch being reinstated.

I. BACKGROUND

1. Lynch graduated from the University of Richmond in 1997 with a double major in Leadership Studies and Latin. She received a Juris Doctorate degree from Wake Forest School of Law in 2000 and was admitted to practice law in 2000.[2]

2. Lynch was employed at Harris, Fears, Davis, Lynch, and McDaniel from October 2000 to February 2001, where she worked as a legal assistant and was supervised by Benjamin P. Lynch, Jr.

3. From February 2001 until February 2003, Lynch worked for the City of Chesapeake Treasurer's Office as Counsel to the Treasurer and was supervised by Treasurer Barbara O. Carraway.

[2]TR. page 67-68.

4. From March 2003 until February 2009, when she was fired, Lynch worked for Pretlow & Pretlow, PC as an associate attorney. She was supervised by Joshua Pretlow, Jr.

5. The disciplinary record of Lynch reflects the following:

A. On May 15, 2009, the Virginia State Bar Disciplinary Board suspended Lynch's license for one (1) year with terms for her on-going medical and psychological care and treatment and with an alternative discipline of a suspension for three (3) years. Lynch was ordered to provide the Clerk of the Disciplinary System a written statement that, within fourteen (14) days of the Summary Order, she gave notice by certified mail, return receipt requested, of the suspension of her license to practice law in the Commonwealth of Virginia, to all clients for whom she was currently handling matters and to all opposing attorneys and presiding judges in pending litigation. She was also ordered to make appropriate arrangements for the disposition of matters, then in her care, in conformity with the wishers of her clients. In addition, the Bar assessed costs against Lynch in the amount of four thousand one hundred and seventy-three dollars and forty-eight cents ($4,173.48).[3]

At the time of the hearing that resulted in the suspension of her license, Lynch's prior disciplinary record (received into evidence by the Disciplinary Board at the May 15, 2009 hearing) included: three (3) cases involving a failure to respond to Assistant Bar Counsel's complaint letters, two (2) cases involving a failure to respond to Intake Counsel's complaint letters, three (3) cases involving incorrect filings, one (1) case involving a failure to respond to the Court of Appeals, five (5) cases involving lack of communication to her clients, one (1) case where Lynch agreed to provide the Bar's investigator certain documentation, but failed to provide it and respond to the investigator's follow-up requests, and five (5) cases where Lynch

[3] Lynch Ex. A-1.

failed to properly communicate with her client.[4] In addition, the Board found that Lynch violated Rule 1.3 Diligence, Rule 1.4 Communication, and Rule 8.1 Bar Admission and Disciplinary Matters of the Rules.[5] The cases and Lynch's violations in those cases that led the Board to suspend Lynch are explained hereinbelow.

i. The Healey Matter 08-010-071408

In 2003, Healey hired Lynch to assist in removing liens on real property he wished to purchase. In 2006, Lynch stopped responding to attempts to communicate by Healey and stopped working on Healey's case altogether. Lynch received an initial inquiry letter from Intake Counsel dated July 24, 2007. The Assistant Bar Counsel sent Lynch a complaint letter dated August 13, 2007, whereas Lynch failed to respond to either letter. Lynch agreed to provide the Bar's investigator with certain documentation, but failed to provide anything or to respond to the investigator's follow-up requests for that documentation.

ii. The Terry Appeal 08-010-071625

On November 8, 2006, Lynch was appointed to represent Terry on a direct appeal to the Court of Appeals. On December 22, 2006, the Court of Appeals denied Terry's appeal; however, Lynch never informed Terry of the denied appeal nor advised Terry to file a further appeal to the Virginia Supreme Court. Lynch received a complaint letter from Intake Counsel dated August 8, 2007, but failed to respond to it.

iii. The Brewer Appeal 08-010-072683

On May 29, 2007, Lynch filed a Notice of Appeal to the Court of Appeals for Brewer. Lynch claimed she never received the Notice of the filing of the record in the Brewer appeal, and once she realized the record had been filed, she sought an extension in which to file

[4] VSB Ex. 9.
[5] Lynch Ex. A-1.

the Petition for Appeal; however, neither was timely and the Court of Appeals dismissed Brewer's appeal. Lynch then failed to advise Brewer of the appeal dismissal and failed to advise him of seeking a delayed appeal. Lynch received a complaint letter from the Assistant Bar Counsel dated November 13, 2007, but failed to respond to it.

iv. The Jordan Appeal 08-010-072684

On March 2, 2007, Lynch was appointed to represent Jordan in a criminal case. On August 30, 2007, Jordan lost his case and Lynch filed a Notice of Appeal to the Court of Appeals; however, Lynch's filed Notice of Appeal did not indicate that she was court appointed and she never paid for the filing fee. The Deputy Clerk called and wrote to Lynch requesting the filing fee or proof that Jordan was exempt from said fee. Lynch failed to respond and the Court of Appeals dismissed the appeal for failure to pay the filing fee. In addition, Lynch failed to advise Jordan of the dismissal or of the possibility of seeking a delayed appeal. Lynch received a complaint letter from the Assistant Bar Counsel dated November 13 2007, but failed to respond to it.

v. The Budd Appeal 08-010-074537

On July 10, 2007, Lynch was appointed to represent Budd in a criminal case. Budd lost his case and Lynch filed a Notice of Appeal to the Court of Appeals; however, Lynch failed to file a Petition for Appeal and the Court of Appeals dismissed the appeal. Lynch then failed to advise Budd of the dismissal or of the possibility of seeking a delayed appeal. Lynch failed to respond to a complaint letter from the Assistant Bar Counsel dated April 10, 2008, or any attempts to return communication with the Bar's investigator.

B. On January 13, 2009, Lynch appeared in the Court of Appeals pursuant to an Order to Show Cause why she should not be held in contempt of court. The transgressions for Lynch's appearance in the Court of Appeals are discussed hereinbelow.[6]

i. On March 14, 2008, Lynch timely filed a petition for appeal in a criminal case as the attorney for Johnson. The petition asked the court for leave to withdraw as counsel, because she believed that Johnson's appeal was without merit. On March 18, 2008, the Court of Appeals issued an order denying Lynch's motion to withdraw as counsel. The order explained that the petition for appeal failed to satisfy certain requirements that the appointed counsel conduct a "diligent and thorough search of the record for any arguable claim that might support the client's appeal."[7] The order directed Lynch to file an amended petition for appeal within fifteen (15) days. Lynch failed to comply with this order and on April 11, 2008, the Court of Appeals issued another order, which noted that Lynch failed to respond to the first order and ordered her to file an amended petition pursuant to the previous order. Again, Lynch failed to respond. On August 13, 2008, the Court entered a new order removing Lynch as Johnson's attorney and directed Lynch to Show Cause. Lynch was personally served with the Show Cause Order.[8]

ii. On January 13, 2009, Lynch appeared before the Court of Appeals. Lynch apologized for her lack of professionalism, but offered no explanation for her actions other than her caseload was heavy and that she failed to pay proper attention to the Court of Appeals' three (3) orders.[9]

iii. The Court found that Lynch was in contempt of court. In the Court's order, it stated,

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[6] VSB Ex. 10.
[7] *Id. See McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429 (1988).
[8] VSB Ex. 10.
[9] *Id.*

> As punishment for her contemptuous disregard for the order of this Court, Lynch shall pay a fine in the amount of [one thousand dollars] $1,000.00 and is disbarred indefinitely from practice before this Court.[10] Three years from the date of this order, Lynch may petition for reinstatement to practice in the Court of Appeals of Virginia, provided that she presents evidence satisfactory to this Court that she has completed continuing legal education courses in the areas of professionalism, appellate practice and time management, sufficient, in the judgment of this Court, to address the problems identified.[11]

C. On December 3, 2009, came Lynch and presented to the Board of the Virginia State Bar an Affidavit Declaring Consent to Revocation of her license to practice law in the courts of the Commonwealth.[12] By tendering her Consent to Revocation at a time when criminal chargers were pending, Lynch admitted that the criminal charges referenced in the Affidavit Declaring Consent to Revocation and the Plea Agreement were true.[13] The Board accepted Lynch's Consent to Revocation and assessed administrative costs against Lynch in the amount of one thousand twenty dollars and eighty-six cents ($1,020.86). The events that preceded Lynch's Consent to Revocation are expressed hereinbelow. Lynch was employed as an associate attorney at Pretlow & Pretlow and represented a client, McGaha, in a personal injury suit. The evidence presented showed the case itself probably had little to no value. During her representation, the client refused to go to his IME examination and was soon after forced to take a nonsuit.[14] The client still wished to proceed with his case; however, Lynch failed to re-file the motion for judgment.[15] The statute of limitations on the case had run and McGaha was not entitled to seek recovery for his damages. At no point did Lynch tell her employer, father, or attorney friends, that she failed to re-file her client's case or that she needed assistance. In fact, Lynch either ignored McGaha's numerous telephone calls or would lie to the client stating she

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[10] *See In re Moseley*, 273 Va. 688, 643 S.E.2d 190 (2007).
[11] VSBEx.10.
[12] Lynch Ex. A-2.
[13] VSB Ex. 5.
[14] TR. page 80-81.
[15] TR. page 83.

had not heard back from the insurance company. When McGaha became impatient and would contact Lynch nonstop, Lynch decided to give McGaha money to "go away".[16] She fabricated elaborate settlement negotiations between what McGaha thought was the insurance company and himself, but in fact, he was negotiating with Lynch's wallet. When McGaha and Lynch settled on forty thousand dollars ($40,000.00), Lynch drafted a settlement agreement that McGaha would sign when he got the money. All this intricate planning and scheming occurred while Lynch claimed to be overwhelmed.

Lynch, instead of using her own money to fund the false settlement, intentionally, and willfully embezzled forty thousand dollars ($40,000.00) from her church on October 16, 2006.[17] Lynch went to the bank and requested a cashier's check out of the capital account payable to McGaha.[18] She met McGaha somewhere in Prince George County and had him sign the fake documents that she drafted to look like a real settlement and gave him the check.[19] At the time of the embezzlement, Lynch was treasurer of her church and acting in a fiduciary capacity. Lynch also had one hundred thousand dollars ($100,000.00) in stocks in her own name and account, so she could have easily paid the fabricated settlement with her own money instead of stealing from a church.

D. A couple of months later, Lynch went to the preacher of the church and resigned as treasurer of the church.[20] The church found a new treasurer who was eager to begin and wanted to review the church's finances. Lynch knew the accounts were not in order, so Lynch began to deceive the new treasurer by stating that she needed to get the checkbook ready

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[16] TR. page 84.
[17] *Id.*
[18] TR. page 89.
[19] TR. page 89.
[20] TR. page 89-90.

or there needed to be a transition meeting.[21] The new treasurer did not wish to wait any longer for Lynch, and went to the bank and received the balances from the accounts and noticed the discrepancy. The preacher approached Lynch about the missing funds, and instead of admitting to her mistake, she lied to him.[22] The second time the preacher approached Lynch, she finally admitted to her stealing. After the preacher approached Lynch twice and six (6) months later, Lynch finally made restitution to the church although throughout the entire scheme, Lynch had her own funds available both to pay the client for the alleged settlement and to make immediate restitution to the church; however, Lynch waited until after the theft was discovered to make restitution to the church. On March 18, 2016, the Clerk of the Disciplinary System, on behalf of the Disciplinary Board, entered a Termination of Cost Suspension Order when Lynch finally paid the fines, including interest, that resulted in the suspension matter in the amount of one thousand three hundred eighty-nine dollars and fifty-four cents ($1,389.54), and the fines that resulted from the five (5) suspension matters in the amount of three thousand eight hundred fifty-one dollars and fifty-six cents ($3,851.56).[23]

E. On February 9, 2017, Lynch filed her Petition for Reinstatement of her Bar License.[24]

II. FINDINGS

In accordance Paragraphs 13-25(F)(1-8) and (G)(5) of the Rules, after revocation, the petitioner's license to practice shall not be reinstated unless the petitioner proves, by clear and convincing evidence, as follows:

- That five (5) years have passed since the effective date of the Revocation;

[21] Tr. page 91.
[22] *Id.*
[23] VSB Docket Nos. 08-010-071408 et. al. Lynch Ex. D.
[24] VSB Ex. 1.

- That she has paid the Bar all costs previously assessed against her, together with any interest due thereon at the judgment rate;

- That within five (5) years prior to filing the petition, she has attended sixty (60) hours of continuing legal education, of which at least ten (10) hours shall be in the area of legal ethics or professionalism;

- That she has taken the Multistate Professional Responsibility Examination and received a scaled score of eight-five (85) or higher;

- That she has reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of petitioner's misconduct;

- That she has reimbursed the Bar for any sums of money paid as a result of a Receivership involving her law practice;

- That she has posted with her Petition for Reinstatement a five thousand dollar ($5,000.00) cash bond for payment of costs resulting from the Reinstatement Proceedings; and,

- That she is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law.

In considering the final factors, the Board is guided by the factors set forth in Section IV, Paragraph 13-25(G)(6)(b)of the Rules, which was incorporated from the matter of *Alfred Lee Hiss*, Virginia Supreme Court, Docket No. 83-26, Opinion dated May 24, 1984.

i. The severity of the Petitioner's Misconduct, including, but not limited to, the nature and circumstances of the Misconduct;
ii. The Petitioner's character, maturity and experience at the time of his or her Revocation;
iii. The time elapsed since the Petitioner's Revocation;
iv. Restitution to the clients and/or the Bar;
v. The Petitioner's activities since Revocation, including, but not limited to, his or her conduct and attitude during that period of time;
vi. The Petitioner's present reputation and standing in the community;
vii. The Petitioner's familiarity with the Virginia Rules of Professional Conduct and his or her current proficiency in the law;
viii. The sufficiency of the punishment undergone by the Petitioner;
ix. The Petitioner's sincerity, frankness and truthfulness in presenting and discussing factors relating to his or her Revocation and Reinstatement; and
x. The impact upon public confidence in the administration of justice if the Petitioner's License is restored.

The evidence has shown that Lynch's license to practice law in the courts of this Commonwealth was revoked on December 4, 2009, more than eight (8) years ago; and, Lynch filed her Petition under oath, with a penalty of perjury. The evidence has also shown that Lynch has proven that within five (5) years prior to filing the petition that she had attended sixty (60) hours of continuing legal education, of which at least ten (10) hours was in the area of legal ethics and professionalism. At the time Lynch applied for reinstatement of her license she completed seventy (70) hours of continuing legal education, eighteen (18) of which were in the area of legal ethics and professionalism.[25] Therefore, at the time she filed her petition, she completed the requisite continuing legal education hours.

Lynch is required to have taken the Multistate Professional Responsibility Examination and receive a scaled score of eighty-five (85) or higher. The record produced by the National Conference of Bar Examiners/Multistate Professional Responsibility Examination showed Lynch took the examination on November 7, 2015 and received a scaled score of ninety-six (96).[26]

Lynch was not required to reimburse the Bar's Client's Protection Fund for any money it may have paid as a result of Lynch's misconduct, as no money paid by the Client Protection Fund and no money was owed to the Client's Protection Fund.

Lynch was required to prove that she paid the Bar all costs previously assessed against her together with any interest thereon. Prior to filing her application, Lynch met that requirement. On September 16, 2009, an Order of Administrative Suspension was imposed. Lynch paid three thousand eight hundred and fifty-one dollars and fifty-six cents ($3,851.56) on March 18, 2016, and the Order was terminated.[27] In addition, Lynch owed over one thousand

[25] Lynch Ex. B.
[26] Lynch Ex. C.
[27] Lynch Ex. D.

dollars ($1,000.00) as a result of her Bar revocation.[28] Lynch finally paid off all of the debt owed to the Bar in 2016.[29] At the time of this hearing, all costs were paid.[30] The evidence was clear that Lynch had an ample amount of money in her brokerage account after the suspension in May 2009 and revocation in December 2009, which she could have used to pay the Bar.[31]

Lynch was not required to reimburse the Bar for any sums of money paid as a result of a Receivership involving her law practice as no Receivership was ever required.

Lynch posted a five thousand dollar ($5,000.00) cash bond for payment of costs at the time she filed her Petition for Reinstatement.

In order to determine whether or not Lynch is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law, the Board considered the factors in Paragraph 13-25(G)(6)(b) the Rules, also known as the *Hiss* Factors.

III. ANALYSIS PURSUANT TO PARAGRAPH 13-25(G)(6)(b) OF THE RULES OF COURT

The Board considered the following factors in determining whether Lynch met her burden, by clear and convincing evidence of proof, as to her good character and fitness to practice law.

1. The severity of Lynch's misconduct, including, but not limited to, the nature and circumstances of misconduct.

The Board considered the nature and character of Lynch's violation of her fiduciary duty to her client and her employer, as well as, the church from which she embezzled forty thousand dollars ($40,000.00). Although not dispositive, the Board took into consideration the finding of the Court of Appeals of Virginia's contempt and suspension order against Lynch. In addition, although not yet proven, the Board did take cognizance of the fact that there were eleven (11)

[28] TR. page 141-142.
[29] *Id.*
[30] *Id.*
[31] TR. page 142.

additional disciplinary complaints held in abeyance at the time she consented to revocation.[32] The Board finds that the misconduct is severe and extreme. In addition, it is clear from the testimony that Lynch presented, her petition, and the disciplinary records set forth by the Bar that Lynch does not appreciate the severity of her own misconduct.

2. Lynch's character, maturity, and experience at the time of her revocation.

Lynch had been practicing law for nine (9) years at the time of her revocation. A psychologist testified that at the time of Lynch's embezzlement, Lynch showed no signs of depression or mental health issues, she was merely overwhelmed with professional responsibilities. Lynch's illegal and immoral behavior was not due, in any manner, to her inexperience or incapacity. Lynch chose to participate in community activities, rather than work on her clients' cases.

3. The time elapsed since Lynch's Revocation.

Lynch's license to practice law was revoked on December 4, 2009 and she has not practiced law since that time. Therefore, significant time has lapsed since Lynch's disbarment.

4. Restitution to the clients and/or the Bar.

No restitution was due to the client who received the church's forty thousand dollars ($40,000.00). Lynch delayed reimbursing the Bar costs from a prior disciplinary disposition and order for approximately six (6) years. Lynch also failed to pay the monies owed to the church for a period of six (6) months. In addition, Lynch has yet to pay any monies owed to the Court of Appeals as a result of her contempt. Lynch claimed she did not know about the fines from the Court of Appeals. Furthermore, while the Bar is mindful that the Rules do not explicitly state when the costs imposed have to be paid back to the Bar, a person who is truly remorseful would pay the fines immediately, particularly one who has the ability to do so. The Board finds that the

[32]TR. page 258.

delay in reimbursing the costs to the Bar is not demonstrative of good character or judgment. The record revealed that Lynch had available to her more than sufficient funds to reimburse any and all costs.

5. Lynch's activities since revocation, including but not limited to, her conduct and attitude during that period.

The evidence is clear and convincing that Lynch is particularly active in the community, her church, civic affairs, and political activities since her revocation. Lynch has always been heavily involved in the community, which is what led to her ignoring clients and bar complaints and eventually led to her suspension and revocation of her license. Lynch is actively involved with the Portsmouth Service League, the Points of View fundraiser, the St. John's Church, the Suffolk Jaycees, the Elizabeth River Garden Club, the Alumni Association for Nansemond-Suffolk Academy, the lawyer hotline for the Suffolk Bar Association, the Suffolk Bar Association, and the I'Anson-Hoffman Inn of Court.[33] While it is notable that Lynch is so active in the community, it is with great apprehension that she continues to be so involved with the community and practice law, if she gets her license reinstated. She has been employed full-time as a paralegal in her father's law office and all evidence indicated that her conduct and attitude in the community are favorably viewed since her revocation. Lynch continues to be in therapy, although her psychologist, Alana Hollings, claims that she has no mental illness, but is diagnosed for insurance purposes as having a depressed mood and anxiety which, according to the psychologist, translated to an Adjustment Disorder. However, the Board does not give any weight to the diagnosis of Lynch nor does the Board find the testimony of Alana Hollings to be persuasive.

6. Lynch's present reputation and standing in the Community.

[33]TR. page 133-136.

The Board heard testimony and received six (6)letters in support of Lynch's petition for reinstatement. On the other hand, there were approximately ten (10) letters in opposition to reinstatement from members of the Bar and community.

Following opening arguments, Lynch presented her case-in-chief in support of reinstatement of her Bar license which was revoked by Consent to Revocation effective December 4, 2009, a period of eight (8) years ago. Lynch presented the following witnesses in support of her petition for reinstatement:

A. Alana Hollings, a non-board certified, clinical psychologist, was qualified as an expert witness, without objection. She administered therapy to Lynch. Hollings testified that she began treatment of Lynch in April 2009 and sees Lynch approximately every other week.[34] She states that her patient was consistent and cooperative with treatment. In Hollings's initial consultation with Lynch, Hollings diagnosed Lynch with Adjustment Disorder. Hollings diagnosed Lynch without any tests nor any input other than Lynch.[35] Hollings stated "Adjustment Disorder is when the individual goes through a major stressor and then from that stressor, [he or she has] ongoing symptoms that could be either depression, anxiety, both, or some type of conduct problems."[36] Hollings further stated that "the difference [between Adjustment Disorder and regular stress] is that Adjustment Disorder is when the symptoms carry on beyond [a] six-month period of time."[37] Hollings noted that this disorder began after Lynch committed embezzlement and after she lied, cheated, and misled her clients.[38] According to Hollings, at the time of her misdeeds, Lynch did not have any mental illness nor disorders.

[34]TR. page 13.
[35]TR. page 37.
[36]TR. page 36.
[37]TR. page 39.
[38]TR. page 18.

Lynch did not take any medications before or after her misdeeds, nor is she currently on medication.

Hollings testified that Lynch, from an early age would separate and distance herself from her emotions and behavior.[39] Hollings also noted that Lynch would be emotionally distant during her (Lynch's) criminal prosecutions and revocation.[40] When asked about Lynch's behavior during the Bar complaints, Hollings responded, "She, it was like she, she wasn't even fully aware that she was, she was just like in denial about it."[41] In addition, when Hollings was asked for reassurances as to whether Lynch would not commit the same mistakes, meaning she would not steal, lie, or ignore the Bar, Hollings stated that Lynch is much more in-tune with her emotions, shows an increased capacity to deal with challenges and to confront adversity, and recognizes her support system.[42]

Hollings further testified that Lynch took responsibility for her actions and took all the steps that she needed to do without having to be told to do so.[43] According to Hollings, Lynch initiated all of the repayment, CLE courses, and informing her friends and family on her own accord.[44] This testimony is based solely on self-reporting by Lynch, as Hollings did not seek outside affirmation as to whether Lynch was truthful or not.[45]

The Board was not persuaded by Hollings's testimony. In fact, the Board noted that Lynch needed to be compliant with her therapy as it was made a condition to her 2009 suspension. If Lynch failed to attend therapy on a regular basis, then it would violate the terms of the Virginia Bar's Order of Suspension.[46] In addition, Hollings was not aware that Lynch did

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[39] TR. page 18.
[40] TR. page 23.
[41] TR. page 23.
[42] TR. page 35.
[43] TR. page 33-34.
[44] TR. page 34.
[45] TR. page 21.
[46] Lynch Ex. A-1.

not repay the costs to the Bar until she (Lynch) filed for reinstatement and she (Lynch) was not forthcoming and completely truthful to her friends and family.

B. Lynch next testified on her own behalf. She stated that she graduated Wake Forest School of Law and passed the bar in October 2000.[47] She worked for various law firms and after 6 years of practice, she had a workload consisting of criminal, civil, and bankruptcy cases.[48] She also had one or more personal injury cases assigned to her.

Concerning the main case that led to her revocation, Lynch testified that she failed to timely refile a civil action after a nonsuit, was dilatory, and lied to her client, McGaha. In particular, she never told anyone that she failed to refile the civil action and lied to her client about the case. Lynch testified that she was over-whelmed with her work, but took the time to create the elaborate false negotiations between her client and the insurance company. She even went so far as to draft a false settlement statement agreement that the client ultimately signed. Most importantly, she embezzled approximately forty thousand dollars ($40,000.00) from her church and gave it to her client to satisfy the fabricated negotiations and the client's case.[49] Lynch, although she had funds of her own available to pay to the client, decided to steal the funds from her church as an alternative to dealing with capital gains had she cashed in on her own stock account. At that time, she had approximately one hundred thousand dollars ($100,000.00) worth of stock available, that she elected not to use until the church discovered that she stole the money.[50] It is clear to the Board that Lynch could have easily used her own money to satisfy the fraudulent transaction and settlement, if she intended to do so prior to being caught.[51] The Board finds that the reason why Lynch chose to steal from a church was because

[47]TR. page 68.
[48]TR. page 74-75.
[49]TR. page 168-170.
[50]TR. page 129-130.
[51]TR. page 130.

she did not want to use her own money and, but for being caught, might not have repaid the church. Lynch acknowledged that she also lied to the preacher at the church when the preacher first confronted Lynch about the church's treasury funds.[52] After the second time the preacher confronted Lynch, she finally admitted to the theft and put the money back in the church's treasury, which occurred approximately six (6) months after the theft.[53] When questioned why she did not immediately repay the church, Lynch replied, "I froze. It was part of the compartmentalizing that I was doing . . . but it was uncomfortable and hard to face that I had done that and so I kept putting it off."[54]

Lynch stated that in February 2009 she was fired from her then law firm and in her testimony appeared aggressively resentful regarding the manner by which she was discharged.[55] When questioned on why she had not apologized to her former boss, Pretlow, as Lynch put the firm's reputation at risk, she replied, "I hadn't thought that it was . . . something I should do."[56] "I don't feel like I wronged him."[57] It is clear to the Board that Lynch still has no appreciation for the severity of her actions, and, although an affirmative defense was not presented, it was clear to the Board that Lynch blames Pretlow for what occurred for his failure to supervise and mentor.

Lynch also revealed that she had not apologized to her client, McGaha, the one that received the forty thousand-dollar ($40,000.00) check. In fact, Lynch had failed to notify the client of the fraudulent transaction altogether. The client had expressed surprise to the Bar Investigator that the money he received was not for his settlement.[58] The Bar asked Lynch why she never contacted the client, to which her response was, "I didn't have a manner to. I mean, I

[52] TR. page 127.
[53] TR. page 129.
[54] TR. page 144-145.
[55] TR. page 145.
[56] *Id.*
[57] *Id.*
[58] *Id.*

guess I could have really dug into it to find him."[59] She noted, "He would deserve an apology from me for lying to him, but I haven't given it to him."[60] In addition, throughout her testimony concerning McGaha, Lynch constantly belittled her client and portrayed him in a negative light. The Board found that this tactic of Lynch's was an attempt to deflect the blame onto McGaha, which the Board found to not represent a person of honest demeanor and good moral character.[61]

While she is currently a paralegal in her father's office, Lynch aspires, should her license be restored, to practice as an attorney in her father's firm. Her father is seventy-eight (78) and is a well-respected attorney in the community. Should he retire or pass, Lynch does not have any plans on how to continue her work as an attorney.[62]

Lynch was and is actively involved in several community service projects and positions, such as: the Portsmouth Service League, the Points of View fundraiser, treasurer and youth director for St. John's Church, the Suffolk Jaycees, the Elizabeth River Garden Club, the Alumni Association for Nansemond-Suffolk Academy, the lawyer hotline for the Suffolk Bar Association, member for the Suffolk Bar Association, and the I'Anson-Hoffman Inn of Court.[63] Lynch participated in all of these activities while she received her Bar complaints. The Board took note that Lynch was able to excel in all of her community service, albeit while neglecting her clients. Lynch claimed that the reason she was able to excel at community service activities was because the community service was not as intricate as it appeared and "to be a good lawyer, [you] have to be a well-rounded person."

In sum, the Board heard testimony from Lynch that she was angry at her employer concerning the manner in which she was discharged, mystified that she was indicted

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[59] TR. page 145.
[60] TR. page 149-150.
[61] TR. Page 170-171.
[62] TR. page 149-150.
[63] TR. page 133-136.

inasmuch as the church had forgiven her regarding her embezzlement, and failed to offer an apology for putting her former firm's reputation at stake. In addition, Lynch failed to inform McGaha that she lied to him and gave him a false settlement with stolen money, all the while belittling him throughout her testimony. The Board notes that Lynch created and executed an elaborate scheme, even though she stated she was overwhelmed at work. She could have easily notified the malpractice insurer or ask for assistance from her employer, father, or attorney friends. Instead Lynch dedicated an inordinate amount of time to false negotiations and settlement agreements, going to a bank to take money from the church, and meeting McGaha to give him the money. The Board, who observed the demeanor of Lynch, unanimously finds that Lynch does not accept full responsibility for her behavior and was not completely candid in discussing her behavior with witnesses who testified on her behalf. Simply stated, Lynch did not believe she was solely responsible for her bar complaints and embezzlement charges.

C. John L. Rowe, a longtime friend of the Lynch family and current mayor of Portsmouth Virginia also testified on behalf of Lynch. He testified that Lynch had a good reputation, was a hard worker, well-liked, of good character, and was helpful in assisting him with his political campaign.[64] Rowe testified that Lynch had an outstanding reputation in the community as to her trustworthiness and opined that she was fit to practice law, and is an asset to the community.[65] However, his testimony also revealed that Lynch was not entirely truthful or forthcoming with him. Lynch never informed Rowe that she was asked to step down from the Board for the Portsmouth Service League due to her embezzlement charges.[66] He was aware of Lynch's embezzlement, but only because he discovered the report in the newspaper, not because

[64] TR. page 194-195.
[65] *Id.*
[66] TR. page 203-204.

Lynch discussed the matter with Rowe.[67] Lynch also failed to disclose her previous suspension and Bar complaints to Rowe.[68] He only became aware of this information during the preparation for this hearing, as Lynch never formally discussed this matter with him.[69] The fact that Rowe only discovered that Lynch had previous suspensions and Bar complaints because he was being prepped for this hearing does not illustrate a person of good moral character. The Board finds that Lynch's lack of candor to Rowe are not the actions consistent with a person with a positive reputation and good standing within the community.

D. Lynch called her fourth witness, longtime friend, Krista McAninley. McAninley has been an attorney for approximately seventeen (17) years, and is currently working for the Norfolk Southern Railway.[70] She testified in support of Lynch's reinstatement, opined that Lynch was well respected, "knows what's right and what's wrong", competent, and an extremely hard worker.[71] She also stated that there was "a complete lack of support" at Lynch's firm.[72] McAninley's testimony demonstrated that rather than accepting responsibility for her actions, Lynch blamed her firm. Lynch informed McAninley about the embezzlement, yet fabricated to McAninley that the money was put back before anyone found out.[73] In addition, Lynch also did not inform McAninley that she (Lynch) was suspended by the Court of Appeals or about the list of Bar Complaints pending at the time she submitted her Consent to Revocation.[74] The Board finds McAninley's testimony was unpersuasive and if anything, proved that Lynch did not even tell the total truth to her closest friend.

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[67] TR. page 204.
[68] *Id.*
[69] *Id.*
[70] TR. page 207-208.
[71] TR. page 211-212.
[72] TR. page 210.
[73] TR. page 216.
[74] TR. page 217.

E. Anna Irvine, a friend of Lynch's since they were both approximately ten (10) years old, testified in support of reinstatement. Irvine is a government contractor specializing in weapons' systems and has a top security clearance.[75] Irvine's last security review was in 2009, and Lynch was on Irvine's list for people who knew Irvine well. Irvine testified that Lynch is one of the finest people she knows and is, in her opinion, beyond reproach and would refer clients to her should she be reinstated.[76]

F. Benjamin Lynch, Lynch's father, testified in support of his daughter's reinstatement. He stated that he is a licensed attorney and Lynch currently works as a paralegal at his law firm.[77] He stated that, "[Ms. Lynch] has been a performer, a pleaser, one who has been highly thought of."[78] He noted he would provide employment for her should she be reinstated; however, he is seventy-eight (78) years old and did not propose a plan of what would happen to Lynch should he retire or pass away.[79] Mr. Lynch testified that he was made aware of the embezzlement charge, but only after it had been reimbursed, a period of two (2) years later.[80] At the time of Lynch's embezzlement charge, Mr. Lynch was renting a space in a building shared by Pretlow and his firm.[81] Mr. Lynch expressed animosity, bewilderment, and aggression toward Pretlow and stated in effect that had the employer just come to him (Mr. Lynch), he would have "taken care of things" and resolved Lynch's embezzlement without any criminal charges.[82] When questioned whether Mr. Lynch would comply with The Rules of Professional Conduct, Rule 8.3, Reporting Misconduct, Mr. Lynch did not affirmatively state he would have

[75] TR. page 220.
[76] TR. page 224.
[77] TR. page 226.
[78] TR. page 234.
[79] TR. page 149.
[80] TR. page 245.
[81] TR. page 230.
[82] TR. page 231-234.

reported Lynch's conduct.[83] It is clear to the Board that Mr. Lynch is protecting his daughter, and as admirable as this may be, Lynch did not inform her father of the embezzlement as her father discovered the charges two (2) years later. Moreover, Lynch did not seek her father's assistance, while she was overloaded with cases, being sent numerous Bar complaint letters, or even when she contemplating stealing from a church. All of this occurred when Lynch and Mr. Lynch were working in the same building. While this Board has no doubt the love Mr. Lynch has for his daughter and would do anything to protect her; this Board is quite concerned that should Lynch become overwhelmed, she has no plan in place to protect the public.

Per the Rules, the Board allowed Mr. Lauck the opportunity to testify against Lynch.

G. Mr. Lauck, a former client of Lynch testified briefly. He stated that should Lynch be reinstated, he would hope for restitution from her. Lauck complained regarding Lynch's prior representation in that she abandoned his matter and caused him some unspecified damages.[84]

The Bar called one (1) witness.

H. The Bar called as its witness, the investigator, Ronald Pohrivchak. He testified that at the time of revocation, Lynch had eleven (11) pending bar complaints including, but not limited to, missing appeal deadlines, lying to clients, and failure to communicate with clients.[85] When the Pohrivchak interviewed Lynch in 2009, "She agreed she might have made some mistakes, but she did not believe there was any misconduct."[86]Pohrivchak also interviewed Lynch's prior employer, Pretlow, who fired Lynch as a result of her embezzlement. Pretlow was upset that Lynch did not come to him if she felt pressured or had other problems and vehemently denied Lynch's claims that he failed to mentor her.[87] Pretlow further stated that he would not

[83]TR. page 246-247.
[84]TR. page 250-255.
[85]TR. page 258.
[86]TR. page 258.
[87]TR. page 259.

trust or hire Lynch again.[88] Lastly, Pohrivchak testified that Lynch's wronged client, McGaha, was not made aware that the money was embezzled, nor did Lynch have any contact with him after the embezzled money was given to McGaha.[89]

7. Lynch's familiarity with the Virginia Rules of Professional Conduct and her current proficiency of the law.

Lynch testified, with no contradictory evidence, that she has taken eight-two and one half (82.5) hours of continuing legal education.[90] There is credible evidence that she is proficient in the law especially in that she has been employed as a paralegal in her father's office since her revocation.

8. The sufficiency of punishment undergone by Lynch.

Lynch's license has been revoked for eight (8) years. Her criminal charges were dropped from a felony to a misdemeanor, and she served a twelve (12) month sentence with twelve (12) months suspended and was on probation for three (3) years.[91] The Board found this to be a light sentence given all of Lynch's serious infractions and the grand larceny embezzlement.

9. Lynch's sincerity, frankness, and truthfulness in presenting and discussing factors related to her revocation and reinstatement.

It is apparent from her testimony and evidence presented, that Lynch is remorseful and embarrassed by her behavior leading to the discovery that she embezzled money from her church. However, the Board unanimously finds that Lynch does not fully accept blame for her illegal conduct, and, the actions she took to protect herself from what would have been a malpractice claim. In addition, Lynch apparently believes that since McGaha received forty thousand dollars ($40,000.00) that he may not have been entitled to, he was not a victim, rather she believes the victim was her own money. The Board also unanimously finds that Lynch was

[88] TR. page 260.
[89] TR. page 260-261.
[90] Lynch Ex. B.
[91] VSB Ex. 5.

selective in what she told others, much to her detriment. In particular, Lynch was not completely candid with her own witnesses regarding her history of bar complaints, her prior disciplinary record, and her suspension from the practice before the Court of Appeals of Virginia.

10. **The impact upon public confidence in the administration of justice if Lynch's license to practice law is restored.**

The Board gives much weight to this factor as the Rules do not require the factors be weighed equally or one such factor should be weighed more than another. The Board finds that the public's confidence in the administration of justice would be undermined and damaged should Lynch's license be restored. Not only was Lynch found guilty of a very serious crime, she also demonstrated a noteworthy lack of candor, professional responsibility, deceptiveness, and at least two (2) serious breaches of a fiduciary obligation and responsibility.

Lynch has a lengthy and significant history of bar complaints, there being eleven (11) pending when she consented to the revocation of her license in 2009.

The Board determines, after observing the demeanor and nature of Lynch's testimony, that Lynch does not fully accept the blame and responsibility for her dishonest behavior. Additionally, she was not completely candid in her disclosures to at least four (4) of the witnesses who appeared before the Board in support of recommending reinstatement, those being: Hollings, Rowe, McAninley, and Mr. Lynch.

The impact upon public confidence in the administration of justice if Lynch's license is restored, the Board, by unanimous vote, finds that reinstatement would have an adverse effect given Lynch's severity of violations, the cover up of the embezzlement for a period of approximately six (6) months, the finding of contempt by the Court of Appeals, and the pending, yet unresolved eleven (11) additional complaints made against Lynch.

IV. RECOMMENDATION

Accordingly, the Board unanimously finds that Lynch has not proven, by clear and convincing evidence, that she is a person of honest demeanor and good moral character and that she possesses the requisite fitness to practice law in the Commonwealth of Virginia. Therefore, the Board respectfully recommends to the Supreme Court of Virginia that Lynch be denied reinstatement of her license.

As required by Part Six, Section IV, Paragraph 13-25(6)(e)(ii), of the Rules of the Supreme Court, the Board finds that the costs of these proceedings are as follows:

Court Reporter Fees:	$1,751.75
Mailing Fees:	$ 24.16
Legal Notice (Richmond Times-Dispatch)	$1,092.02
Administrative Fee:	$1,500.00
Medical Records	$ 74.50
Total:	$4,442.43

It is further **ORDERED** that the Clerk forward this Order of Recommendation and the record to the Supreme Court of Virginia for its consideration and disposition.

It is further **ORDERED** that the Clerk shall mail an attested copy of this Order to the Petitioner, Anne Marston Lynch (Wilbur), by certified mail, return receipt requested, at her address of record with the Virginia State Bar, 425 Sussex Drive, Portsmouth, Virginia 23707, and her counsel, Michael L. Rigsby, and hand deliver to Kathryn R. Montgomery, Deputy Bar Counsel, 1111 East Main Street, Suite 700, Richmond, Virginia 23219.

This Order is final.

ENTERED THE 8th DAY OF FEBRUARY, 2018.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Sandra L. Havrilak

Digitally signed by Sandra L. Havrilak
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Sandra L. Havrilak, Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF JOSEPH DEE MORRISSEY
VSB DOCKET NO. 11-000-084602

ORDER OF RECOMMENDATION

This matter came on to be heard on April 22, 2011 and May 10, 2011 before a panel of the Virginia State Bar Disciplinary Board. On April 22, 2011 the Board convened at the Worker's Compensation Commission-courtroom A, Second Floor, 1000 DMV Drive, Richmond, Virginia 23220. On May 10, 2011, the Board reconvened at the State Corporation Commission, 1300 East Main Street, Richmond, Virginia 23219, hearing room A. The Board was comprised of William E. Glover, Chair, Pleasant S. Brodnax, III, Richard J. Colten, Sandra Lea Havrilak, and Stephen A. Wannall, lay member. On Day 1, Petitioner Joseph Dee Morrissey (hereinafter "Morrissey"), was present, with his counsel, Edward B. Lowry. The Virginia State Bar appeared by its counsel, Edward L. Davis, Bar Counsel and Paulo E. Franco, Assistant Bar Counsel. Proceedings in this matter were transcribed by Tracy J. Stroh, a registered professional reporter, Chandler and Halasz, Court Reporters,

Post Office Box 9349, Richmond, Virginia, 23227, (804) 730-1222[1]. The court reporter was sworn by the Chair, who then inquired of each member of the panel as to whether they had any personal or financial interest or bias which would interfere with or influence that member's determination of the matter. Each member, including the Chair, answered in the negative; the matter proceeded.

The Chair advised Morrissey and the Bar how the hearing would proceed and they were specifically advised that Morrissey had the burden of proving by clear and convincing evidence that he is a person of honest demeanor and good moral character and that he possesses the requisite fitness to practice law, and, that he complied with the other requirements of Part Six, §IV, ¶13-25 of the Rules of the Supreme Court of Virginia. Both sides were afforded an opportunity to raise any questions or objections they might have about the procedure as outlined by the Chair.

The Chair advised everyone that there would be conference calls that would be placed first and everyone agreed to the conference call protocol. The Bar requested a rule on witnesses, which was granted. Prior to the hearing, the Clerk of Disciplinary System provided Notice to all interested parties by mail and press releases as required by Part Six, §

[1] Hearing Transcript 1 (hereinafter " Tr.1") refers to the transcript dated April 22, 2011; and, Hearing Transcript 2 (hereinafter "Tr. 2") refers to the transcript dated May 10, 2011

IV, ¶13-25(J)(5). In response to the Notice, the Board received numerous letters in support or opposition of Morrissey's reinstatement.

Morrissey testified on his own behalf at the hearing; although he left before the Board announced its decision. Additionally, the Board heard from General Robert B. Newman, Jr.; John F. Berry, Jr; Clovia Lawrence; Jerry Cable; and John Stokes McCune. Those witnesses were offered as Petitioner's character witnesses. Additionally, Morrissey presented testimony from the following fact witnesses: John O'Keeffe, Denis Mockler, and Congressman Morgan Griffith, by telephone; Dennis Gallagher; Delegate Ward Armstrong; Delegate Riley Ingram; Delegate Harvey Morgan; Reverend Joe Ellison; Jerry Cable; Mark Jones; John Dixon; C.T. Woody, Jr.; Dawn Stowers; Alfred Ray Collins, III; Gary Hershner; Larry Catlett; James Maloney; and, Sherri Thaxton; all appeared in person to testify on behalf of Morrissey.

The Virginia State Bar presented the testimony of Tina Bertenshaw; Janet Roberts; Thomas H. Roberts.

In accordance with the Rules, the Bar received requests by members of the public, who wished to be heard. David Baugh testified on the first day; and, Guy Kinman testified on the second day. Morrissey's exhibits 1 through 21 and 37 were admitted into evidence without

objection. Morrissey's exhibits 22 and 23 were admitted into evidence over the Bar's objections. Exhibits 24 through 36 were not admitted into evidence.

Virginia State Bar exhibits 1 through 5 and 7 through 18 were admitted into evidence without objection. Virginia State Bar exhibit 6 was admitted into evidence over Morrissey's objection. Exhibit 13, the video of Morrissey's interview after the first day of the hearing was previously admitted, subject to the Bar presenting it in its original form to Morrissey. The audio of the interview was received and transcribed by the court reporter. The record, as provided by the Clerk of the Disciplinary System was also reviewed as part of this reinstatement hearing.

I. BACKGROUND

A. Morrissey graduated from the University of Virginia with a Bachelor of Science in Economics in 1979; he received his juris doctorate from Georgetown University in 1982 and was admitted to practice law in 1983. He also received his Masters of Law (LL.M.) from Trinity College, Dublin, Ireland, in 2003.

B. Morrissey was in private practice from 1983 until 1989. He was elected Commonwealth Attorney for the City of Richmond in 1989 until 1993.

C. He returned to private practice in 1993; and, practiced law until he was suspended for 3 years in 1999.

D. Morrissey was a law school lecturer at Dublin Institute of Technology from September 2001 - September 2003; law school lecturer at Portobello College, Dublin, from September 2001 - September 2002; University of Dublin, Trinity College, guest lecturer, 2002-2003; University of Adelaide, South Australia, law lecturer, 2004; New South Wales, Crown Prosecutor's Office, Sydney, Australia.

E. He was the owner/operator of TLC Residential Services in Richmond, 2007-2010; and, former part-owner of JDM of Va, LLC, trading as Adult Day Service of South Richmond, 2001-2005. (Virginia State Bar (hereinafter "VSB") Exhibit 1).

F. The Disciplinary record of Morrissey reflects the following:

1) On April 25, 2003, the Virginia State Bar Disciplinary Board revoked Morrissey's license to practice law for failing to comply with the obligations imposed by Part Six, § IV, ¶13(K)(1) of the Rules of the Supreme Court of Virginia, as amended, to give timely notice of the suspension of his law license to his clients, opposing counsel and courts before which matters were pending; to make appropriate arrangements in compliance with the wishes of his clients; and, to furnish proof thereof to

the Virginia State Bar. This action, derived from the suspension imposed upon him in a proceeding styled: *Virginia State Bar, ex. rel., Third District Committee, Section Two, Joseph D. Morrissey*, Chancery Number HK, 1655 (Richmond Circuit Court February 18, 2000).

At the time of the hearing that resulted in the revocation of his license, Morrissey's prior disciplinary record (received into evidence by the Disciplinary Board at the April 25, 2003 revocation hearing) included three dismissals with terms, one private reprimand, one public reprimand, a six month suspension, a three year suspension, and a Show Cause Summary Suspension of his law license based on his disbarment by the United States District Court for the Eastern District of Virginia. (The Show Cause matter was dismissed subject to the agreement described in paragraph 9 hereinbelow.)

2) A dismissal with terms in April 1990 that required him to attend the Virginia State Bar Professionalism Course and certify that he would establish and maintain a trust account if he returned to private practice.

3) A dismissal with terms in September 1990 that required him to attend two (2) hours of legal ethics training after findings that he

represented a criminal defendant in the same manner for which he previously prosecuted him while serving as a Commonwealth Attorney.

4) A private reprimand in December 1990 for failing to perfect two (2) criminal appeals and for failing to keep the client reasonably informed about them.

5) A public reprimand in March 1992 for his involvement, while serving as a Commonwealth Attorney, in a fist fight with opposing counsel in a criminal trial conducted in the Circuit Court of the City of Richmond. Morrissey appealed the decision, which was affirmed by the Virginia Supreme Court. *Morrissey v. Virginia State Bar*, 260 Va. 472, 538 S.E.2d 677 (2000).

6) A dismissal with terms in June 1993 that required him to write a letter of apology to the presiding judge in a case in which he, while serving as a Commonwealth Attorney, amended a felony warrant of arrest for drunk driving down to a misdemeanor reckless driving without leave of court.

7) A six month suspension in December 1993 for misconduct that constituted, "dishonesty, fraud, deceit, or misrepresentation" in arranging a plea bargain in a rape case in which the charge was reduced to a misdemeanor and the Defendant's father paid $25,000.00 to the

victim and $25,000.00 to charities designated by Morrissey while Morrissey was serving as Commonwealth Attorney. Morrissey concealed this portion of the agreement from the victim, who had indicated to Morrissey that she wanted more than $25,000.00 as an "accord and satisfaction." This decision was appealed by Morrissey and affirmed by the Supreme Court of Virginia. *See Morrissey v. Virginia State Bar*, 248 Va. 334, 448 S.E.2d 615 (1994).

8) A three year suspension in December 1999 deriving from his conviction on 2 counts of contempt for violating Local Criminal Rule 57(C) of the United States District Court for the Eastern District of Virginia (hereinafter "Local Rule 57(C)"), making public statements about the identity, testimony or credibility of prospective witnesses, for which he was sentenced to 90 days in prison, followed by three years of probation, and a third citation of contempt for his angry outburst directed at the presiding judge during the sentencing hearing in the Chesterfield County Circuit Court. This decision was appealed by Morrissey and affirmed by the Supreme Court of Virginia. *Morrissey v. Virginia State Bar*, 260 Va. 472, 538 S.E.2d 677 (2000).

9) A Show Cause summary suspension of his license in October 2002 deriving from his disbarment from practice in the U.S. District Court

for Eastern District of Virginia, effective December 21, 2001, in which the court addressed the matter set forth in paragraph 8 hereinabove and Morrissey's subsequent violations of his conditions of probation (attempting to circumvent the conditions of probation and lying to a probation officer), resulting in an additional ninety day jail sentence and the revocation of his probation. *In re: Joseph D. Morrissey*, 305 F.3d 211 (4th Cir. 2002). In exchange for Morrissey's withdrawal of the appeal of the April 2003 revocation of his law license, the Virginia State Bar dismissed the Show Cause matter.

10) In addition to Morrissey's disciplinary record with the Virginia State Bar, on December 21, 2001 the United States District Court for Eastern District of Virginia entered an order disbarring Morrissey from practicing before the Eastern District of Virginia. At that time, the court recited Morrissey's disciplinary and criminal history including a contempt of court finding on March 24, 1986 in the Richmond Circuit Court for berating the judge and continuing to argue after the court's ruling[2].

In December 1987 the Henrico County Circuit Court twice cited Morrissey for contempt in the same trial, fining him $50.00 for the first violation, $100.00 for the second violation. *See Commonwealth v.*

[2] The Court subsequently vacated this conviction after Morrissey submitted a written apology. *See Commonwealth v. Miles*, #86-F-129 (Va. Cir. Ct. March 24, 1986); *Morrissey v. Virginia State Bar*, 260 Va. 472, 538 S.E.2d 677, (2000).

Walker, # 87-F-1143 (Va. Cir. Ct. Dec. 18, 1987); *Morrissey v. Virginia State Bar*, 260 Va. 472, 477, 538 S.E.2d 677, 680. The United States Court of Appeals affirmed the disbarment on September 11, 2002. *In re: Morrissey*, 996 F.Supp. 530 (E.D. Va. 1998), *aff'd* 188 F.3d 134 (4th Cir. 1999). In that decision, the court recited the fact that Morrissey was found to have violated the terms and conditions of his probation, which required that he should "answer truthfully all inquiries of the probation officer," and violating 18 U.S.C. §1001, both violations having been committed by the making of false statements to a United States Probation Officer and such acts were charged to have constituted misconduct within the meaning of Rule 102(A)(4).

The court recited again the 1986 finding in the Circuit Court of the City of Richmond for berating the judge and continuing to argue after the court's ruling; December 1987 and May 1988 findings for three occasions of contempt in the Circuit Court of Henrico County; two (2) 1990 disciplinary proceedings before the Virginia State Bar Disciplinary Committee, one of which was dismissed on terms, the other of which was affirmed; a July 1991 sentence of 5 days in jail for writing a threatening letter to a judge of the General District Court of the City of Richmond; a December, 1991 reprimand for engaging in a fist fight with opposing

counsel in a criminal trial in the Circuit Court of the City of Richmond; in August 1993 a dismissal upon apology to the trial court for amending a felony arrest warrant without leave of court; a 1993 six (6) month suspension from the practice of law by a three judge Virginia Court for his handling of a guilty plea in a rape case as Commonwealth's Attorney; October 1997 fine and jail sentence in the Circuit Court of Chesterfield County for an angry outburst directed at the presiding judge during a sentencing hearing; and, the probation revocation proceeding in the U.S. District Court.

In the case that resulted in his license revocation from the federal court, while representing one Joel Harris, a man of some political prominence who faced federal charges of drug distribution, Morrissey interviewed witnesses in the trial who had testified before a grand jury. Morrissey videotaped the interview in which a witness recanted part of his grand jury testimony. Morrissey arranged for a press conference to release the interview. For this, he was tried in the District Court and found guilty of violating Local Rule 57(C) prohibiting the defense from releasing or authorizing the release of any extrajudicial statement which a reasonable person would expect to be further disseminated by public communication. Morrissey was sentenced to ninety days in prison

followed by 3 years of probation. *In re: Morrissey*, 996 F. Supp. 530 (E.D. Va. 1998), *aff'd*, 168 F.3d. 134 (4th Cir. 1999) cert. denied, 527 U.S. 1036 (1999).

The court further went on to describe that while on probation, Morrissey got into a dispute with a home repair contractor who was working at the home of Morrissey's associate. This resulted in a fist fight in which Morrissey badly injured the contractor [Gary Wycoff]. His bond was revoked. He was subsequently placed on probation and ordered to perform three hundred hours of community service. Fifty hours of those services were to be performed for the Habitat for Humanity. Morrissey attempted to have the Director of the Habitat for Humanity sign off on community service that was not accurate and not in compliance with his probation. When confronted by his probation officer, Morrissey denied ever asking the director to sign his timesheets inappropriately. Morrissey was found guilty and he was sentenced to serve an additional ninety days in jail.

At that time, a three judge Federal Rules of Disciplinary Enforcement (hereinafter "FRDE") district court in the case found that Morrissey's action in the Harris affair and his long record of professional difficulties merited disbarment and entered its order disbarring Morrissey,

finding that Morrissey had a "long track record of severe ethical problems" in the state court extensively compounded by his misconduct before the District Court. *In re: Joseph D. Morrissey*, 305 F.3d 211, 215 (4th Cir. 2002). The gist of the FRDE court's opinion is quoted in the U.S. Court of Appeals case, which affirmed the district court's opinion, and stated as follows:

> Morrissey's lack of candor, of outright dishonesty, in dealings with this Court and those responsible for supervising the performance of his sentence is wholly unacceptable from an officer of the court. This Court and the public are entitled to rely on the honesty, integrity, and civility of counsel. Morrissey, however, has conclusively shown himself unworthy of this trust. Regardless of his past contributions to the community and the bar, Morrissey's proclivity for unprofessional and unethical conduct, his lack of candor before Judge Payne, the probation officer, and this panel, and his failure to acknowledge his misconduct renders him unfit to practice before the judges of this district.

Id. at 215.

11. On July 2, 2010, Morrissey filed his Petition for Reinstatement of Bar License. Although an affidavit was attached, the notary attested to it after her commission expired. (Morrissey Ex. 2).

II. FINDINGS

In accordance with Part Six, § IV, ¶13-25(D)(1-6), after revocation, the petitioner's license to practice law shall not be reinstated unless the petitioner proves by clear and convincing evidence as follows:

- Within five (5) years prior to filing the petition has attended sixty (60) hours of continuing legal education, of which at least ten (10) hours shall be in the area of legal ethics or professionalism;
- Has taken the Multistate Professional Responsibility Examination and received a scaled score of 85 or higher;
- Has reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of Petitioner's Misconduct;
- Has paid the Bar all costs previously assessed against him, together with any interest thereon at the judgment rate;
- Is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law.

In considering the final factors, the Board is guided by the factors set forth in *The Matter of Alfred Lee Hiss*, Virginia Supreme Court, Docket No. 83-26, opinion dated May 24, 1984:

1. The severity of the petitioner's misconduct including, but not limited to, the nature and circumstances of the misconduct.
2. The petitioner's character, maturity and experience at the time of his disbarment.
3. The time elapsed since the petitioner's disbarment.
4. Restitution to clients and/or the Bar.

5. The petitioner's activities since disbarment including, but not limited to, his conduct and attitude during that period of time.
6. The petitioner's present reputation and standing in the community.
7. The petitioner's familiarity with the Virginia Rules of Professional Conduct and his current proficiency in the law.
8. The sufficiency of the punishment undergone by the petitioner.
9. The petitioner's sincerity, frankness and truthfulness in presenting and discussing factors relating to his disbarment and reinstatement.
10. The impact upon public confidence in the administration of justice if the petitioner's license to practice law was restored.

The evidence has shown that Morrissey is required to prove that within five years prior to filing the petition, he had attended sixty hours of continuing legal education, of which at least ten hours shall be in the area of legal ethics and professionalism. At the time Morrissey applied for reinstatement of his license, he only completed forty eight and one half (48.5) hours of continuing legal education; two and one half (2.5) of which were in the area of legal ethics and professionalism. Therefore, at the time he filed his Petition he did not have the requisite CLE hours; however, at the time of the hearing, he had completed sixty six and one half (66.5)hours of continuing legal education, eleven and one half (11.5) hours in legal ethics.

Morrissey is required to have taken the Multistate Professional Responsibility Examination and received a scaled score of 85 or higher. The record produced by the National Conference of Bar Examiners/Multistate Professional Responsibility Examination unofficial record showed Morrissey took the exam in August 2010, and received a scaled score of 90.

Morrissey was not required to reimburse the Bar's Clients' Protection Fund for any money it may have paid as a result of Petitioner's misconduct. Bar Counsel stipulated that Morrissey does not owe any money to the Clients' Protection Fund.

Morrissey was also required to prove that he paid the Bar all costs previously assessed against him together with any interest thereon. Prior to filing his application, Morrissey failed to meet that requirement. As of June 21, 2001, Morrissey owed $2,482.60 in costs and $102.23 in interest as a result of the final December 29, 1999 order of the Circuit Court of the City of Richmond. On June 21, 2001 an Order of Administrative Suspension was imposed. Morrissey paid $2,482.60 on December 28, 2001 and the remaining balance of $102.23 was received on December 9, 2010 from the Department of Taxation Debt Set Off Program. At the time of the hearing all costs were paid.

In order to determine whether or not Morrissey is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law, the Board considered the factors set forth in the *Hiss* case as follows:

1. The severity of the petitioner's misconduct including, but not limited to, the nature and circumstances of the misconduct.

Morrissey's disbarment was a culmination of a lengthy series of hearings, trials and appeals that involved findings of misconduct, contempt of court, sanctions of imprisonment, suspension, and disbarment. All of his disciplinary record has been set forth hereinabove. The circumstances of that misconduct involve a history of aggressive practice, self-interest, and a marked lack of respect for the administration of justice. It is apparent from his disciplinary record that Morrissey had many opportunities since 1983 to learn from his errors. It is clear from the testimony he presented, his petition and the disciplinary records set forth by the Bar that Morrissey does not appreciate the severity of his own misconduct.

2. The Petitioner's character, maturity and experience at the time of his disbarment.

Morrissey was disbarred on April 23, 2003. Morrissey did not appear at the hearing. (Morrissey Ex. 1). At that time he had been practicing law for 20 years, having been admitted to practice in 1983. He had substantial experience as an attorney, including in private practice, as well as being elected as a Commonwealth Attorney for the City of Richmond in 1989. (Tr. 1 at 224). Based on his disciplinary record, his character at that time was severely lacking. While he had years of legal experience and a wide breadth of knowledge, his character and maturity of judgment were s lacking based on his conduct described herein. His Virginia State Bar record reflects a person who has engaged in both deliberately wrongful acts and acts of selfish disregard for the rights of others.

3. The time elapsed since the petitioner's disbarment.

Morrissey's license to practice law was revoked on April 25, 2003; however, he has not practiced law since December, 1999 when he was suspended for 3 years by order of a three judge panel, that was affirmed by the Virginia Supreme Court. Therefore, significant time has lapsed since Morrissey's disbarment.

4. Restitution to clients and/or the Bar.

Morrissey did not owe any restitution to any clients or to the Bar at the time of his application.

5. The petitioner's activities since disbarment including, but not limited to, his conduct and attitude during that period of time.

Prior to Morrissey's disbarment, but during his suspension, he moved to Dublin, Ireland with the intent to teach law school. (Tr. 1 at 239). At that time, he met with Bruce Caralon of the Dublin Institute of Technology, which had a law school attached to it. He also taught at Portobello College, a private college in Dublin. While teaching, he decided to pursue his Master's in Law and was accepted at the Trinity College of Dublin. (Tr. 1 at 240). During that time, he also continued as a lecturer at Trinity College, Dublin. In 2004, Morrissey completed his Masters in Law degree. According to John O'Keeffe, Morrissey contacted him via email in 2001 to see if he could get a job teaching. (Tr. 1 at 47).

While lecturing at Portobello College, Morrissey taught the law of evidence and trial advocacy. According to Mr. O'Keeffe, the students really liked Morrissey; and, the lectures he conducted were well attended by faculty as well as students. O'Keeffe went on to describe Morrissey as the best lecturer in the college that he had seen. (Tr. 1 at 48). According to Mr. O'Keeffe, Morrissey advised him of his past troubles with the Virginia State Bar. (Tr. 1 at 51). He also recalled that after hiring

Morrissey, there was an article that appeared in the Irish Times about his troubles.

When the article was published, Morrissey went to Mr. O'Keeffe and wanted to be sure that everything was okay. According to Mr. O'Keeffe, he knew about the problems raised in the paper prior to it being published. (Tr. 1 at 52). Mr. O'Keeffe could not recall with specificity the problems Morrissey reported but believed he knew of Morrissey's past problems. (Tr. 1 at 54). He also informed Mr. O'Keeffe of the assault and battery case against him. (Tr. 1 at 57).

Morrissey testified that when he went to Ireland he met with Bruce Caralon and subsequently Mr. O'Keeffe. According to Morrissey, he told Mr. O'Keeffe because they became colleagues – and over some period of time – explained what happened in the United States, that he has been suspended and the reasons for the suspension. (Tr. 1 at 241). According to Morrissey, upon obtaining his LL.M. he began teaching as a casual lecturer at the University of Adelaide. (Tr. 1 at 242). After returning from one of his breaks to the United States and returning to Dublin, someone called and told Mr. O'Keeffe that Morrissey was suspended and they told Bruce Caralon the same thing. (Tr. 1 at 243). The Irish Times published an article regarding the suspension. Morrissey

testified that he left Ireland to go to Australia because of the weather. (Tr. 1 at 247). He denied ever seeking membership in the Bar of Ireland. While in Australia he taught trial advocacy at the University of Sydney and the University of Western Sydney. He did not have to submit any written applications.

According to Morrissey, after his first year at Portobello College, someone called from the United States asking Mr. O'Keeffe if he knew that he had someone teaching trial advocacy at Portobello who was suspended in Virginia. (Tr. 1 at 243). The same thing happened at Dublin Institute of Technology. Even after the article appeared in the Irish Times, Morrissey continued to teach at both schools. Morrissey did not recall ever putting his history with the Virginia State Bar in writing when he applied for the positions; however, he testified that he orally advised them about his history. (Tr. 1 at 246).

The Board also heard from Denis Mockler. Mr. Mockler's partner, Mr. Cuddy, assisted Morrissey in applying to be a member of the New South Wales Bar. (Tr. 1 at 64). Mr. Cuddy assisted Morrissey in preparing and submitting his application to the Legal Practitioners' Admission Board, a body that investigates the application process. (Tr. 1 at 65).

On or about January 20, 2005, Morrissey completed his Statutory Declaration seeking admission as a legal practitioner in the State of New South Wales. (Morrissey Ex. 8). In that Statutory Declaration, he admitted that he had two matters that he wanted to bring to the Board's attention. The first matter, involved his suspension of practicing law for six months as a result of his role in the rape trial that, as Commonwealth Attorney, he amended it to an assault and battery case and resolved it by accord and satisfaction. (*See* paragraph 7 hereinabove). According to Morrissey's Declaration, based on that case, he was charged and prosecuted on an alleged bribery charge, which was dismissed but Morrissey alleges that it was the notoriety of the charge and the trial that caused the Virginia State Bar to suspend his license. (Morrissey Ex. 8).

The second matter he disclosed was the charge that resulted in his jail sentence of 60 days in federal court for giving an interview to the press in violation of the local rules. Morrissey disclosed that he was convicted twice out of this matter for contempt of court and sentenced 30 days on the first charge and 60 on the second. He also advised that his license was suspended for three years as a result of his convictions. (Morrissey Ex. 8). Morrissey also advised the Board in Australia that he

was subsequently revoked due to his failure to notify his clients of the suspension, even though, according to Morrissey, he did in fact notify his clients. He never mentioned the Show Cause that was pending at the same time; and, subsequently dropped by the Virginia State Bar. In conclusion of his application, Morrissey stated that "[i]n support of my application, I request the Board take into account what I respectfully submit to the Board was a political campaign in my home state to have me neutralised as a practicing lawyer. . ." (Morrissey Ex. 8).

Upon request of the Board investigating Morrissey's application, he submitted another affidavit to the Supreme Court of New South Wales, Sydney Register, Commonlaw Division on or about August 17, 2005. In that application he confirmed the truth and substance of his submissions previously made to the Board, which were "read and approved by me before dispatch." (Morrissey Ex. 8). Morrissey went on to explain the other parts of his Virginia State Bar record. In this affidavit, Morrissey, in discussing his 1993 suspension following the plea bargain in the rape case, stated, "I consider, in light of the rejection of the criminal charges, that I was dealt with unfairly by the Bar and the Supreme Court of Virginia." (Morrissey Ex. 8).

Morrissey went on to state that, "I have not done anything likely to affect adversely my fame and character or which might affect my fitness to practice." Morrissey also stated, "[i]n the United States, action for contempt in the face of the court, is meted out regularly and routinely. Gaoling is quite rare, but in my case, after my appointment in 1989, I was a high profile candidate and open to hostile political action. This is perhaps evidenced best by their reaction to the fist fight with the contractor. In less than a week after the assault, I was referred to Judge Payne. This even before I was charged with any offense." The Virginia Bar noted but did not look to the federal disbarment as sustaining it or justifying its action in 2003. (Morrissey Ex. 8). The Legal Practitioners Admissions Board recommended on April 18, 2005 and June 20, 2005 that the Board declare that it is satisfied that Morrissey is a person of good fame and character and otherwise fit to practice. (Morrissey Ex. 8).

When making his application to become a member of the Australian Bar, Morrissey testified that the main advice he received from his counsel was to disclose everything, and he thought he did. (Tr. 1 at 256-257). While he was preparing his application, he started working in the Crown Prosecutor's Office to complete one hundred hours of practical legal experience. He pursued this position and did so for no

compensation. Ultimately, he did the same working for the Queen's Counselor, Mark Tedeschi, the Senior Prosecutor in Australia. (Tr. 1 at 260). According to Morrissey, he fulfilled his practical hours, everyone was happy with him and he conducted three seminars for Senior Crown Prosecutors on trial advocacy. He had worked on four trials and completed well over four hundred hours. He never received any money from the Crown Prosecutor's Office.

According to Morrissey, Mr. Tedeschi, along with Alexander Bennett and Jill Barber Hunter, were all happy with his work, as evidenced by the references they provided to him. (VSB Ex. 2). Morrissey stated that he never asked Mr. Tedeschi, Mr. Bennett or Ms. Hunter to review his background or do anything other than comment on their observations of his skills and performance. (Tr. 1 at 270-271). According to Morrissey, during the first vetting of his application, someone on the committee did a Lexis search and inquired of the federal suspension in 2003. (Tr. 1 at 273-274). This prompted the Board examining the application to request additional information, which Morrissey submitted through his counsel on June 15, 2005. (Morrissey Ex. 21). Through both processes, Morrissey testified that he was approved. Morrissey also testified that subsequently, the Sydney Morning

Herald published an article that an American prosecutor who was disbarred is teaching the Crown Prosecutors how to be prosecutors. It caused a firestorm of publicity. (Tr. 1 at 277).

Apparently, after the second recommendation, members of the South Wales Bar that provided recommendations on behalf of Morrissey subsequently withdrew them. Specifically, the Deputy Senior Crown Prosecutor for New South Wales filed an affidavit stating that, at no time before he gave his reference in support of Morrissey to become a member of the bar, had he been aware of the events that lead to his disbarment. He provided his December 13, 2004 letter of reference in response to the request by Morrissey. He provided the document expecting Morrissey would submit it with his application for admission. According to Mr. Bennett, "at no time did [Morrissey] disclose to me any of the events or conduct that lead to disbarment. Had he done so, it would not have been possible for me to form the opinion that he is a person of suitable for admission to this profession as I expressed in my reference. His suitability is further challenged by his failure to fully and frankly disclose these matters. It follows that I must withdraw my support for his admission." (VSB Ex. 2).

In his letter dated September 28, 2005, Mr. Bennett goes on to state, "I view Mr. Morrissey's failure to disclose, in the circumstances of my association with him, that to be an integral component of a false pretense that there was nothing in his background that might detract from the perception of good fame and character, by means of which he sought admission to the legal profession of New South Wales, notwithstanding his disciplinary history as a lawyer in Virginia. For an extended period he represented his history to be that of a successful lawyer from Virginia, who had traveled from that place to extend his legal experience and explore new opportunities and conducted himself so as to leave a favorable impression upon which one might draw for the reference he later sought." (VSB Ex. 2).

Mark Tedeschi QC also filed an affidavit with the New South Wales Bar dated November 15, 2005. In that affidavit Mr. Tedeschi states that he is a Senior Crown Prosecutor for New South Wales (hereinafter "NSW"). One of his duties was to arrange continuing education programs for the 94 NSW Crown Prosecutors. According to Mr. Tedeschi he met Morrissey in 2004. He was so impressed by Morrissey that they discussed the possibility of developing an advocacy mentoring program for the NSW Crown Prosecutors and using him as a mentor. In fact, he

did so. According to Mr. Tedeschi, "on two separate occasions, he discussed with Morrissey the reasons why he left the United States. On each occasion, Morrissey stated some vague reason about wanting to do other things and see the world. On no occasion did he mention to me that he had been disbarred in the United States." (VSB Ex. 3).

Mr. Tedeschi apparently tried to contact Morrissey's prior partner, Robert Jacobs, for a reference. According to Mr. Tedeschi, Mr. Jacobs ended his letter by stating that he highly recommended Morrissey for the position, never mentioning Morrissey was disbarred. (VSB Ex. 3). Some time in mid-August 2005, Mr. Tedeschi became aware of Morrissey's problems as set forth in the case from U.S. Court of Appeals for the 4th Circuit that Morrissey was disbarred in federal court. He confronted Morrissey, who confirmed that he was the person referred to in the judgment. Immediately thereupon, Mr. Tedeschi suspended Morrissey from his involvement in the New South Wales Crown Prosecutors Advocacy Mentoring Program. Subsequently, Mr. Tedeschi terminated Morrissey all together. According to Mr. Tedeschi, he felt betrayed by Morrissey's failure to notify him of his disbarment prior to using him as a mentor. Mr. Tedeschi goes on to state that he would not have allowed Morrissey to become a mentor of the New South Wales Crown

Prosecutors if he had known about the circumstances leading to his disbarment. (VSB Ex. 3) Mr. Tedeschi stated, "I am somewhat dismayed at Morrissey's lack of candor to me about his disbarment. This is particularly so in light of having asked him on 2 separate occasions what lead to him leaving Virginia and going to Ireland." (VSB Ex. 3).

Jill Barber Hunter, Associate Professor in the School of Law at the University of NSW, filed her affidavit on November 16, 2005, wherein she withdrew her recommendation for admission once she became aware of the decision of the U.S. Court of Appeals, 4th Circuit. Ms. Hunter had a similar experience as the others and stated, "I now realize Mr. Morrissey's disclosures for me were far from complete. His lack of candor is such that were I to be asked now to provide a reference for Mr. Morrissey's LPAB Application, I would not do so." (VSB Ex. 4).

When asked why Ms. Hunter would have withdrawn her letter supporting him for membership in the Australian Bar, he testified that someone contacted the Sydney Morning Herald and told them the same story that occurred in Ireland. He said that caused great embarrassment for Mark Tedeschi as well as Ms. Hunter. (Tr. 1 at 250). Morrissey claims he told Ms. Hunter about his disbarment, but he did not state he was

disbarred in the 4th Circuit or the Western District of Virginia since it is an automatic disbarment. (Tr. 1 at 250-251).

Paul Aimes Fairall, filed a similar affidavit on February 9, 2006. Mr. Fairall was a professor of law and Dean of the Law School at the University of Adelaide. Mr. Fairall states in his affidavit that in August 2003 he became aware of matters involving Morrissey's loss of his law license in Virginia. In his letter of October 25, 2005, Mr. Fairall stated that he believed that the matters arose out of a politically charged prosecution that Morrissey was involved in. According to Mr. Fairall, Morrissey had not disclosed any of those matters prior to his engagement and did not believe they were relevant to his academic assignment. According to Mr. Fairall, after discussing the matter with Morrissey, they agreed it would be preferable for Morrissey to pursue his career options in Sydney. In his affidavit of February 9, 2006, Mr. Fairall states that once Morrissey's background came to light, he did not think it was appropriate for Morrissey to be teaching evidence and advocacy that involve high standards of professional conduct; and, he was disappointed that Morrissey failed to disclose this information. (VSB Ex. 5).

At the hearing before the Supreme Court of New South Wales, Commonlaw Division, on March 6, 2006, the Bar Association was opposed to Morrissey's admission. (VSB Ex. 6).

Morrissey stated that in August 2003 Professor Fairall met with him to talk about his disbarment in Virginia for the first time. He admitted that Professor Fairall mentioned to him that he had not disclosed the federal disbarment or the assault and battery on Wycoff prior to his engagement as a visiting academic. (Tr. 1 at 339). Morrissey justified the conversation by stating his dealings were with another person, Andrew Ligertwood, and when someone got on the internet and saw what occurred, that is when Professor Fairall confronted him. Morrissey acknowledged it was the first time that he had, in fact, told Profession Fairall that he was suspended and disbarred. He stated he never said anything and never had been asked about it prior to that time. (Tr. 1 at 339). As a result of that meeting, Morrissey resigned from the University of Adelaide, where he taught trial advocacy, Australian criminal procedure and criminal law. (Tr. 1 at 252).

Morrissey also acknowledged that, at some point when he testified before the New South Wales Supreme Court, he acknowledged that he did not tell Mr. Tedeschi or Mr. Bennett about any of his

disciplinary problems in Virginia before being offered positions with them. (Tr. 1 at 345). He also admitted that even though Mr. Tedeschi asked him why he left the United States, he never told him he was suspended or disbarred. (Tr. 1 at 346). Morrissey stated, "it is important, I think – and I don't say this in any way to suggest, defend, explain, excuse it, but I started there doing volunteer work to fulfill a component, and whilst I was never asked about it, I did not volunteer it." (Tr. 1 at 346). Morrissey admitted that he first wanted to show how well he could do and then, at the appropriate time, tell and explain what his circumstances were in Virginia. (Tr. 1 at 347). He wanted to establish himself to show what he could do prior to admitting what happened.

Morrissey acknowledged that when he submitted his application under oath that he stated that the suspension for 6 months was a result of a political campaign in his home state to have him neutralized as a practicing lawyer. While he blamed his lawyer for the language, he "did not run from it." (Tr. 1 at 354). In fact he attested to it twice in the filings he made. Morrissey acknowledged when completing his statutory declaration on January 25, 2005 that he had the opportunity to correct that affidavit; however, he did not do so. (Tr. 1 at 396). Morrissey also acknowledged that he should have disclosed to Mr.

Bennett and Mr. Tedeschi that he was suspended and disbarred and regretted that he did not do so. He acknowledged failure to so was an act of dishonesty. (Tr. 1 at 401-402).

The New South Wales Supreme Court rendered a 35 page opinion in the matter of *Morrissey v. the New South Wales Bar Association*, dated April 26, 2006, where the court considered whether Morrissey was a fit and proper person to be admitted to practice law in that jurisdiction. The court finds that:

> There is no doubt that Mr. Morrissey is a talented and effective advocate. He is also regarded by those who have taught with him and by those whom he has taught as an extraordinarily gifted teacher. However, I have after very careful consideration come to the view that he is "not a fit and proper person" to be admitted as a legal practitioner. His character is marked by willful disobedience of court orders and rules, episodes of violence, a failure to make appropriate disclosure and a lack of candor when dealing with his colleagues. Notwithstanding the fact that some of his difficulties may have been provoked by political animosity and some of his actions were committed some years ago when he was less experienced and mature than he is today, he is not a person in whom the bench and legal practitioners could repose their trust.
>
> It is possible that if appropriate disclosure had been made, his transgressions in Virginia could have been put behind him and his determination to commence a new career free of political difficulties and the misjudgments of youth accepted. His explanation for his initial failure to make full disclosure to the LPAB might also have been accepted. However, his breaches of trust in

> relation to those who were asked to provide references for him are so great that in my opinion Mr. Morrissey's application must be rejected." (VSB Ex. 1, [2006 NSWSC 323], page 34).

Once the Supreme Court of Australia denied his application Morrissey returned to the United States. According to Morrissey he could not appeal this decision; rather at a later date he could reapply for admission.

The evidence demonstrates that during this period, Morrissey engaged in deception of his colleagues in the Australian Bar in a failed attempt to become a member of the New South Wales Bar. He attempted to gain the trust of those people he needed to help succeed by showing what a skilled teacher and advocate he was, hoping that would outweigh any failure on his part to disclose his complete history in Virginia.

Since his return from Australia in 2006, Morrissey taught high school, U.S. and Virginia history and U.S. government and coached the wrestling team. (Tr. 1 at 225). He also had a business that provided adult day services for intellectually challenged adults.

Also, upon his return, he did a lot of volunteer work at the Richmond City jail; the Lions Club; the Boys and Girls Club; and other similar entities. At the same time, he started TLC Residential Services, which was a mentally retarded waiver based program for those individuals

who did not have mental illnesses but had intellectual challenges; anything from Downs' Syndrome to a low or below average I.Q. (Tr. 1 at 227).

Morrissey testified that he represents a minority district and is a very active member of the House of Delegates. According to him, his legislation tends to focus on restorative justice issues, the environment, and issues that perhaps involve grass roots organizations. (Tr. 1 at 230). He acknowledged that he has sponsored, overall, 40-60 pieces of legislation. (Tr. 1 at 232). In 2007, he ran for the House of Delegates and won the election. It should be noted in this Petition for Reinstatement of Bar License he states that he just completed his third session with the Virginia General Assembly, and in that capacity "drafted, revised, vetted and debated thousands of pieces of legislation that subsequently became law in the Commonwealth." (Morrissey Ex. 2).

Since his disbarment Morrissey had three civil judgments against him. In February 2004 Carrell/Rice obtained a judgment in the Hanover General District Court in the amount of $8,710.00 that Morrissey satisfied in September 2007. In December 2004 Midkiff/Muncie obtained a judgment in the amount of $2,542.00 in the Richmond City General District Court that Morrissey satisfied in October 2007; and in May 2003,

Gary Wycoff obtained a judgment in the amount of $390,000.00 that Morrissey satisfied in September 2007. (VSB Ex. 1).

The litigation in the Wycoff matter was contentious. Morrissey resisted paying a civil judgment owed by him for physical injuries caused by him when he beat Mr. Wycoff with his fists. Morrissey was indicted on the charge of aggravated malicious wounding and was convicted of assault and battery of Mr. Wycoff, in the Circuit Court of the City of Richmond; *See Commonwealth v. Joseph D. Morrissey*, Case No. F-99-2548, (Va. Cir. Oct. 9, 1999) for which he received a fine of $2,500.00. (VSB Ex. 10). Morrissey appealed that conviction, which was affirmed by the Court of Appeals on April 26, 2000. (*Morrissey v. Commonwealth of Virginia*, In the Court of Appeals of Virginia, Record Number: 2437-99-2 (2000)). (VSB Ex. 10).

Thomas H. Roberts was called to testify on behalf of the Virginia State Bar. Mr. Roberts is an attorney practicing law in the City of Richmond and represented Gary Wycoff in a law suit against Morrissey for the assault. According to Mr. Roberts, after a 3 day jury trial, on July 18, 2002, Mr. Wycoff received judgment in the amount of $40,000.00 in compensatory damages and $1,000,000.00 in punitive damages. The

punitive damages were subsequently reduced to $350,000.00 on August 27, 2002. (VSB Ex. 9).

Morrissey appealed the decision to the Virginia Supreme Court; and the Writ was denied on February 24, 2003. Mr. Roberts began to collect judgment on behalf of Mr. Wycoff immediately after obtaining the verdict by filing a *lis pendens.* (Tr. 1 at 467). As a result of the *lis pendens*, Morrissey filed two suits against Mr. Roberts. In the matter in the Circuit Court of the County of Henrico, a commissioner's hearing was held on June 6, 2007 in the case of *Gary Wycoff, etc. v. Joseph D. Morrissey, et. al.,* Chancery Number: CH: 039921 and CH: 031366 (2007). (VSB Ex. 11). From the date of judgment to the date of the hearing, Mr. Wycoff received $16,928.06 towards the judgment. (VSB Ex. 11). (Tr. 1 at 471).

Morrissey, in an effort to avoid paying the judgment, transferred property to the Angela Schaefer Irrevocable Trust. (Tr.1 at 472). According to Mr. Roberts, after the commissioner's hearing, the case settled for approximately $500,000.00 plus Morrissey paid the commissioner's fees. (Tr.1 at 474). (Morrissey Ex. 29).

Gary Hershner testified on behalf of Morrissey. Mr. Hershner is an attorney who practiced law with Morrissey for a number of years.

Mr. Hershner was called to testify to rebut the testimony of Mr. Roberts. In preparation of that testimony, he was provided a transcript of Mr. Roberts' testimony of the hearing contrary to the rule on witnesses. The Chair sustained the objection and prohibited Mr. Hershner from testifying. (Tr. 2 at 621-627). The Chair permitted counsel to proffer his testimony.

Morrissey also called Larry Catlett to testify in this case. Mr. Catlett represented Morrissey before the commissioner in the Wycoff matter. Mr. Catlett testified that at no time did Morrissey state that he was placing property in trust for his daughter so Mr. Wycoff could not get it. (Tr. 2 at 686). He also testified that the commissioner did not make any findings because the case settled. (Tr. 2 at 688). Mr. Catlett acknowledged on cross-examination that, at the commissioner's hearing, Morrissey did, in fact, testify that one of the reasons he placed the property in trust was so it wouldn't be seized by Mr. Roberts. (Tr. 2, 690). (VSB Ex. 11).

Mr. Catlett acknowledged that Morrissey sold and liquidated some of the assets and deposited cash into the trust. (Tr. 2 at 691). That transfer of cash in the amount of $432,500.00 was used to purchase the note that was secured on a house owned by Morrissey at 8700 Osborne Turnpike. (Tr. 2 at 694). Mr. Catlett's recollection was not accurate

regarding the events based on the transcript of the commissioner's hearing. Also, VSB Exhibit 17 shows that on March 26, 2003, the Schwabb account in the name of Angela Schaefer Irrevocable Trust contained $433,476.72 in cash. On May 5, 2003, $432,500.00 was transferred from that account. (VSB Ex. 21). On April 30, 2003, a loan servicing agreement was executed between the Angela Schaefer Irrevocable Trust and Crestar Mortgage, Inc. authorizing Crestar Mortgage, Inc. to purchase promissory notes on behalf of the Angela Schaefer Irrevocable Trust. (VSB Ex. 19). VSB Exhibit 20, the Assignment of Mortgage Deed of Trust, evidences that the Deed of Trust, dated April 9, 1997, executed by Joseph D. Morrissey was transferred to Crestar Mortgage, Inc. on May 14, 2003. As part of that loan servicing agreement, Crestar Mortgage, Inc. assigned and transferred the note and Deed of Trust to the Angela Schaefer Irrevocable Trust for $472,000.00. (VSB Ex. 19).

According to Morrissey, he opened the Angela Schaefer Irrevocable Trust in 2000-2001 with $80,000.00. (Tr. 2 at 709). In 2003, he acknowledged selling property that was located in Maryland, for which he was a passive investor and placed the proceeds in the trust. The trust paid off the mortgage, which was held by Resource Bank, which was the

holder prior to Ohio Savings and Loan, for $472,000.00 and they paid the mortgage in full to Crestar Mortgage, Inc. (Tr. 2 at 710). According to Morrissey, he disclosed all of his assets in the Wycoff matter. (Tr. 2 at 711-712). On cross-examination, Morrissey testified that the reason the note was purchased was because the asset that it paid for was a significant asset that generated inconme. However, he also admitted that one of the reasons he put the money in the trust was he didn't want Roberts to seize the home when he came back from Australia. (Tr. 2 at 717).

The act of transferring his own funds to a trust on behalf of his daughter in order to purchase a note on a home that he owned to defraud a creditor evidences that Morrissey's behavior has not improved since his disbarment and reflects poorly on how he would conduct himself if admitted to practice law again.

The Board also heard testimony from Tina Bertenshaw on behalf of the Virginia State Bar. Ms. Bertenshaw leased her bed and breakfast, The High Street Inn, to Morrissey in May of 2007. According to Ms. Bertenshaw, she and her husband were moving overseas due to her husband's employment and Morrissey contacted them to lease the property. The tenant on the lease was known as Central Virginia

Redevelopment Authority, LLC (hereinafter "CVRA, LLC") and Morrissey executed the lease as an agent of the company. (Tr. 1 at 293-294). (VSB Ex. 12). According to Ms. Bertenshaw, rent was received for the first six months abut no additional payment was received. She tried to contact Morrissey; however, after trying to reach him for three weeks and him not returning her telephone calls, she contacted a lawyer in Virginia. (Tr. 1 at 295). While trying to reach Morrissey, Ms. Bertenshaw spoke with Dawn Stowers, the person who leased the property on behalf of CVRA, LLC who informed her that she needed to talk to Morrissey.

Two letters were written to CVRA, LLC and Morrissey by Ms. Bertenshaw's counsel (VSB Ex. 12). In July 2008, the Bertenshaws returned to Virginia. They did so to take possession of their Inn and change the locks. (Tr. 1 at 298). Soon after they moved in, Morrissey, Stowers and the police arrived, threatening to arrest the Bertenshaws for trespassing. Initially the police stated it was a civil matter, and they did not need to be there. (Tr.1 at 300). According to Ms. Bertenshaw Morrissey stated that he would allow the Bertenshaws to stay until Monday. (Tr. 1 at 300). The Chief of Police was also present.

Subsequently, Ms. Bertenshaw and her husband were arrested for trespass. (VSB Ex. 12). The warrant of arrest was sworn out

by Dawn Stowers. After a trial on the matter, the charges were dismissed. (VSB Ex. 12). Mr. and Mrs. Bertenshaw had to hire counsel to defend them in this matter.

According to Ms. Bertenshaw, the judge dismissed the charges based on the fact that the Bertenshaws had a reasonable belief they were entitled to occupy the High Street Inn; that it was a civil matter under a commercial lease; and it should be handled as a civil matter, rather than the police coming and interpreting the lease without that information. (Tr. 1 at 322).

Dawn Stowers testified on behalf of Morrissey. Ms. Stowers testified that she is the owner of CVRA, LLC. According to Ms. Stowers, CVRA, LLC partnered with Morrissey to open the group home that rented the property from the Bertenshaws. (Tr. 2 at 569). Ms. Stowers acknowledged that she received a letter from the Bertenshaws' lawyer that they were in default on the lease. (Tr. 2 at 573). She claimed to have sent payment, which was returned to her lawyer, Richard Knapp, Esquire. When she discovered that the Bertenshaws were residing in the home, she called Morrissey and, on the morning of July 8, 2008, they both called the police. The police took a copy of the lease and went to the home. (Tr. 2 at 575). According to Ms. Stowers, Morrissey was

present and answered questions, but was otherwise not involved. Subsequently, on the following Monday, she went to the magistrate and obtained a warrant. (Tr. 2 at 577). According to Ms. Stowers, she and her partner purchased CVRA, LLC from Morrissey. She has known Morrissey since April 2006. While Morrissey was not an owner of the property, he guaranteed the lease. (Tr. 2 at 587). According to Ms. Stowers, she consulted with her attorney, Richard Knapp, who was also Morrissey's attorney, regarding obtaining the criminal warrants. (Tr. 2 at 589). Morrissey knew she was going to obtain the trespass warrants and he did not tell her not to do so. (Tr. 2 at 590-591). Ms. Stowers also acknowledged that Morrissey was aware that CVRA, LLC defaulted on the rent that he guaranteed. (Tr. 2 at 592).

Chief John Dixon was called on behalf of Morrissey. He is the Chief of Police for the City of Petersburg, and, he responded to the incident involving the Bertenshaws. According to Chief Dixon, he heard on the radio that Morrissey was there and because Morrissey was a Delegate, Chief Dixon thought he needed to respond. (Tr. 2 at 598-599). According to Chief Dixon, Morrissey behaved like a gentleman. (Tr. 2 at 601).

Morrissey also called Alfred Ray Collins, III, Esquire, Deputy Commonwealth Attorney in the City of Colonial Heights, who was appointed to prosecute the trespass warrants. Mr. Collins testified that he found probable cause to go forward with the case and, after presenting his case, the court dismissed it.

The transcript from the proceedings in the Petersburg Circuit Court showed that the court stated,

> [b]ut what may be a breach of the peace in a civil matter and what you call the police for as a breach of the peace may be different. In this case, he is calling the police so I believe that is the accretion that they were called because of the breach of peace. There wasn't one and there was no reason to call. He did call the police. I understand it to be to remove them from the property. He claims he has a lease. He doesn't, apparently, have copies of the letters showing all of the correspondence that's gone before. Obviously, there is a dispute over whether or not there was a default. Although the evidence I have seen today appears to indicate there was a default. But, this is in a civil case and I may not have all of the evidence that I would be presented in a civil matter. But as to a claim of right, I believe the defense acted under a claim of right. They moved in under a claim of right. . . . It was a commercial lease. I was interested to hear what the parties understood. I believe they understood it was a commercial lease. I don't think they could take that action under a residential lease, but I think under a commercial lease they can take action. Take self-help action unless it does rise to the level of breach of the peace and perhaps in a civil sense. But there is no indication the defendants attempted to throw Mr. Morrissey off of the property or visa versa. Attorney's were engaged.

> I think was not an action to have them removed by the police and it put the police in the awkward position of trying-of having to try-to enter a lease without having all the facts, and I believe a civil determination would have been the proper method to have utilized here.

(Tr. 2 at 613-615).

The Virginia State Bar called as a witness Janet Roberts. Ms. Roberts is the mother of Berkley Alexander and Lawrence James. She has known Morrissey for approximately 10 years and testified that in 2006 she asked her son, Lawrence, to talk to Morrissey about a personal injury settlement that he was about to receive. (Tr. 1 at 432-433). According to Ms. Roberts, Morrissey reviewed the settlement documents and called and told her that her son was being robbed millions of dollars from a structured settlement and asked for a meeting. (Tr. 1 at 433). The meeting was to occur at Richard Knapp's office, an attorney in Richmond. The same attorney who represented Morrissey and Stowers in the Berkenshaw matter. Mr. Knapp represented Ms. Stower and Mr. Morrissey in other legal matters. Lawrence James did not show up for the meeting and, without meeting with Morrissey, decided to take the structured settlement.

With part of the money he received from the structured settlement, Lawrence James purchased a new home for his mother. Ms.

Roberts moved into that home on March 13, 2007. At that same time, Ms. Roberts' other son, Berkley, operated Morrissey's Adult Day Care Services. It should be noted that Berkley was a convicted felon before he became involved with Morrissey and Morrissey was aware of Berkley's past. (VSB Ex. 7) After discussions with her son, Ms. Roberts agreed to use her original home as a location for the Adult Day Care Services and based on her son's request and his representation that he was being added to the deed, she executed a deed of gift, prepared by Mr. Knapp that actually divested her and her husband of all interest in the property. (Tr. 1 at 439-440). (VSB Ex. 14).

Apparently, prior to the conveyance, Berkley was embezzling funds from Morrissey and Adult Day Care Services of South Richmond. Subsequently, Morrissey advised Ms. Roberts that Berkley owed him $60,000.00 and he needed the money to pay off his campaign debt. He also told her that he told Berkley to deed the house to Ken Stoner to pay off the debt and once the debt was paid off, they would transfer the house back to Berkley. It should be noted The Deed of Gift between Berkley Alexander to Kenneth Stoner was prepared by Richard Knapp. (VSB Ex. 15). That never occurred and Ms. Roberts had to file suit in order to try to set aside the transfer. (VSB Ex. 8(a)). Morrissey and the Adult Day Care

Services subsequently sued Ms. Roberts, her husband Oswald and Berkley. (VSB Ex. 8(b)). The matters against Janet and Oswald Roberts were settled and dismissed with prejudice. (VSB Ex. 8(c)). Morrissey took judgment against Berkley Alexander for $491,000.00 as a result of his embezzlement and/or otherwise misappropriating money deposited into accounts of Joseph D. Morrissey and the Adult Day Care Services of South Richmond. (VSB Ex. 8(d)). Ms. Roberts acknowledged in her testimony that Morrissey was the first one to tell her about Berkley's theft; and, her son was lying to her, particularly about the Deed of Gift. (Tr. 1 at 450). However it was Morrissey's lawyer who prepared the deed of gift to property that Morrissey ended up having an interest. As part of the settlement, Ms. Roberts agreed to pay Morrissey $60,000.00, the house was ordered to be sold, and upon the sale of the house she was to receive any money above $100,000.00.

Sherri Thaxton testified on behalf of Morrissey. She represented Morrissey in 2008 in connection with the case of Berkley Alexander. She was counsel in the lawsuit filed by Ms. Roberts against Morrissey and the counter lawsuit. Sherri Thaxton acknowledged that the deed from Janet and Oswald Roberts to Berkley Alexander was dated March 15, 2007 and was prepared by Mr. Knapp. (Tr. 2 at 680).

However, she testified that at no time in that litigation did Ms. Roberts ever allege that Morrissey sent her to see Mr. Knapp, who prepared the deed. (Tr. 2 at 677). It was unclear from the evidence presented why Berkley went to Mr. Knapp to prepare the Deed of Gift and at whose direction. While Ms. Robert's did not blame Morrissey for this transaction, it was clear from the evidence that he had some role in the transfer.

The aforesaid conduct, in the Board's opinion, reflects adversely on his demeanor and character and casts serious doubt on his fitness to practice law.

6. The petitioner's present reputation and standing in the community.

Congressman Morgan Griffith testified on behalf of Morrissey. He met Morrissey when Morrissey had his bar problems that ultimately ended in Morrissey's disbarment. (Tr. 1 at 110). Congressman Griffith testified that he assisted lead counsel, Michael Rigsby, in that hearing who had to testify due to the fact that Morrissey did not appear at the hearing. Subsequently, Congressmen Griffith did not have much contact with Morrissey until Morrissey became a member of the House of Delegates. Congressman Griffith testified that Morrissey, since becoming a member of the House of Delegates, is aggressive but friendly and conducted himself absolutely appropriately. (Tr. 1 at 112).

Delegate Riley Ingram testified that he has known Morrissey for twenty five to thirty years and served together with him in the House of Delegates. He testified that ever since becoming a Member of the Assembly, Morrissey has acted as a gentleman to everyone. Since his return from Australia, he is a different person. "He is just a great person. He really is. He just really is a good guy." (Tr. 1 at 126).

Delegate Ward Armstrong, who testified via telephone, testified on behalf of Morrissey. He became personally acquainted with Morrissey when he won his first election bid to the House of Delegates. He describes Morrissey as gifted in the area of oral argument and a superb extemporaneous speaker. He went on to testify that he was appointed as the Floor Whip several years ago and is a very active participant in the Caucus. He describes Morrissey as having a very keen intellect. (Tr. 1 at 133-134). According to Delegate Armstrong, Morrissey introduced probably ten pieces of legislation per session and over the last 4 years probably anywhere from thirty to forty pieces of legislation. (Tr. 1 at 142-143). Delegate Armstrong testified that Morrissey is a hard worker; and, considers him to be a person of high credibility. (Tr. 1 at 136).

Delegate Harvey Morgan also testified on behalf of Morrissey. Delegate Morgan came to know Morrissey when he became a member of the General Assembly. He describes Morrissey as one of the brightest lights that he has seen in a long time. (Tr. 1 at 148).

Reverend Joe Ellison testified on behalf of Morrissey. He has known Morrissey for twenty years. He describes Morrissey as zealously representing his church in the 74th District. Together, they have worked on school tutorial programs, held community Thanksgiving drives, and Christmas outreach programs. According to Reverend Ellison, Morrissey has been an active supporter of the church. (Tr. 1 at 152-161).

Jerry Cable testified on behalf of Morrissey. He has known Morrissey for twenty five to thirty years. Since his return from Australia, Mr. Cable describes Morrissey as being settled down and very focused on his work in the General Assembly. (Tr. 1 at 166).

John F. Berry testified that is he the President of the Richmond Metropolitan Convention and Visitors Bureau and in that capacity came to know Morrissey as a delegate in the House. He stated that Morrissey attends a lot of events on behalf of his constituents; that he attends those events to be helpful and supportive. (Tr. 1 at 171-173).

General Robert B. Newman, Jr. testified that he has known Morrissey since he became a member of the General Assembly. Morrissey assisted him with his legislative agenda and Morrissey was interested in helping the National Guard of Virginia. (Tr. 1 at 178-181).

John Stokes McCune testified that he knew Morrissey from when he was a defense attorney, prosecutor and most recently since Morrissey lived in his neighborhood. Mr. McCune describes Morrissey as being helpful in the community and volunteers whenever he can. (Tr. 1 at 187).

Dennis Gallagher testified that he has known Morrissey since 2007 and worked with him during the sessions of the General Assembly. Mr. Gallagher testified that while in the General Assembly Morrissey created a sense of awareness over a broad range of issues that impact not only his constituents, but also the people in the Commonwealth. (Tr. 1 at 192). Mr. Gallagher was previously a member of the Virginia State Bar, Third District Committee, and also served on the Disciplinary Board. While he testified that he was aware of Morrissey's disciplinary record, he had no specific knowledge or recollection. He did not know that Morrissey applied for membership to the Bar of New South Wales in Australia. (Tr. 1 at 195).

Sheriff C.T. Woody, Jr. testified that he has known Morrissey for approximately twenty to twenty five years. He met Morrissey when he was a Commonwealth Attorney for the City of Richmond. He has known Morrissey to be involved in community work ever since he met him. He described Morrissey as participating in community service at church and while he was a Sheriff at Richmond City Jail, Morrissey would meet with and talk with prisoners in the jail, telling them about life things and encouraging them not to give up. (Tr. 1 at 202). While Sheriff Woody appeared to know a lot about Morrissey's past record, he was not aware that Morrissey applied for admission to the Bar in New South Wales. (Tr. 1 at 207).

Morrissey's Certified Public Accountant, Mark Jones, also testified on his behalf. Mr. Jones has known Morrissey for eighteen to twenty years and for the last fifteen years, he or his firm handled Morrissey's tax work. According to Mr. Jones, four or five months ago, Morrissey contacted him to set up a charitable foundation and wanted to set aside $150,000.00. (Tr. 1 at 212). According to Mr. Jones, they set up the Joseph D. Morrissey Charitable Foundation, a 501(C)(3) organization. The purpose was to establish programs for youth sports and educational programs and health and medical type things. (Tr. 1 at

213). Also, Mr. Jones testified that Morrissey established the 74th District Scholarship Fund where Morrissey contributed $100,000.00 for a scholarship fund for seniors in that District. (Tr. 1 at 214).

Mr. Jones was recalled to the stand to discuss the filing of Morrissey's tax returns. Mr. Jones testified that Morrissey was always concerned about filing his tax return and paying any taxes owed on time. He admitted there may have been one or two years when they might have been filed late and acknowledged that the 2003 return that was not prepared until 2006, was grossly negligent. (Tr. 2 at 663). He could not adequately explain how that happened. He took the position that if there was no tax due, he did not have to file the return. He acknowledged that if he knew of the $200,000.00 K-1 income in 2003, he would have filed the return. (Tr. 2 at 665-666).

Clovia Lawrence testified on behalf of Morrissey. Ms. Lawrence is employed by Radio 1, Inc. as a community outreach director of media personality. She personally met Morrissey when he was campaigning to run for the House of Delegates in 2007. According to Ms. Lawrence, Morrissey assisted her in restoration of rights rallies and became an advocate for giving felons a second chance. Morrissey also provides food to support their food drives for Thanksgiving Day; he would

also bring bicycles to the radio station when they had a Radio 1 toy drive; and, helped sponsor an event for the American Cancer Society. (Tr. 1 at 325-331).

David Baugh asked to speak against Morrissey's reinstatement. He is currently employed by the state with the State Indigent Defense Commission. Mr. Baugh commented on the case at hand and also testified with regard to his personal incident with Morrissey in 1992 that resulted in contempt citations and jail time for Morrissey and Baugh. Mr. Baugh denied ever pushing Morrissey; however, he admitted he called Morrissey a "faggot." Mr. Baugh acknowledged that it was wrong and it was horrible slur and apologized often for that, and he apologized again before the Board. Mr. Baugh acknowledged that he did not appeal the contempt citation and was very sorry that it occurred. According to Mr. Baugh, it would be a disservice to the Bar and community to grant Morrissey's Petition for Reinstatement.

On the second day of the hearing, the Board granted Guy Kinman's opportunity to be heard. Mr. Kinman has been a resident of Richmond and the Commonwealth for fifty one years and was ninety three years old. He has watched Morrissey's career over the years and has seen him at meetings and rallies and restaurants. He was recently at

a dinner with Morrissey with six hundred other people who applauded Morrissey. (Tr. 2 at 501). Mr. Kinman acknowledged that nobody is perfect but he thinks Morrissey is a good lawyer, a good would-be lawyer, and asked the Board to recognize that the people overall have trusted him and he has known it and has lived up to their expectations. (Tr. 2 at 503).

Counsel for Morrissey wanted to call Judge James Yoffy to testify. The Board unanimously determined that Mr. Yoffy's testimony would not be heard; however, the Board received the transcript of his testimony of August 17, 1993 in the case of *Commonwealth of Virginia v. Joseph D. Morrissey*, in the Circuit Court of the City of Richmond, which was the bribery case brought against Morrissey. (Morrissey Ex. 23.) Mr. Yoffy was counsel for the defendant Mr. Molyneux in the rape trial that was settled by accord and satisfaction. (VSB Ex. 23). At the hearing, Mr. Yoffy testified that while he was trying to resolve the rape trial, it was Morrissey who said to him, "how much does it cost to mount a defense for this type of situation?" (Morrissey Ex. 23, at p. 6).

According to Mr. Yoffy, he did not know what to say. He was taken back by the question because previously Morrissey was a defense attorney and he knew what it cost. Nevertheless, Morrissey planted the seed of an accord and satisfaction. When they further discussed the

matter, Morrissey initially suggested that $25,000.00 goes to the victim and $25,000.00 for The Prosecutor's Corner, which Mr. Yoffy did not agree. He, instead, suggested a rape crisis center. Morrissey agreed to $25,000.00 but not for the rape crisis center. Subsequently, Mr. Yoffy, Morrissey, and Mr. McNally, the Deputy Commonwealth Attorney at the time, met with Ms. Nuchols, the victim in the case, and Mr. Yoffy was permitted to tell her the strengths and weaknesses of the case and he focused on the holes in the Commonwealth's case. (Morrissey Ex. 23, at p. 14). Mr. Yoffy was specifically told by Morrissey not to mention anything about the $25,000.00 that would go to charity, but only the $25,000.00 that would go to her. (Morrissey Ex. 23, at p. 15). Initially, Ms. Nuchols rejected the offer and wanted $100,000.00.

Subsequently, Mr. Yoffy filed a Motion *in limine* and, at that hearing, Mr. Yoffy presented extensive psychiatric evidence of Ms. Nuchols, to challenge her credibility. Morrissey allowed Ms. Nuchols to be present during that testimony. (Morrissey Ex. 23, at p. 18-19). According to Mr. Yoffy, Morrissey thought it was a good idea for Ms. Nuchols to be present so she can appreciate what she may or may not have to go through in the trial if the evidence was admitted. Morrissey v. Virginia State Bar, 248 Va 334, 339, 448 S.E.2d 614, 618 (1994).

Morrissey wanted to put pressure on Ms. Nuchols. (Morrissey Ex. 23, at p. 18-19).

At the conclusion of the hearing, Morrissey and Mr. Yoffy had a side bar with the court and, at that time, the court indicated in no uncertain terms that the motion to allow that psychiatric testimony was going to be denied as it was too remote in time. (Morrissey Ex. 23 at p. 21). At that time, both counsel request that the court withhold his ruling on the motion. (Morrissey Ex. 23, at p.21-22). The court did so. According to Mr. Yoffy, Judge Nance knew that Morrissey and he were trying to negotiate the case and gave them more time.

At the hearing, Ms. Nuchols found the psychiatrist's testimony regarding her psychiatric past very painful. And she was devastated at the thought that the evidence would come in at the trial. Morrissey, 248 Va. at 318, 448 S.E.2d at 618. Even though Morrissey knew Judge Nance was going to deny the defense's request to get into her psychiatric history, when asked by Ms. Nuchols whether the evidence would be admissible, Morrissey responded that he did not know. Id. at 318,618. Several days after the motion, Morrissey advised Mr. Yoffy that Ms. Nuchols was going to take their deal. The court was not advised of the $25,000.00 that went to charities. (Morrissey Ex. 23, p. 25). After the agreement was worked

out, Morrissey contacted Mr. Yoffy and told him to have several cashier's checks made out to certain charities and delivered to him so he could pass them out. After resolving other issues that developed, including transferring the funds to a different law firm because Mr. Yoffy's partner was going to run for Commonwealth Attorney against Morrissey, Mr. Yoffy finally agreed to have the checks written out to the charities and delivered to Morrissey.

James Maloney also testified on behalf of Morrissey. He practiced with Morrissey from 1996 to late 2000 or early 2001, and included the time period when Morrissey's license to practice law was suspended. (Tr. 2 at 727). He testified that he represented Mr. Watkins in his appeal before the Virginia Supreme Court. Prior to appearing at the meeting before the Supreme Court staff attorney, he initially stated that he met with Mr. Watkins and his grandmother, Cledy Watkins and explained what was going to happen. According to Mr. Maloney, Ms. Watkins wanted him to stay on representing her grandson; and he could not recall discussing with them the fact that Morrissey did not contact them about not being present to represent them. (Tr. 2 at 732-733).

The testimony of James Maloney was proffered for the record regarding the hearing that resulted in Morrissey's disbarment. The Board

declined to receive this testimony based on the fact that the witness would not be permitted to testify to a fact which may have been material in the trial of the case that has been tried to decision, and not appealed. (Tr. 1 at 218-221).

7. The petitioner's familiarity with the Virginia Rules of Professional Conduct and his current proficiency in the law.

Since Morrissey's disbarment, he obtained his Masters of Law degree from Trinity College of Dublin. Additionally, he has attended a variety of continuing legal education classes in the Commonwealth of Virginia; and, by the time of this hearing he completed the requisite number of CLE credits. Also, it is clear from the testimony presented that Morrissey is proficient in the law. However, neither Morrissey's testimony nor his actions while disbarred and pending his application for reinstatement to the Bar indicate any particular familiarity with the Virginia Rules of Professional Conduct.

8. The sufficiency of the punishment undergone by the petitioner.

The Board is charged with considering the sufficiency of the punishment in making its recommendations. In doing so, the Board must consider all of the evidence and testimony presented; and, is particularly troubled by Morrissey's failure to be open and honest with those members of the Bar in Australia and Ireland who placed trust in him and supported

him in his desire to become a member of that Bar. He did so by misleading them about his disciplinary history in Virginia in hopes that his skills and expertise as a trial lawyer would impress them such that his history would not matter. In this case, Morrissey's license has been revoked since April 25, 2003 having last practiced in December 1999. The Board considers the loss of Morrissey's license for twelve years to be significant, yet, based on his conduct as set forth in this opinion since that time, the Board cannot determine that punishment to be sufficient.

9. The petitioner's sincerity, frankness and truthfulness in presenting and discussing factors relating to his disbarment and reinstatement.

Rather than being totally truthful regarding his disbarment, Morrissey was selective in what he told others, much to his detriment. Morrissey has expressed no remorse, no sense of regret or shame or even any real understanding of the opprobrium his actions brought to him and to his profession. When Morrissey was candid in his testimony his candor lacked any insight into the significance of his actions in relation to the consideration required of this Board.

10. The impact upon public confidence in the administration of justice if the petitioner's license to practice law was restored.

The Panel's consideration of this factor requires an examination of how Morrissey's conduct in the past affected public

confidence in the administration of justice. During the years prior to his revocation, Morrissey's actions directly and repeatedly injured the image of the Bar and the legal process in the eyes of the public. He engaged in fist fights, castigated and disobeyed judges and used the resolution of cases to bolster his political objectives. He spoke to the press in direct violation of a court order. He attempted to avoid the sanctions imposed upon him for contempt. The Board is charged with determining whether Morrissey's action since disbarment show that he would conduct himself in a manner upon reinstatement that would be something different, at least to the extent that his conduct might affect the public's confidence in the administration of justice. Morrissey's actions in Australia and in the United States in the last ten years give the Board no reason to believe that Morrissey intends or is even capable of demeaning himself in a manner so as to foster confidence in the administration of justice.

This Panel is not tasked with determining whether Morrissey is generous, hard working, or well liked among those whose lives he has touched. The Bar is not tasked with determining how talented a lecturer or advocate he may be. Instead, this Panel is tasked with making a recommendation, pursuant to the Rules and the *Hiss* factors as to

whether to recommend that Morrissey's license to practice law be reinstated.

It is the unanimous determination of the Board to recommend that the Petition for Reinstatement be disapproved.

CONCLUSION

The Board finds by unanimous vote that Morrissey has failed to prove, by clear and convincing evidence, that he possesses the requisite fitness to practice law based on the *Hiss* factors. Therefore, the Board respectfully recommends to the Supreme Court of Virginia that the petition to reinstate the license of Joseph D. Morrissey be disapproved.

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

Copying invoices:	$ 1,510.66
Court reporter fees:	$ 5,982.50
Witness expense	$ 65.00
Mailing fees:	$ 67.54
Mailing notice:	$ 659.55
Legal notices:	$ 626.82
Administrative fee:	$ 1,500.00
Total Costs	$10,412.07

IT IS ORDERED that the Clerk of the Disciplinary System shall forward this Order of Recommendation and the record to the Virginia Supreme Court for its consideration and disposition.

IT IS FURTHER ORDERED that the Clerk of the Disciplinary System shall forward and attest a copy of this Order of Recommendation by certified mail, return receipt requested to Edward B. Lowry, Michie Hamlet, Attorney at Law, 500 Court Square, Suite 300, Charlottesville, Virginia 22902-5146, Joseph Dee Morrissey, at his address of record with the Virginia State Bar, 588 Virginia Center Parkway, Glen Allen, Virginia 23059, and delivery by hand to Edward L. Davis, Bar Counsel and Paulo E. Franco, Assistant Bar Counsel, Virginia State Bar, Eighth and Main Building, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2803.

Entered this 25th day of July, 2011.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 

William E. Glover, Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
ROBERT HENRY SMALLENBERG

VSB DOCKET NO. 12-000-091299

ORDER OF SUSPENSION

This matter came before the Virginia State Bar Disciplinary Board (the "Board") for hearing on May 18, 2012 upon the Virginia State Bar's (the "Bar") *Petition for Show Cause Hearing Violation of Order* requiring the Respondent, Robert Henry Smallenberg, to appear before the Board to show cause by clear and convincing evidence that he did not violate the *Agreed Disposition Summary Order* and the *Memorandum Order of Suspension and Restitution* imposed by a Three-Judge Court sitting in Hanover County.[1] Specifically, Respondent is required to show cause why his license to practice law in the Commonwealth of Virginia should not be revoked or further suspended pursuant to Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia.[2]

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[1] The *Agreed Disposition Summary Order* and the *Memorandum Order of Suspension and Restitution* were entered by a Three-Judge Court in VSB Docket No. 09-032-078278. The Bar also presented other separate and distinct Orders relevant to Respondent's alleged failure to comply with Paragraph 13-29. These include the Bar's *Petition for Show Cause Hearing Violation of Disciplinary Board Order* regarding an *Interim Suspension Order* entered by the Board in VSB Docket No. 12-060-089121 and four additional *Interim Suspension Orders* entered by the Board under four separate VSB Docket Numbers but collectively brought in this proceeding under VSB Docket No. 12-000-091299.

[2] Part Six, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia reads as follows:

After a Suspension against a Respondent is imposed by either a Summary or Memorandum Order and no stay of the Suspension has been granted by this Court,

A duly convened panel of the Board consisting of Randall G. Johnson, Jr., Chair Designate, John A. Dezio, Sandra L. Havrilak, William H. Monroe, Jr. and Dr. Theodore Smith, lay member, heard the matter. Kathryn R. Montgomery, Deputy Bar Counsel and Renu M. Brennan, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar. Respondent appeared in person and represented himself. Jennifer L. Hairfield, Shorthand Reporter with Chandler & Halasz, P.O. Box 9349, Richmond, Virginia, 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings. The Chair polled members of the Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing these matters and serving on the panel, to which inquiry each member, including the Chair, responded in the negative.

I. Motion for Continuance

Respondent sought a continuance of this matter until a time when Respondent's counsel could appear at the hearing. In his Motion for Continuance, Respondent advised

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or after a Revocation against a Respondent is imposed by either a Summary Order or Memorandum Order, that Respondent shall forthwith give notice, by certified mail, of his or her Revocation or Suspension to all clients for whom he or she is currently handling matters and to all opposing Attorneys and the presiding Judges in pending litigation. The Respondent shall also make appropriate arrangements for the dispositions of matters then in his or her care in conformity with the wishes of his or her clients. The Respondent shall give such notice within 14 days of the effective date of Revocation or Suspension, and make such arrangements as are required herein within 45 days of the effective date of the Revocation or Suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective date of the Revocation or Suspension that such notices have been timely given and such arrangements made for the disposition of matters. The Board shall decide all issues concerning the adequacy of the notice and arrangements required herein, and the Board may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph 13-29.

the Chair that his counsel would not be able to appear on the scheduled hearing date of May 18, 2012. Respondent's Motion was made on the afternoon of May 17, 2012.

Upon learning of Respondent's Motion for Continuance, the Chair considered Respondent's Motion and the Motion was denied. Respondent was advised that either he or his counsel could renew the request for a continuance at the hearing if they chose to do so and the Motion would be heard by the Chair and Panel.

On May 18, 2012, the Respondent appeared *pro se* and renewed his Motion for a Continuance. Respondent's reasoning for seeking a continuance included the fact that he now understood the seriousness of the charges against him and was overwhelmed. Respondent stated that he had intended to come to the hearing "with hat in hand" but was no longer comfortable representing himself.

The Bar opposed Respondent's Motion for a Continuance and argued that Respondent had been notified of this hearing date and all charges to be brought against him beginning on March 20, 2012 and also on April 4 and 5, 2012, when the Bar filed and served its notice for a Show Cause Hearing. No request for a continuance was made by Respondent or communicated to the Bar until the afternoon of May 17, 2012, less than 1 day prior to the May 18, 2012 hearing date.

As regarding Respondent's failure to appreciate the seriousness of the charges to be addressed at the hearing, Respondent had previously been represented by counsel in the past disciplinary matter from which this hearing became necessary. Respondent therefore knew or should have known the significance of the issues involved. Additionally, the request for a continuance was made with Respondent's complete understanding that the Bar had secured the appearance of witnesses to testify at the

hearing, Respondent having received a copy of the subpoena issued to one such witness by the Bar.

In rebuttal of the Bar's argument, Respondent argued that this proceeding was "quasi-criminal" in nature thereby triggering Constitutional rights guaranteed to Respondent by the United States Supreme Court. Additionally, Respondent complained that the Bar set the hearing date without regard to his schedule.

Having heard argument of the parties, the Board retired to deliberate the merits of Respondent's Motion for Continuance. Part Six, Section IV, Paragraph 13-18 (F) of the Rules of the Supreme Court of Virginia addresses the Continuance of a Hearing. It states that "[a]bsent exceptional circumstances, once the Board has scheduled a hearing, no continuance shall be granted unless, in the judgment of the Chair, the continuance is necessary to prevent injustice. No continuance will be granted because of a conflict with the schedule of the Respondent or the Respondent's counsel unless such continuance is requested in writing by the Respondent or the Respondent's counsel within 14 days after mailing of a notice of hearing. Any request for a continuance shall be filed with the Clerk of the Disciplinary System." The facts of this matter clearly show that Respondent was aware of the scheduled hearing date of May 18, 2012, having received notice on March 20, 2012 and two additional times on April 4, 2012 and April 5, 2012. Respondent's failure to appreciate the seriousness of the subject matter to be addressed in this hearing does not afford Respondent the right to change his mind regarding representation with less than one days notice to the Bar, testifying witnesses and/or the Panel. Accordingly, the Panel believes that Respondent waived his right to be represented by counsel by failing to timely notify the Clerk of his request and/or

demonstrate such "exceptional circumstances" as are called for in paragraph 13-18. For these reasons, Respondent's Motion for a Continuance was denied.

II. Findings of Fact

In re VSB Docket No. 09-032-078278

On September 13, 2011 a Three-Judge Court, sitting in the Circuit Court for Hanover County, approved an *Agreed Disposition Summary Order* resulting from a hearing held before the Court on July 11, 2011. The terms of the Agreed Disposition provided, in part, that the Respondent receive a thirty day suspension for the violation of numerous disciplinary Rules including Rules 1.3(a), 1.4(a), 1.15(c)(3), 1.15(c)(4), 1.16(d) and 1.16(e). The Suspension became effective on August 27, 2011. Paragraph 4 of the *Agreed Disposition Summary Order* stated "The Court notes that concerning Paragraph 13-29 that the Respondent shall comply with all requirements of Paragraph 13-29 of the Rules, including but not limited to sending the required notices, making the required arrangements, and providing the required proof to the Bar." The Respondent and his counsel each signed the *Agreed Disposition for a Thirty Day Suspension and Restitution* confirming their understanding of the terms of the disposition and their agreement to same. The matter was further confirmed in the *Memorandum Order of Suspension and Restitution* that was signed by the Chief Judge of the Three-Judge Court on September 13, 2011.

By letter dated September 22, 2011, Barbara S. Lanier, Clerk of the Disciplinary System, forwarded the Memorandum Order via certified mail to Respondent's address of record with the Bar and to Respondent's counsel. The Clerk's September 22, 2011 letter to Respondent further reminded Respondent of his duties under Paragraph 13-29.

By letter dated October 27, 2011, the Clerk advised Respondent that the Clerk's office had not received proof of his compliance with Paragraph 13-29. The Clerk also advised Respondent that his continuing failure to comply with Paragraph 13-29 could result in the setting of a show cause proceeding wherein Respondent's license to practice law in the Commonwealth of Virginia could be further Suspended or Revoked.

By letter of March 06, 2012, Assistant Bar Counsel requested Respondent to provide proof of compliance with Paragraph 13-29 to the Clerk's office with a copy to Assistant Bar Counsel. No proof of compliance with the requirements of Paragraph 13-29 by the Respondent was ever received by the Clerk or Assistant Bar Counsel.

In re VSB Docket No. 12-060-089121

On January 05, 2012 the Board entered an Order of Interim Suspension, effective immediately, suspending the Respondent's license to practice law in the Commonwealth of Virginia for failure to comply with a subpoena *duces tecum* issued by the Bar in the course of a Bar investigation. The Order required the Respondent to produce documents as well as comply with all requirements of Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia. The Respondent's suspension was terminated the next day on January 06, 2012 by a subsequent Order of the Board, however the January 06, 2012 Order did not excuse Respondent from complying with Part Six, Section IV, Paragraph 13-29 of the Rules of Court. Respondent failed to provide proof of compliance with Paragraph 13-29 to the Clerk's office.

On July 28, 2011 (VSB Docket No. 11-060-085684), August 4, 2011 (VSB Docket No. 11-060-087698), September 20, 2011 (VSB Docket No. 11-060-088181) and September 20, 2011 (VSB Docket No. 11-060-088180), the Board entered various Interim Suspension Orders suspending the Respondent's license to practice law in the Commonwealth of Virginia, each by reason of the Respondent's failure to comply with a subpoena *duces tecum* issued by the Bar in the course of various Bar investigations. In addition to requesting the production of documents, each Interim Suspension Order required the Respondent to comply with all requirements of Part Six, Section IV, Paragraph 13-29 of the Rules of the Virginia Supreme Court. The Respondent's Interim Suspensions were each terminated within days of their entry by a subsequent Order of the Board, however, the Orders terminating each Interim Suspension did not excuse Respondent from complying with Part Six, Section IV, Paragraph 13-29 of the Rules of Court. Respondent failed to provide proof of compliance with Paragraph 13-29 to the Clerk's office.

III. Disposition

Upon hearing the foregoing Findings of Fact, reviewing the exhibits presented by Bar Counsel on behalf of the VSB (Exhibits 1 through 9), the exhibits presented by Respondent on his own behalf (Exhibits A through C), the evidence from witnesses presented on behalf of the Bar and upon evidence presented by Respondent in the form of his own testimony, the Board recessed to deliberate. After due deliberation, the Board reconvened and stated its findings as follows:

1. The Board finds that Respondent has failed to show by clear and convincing evidence that Respondent complied with the requirements of Paragraph 13-29 as they were imposed upon Respondent in each of the matters presented by the Bar.
2. The Board finds that Respondent admitted to failing to send notice letters of his various suspensions to his clients via certified mail, to the extent notice letters were sent out at all.
3. The Board finds that despite Respondent's production of example notice letters (Exhibits A through C) prepared by Respondent for use with clients, opposing counsel and presiding judges in current litigation wherein the Respondent was involved, the Respondent failed to prove by clear and convincing evidence that these notice letters were mailed by Respondent and/or received by their intended recipients. The witness called by the Bar, Alexis Howell, who was a client of the Respondent at such time as Respondent had been suspended, provided sworn testimony that she was never informed of Respondent's suspension by way of any written or oral communication. Further sworn testimony from VSB investigator, Oren Michael Powell, confirmed that he found no confirmation of any notification letters sent by Respondent or received by judges, clients or opposing counsel in the Howell matter.
4. The Board finds Respondent's arguments in defense of his failure to comply with Orders containing the requirements of Paragraph 13-29

both unpersuasive and troubling. Respondent contends that the Orders, as entered by the VSB Disciplinary Clerk are void *ab initio* by reason that the Rules provide no authority for the Clerk to enter Orders. Respondent failed to address the procedural methods utilized by the Board wherein the presiding Chair receives all pleadings relevant to a proposed Order for his or her review. This review is conducted by the Chair in advance of any decision by the Chair regarding the entry of an Order. In the event the Chair approves the Order, the Chair notes his or her approval on the face of the Order and sends the Clerk a copy noted "approved" and initialed by the Chair. This is accomplished via telefax or via a scanned Order attached to an email instructing the Clerk to sign and enter the original Order. No Order is entered by the Clerk without the express written approval of the presiding Chair. Respondent also contends that the requirements of Paragraph 13-29 apply only to "a Summary Order or Memorandum Order" under the language contained in Paragraph 13-29. Respondent fails to recognize that he personally endorsed a Summary Order (later confirmed by the Chief Judge of the Three-Judge Court by Memorandum Order) containing specific language requiring Respondent to comply with the requirements of Paragraph 13-29. Moreover, Respondent also fails to note the clear language of Paragraph 13-6(G)(3) addressing additional Board powers to impose an interim Suspension upon attorneys who fail to comply with a summons *or subpoena* issued by any member of the Board, *the*

Clerk of the Disciplinary System, Bar Counsel or any lawyer member of a District Committee. "An Attorney suspended pursuant to this subparagraph G.3 is subject to the provisions of subparagraph 13-29."

Having found that Respondent failed to comply with the requirements of Paragraph 13-29 as set forth in the aforementioned Orders, the Board then heard evidence regarding the appropriate sanction that should be imposed. The Board received and reviewed the prior disciplinary record (VSB Exhibit 10) of the Respondent and additionally heard arguments of Bar Counsel and Respondent.

The Board then recessed to consider the evidence and arguments by counsel. After due deliberation, the Board reconvened and the Chair announced that Respondent's license to practice law in the Commonwealth of Virginia was SUSPENDED for a term of THREE YEARS, effective immediately.

Accordingly, it is ORDERED that the Respondent's license to practice law in the Commonwealth of Virginia be, and hereby is SUSPENDED for a term of THREE YEARS, effective May 18, 2012.

It is further ORDERED that the Respondent must comply with the requirements of Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes

of the client. Respondent shall give such notice within 14 days of the effective date of the suspension and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective date of the suspension that such notices have been timely given and such arrangements made for the disposition of matters. (If no matters in the Respondent's care require arrangements for disposition as a result of this Order, then the Respondent need not furnish proof of any such arrangements.)

It is furthered ORDERED that if Respondent is not handling any client matters on the effective date of the suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for a hearing before a Three-Judge Court.

It is further ORDERED that costs shall be assessed by the Clerk of the Disciplinary System pursuant to the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-9.E.

It is further ORDERED that the Clerk of Disciplinary System shall send a certified copy of this Order by certified mail to Robert Henry Smallenberg at 10035 Sliding Hill Road, Suite 204, Ashland, Virginia 23005, his address of record with the Virginia State Bar; and by regular mail to Respondent's Counsel, Gary R. Hershner, 9 South Adams Street, Richmond, VA 23229, and by hand-delivery to Kathryn R. Montgomery, Deputy Bar Counsel and Renu M. Brennan, Assistant Bar Counsel, at the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800.

ENTERED his 26 day of June, 2012

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: _____
Randall G. Johnson, Jr., Chair Designate

VIRGINIA: BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF:)
)
Joseph Dee Morrissey) VSB Docket No. 01-000-2048

ORDER

THIS MATTER came on April 25, 2003, before a duly convened panel of the Virginia State Bar Disciplinary Board (the "Board"), consisting of Roscoe B. Stephenson, III (the "Chair"), V. Max Beard (Lay Member), William C. Boyce, Jr., Robert L. Freed and Peter A. Dingman, pursuant to a Show Cause Order entered September 25, 2002, and duly served upon Joseph Dee Morrissey ("Respondent"). The Virginia State Bar (the "Bar") was represented by Edward L. Davis, Esq., Assistant Bar Counsel. Appearing for Respondent were H. Morgan Griffith, Esq. ("Griffith"), and Michael L. Rigsby, Esq. ("Rigsby"). The proceedings were recorded and transcribed by Theresa S. Griffith of Chandler & Halasz, Registered Professional Reporters, Post Office Box 9349, Richmond, Virginia, 23227; telephone number (804) 730-1222.

The Hearing commenced promptly at 9:00 a.m., with the Chair reciting the purpose of the Hearing to determine whether, upon the allegation that Respondent had failed to comply with the obligations imposed by Part Six, Section IV, Paragraph 13.K.(1) of the Rules of the Supreme Court of Virginia, arising in relation to the suspension imposed on Respondent in a proceeding styled *Virginia State Bar, ex rel, Third District Committee, Section II, Joseph D. Morrissey*, Chancery No. HK, 1655 (Richmond Cir. Ct. Feb. 18, 2000), Respondent's license to practice law in the Commonwealth of Virginia should not be further suspended or revoked. The Chair then polled the members of the Board as to whether any of them were conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter. Each member, including

the Chair, answering in the negative, the Hearing proceeded.

As preliminary matters, the Board was presented with a Motion for Continuance advanced on behalf of Respondent and a Motion of Rigsby for leave to withdraw as counsel, should the Hearing proceed as scheduled, on the grounds that Rigsby's testimony would be required as to some issues in the case, Respondent being absent from the Hearing and, to his counsel's knowledge, in the country of Ireland. The Board first heard argument on Rigsby's Motion to Withdraw. Griffith, arguing for Respondent, asserted that the testimony of Rigsby would be critical to the case of Respondent on the issue of notice in that Respondent was unavailable to testify to those issues, being in Ireland where Respondent is reportedly pursuing an advanced degree while teaching at a local college. The Bar responded, arguing that the absence of Respondent was voluntary, the Hearing date having been set in February by agreement with Rigsby, and Respondent having had ample opportunity to be present if he so chose. Further, the Bar stated that it would not seek sanctions against Rigsby for proceeding as attorney in this matter, nor would the Bar object to his testimony on the grounds of his participation in the case as attorney for Respondent.

The Board then retired to consider the Motion to Withdraw and, after deliberation, reserved its ruling on this Motion, electing to first hear argument on the Motion to Continue.

Griffith argued for Respondent that the matter should be continued as it was the preference of Respondent that Henry L. Marsh, III, Esq., participate as lead counsel on behalf of Respondent and Mr. March was unavailable on April 25, 2003, having on April 23rd, by letter to the Chair, advised that he would be attending a conference in Boston, Massachusetts, from April 24, 2003, through April 26, 2003. Griffith stated that, if Rigsby were permitted to withdraw, Griffith would be "minimally competent" to proceed with the Hearing in this matter, but that Respondent would be

disadvantaged by the absence of his preferred lead counsel. The Bar again argued that this matter had been previously continued twice at Respondent's request and was scheduled for April 25, 2003, with the agreement of Rigsby on behalf of all of Respondent's counsel. The Board, then, retired to consider both Motions.

Upon resuming the Hearing, the Chair announced that the Motion to Continue was denied, but that Rigsby's withdrawal would be permitted, at his option. That is, counsel was advised, the Board determined that it was clear that Respondent's absence was voluntary, and that no issue was presented under Rule 3.7 of the Rules of Professional Conduct regarding Rigsby's testimony, in that the Board would not object to his testimony and the matter of filing of notices was largely uncontested. Rigsby's testimony would be limited to matters within his own personal knowledge. The Board then took a recess to allow counsel for Respondent to determine whether Rigsby would withdraw and in what fashion they would proceed given the rulings of the Board.

The Hearing then resumed with Rigsby electing to remain as counsel. The Hearing proceeded then with the Bar presenting its evidence through its exhibits, filed, received and heard herein, and its witnesses: Vivian Byrd, Deputy Clerk of the Disciplinary System, Barbara Sayers Lanier, Clerk of the Disciplinary System, Michael Huberman, Assistant Commonwealth Attorney for Henrico County, Kevin Watson, a former client of Respondent who testified via telephone from the Stone Mountain Correctional Center in Norton, Virginia, Clady Watson, Kevin Watson's grandmother, and Talaya Glenn, an Assistant Clerk of the Disciplinary System. For the record it is noted that Kevin Watson gave his testimony at the Stone Mountain Correctional Center in Norton, Virginia, before Craig Miller, of Linda C. Miller, Court Reporters, P.O. Box 115, Norton, VA 24273; telephone (276) 679-1000, who transcribed his testimony.

After the Bar rested its case, Respondent presented his evidence through his exhibits filed, received and read herein and the testimony of Alice David, a former legal assistant of Respondent, and Rigsby. Respondent then rested and the parties argued their case.

The Board then retired to consider the evidence and arguments presented to it. The Board concluded that the following facts had been proved by clear and convincing evidence:

1. That on February 18, 2000, a three-judge court entered an Order of Suspension in Chancery No. HK-1655, Circuit Court of the City of Richmond, which order included requirements imposed by Part Six, Section IV, Paragraph 13.K.(1) (hereinafter cited as "Rule 13K"), requiring in brief summary:

> that the Respondent shall forthwith give notice, by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care, in conformity with the wishes of his clients. The Respondent shall give such notice within 14 days of the effective date of the suspension order, and make such arrangements as are required herein within 45 days of the effective date of the suspension order. The Respondent shall furnish proof to the Bar within 60 days of the effective date of the suspension order that such notices have been timely given and such arrangements for the disposition of matters made . . . .

2. Respondent pursued an appeal from the above-described Order of Suspension and on March 27, 2000, the Supreme Court of Virginia stayed the suspension of Respondent's

license pending the appeal. On November 3, 2000, the Supreme Court of Virginia affirmed the judgment of the three-judge court and on December 15, 2000, the three-judge court entered an "Order Imposing Suspension". That later order did not reference Rule 13K.

3. On January 18, 2001, Vivian R. Byrd sent a letter to Respondent enclosing a copy of the "Order Imposing Suspension", reminding Respondent of "your duty under the Rules of Court" and quoting Rule 13K which is, by its own terms, applicable to "any attorney who is disbarred or suspended".

4. On January 22, 2001, by courtesy copy sent to Ms. Byrd of a letter addressed to James T. Maloney, Respondent acknowledged receipt of Ms. Byrd's January 18, 2001, letter and asked Mr. Maloney to assist with preparation of a list of all clients "so that [Respondent] can formally notify them".

5. On February 13, 2001, Ms. Byrd wrote to Respondent reminding him of his obligations under Rule 13K.

6. On June 21, 2001, Barbara Sayers Lanier, Clerk of the Disciplinary System, wrote to Respondent again reminding him of his obligations under Rule 13K and again quoting the Rule in its entirety.

7. On September 5, 2001, Ms. Lanier again wrote to Respondent reminding him of his responsibilities under Rule 13K and noting that the Bar, as of that date, had not received any proof of his compliance with Rule 13K.

8. On December 28, 2001, Respondent sent a letter to Ms. Lanier which, among other things, asserted that he "gave notice of my suspension to all of my clients following the December 15, 2000, suspension".

9. On January 7, 2002, Ms. Lanier wrote to Respondent informing him, among other things, that "at this time, our office has not received copies of the suspension notification letters with certified return receipts".

10. On January 11, 2002, Respondent wrote to Ms. Lanier asserting that "there were no suspension notification letters because I had no clients at the time".

11. On January 15, 2002, Ms. Lanier responded to that letter, sending to Respondent a copy of his January 22, 2001, letter which indicated that "you intended to comply with this Rule" [Rule 13K].

12. No proof of notification was thereafter received by the Bar prior to the issuance of the Show Cause Order in this matter.

13. Exhibits presented by Respondent at the Hearing and the testimony of Ms. David and Rigsby indicated that, on or about February 9, 2001, Respondent did send notice letters to a number of clients and that many such letters indicated copies were also sent to opposing counsel. Some courts may also have been notified at that time.

14. After Rigsby was consulted by Respondent regarding the Show Cause Order in this matter, in October or November of 2002, Ms. David found a file containing copies of letters to clients and certified mail, return receipt cards in Respondent's former offices. This file was offered to the Bar, for the first time, on April 1, 2003, and was retrieved by the Bar from Rigsby's office on April 23, 2003.

15. Kevin Watson was a client of Respondent who had been represented by Respondent in trial court proceedings and in appellate proceedings before the Court of Appeals of Virginia. On January 3, 2001, Mr. Watson's Petition for Appeal was scheduled to be heard by an

authorized representative of the Supreme Court of Virginia. Mr. Watson and his grandmother both testified that neither was advised prior to the date and time of that hearing of the fact of Respondent's suspension or that the matter would be presented not by Respondent, but by James T. Maloney. This unadvised and unapproved substitution was particularly egregious given the grandmother's testimony that she had advised the Respondent that she had little money for lawyers and that the Respondent had assured her that he got good results in Henrico County. Michael Huberman, the Assistant Commonwealth's Attorney responsible for the prosecution of the matter in which Mr. Watson was a defendant, testified that he was also not advised of the suspension of Respondent's license by Respondent either prior to or subsequent to the hearing on the Petition for Appeal. The Exhibits submitted by the Bar included a letter from the office of the Clerk of the Supreme Court of Virginia attesting that the Court never received notice from, prior to the hearing in the Watson case, that his license had been suspended.

IN CONSIDERATION WHEREOF, THE BOARD FINDS: That the matters presented to the Board at the Hearing on April 25, 2003, showed by clear and convincing evidence that Respondent failed to comply with the requirements of Rule 13K, as to his obligation to give timely notice to his clients, opposing counsel and courts before which matters were pending, to make appropriate arrangements in compliance with the wishes of his clients and to furnish proof thereof to the Bar.

The Board thereupon invited the parties to submit such evidence and arguments as they might offer respecting the appropriate sanction to be imposed in this matter. The Bar submitted a summary of Respondent's previous record regarding professional disciplinary matters which includes, three matters which were dismissed with terms, one private reprimand, one public reprimand, one six-

month suspension, a three-year suspension (the underlying matter), and his disbarment by the United States District Court for the Eastern District of Virginia. The Bar requested that the Board revoke the license of Respondent, arguing that the circumstances of this case and his prior record demonstrate a lack of the necessary respect for his profession and merits the complete revocation of his license. Respondent's counsel argued that the Board should draw a distinction between cases of active misconduct and violations of administrative requirements, suggesting that compliance with Rule 13K is an administrative matter, that "umbrage by the Bar" at the tardiness of the delivery of certain proofs of notice does not merit revocation and that the evidence showed substantial compliance with Rule 13K.

The Board retired to consider the appropriate disposition and, by unanimous decision, concluded as follows:

ORDERED that, the license of Respondent, Joseph Dee Morrissey, to practice law in the Commonwealth of Virginia, be, and the same hereby is, REVOKED, effective April 25, 2003 (a summary order being entered that date); and

FURTHER, ORDERED that, as directed in The Board's April 25, 2003, Summary Order in this matter, a copy of which was served on Respondent by certified mail, Respondent must comply with the requirements of Part 6, Section IV, Paragraph 13 (M), of the Rules of the Supreme Court of Virginia. All issues concerning the adequacy of the notice and arrangements required by the Summary Order shall be determined by the Board; and

FURTHER ORDER that, pursuant to Part Six, Section IV, Paragraph 13.B.8(C), of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs; and

FURTHER, ORDERED that, an attested true copy of this Order shall be mailed (i) by

certified mail, return receipt requested, to Respondent at his address of record with the Virginia State Bar, Seven South Adams Street, Richmond, Virginia, 23220-5601; (ii) by first-class mail to Respondent's counsel, Henry L. Marsh, III, Esq., Hill Tucker Marsh & Jackson, P.L.L.C., 600 East Broad Street, Suite 402, Richmond, Virginia, 23219; Michael L. Rigsby, Esq., Carrell Rice & Rigsby, 7275 Glen Forest Drive, Forest Plaza II, Suite 309, Richmond, Virginia, 23226; H. Morgan Griffith, Esq., Post Office Box 1250, Salem, Virginia, 24153; and by hand delivery to counsel for the Bar, Edward L. Davis, Esq., 707 East Main Street, Suite 1500, Richmond, Virginia, 23219.

ENTERED this 15th day of May, 2003.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: Roscoe B. Stephenson

Roscoe B. Stephenson, III, First Vice Chair

RESA

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
GEORGE WELLS ROWE

VSB Docket No. 11-031-086546
VSB Docket No. 12-000-091393 (CRESPA)

ORDER

These matters came on May 18th, 2012, to be heard upon the Certification of the Third District Subcommittee of misconduct related to unauthorized practice of law during the periods of administrative suspensions for failures to comply with the Virginia State Bar Mandatory Continuing Legal Education requirements, and pursuant to the Virginia State Bar's Request for Hearing before the Board pursuant to the Consumer Real Estate Settlement Protection Act (CRESPA), Va. Code Section 6.1-2.30 *et seq.*, and Real Estate Settlement Agents (RESA), Va. Code Section 55-525.16 *et seq.* A duly-convened panel of the Virginia State Bar Disciplinary Board consisting of Thomas R. Scott, Jr., Chair, presiding, along with Jody D. Katz, Lay Member, William M. Moffet, Michael S. Mulkey, and Samuel R. Walker heard the cases.

Kathryn R. Montgomery, Deputy Bar Counsel, represented the Virginia State Bar and the Respondent, George Wells Rowe, was represented by William D. Bayliss of Williams Mullen. The court reporter for the proceeding was Tracy J. Stroh, Chandler and Halasz, P.O. Box 9349, Richmond, Virginia, 23227, telephone (804) 730-1222.

The Chair opened the hearing by calling the cases. The panel was polled as to whether any member had any conflict of interest or other reason why the member should not participate in the hearing. Each member, including the Chair, answered in the negative.

I. FINDINGS OF FACTS

The exhibits of the Virginia State Bar and the Respondent were admitted without objection. The parties stipulated to the following facts:

VSB Docket No. 11-031-086546

1. Respondent was licensed to practice law in the Commonwealth of Virginia on January 30, 1974.

2. On January 23, 2009, the Virginia State Bar Mandatory Continuing Legal Education ("MCLE") Board sent Respondent a Notice of Noncompliance for 2008 MCLE.

3. On March 24, 2009, Respondent submitted to the bar's MCLE office an executed 2008 MCLE Notice of Noncompliance, certificates of attendance forms, and a check for $200.00.

4. Although Respondent has indicated that on March 24, 2009 he was under the belief that he had satisfied the requirements with his submission, he later learned that his submission did not satisfy the bar's MCLE requirements.

5. On March 25, 2009, Respondent's license to practice law in Virginia was suspended for failure to comply with the MCLE requirements of the Virginia State Bar.

6. On March 27, 2009, the Director of MCLE sent Respondent a letter notifying him that his license to practice law in Virginia had been suspended on March 25, 2009.

7. On April 16, 2009, Respondent made further submissions to the bar's MCLE office.

8. On April 20, 2009, Respondent's license to practice law in Virginia was reinstated.

9. Respondent admittedly continued to practice law in Virginia from March 25, 2009 to April 20, 2009.

10. Respondent did not at any time report to the bar that in 2009, he had practiced law while his license was suspended.

11. On January 8, 2010, the Virginia State Bar MCLE Board sent Respondent a Notice of Impending MCLE Suspension for 2009 MCLE.

12. On March 10, 2010, Respondent's license to practice law in Virginia was suspended for failure to comply with the MCLE requirements of the Virginia State Bar.

13. On March 11, 2010, the Director of MCLE sent Respondent a letter notifying him that his license to practice law in Virginia had been suspended on March 10, 2010.

14. On December 29, 2010, Respondent's law partners learned that Respondent's license to practice law was suspended. The law partners confronted Respondent with this information.

15. Respondent, by counsel, submitted that he intended to self-report his 2010 misconduct to the Virginia State Bar, and that his counsel and counsel for the law partners had engaged in discussions about reporting the matter to the Virginia State Bar and was in the process of coordinating the reporting prior to January 12, 2011.

16. On January 3, 2011, Respondent complied with the bar's MCLE requirements and his license to practice law in Virginia was reinstated.

17. On January 12, 2011, Respondent's law partner reported Respondent's misconduct to the Virginia State Bar.

18. In response to the bar complaint, Respondent has accepted responsibility for his conduct and has cooperated with the State Bar and has admitted to the Virginia State Bar that he engaged in the practice of law in Virginia while his law license was suspended from March 10, 2010 to January 3, 2011. During the course of the bar's investigation, Respondent admitted that he also practiced law while his license was suspended from March 25, 2009 to April 20, 2009.

19. Respondent also submitted that his wife had been in poor health in recent years, and that he had suffered a stroke in August, 2010.

20. During his two suspensions, Respondent did not disclose to his clients or law partners that his license to practice law was suspended in Virginia.

VSB Docket No. 12-000-091393

21. Respondent was licensed to practice law in the Commonwealth of Virginia on or about January 30, 1974.

22. Respondent's license was suspended and he was not in good standing with the Virginia State Bar from March 25, 2009 to April 20, 2009 and from March 10, 2010 to January 3, 2011.

23. Respondent was registered with the Virginia State Bar as an attorney settlement agent from 1997 to March 2009.

24. Respondent's CRESPA certification was revoked after his license to practice law was suspended on or about March 25, 2009. By letter dated March 27, 2009, the Virginia State Bar notified Respondent that his CRESPA certification had been revoked.

25. Respondent reregistered as an attorney settlement agent with the Virginia State Bar on or about December 19, 2011.

26. In order to function as the settlement agent in residential real estate transactions, Respondent was required to have been registered as a settlement agent with the Virginia State Bar and have in full force and effect the following:

a. A lawyer's professional liability insurance policy providing first dollar coverage and limits of at least $250,000.00 per claim covering Respondent;

b. A blanket fidelity bond or employee dishonesty insurance policy providing limits of at least $100,000.00 covering all other employees of Respondent; and

c. A surety bond providing limits of at least $200,000.00 covering Respondent.

27. Respondent is a named partner in his law firm, and during all periods of time germane to his conduct alleged herein, the Firm, in fact, maintained the professional liability insurance policy and the fidelity and surety bonds required by CRESPA.

28. Respondent acted as settlement agent in 262 residential real estate transactions that were closed between March 27, 2009 and December 18, 2011.

At the hearing, the parties entered into additional stipulations confirming (1) that Respondent had received, read and understood the March 27, 2009, letter from the Director of MCLE informing him of the suspension of his law license, which is referred to above in No. 6; (2) that Respondent had received, read and understood the March 11, 2010, letter from the Director of MCLE informing him of a second suspension of his law license, referenced above in No. 13; and (3) that Respondent had received, read and understood the March 27, 2009, letter from the Virginia State Bar notifying him that his CRESPA certification had been revoked.

II. MISCONDUCT

The Certification as to VSB Docket No. 11-031-086546 charged violations of the following three provisions of the Virginia Rules of Professional Conduct:

RULE 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice of Law

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

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; and

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyers fitness to practice law.

The Bar's Request for Hearing, VSB Docket No. 12-000-091393, pursuant to the Consumer Real Estate Settlement Protection Act (CRESPA), Va. Code Section 6.1-2.30 *et seq.*, and Real Estate Settlement Agents (RESA), Va. Code Section 55-525.16 *et seq.* alleged as follows:

Without being properly registered as an attorney settlement agent with the Virginia State Bar, Respondent acted as settlement agent in 262 residential real estate transactions which were closed between March 27, 2009 and December 18, 2011.

Such conduct by Respondent may constitute violations of Regulation 15 VAC 5-80-30, Registration; Reregistration; Required Fee.

III. DISPOSITION

After accepting the written stipulations and the additional stipulations offered at the hearing as to the evidence, and hearing argument on behalf of the Bar and the

Respondent, the Board recessed to deliberate. After due deliberation, the Board reconvened and announced its finding that the Virginia State Bar had proven, by clear and convincing evidence, that the Respondent had violated the following provisions of the Virginia Rules of Professional Conduct during both separate time periods described in the stipulations above:

RULE 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice of Law

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

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

The Board found that the Virginia State Bar did not prove by clear and convincing evidence a violation of Rule 8.4(c);

The Board also found that the Respondent violated CRESPA regulations, Regulation 15 VAC 5-80-30, Registration; Reregistration; Required Fee, by not being properly registered as an attorney settlement agent with the Virginia State Bar while acting as a settlement agent in 262 residential real estate transactions which were closed by him between March 27, 2009 and December 18, 2011.

Thereafter, the Board received further evidence of aggravation and mitigation from the Bar, including Respondent's lack of any prior disciplinary record and several witnesses on behalf of the Respondent in mitigation.

The Board then recessed to deliberate as to what sanctions to impose upon its findings of misconduct by Respondent and violation of the CRESPA regulations by the

Respondent. After due deliberation the Board reconvened to announce the Board's determination that regarding VSB Docket No. 11-031-086546 the Respondent's license to practice law in the Commonwealth of Virginia is suspended for a period of thirty (30) days, effective immediately on May 18th, 2012.

As to the CRESPA violations in VSB Docket No. 12-000-091393, the Board imposes a penalty, as provided by §55-525.31 of the *Code of Virginia*, 1950, as amended, of $5000.00. The Respondent has thirty (30) days from the date of this Order to pay the penalty. A check for the penalty shall be made payable to the Virginia State Bar and should remitted to the Office of the Clerk of the Virginia State Bar Disciplinary Board.

It is further ORDERED that, as directed in the Board's May 18, 2012, Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the suspension, and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail by Certified Mail an attested copy of this Order to Respondent at his address of record with the Virginia State Bar, 8310 Midlothian Turnpike, Richmond, VA 23235-5120, by regular mail to his counsel, William D. Bayliss, at Williams Mullen, 200 S. Tenth Street, P. O. Box 1320, Richmond, Virginia 23218, and by hand-delivery to Kathryn R. Montgomery, Deputy Bar Counsel, Virginia State Bar, at 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 30th day of May, 2012.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Thomas R. Scott

Thomas R. Scott, Jr., Chair