The Importance of Being Earnest,
A Trivial Presentation for People Serious About Rules 3.1 and 3.3

I'Anson-Hoffman American Inn of Court
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Norfolk Yacht and Country Club
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Rule 3.1

Meritorious Claims and Contentions

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

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Virginia Code Comparison

Rule 3.1 is similar to DR 7-102(A)(1), but with three differences. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applied only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

Committee Commentary

Although Rule 3.1 is similar in substance to existing Virginia Code provisions, the Committee concluded that the objective standard of the *ABA Model Rule* was preferable and more closely paralleled Section 8.01-271.1 of the *Code of Virginia*, dealing with lawyer sanctions.

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;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(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.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Comment

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

[2] *ABA Model Rule* Comment not adopted.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, Section 8.01-271.1 of the *Code of Virginia* states that a lawyer's signature on a pleading constitutes a certification that the lawyer believes, after reasonable inquiry, that there is a factual and legal basis for the pleading. Additionally, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), *see* the Com-

ment to that Rule. *See also* the Comment to Rule 8.4(b).

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Furthermore, the complexity of law often makes it difficult for a tribunal to be fully informed unless pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party.

False Evidence

[5] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[6] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[7-9] *ABA Model Rule* Comments not adopted.

Remedial Measures

[10] *ABA Model Rule* Comments not adopted.

[11] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

[12] Whether an advocate for a criminally accused has the same duty of disclosure has been in-

tensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

[13] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[13a] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[13b] The ultimate resolution of the dilemma, however, is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. *See* Rule 1.2(c).

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. For purposes of this Rule, *ex parte* proceedings do not include grand jury proceedings or proceedings which are non-adversarial, including various administrative proceedings in which a party chooses not to appear. However, a particular tribunal (including an administrative tribunal) may have an explicit rule or other controlling precedent which requires disclosure even in a non-adversarial proceeding. If so, the lawyer must comply with a disclosure demand by the tribunal or challenge the action by available legal means. The failure to disclose information as part of a legal challenge to a demand for disclosure will not constitute a violation of this Rule.

Virginia Code Comparison

Paragraph (a)(1) is substantially similar to DR 7-102(A)(5), which provided that "[i] n his representation of a client, a lawyer shall not knowingly make a false statement of law or fact."

With regard to paragraph (a)(2), DR 7-102(A)(3) provided that "[i] n his representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal."

Paragraph (a)(3) has no direct counterpart in the *Virginia Code*. EC 7-20 stated: "Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part."

With regard to paragraph (a)(4), the first sentence of this paragraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not "knowingly use perjured testimony or false evidence." DR 4-101(D)(2), adopted here as Rule 1.6(c)(2), made it clear that the "remedial measures" referred to in the second sentence of paragraph (a)(4) could include disclosure of the fraud to the tribunal.

Paragraph (b) confers discretion on the lawyer to refuse to offer evidence that the lawyer "reasonably believes" is false. This gives the lawyer more latitude than DR 7102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knows" is false.

There was no counterpart in the *Virginia Code* to paragraph (c).

Paragraph (d) is identical to DR 7-102(B).

Committee Commentary

The Committee generally adopted the *ABA Model Rule*, but it deleted the word "material" from paragraph (a)(1) to make it identical to DR 7-102(A)(5) and from paragraph (a)(2) because it appeared to be redundant. Additionally, the word "directly," preceding "adverse" was deleted from paragraph (a)(3).

With respect to paragraph (a)(3), the Committee believed it advisable to adopt a provision requiring the disclosure of controlling adverse legal authority. While there was no corresponding provision within the Disciplinary Rules of the *Virginia Code*, there is a corresponding provision within the *ABA Model Code*, DR 7-106(B)(1). However, the Committee deleted the word "directly" from the paragraph in the belief that the limiting effect of that term could seriously dilute the paragraph's meaning.

The Committee determined to retain the obligation to report a non-client's fraud on the tribunal, and therefore repeated the provisions of DR 7-102(B) in paragraph (d).

BANKRUPTCY CASE SUMMARY AND QUESTIONS

In re Sandra Wenk

Kane, a bankruptcy attorney, electronically filed a Chapter 13 bankruptcy petition on behalf of debtor-client. An hour later, White, a different bankruptcy attorney, electronically filed a Chapter 13 petition on behalf of the same debtor-client.

White told the court that he believed Kane did not get debtor's signature on his petition. At a show cause hearing, Kane told the court that Debtor did not make the meeting where Debtor was going to sign the petition due to bad weather. Kane explained he then told his paralegal to file the petition anyways.

White said the Debtor contacted him because she could not reach Kane and wanted to file before an impending foreclosure schedules for later that day. White argued that Debtor did not authorize Kane to file a petition on her behalf. The court dismissed Kane's petition and issued an order of sanctions suspending Kane or any member of his firm from filing any new petitions in the EDVA for a 20-day period, and requiring Kane and his assistant to attend ECF training.

At a rehearing, Kane argued that the circumstances were unique, that the purpose of debtor's signature is to affirm the information in the document is true so there was no harm because the information was true, and that if he did not file the petition then debtor would have sued him for malpractice. Kane further testified that he did not intend to file a petition purporting to have debtor's signature but to file a deficient petition, one without the debtor's signature, and have debtor sign the original copy later. Kane said he commonly filed deficient petitions to take advantage of the ten-day automatic stay cure period.

Kane testified he left the country right after the filing so he was unaware that the electronic petition had an electronic signature on it until he returned, at which point he notified his paralegal of the error.

In ordering sanctions on Kane, the Virginia Supreme Court found that Kane violated the Federal Rules of Bankruptcy Procedure and cause the court to incur unnecessary expense.

Discussion Question

Nathan, a bankruptcy attorney, is unable to meet with his client, Erin, due to a severe snowstorm. The purpose of the meeting was to have Erin sign her bankruptcy petition. Erin wants to get the petition filed before the foreclosure on her home scheduled for that afternoon. Nathan is filing the petition electronically. Nathan wants to put Erin's electronic signature on the electronic filing and have Erin sign a physical copy later. May Nathan do so without violating the Virginia Rules of Professional Conduct?

CRIMINAL CASE SUMMARY AND QUESTIONS

Livingston v. Virginia State Bar

Collins bought fake OxyContin pills from an undercover police officer within 1000 feet of a public school. Livingston, an assistant Commonwealth's Attorney, prosecuted Collins for possession with intent to distribute within 1000 feet of a public school.

Collins moved to dismiss the charges on the grounds that the pills were fake so Collins cannot be guilty of intent to distribute OxyContin. The Court granted Collins's motion to dismiss.

However, Livingston re-indicted Collins charging him with manufacturing, selling, or distributing an imitation controlled substance imitating OxyContin. Despite the listed charge, Livingston repeatedly referred to the charge as possession with intent to distribute.

The Virginia State Disciplinary Board (VSB) found that Livingston was incompetent in prosecuting the case: first, for proceeding to trial on a possession with intent to distribute OxyContin charge when Livingston knew it was an imitation pill; second, for obtaining an indictment not supported by probable cause when the evidence showed that Collins didn't actually manufacture or distribute the pills; and third, the VSB charged that Livingston was incompetent for objecting to the substitution of the words "imitation control substance" for "marijuana."

Livingston admitted that his indictment against Collins for selling within 1000 feet of a school was based on a "glaze[] over" the case law, which caused him to incorrectly analyze the law. The VSB found that Livingston violated Rules 1.1, 3.1, and 3.8(a) and imposed sanctions—a public reprimand requiring completion of two hours of CLE on ethics.

The Virginia Supreme Court upheld the VSB's finding as to Rule 1.1 finding clear and convincing evidence that Livingston obtained three indictments against Collins based on factual or legal errors that were due to his failure to analyze the evidence and the elements of the charges brought and not mere negligence. However, the Supreme Court overturned the violations of 3.1 and 3.8(a). The Court did not find clear and convincing evidence that Livingston maintained a frivolous argument in violation of Rule 3.1 by objecting to the substitution of 'imitation controlled substance' for 'marijuana.' Furthermore, the Court did not find clear and convincing evidence that Livingston had actual knowledge that the indictments against Collins were not supported by probable cause, thus violating Rule 3.8. While Livingston's erroneous analysis of the applicable law supported finding him incompetent under Rule 1.1, it did not rise to the level of actual knowledge necessary for Rule 3.8. The Court vacated the VSB's sanctions and remanded for further consideration of appropriate sanctions.

Discussion Question

Police officers arrest Sonny for buying Oxycodone within 1000 feet of a school. However, the pills used in the transaction were fake. Marisa, a Commonwealth's attorney, indicts Sonny for possession with intent to distribute Oxycodone. Because the pills were in fact fake and not Oxycodone, the court enters an order dismissing the indictment but states that Marisa may "re-indict" Sonny; however, in the order, the court mistakenly refers to the charge in the indictment as "possession with intent to distribute marijuana on or near school property." Sonny moves to amend the order to substitute "imitation controlled substance" for "marijuana." Marisa objects because of concerns about res judicata or collateral estoppel arguments that Sonny might raise. Did Marisa violate Rule 3.1 of the Virginia Rules of Professional Conduct by arguing against the correction of the court order?

PERSONAL INJURY CASE SUMMARY AND QUESTIONS

Lester v. Allied Concrete

Ms. Lester was killed in a horrific car accident, in which an Allied Concrete truck turned a corner on two wheels at an excessive speed, flipped over, and crushed Ms. Lester under 600,000 lbs of concrete. A wrongful death suit followed, during which the following incidents took place:

Summary (Lester 2010)

Defense counsel filed a motion for a continuance. Plaintiff, represented by attorney Murray, opposed defense's motion. At the motion hearing, Murray claimed that defense counsel had "hacked" into Plaintiff's Facebook page. Murray used a photograph and his bare assertion as evidence for this claim against defense counsel. Murray made it clear to the court he was not accusing defense counsel of the crime of "hacking," but rather was accusing defense counsel of making unauthorized access of his client's Facebook page. Judge Hogshire found that Murray based his repeated claims of unauthorized access on nothing more than his client's assertions. In doing so, Murray violated Rule 3.3: Candor to the Tribunal, by maintaining these claims without even an inquiry into the relevant facts and their validity.

Finally, plaintiff's counsel was ordered to pay reasonable attorney's fees for defense counsel's efforts in responding to plaintiff's accusations.

Summary (Lester 2011)

Almost a year after a massive wrongful death award to Mr. Isaiah Lester, Judge Hogshire entered a $722,000 judgment against Mr. Lester and his attorney, Mr. Murray. Judge Hogshire found that Murray instructed his paralegal to tell Mr. Lester to "clean up" his Facebook profile in response to defense counsel's discovery request. (Potential "trial blowups" included a picture of Lester drinking alcohol while wearing an "I heart hot moms" shirt shortly after his wife's untimely death.) Murray's plan was to "deactivate" Lester's Facebook and then inform defense counsel that Lester had no Facebook account to disclose at the time of the discovery request. Defense counsel later filed a motion to compel, prompting Murray to instruct Lester to reactive his Facebook page.

Judge Hogshire found Murray responsible for destroying discoverable evidence, and held Murray and Lester liable for $722,000.

Discussion Questions (Lester 2010, 2011)

If a client approached you with the allegation that defense counsel "hacked" their Facebook and found an incriminating photo they should not have had access to, which would constitute the "reasonable inquiry" required by Va. Code. Ann § 8.01-271.1?

I. Asking several times if they are sure there's no way defense counsel had access to the photo.
II. Going on Facebook and trying to locate the photo.
III. Looking into "unauthorized access" measures and how they are accomplished.
IV. Going with your gut.

Discussion: What else could constitute reasonable inquiry?

If a client approached you during a meeting, confessed they had various unsavory photos on their social media profiles and asked if they should delete them – what should you do?

If a client said they had already destroyed them?

FAMILY LAW CASE SUMMARY AND QUESTIONS

Barrett v. Virginia State Bar

Barrett (2005)

Rhudy Barrett is seeking a divorce from her husband Thomas Barrett, an attorney. Barrett appeals a decision by the Virginia Bar Association pursuant to Rules **4.3,** of the Rules of Professional Conduct. Under Rule 4.3(b), Barrett is prohibited from giving unauthorized legal advice to an unrepresented person. Barrett wrote several emails to his wife in which he predicts the outcome of their legal battle. For example, he contends that Mrs. Barrett has no case against him for adultery, among other things. Barrett also used the emails as an opportunity to reconcile with Mrs. Barrett. The court found that conduct which usually constitutes a violation of this rule tends to be more egregious and set aside the Board's finding.

Barrett was also accused of violating Rule 3.4(j) which prohibits a lawyer from harassing another. In a series of emails, Barrett insulted Mrs. Barrett's lawyer by appealing to faith. He says, "words cannot express the disappointment I feel towards you, one who ostensibly claims Chris as her savior, in that you would represent one Christian in their suit against another, let alone a wife verses [sic] a husband . . . You are inept. . .." ***Timothy Martin Barrett v. Virginia State*** **Bar, 611 S.E. 2d 375, 377.** Additionally, in protest, Barrett refused to refer to the lawyer by her maiden name and instead continued to address her by her former husband's last name. The Court held that Barrett's behavior were intended to harass Mrs. Barrett's lawyer and were therefore a violation of the rule.

Rule 3.4(i) prohibits lawyers from presenting or threatening to present criminal or disciplinary charges solely to gain an advantage. Barrett was held to have violated the rule after he repeatedly told Mrs. Barrett's attorney that she had violated cited portions of the Rules of Professional Conduct and that he would bring charges. Barrett argued that he believed typographical errors to be sufficient for a Bar complaint. The court disagreed and held that the succession of threats were made without good faith.

Barrett was held to violate rule 3.1 which prohibited him defending or bringing a proceeding unless the basis for doing so is not frivolous. Barrett filed a Motion to Strike after Mrs. Barrett's full name was used on a pleading. He argued that the name used on the pleading was not the full legal name of his ex-wife. The Court held that Barrett was familiar with Mrs. Barrett's name, including her maiden name and even used it himself in several pleadings. Therefore, filing the Motion to Strike was a violation of rule 3.1.

Barrett II (2006)

In 2006, the Supreme Court of Virginia heard Barrett's appeal on the imposition of a 30-month suspension of his license to practice law. The Court reviewed actions involved in Barrett's divorce proceeding against his wife, Jill Barrett. In that litigation, Barrett procured a witness subpoena for his former employer, Hayden I. DuBay, alleging DuBay had information regarding his wife's earning capacity. Barrett sent two letters to DuBay's attorney reciting the expense and inconvenience that DuBay would incur if he had to appear and testify and then offered to release DuBay from the subpoena if DuBay would withdraw a claim for an attorney's lien DuBay had filed against Barrett. The Court found that these actions violated *Rules 4.4*. and *8.4(b) of the Rules of Professional Conduct.* The Supreme Court affirmed the three-judge court's decision because Barrett's intent was clearly to harass DuBay and compel him to waive the lien in violation of both rules.

Additionally, at that trial, Barrett called opposing counsel, Martin L. Davis, as an adverse witness because Barrett "ha[d] reason to believe that Mr. Davis and Ms. Barrett have a romantic relationship." When Davis denied the allegations, Barrett abandoned his request to call Davis as a witness. The three-judge court

found that Barrett violated *Rules 3.1* and *3.4(j)* by these actions. The Supreme Court concluded that Barrett only called Mr. Davis up to the stand to harass him and impugned the personal and professional reputation of his client, thus, affirming the three-judge court's decision.

Finally, the last issue was related to an action a former client, Debra Eller, brought against Barrett and his law firm, The Injury Law Institute of Virginia, PLC, in which Eller alleged negligence and malpractice based on Barrett's failure to file her personal injury lawsuit prior to the expiration of the statute of limitations. Barrett filed a special plea of immunity claiming that he was immune from liability because he practiced as a professional limited company. Eller's counsel filed a response citing the statutory provisions that specifically affirm the personal liability of attorneys who are members of professional limited companies. Barrett declined to withdraw his plea until the trial court convened to hear the motion. The three-judge court held that these actions constituted a violation of *Rules 1.1* and *3.1* of the Rules of Professional Conduct. The Court overturned this finding holding that Barrett's position, although erroneous, is not frivolous and was supported by legal research he conducted in law school.

In addition to these issues, Barrett also made three procedural arguments. First, he argued that the Court erred in dismissing his demurrer. The Court held that there was no basis for a demurrer and Barrett was sufficiently on notice of the charges before him. Second, Barrett argued that one of the judges on the panel was conflicted because Barrett was once retained by a former client of the Judge's. That argument was deemed to have been waived. Finally, Barrett claimed that the rules did not apply to him because he was representing himself and these rules apply to an attorney. The Court held that where the rules are concerned, Barrett was acting as a lawyer (for himself) and not a client and therefore, the rules do apply.

Barrett III (2009)

The saga continues. In this matter, the Supreme Court reviews a decision by the lower court finding that Barrett violated rule 3.1 prohibiting an attorney from bringing or defending an issue unless there is a basis for doing so that is *not* frivolous. The lower court did dismiss the finding that Barrett had violated rule 3.4 for the State Bar did not sufficiently prove the violation.

For his violation of rule 3.1, the bar imposed a revocation of Barrett's license. At the time of this suspension, Barrett was already serving two suspensions of his license for the aforementioned violations during litigation with his former wife. Barrett filed a motion to dismiss on two grounds. He asserted that as a non-lawyer at the time of the proceeding, the Court now lacked jurisdiction to try a non-lawyer under the rules of professional conduct. Additionally, applications of such rules would violate his rights under the 14th Amendment. The Court denied his motion.

On the question of jurisdiction, the court reaffirmed their position in Barrett II, stating that rules of statutory construction provide that should construction of the language result in a manifest absurdity, then the rules should not be interpreted as such. If Barrett could circumvent the rules by simply representing himself in the event of an alleged violation, this would result in manifest absurdity and a distortion of the purpose of the rule. The Court said the same applies here if Barrett could use his suspension to circumvent the rules. A lawyer whose license is suspended is still an active member of the bar and thus, subject to the Rules.

The Court also rejected Barrett's Equal Protection. Barrett argued that applying the Rules of Professional Conduct to him while exercising his right to represent himself burdens him in a way that does not burden other litigants. The Court reasoned that Barrett is not like other classes of litigants because he is a lawyer and is so by choice. Therefore, he can be treated as other lawyers with suspended licenses would be treated.

Barrett's alleged violation of Rule 3.1 in this case stems from Barrett's argument that he is no longer responsible for paying child support since the Court awarded full legal custody of all of the children to his ex-wife. Barrett cites to the Code's definition of "sole custody" which says that a person retains sole responsibility for the case and control of a child. Barrett also cites the Code's section on guidelines for determina-

tion of child support. Barrett argues that "joint legal responsibility" is equated with "joint legal custody" and that, since the order vested sole legal custody of the children in his ex-wife, he had no legal custody and thus, no shared legal responsibility to support any of his children under the Code.

The Court dismisses his argument. The section of the Code cited, says the Court applies to parents who have joint custody of their children and thus, have joint responsibility for support. The Court reminds Barrett that his parental rights have not been terminated, he is not a stranger to his children and must therefore continue to pay child support. The Court held that the persistent assertion of this position is frivolous and affirmed the Panel's order revoking his license to practice law.

Discussion Question

Jonathan represents plaintiffs in a suit against a large corporation accused of dumping chemicals into a local water source. Over the years following the corporation's alleged dumping, people in the town who drank water from the water source began developing various cancers and malignant tumors. Jonathan filed a complaint alleging that the corporation's dumping was the proximate cause of the plaintiffs' injuries without any proof but he hopes to attain proof during discovery. Additionally, Jonathan does not actually think his clients will win, he just sees the big bucks in this one. Finally, this may be a minor detail but Jonathan really hates the CEO of this corporation and the real reason he is filing suit is purely to drive stock prices down. Has Jonathan violated Rule 3.1 in any way?

IN RE: SANDRA F. WENK

Case No. 02-60033-DOT, 02-60035-DOT

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

296 B.R. 719; 2002 Bankr. LEXIS 1733; 50 Collier Bankr. Cas. 2d (MB) 430; 199 A.L.R. Fed. 729

July 16, 2002, Decided

DISPOSITION: [**1] Court found that Kane's actions impeded and disrupted bankruptcy process and caused this court to incur unnecessary expense. Court imposed appropriate sanction.

CASE SUMMARY:

PROCEDURAL POSTURE: A bankruptcy attorney filed a motion to rehear and reconsider the court's sanctions order against the attorney. The court granted the motion to rehear and reconsider, and vacated its earlier sanctions order.

OVERVIEW: The attorney filed an electronic bankruptcy petition that indicated that it was electronically signed by the attorney and the debtor, when the debtor had not in fact signed a petition. The attorney argued that the circumstances surrounding the filing were unique in that: (1) the debtor was about to lose her home, (2) the debtor had made several frantic phone calls to the attorney's office, (3) a snowstorm had virtually shut down the city, (4) the debtor was unable to make it to the attorney's office, (5) the attorney experienced trouble making it to the office, and (6) the petition, though unsigned, had been prepared many weeks before and the attorney was very familiar with the parties. The court found that the attorney represented to the court that he had secured an originally executed petition physically signed by the debtor prior to electronically filing the case. In this case, when the petition was received, the court was presented with a document which stated on its face that debtor had signed it, under penalty of perjury, when it was not true. This amounted to fraud. The attorney violated *Fed. R. Bankr. P. 9011*.

OUTCOME: The attorney's actions impeded and disrupted the bankruptcy process and caused the court to incur unnecessary expense. The conduct was sanctionable, and the court intended to impose an appropriate sanction.

LexisNexis(R) Headnotes

Bankruptcy Law > Case Administration > Commencement > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
[HN1] See *Fed. R. Bankr. P. 5005(a)(2)*.

Bankruptcy Law > Case Administration > Commencement > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview

[HN2] A bankruptcy case filed electronically is no different from a paper case filed in person at the counter. As such, the electronically filed petition must comply with E.D. Va. *Bankr. R. 5005-1*, which specifically states that each petition filed must include an unsworn declaration with the signature of all debtors. E.D. Va. *Bankr. R. 5005-1(D)(1)*.

Bankruptcy Law > Case Administration > Commencement > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
[HN3] See E.D. Va. *Bankr. R. 5005-1(C)(4)*.

Bankruptcy Law > Case Administration > Commencement > General Overview
Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
[HN4] In electronically filed bankruptcy cases, the "/s/" followed by a full typewritten name constitutes that person's signature under *Fed. R. Bankr. P. 9011* and E.D. Va. *Bankr. R. 5005-1(C)(4)*.

Bankruptcy Law > Case Administration > Commencement > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
[HN5] In filing a bankruptcy petition electronically, the practitioner represents to the court that he or she has secured an originally executed petition physically signed by the debtor prior to electronically filing the case.

Bankruptcy Law > Case Administration > Filing Fees
Bankruptcy Law > Case Administration > Notice
Civil Procedure > Judgments > Entry of Judgments > Stays of Proceedings > Automatic Stays
[HN6] A debtor's signature is absolutely required even on skeletal petitions. While E.D. Va. *Bankr. R. 5005-1(E)* provides a procedure whereby persons filing pleadings or other papers not meeting the requirements of the local bankruptcy rules will receive a notice of deficient filing allowing for 10 days to correct the deficiency, before striking the pleading or other paper, this rule should not be viewed as an extension of time during which counsel can procure the debtor's signature on the petition. E.D. Va. *Bankr. R. 5005-1(E)* was enacted to allow parties who have made honest, inadvertent mistakes time to correct those mistakes without having to pay another filing fee. Intentionally filing an unsigned petition to attain the benefit of the automatic stay for 10 days during which the deficiency may be cured is ultimately a fraud on the court and the debtor whether or not it appears to be allowed by E.D. Va. *Bankr. R. 5005-1(E)*.

Legal Ethics > Professional Conduct > Illegal Conduct
[HN7] See Va. Sup. Ct. R. pt. 6, ß II, pmbl., para. 8 (2001).

Bankruptcy Law > Case Administration > Commencement > General Overview
[HN8] The purpose of debtor's signature on the bankruptcy petition is not merely to affirm that the information contained in the petition is true and correct. Logic dictates that only the debtor can state under oath that the information provided in his or her petition is true and correct. Moreover, the debtor's signature indicates the debtor's consent to the bankruptcy filing, consent which can only be given by the debtor.

Bankruptcy Law > Case Administration > Commencement > General Overview
Bankruptcy Law > Practice & Proceedings > Professional Responsibility
[HN9] *Fed. R. Bankr. P. 9011* imposes obligations on both attorneys and debtors to sign certain documents, and specifically prohibits attorneys from signing a debtor's name to the lists, schedules and statement of financial affairs.

Bankruptcy Law > Case Administration > Commencement > General Overview
Bankruptcy Law > Practice & Proceedings > Professional Responsibility

[HN10] See *Fed. R. Bankr. P. 9011(a), (b).*

Bankruptcy Law > Case Administration > Commencement > General Overview
Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
[HN11] See *Fed. R. Bankr. P. 1008*.

Governments > Courts > Court Personnel
Legal Ethics > Professional Conduct > Frivolous Claims
Legal Ethics > Professional Conduct > Tribunals
[HN12] Attorneys serve as officers of the court, which obligates them: (1) to be candid with the court, (2) to bring only non-frivolous matters before the court, and (3) to maintain a professional and courteous demeanor before the court. Va. Sup. Ct. R. pt. 6, ß II, R. 3.1, 3.3 (2001). Attorneys should not take their position lightly because they have a "special responsibility for the quality of justice" and a "duty to uphold the legal process." Va. Sup. Ct. R. pt. 6, ß II, pmbl., para. 1, 4 (2001). Further, the integrity of the judicial process in any court depends to a large extent on the veracity and integrity of the attorneys who practice before it. Absent the trust those virtues inspire, the system cannot function.

Bankruptcy Law > Practice & Proceedings > Professional Responsibility
Criminal Law & Procedure > Criminal Offenses > Fraud > Bankruptcy Fraud > Penalties
[HN13] Upon finding a violation of *Fed. R. Bankr. P. 9011*, a court may impose sanctions. *Fed. R. Bankr. P. 9011(c)(2)* gives the court wide latitude in imposing sanctions to include non-monetary or monetary penalties.

COUNSEL: For Sandra F. Wenk, Debtor (02-60033-DOT): James E. Kane, Chaplin, Papa & Gonet, Richmond, VA.

For Sandra F. Wenk aka Sandra E. Fry, Debtor (02-60035-DOT): Bruce W. White, Richmond, VA.

(02-60033-DOT, 02-60035-DOT): Robert E. Hyman, Trustee, Richmond, VA.

JUDGES: Douglas O. Tice, Jr., Judge.

OPINION BY: Douglas O. Tice, Jr.

OPINION

[*721] ***MEMORANDUM OPINION***

Hearing was held on April 10, 2002, on James E. Kane's motion to rehear and reconsider the court's sanctions order of March 5, 2002.

Background.

On January 3, 2002, the court received two electronically filed chapter 13 petitions for debtor Sandra F. Wenk. Case Number 02-60033-T was filed on January 3, 2002, at 12:18 p.m. by attorney James E. Kane. Case Number 02-60035-T was filed at 1:21 p.m. on same day by attorney Bruce W. White. The cases were filed with both debtor's and counsel's electronic signature ("slash s" name). Both counsel are members [**2] of the Bar of this court, and both are approved participants in the court's electronic case filing system (ECF).

On January 4, 2002, White contacted chambers and informed the court of his belief that Kane had filed case number 02-60033-T without a petition having been signed by debtor. On January 10, after making several attempts to contact Kane to no avail, the court issued a show cause order compelling Kane and White to appear before the court and show cause why debtor's cases should not be dismissed.

JANUARY 30 SHOW CAUSE HEARING.

Hearing was held January 30, 2002, for Kane and White to show cause why cases [*722] which they filed for debtor on January 3, 2002, should not be dismissed.

At hearing held on January 30, 2002, Kane stated to the court that he had represented debtor and her husband in their joint chapter 7 case that was discharged in December 2001. He stated that he had been negotiating with the attorney representing the Wenks' mortgage company in an effort to halt a foreclosure on debtor's residence that was scheduled to occur on January 3, 2002.

According to Kane, debtor indicated that she wanted to file a chapter 13 case to prevent foreclosure and that he had [**3] scheduled an appointment for her to come in to sign her petition at 1:30 p.m. on January 3. On January 3, Kane did not arrive at his office until noon due to the snowstorm the night before. He stated that his paralegal called him at home on the morning of January 3 to let him know that debtor had called and wanted to make sure he was still going to file her petition. He also stated that debtor told his paralegal that she was not sure if she could make her 1:30 p.m. appointment due to the weather.

Kane stated that because of the weather, he asked his paralegal to file the petition from her home, advising her that debtor would come to the office at 1:30 p.m. to execute the bankruptcy papers. The petition was filed at 12:18 p.m. on January 3. Kane left a message for debtor on January 3 after she did not show up for her appointment. However, he never heard from her.

Kane stated he did not find out that White had filed a duplicate case until January 14 when Kane returned from vacation.

At hearing on January 30, White stated that debtor contacted him on January 3, concerned about an impending home foreclosure that was to occur that afternoon at 4 p.m. and her inability to get in touch [**4] with Kane. Debtor told White that she had an appointment with Kane at 1:30 p.m. on January 3, but she was unable to reach anyone at Kane's office other than a paralegal. Debtor and debtor's husband arrived at White's office around noon on January 3, and debtor signed her bankruptcy petition. The petition was filed at 1:21 p.m.

White stated that he attempted to contact Kane on the afternoon of January 3, but Kane was not in the office. White asserted that debtor advised him she had not authorized a filing by Kane as she had not been able to get in touch with him on January 3 regarding her petition.

THE COURT'S PRIOR RULINGS.

On February 14, 2002, the court issued an order dismissing case 02-60033-T. On March 1, 2002, the court issued a Memorandum Opinion supplementing its February 14 dismissal order based upon its finding that Kane, a member of the Bar of this court and an approved participant under the court's electronic case filing system, had filed case 02-60033-T on January 3, 2002, with a petition that had not been signed by debtor. The court's determination was based upon Kane's remarks to the court at hearing on January 30, 2002.

Also on March 1, the court issued [**5] an order of sanctions suspending Kane and any member of his law firm from filing any new bankruptcy petition in the Eastern District of Virginia for the period of March 11, 2002, through March 31, 2002, and requiring Kane and his assistant to attend ECF training prior to April 1, 2002. On March 5, 2002, the court amended its sanctions order to defer the suspension period to April 1, 2002.

MOTION TO REHEAR.

On March 7, 2002, Kane filed a motion to rehear and reconsider the sanctions order of March 5, 2002. In his motion, Kane [*723] states that there were unusual circumstances surrounding the filing of case 02-60033-T that should excuse his filing of an electronic petition including debtor's electronic signature when debtor had not signed an original paper petition.

Additionally, Kane asserts that: 1) the order of sanctions went beyond the scope of the show cause hearing conducted on January 30, 2) the sanctions are disproportionate to the alleged infraction, and 3) the sanctions ordered against other members of Kane's firm exceed the scope of the proceedings and the infraction.

On March 15, the court granted Kane's motion to rehear and reconsider. On same day the court issued [**6] an order vacating its amended order of sanctions dated March 5, 2002.

SHOW CAUSE REHEARING.

Show cause rehearing was held on April 10 to determine why sanctions, including monetary sanctions, should not be imposed.

At hearing, Thomas Papa appeared as counsel for Kane. In essence, counsel for Kane argues that the circumstances surrounding the filing are unique in that: 1) debtor was about to lose her home, 2) debtor had made several frantic phone calls to Kane's office, 3) a snowstorm had virtually shut down the city, 4) debtor was unable to make it to Kane's office, 5) Kane experienced trouble making it to the office, and 6) this petition, though unsigned, had been prepared many weeks before and Kane was very familiar with the parties.

Counsel asserts that the mere purpose of debtor's signature on the petition is to affirm that the information contained in the petition is true and correct. Counsel argues that there was no wrong committed because the information on the petition was correct. Lastly, counsel argues that had Kane not filed the petition, debtor would likely have sued Kane for malpractice.

At rehearing, Kane testified to essentially the same facts leading [**7] up to the filing of case 02-60033-T as he stated at hearing on January 30. However, Kane testified to the following facts for the first time at rehearing, some of which contradict his testimony of January 30.

At rehearing, Kane said that it was not his intention to file an electronic petition purporting to have debtor's signature, but to file a deficient petition [1] without any signatures on it - debtor or attorney. Kane stated that he planned to fix the deficient petition upon his return to the country on January 14 and that he had instructed his paralegal to have debtor sign the original petition while he was away. However, at previous show cause hearing on January 30, Kane stated that it was his intention to first file the electronic petition and that debtor would come into the office afterwards to sign the original petition. [2]

1 Kane also testified that because he had previously represented debtor in a prior joint bankruptcy, he was able to transfer most of the information from debtor's prior chapter 7 petition, with updates achieved by telephone conversations with debtor. Kane stated that he filed a minimal petition in Case 02-60033-T including only debtor's name, address, social security number, and estimation of assets and liabilities and that all of the information in the petition was true and correct.

[**8]

2 Based on the transcript from the January 30, 2002, show cause hearing, Kane testified as follows:

> Kane: Mrs. Wenk had requested that we go ahead and get something filed so that she could rest easy, and then she would get everything else executed. So I spoke with my paralegal over the phone, and told her to go ahead and get it filed from home .... And Ms. Wenk would come in at 1:30 and get everything fully executed.

Tr. at 3, *In re Wenk* (Bankr. E.D. Va. January 20, 2002) (Case Nos. 02-60033-T, 02-60035-T)

[*724] Kane further stated that it was his practice to sometimes file petitions without a debtor's signature because the debtor could receive the benefit of the automatic stay during the pendency of the court's issuance of a deficiency notice and ten day time to cure. [3]

3 At rehearing, Kane specifically stated "I indicated to [my paralegal] to go ahead and file without a signature on it, ... as we had done in prior cases, we normally would file it, we get a deficiency notice from the court that ... it was missing a signature, but at least we would get the benefit of a stay ...." Tr. at 10-11, *In re James Kane, Esq.* (Bankr. E.D. Va. April 30, 2002).

[**9] Kane testified that he was unable to retrieve voicemail messages from his cellular phone while out of the country and first learned of a problem with the petition on January 13 when he was flying back into the United States. He stated that when he returned to the office on January 14 he noticed that there was an electronic signature on the petition. He notified his paralegal of the error, and she informed Kane that the electronic filing program's default is to place electronic signatures on petitions.

Kane testified that he has never received a filing fee from debtor for dismissed case 02-60033-T, and the firm paid the $ 185.00 filing fee in the case.

Robert Van Arsdale, Assistant U.S. Trustee, appeared on behalf of the U.S. Trustee's office and cross-examined Kane. Van Arsdale questioned Kane about his April 10 testimony that it was his intention to file a deficient petition unsigned by both he and debtor. The U.S. Trustee focused on Kane's January 30 testimony, at which time Kane stated that he had signed the petition at the time it was filed. [4] In response, Kane asserted his belief that the court was inquiring whether he had signed the petition by January 30, the date of the [**10] hearing, not January 3.

4 Based on the transcript from the January 30, 2002, show cause hearing, the following dialogue occurred:

> Court: How did the case get filed by your office? You were out of the country.
>
> Kane: It was filed that day, on the 3rd. I was still in my office.
>
> Court: You were there. Did you sign the petition?
>
> Kane: Yes, I did.
>
> Court: Did the debtor sign the petition?
>
> Kane: The debtor never came in to sign. That's what the problem is. The debtor never kept her appointment.

Tr. at 4, *In re Wenk* (Bankr. E.D. Va. January 20, 2002) (Case Nos. 02-60033-T, 02-60035-T).

Van Arsdale argued that the court should suspend Kane from filing new petitions for 180 days.

Conclusions of Law.

ELECTRONIC PETITIONS ARE EQUIVALENT TO WRITTEN PETITIONS.

Federal Rule of Bankruptcy Procedure 5005(a)(2) provides that [HN1] "[a] document filed by electronic means in compliance with a local rule *constitutes a written paper* for the purpose of applying these rules, the Federal Rules [**11] of Civil Procedure made applicable by these rules, and *ß 107* of the Code." *Fed. R. Bankr. P. 5005(a)(2)* (emphasis added). [HN2] A case filed electronically is no different from a paper case filed in person at the counter. As such, the electronically filed petition must comply with Local Bankruptcy Rule 5005-1, [5] [*725] which specifically states that "each petition filed must include an unsworn declaration with the signature of all debtors ...." L.B.R. 5005-1(D)(1). Local Bankruptcy Rule 5005-1 further requires that [HN3] "all petitions, motions, pleadings and other papers shall be signed by counsel of record ...." L.B.R. 5005-1(C)(4).

5 On January 1, 2002, the Judges for the United States Bankruptcy Court for the Eastern District of Virginia issued Standing Order No. 01-6 entitled "Order Adopting Case Management/Electronic Case Filing Procedures" which states that "the Administrative Procedures provide a means for the signing of pleadings and papers through the mechanism of a password, *in compliance with LBR 5005-1(C)(4) ...." Order Adopting Case Management/Electronic Case Filing Procedures (Standing Order 01-6)*, page 1 (Bankr. E.D. Va. Jan. 1, 2002) (replaced by Standing Order 02-2 (Bankr. E.D. Va. July 1, 2002)) (emphasis added).

[**12] Also, in all electronic filings that require original signatures, [6] verification under *Federal Rule of Bankruptcy Procedure 1008* or contain an unsworn declaration as provided in *28 U.S.C. ß 1746*, "*originally executed copies must be retained* by the filer until three (3) years after the closing of the case unless the Court orders a different period ... [and] upon request of the Court, the filer must provide original documents for review." *Administrative Procedures for Filing, Signing, Retaining and Verification of Pleadings and Papers in the Case Management/Electronic Case Filing (CM/ECF) System (Exhibit to Standing Order No. 01-6)*, II(C)(1) (Bankr. E.D. Va. Jan. 1, 2002) (replaced by Standing Order 02-2 (Bankr. E.D. Va. July 1, 2002)) (emphasis added).

6 [HN4] In electronically filed cases, the "/s/" followed by a full typewritten name (e.g., /s/ Jane Doe) "constitutes that person's signature under FBRP 9011 and LBR 5005-1(C)(4)." *Administrative Procedures for Filing, Signing, Retaining and Verification of Pleadings and Papers in the Case Management/Electronic Case Filing*

(CM/ECF) System (Exhibit to Standing Order No. 01-6), II(C)(2) (Bankr. E.D. Va. Jan. 1, 2002) (replaced by Standing Order 02-2 (Bankr. E.D. Va. July 1, 2002)).

[**13] [HN5] In filing a petition electronically, the practitioner represents to the court that he or she has secured an originally executed petition physically signed by debtor *prior to* electronically filing the case.

A petition was filed electronically at Kane's direction indicating that debtor's signature had been obtained on the original petition when it had not. At second show cause hearing held on April 10, Kane asserted for the first time that it was his intention to file a deficient petition, without any signatures, and that the petition was mistakenly filed with the electronic signature of Kane and debtor.

When the petition was received, the court was presented with a document which stated on its face that debtor had signed it, under penalty of perjury, when it was not true. This amounts to fraud. The court must consider that Kane's action of filing a petition electronically purporting to have debtor's signature is no different than Kane physically forging debtor's signature and handing the petition over the counter to the clerk.

Because of the novelty of electronic filing, the court has been unable to find a case that has dealt specifically with electronic signatures. However, [**14] various courts have broached situations in which attorneys, believing that an impending emergency necessitated an immediate bankruptcy filing, physically forged a debtor's signature on the petition. *See In re Ludwick, 185 B.R. 238 (Bankr. W.D. Mich. 1995)* (holding that an attorney's forgery of debtor's signature on a petition and dishonest testimony warranted reimbursement of attorney fees, monetary sanctions, and suspension from practicing before the court for two years); *In re Nesom, 76 B.R. 101 (Bankr. N.D. Tex. 1987)* (holding that attorney's forgery of debtor's signature on [*726] the statement of financial affairs and schedules warranted suspension from practicing before the court for sixty days).

No court in the above cited cases found that the situations facing the attorneys justified forgery of debtor's signature, and sanctions were imposed.

PURPOSELY FILED DEFICIENT PETITIONS.

Based on Kane's testimony at rehearing regarding his intention to file an unsigned petition, Kane seems to believe that filing a deficient electronic petition with no signatures is acceptable. The court considers this as no less egregious than filing an electronic [**15] petition purporting to have debtor's signature when debtor has not signed an original petition.

The court understands that petitions are often filed in skeletal form and later amended; however, [HN6] a debtor's signature is absolutely required even on skeletal petitions. While Local Bankruptcy Rule 5005-1(E) provides a procedure whereby persons filing "pleadings or other papers not meeting the requirements of [the] Local Bankruptcy Rules will receive a Notice of Deficient Filing allowing for ten days to correct the deficiency" before striking the pleading or other paper, this rule should not be viewed as an extension of time during which counsel can procure debtor's signature on the petition.

Local Bankruptcy Rule 5005-1(E) was enacted to allow parties who had made honest, inadvertent mistakes time to correct those mistakes without having to pay another filing fee. Intentionally filing an unsigned petition to attain the benefit of the automatic stay for ten days during which the deficiency may be cured is ultimately a fraud on the court and debtor whether or not it appears to be allowed by Local Bankruptcy Rule 5005-1(E). The court depends on the professional and moral judgment of attorneys, [**16] and this practice is a flagrant abuse of the bankruptcy process. [7] It not only stretches the court's rules far beyond their purpose, but more importantly, it could ultimately harm debtors.

7 The Preamble to the Virginia Rules of Professional Conduct states:

> [HN7] in the nature of law practice ... conflicting responsibilities are to be encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

Virginia Rules of Prof'l Conduct, Preamble P 8 (2001).

Bankruptcy is a very personal action which should [**17] only be undertaken by the individual. As stated by Judge Bonney, "bankruptcy is a serious step; it holds its stigmas still. It is a unique judicial process where one is laid bare, financially .... [and] results in a court record for future employers, creditors, friends, relatives and the public to see." *In re Raymond, 12 B.R. 906, 907 (Bankr. E.D. Va. 1981)*. Furthermore, a bankruptcy filing remains on the debtor's credit report for ten years despite the fact that the credit report will indicate a dismissal. *See 15 U.S.C. ß 1681c(a)(1)*. This could adversely affect debtor in credit and employment decisions.

PURPOSE OF DEBTOR'S SIGNATURE.

Contrary to the argument of Kane's counsel, [HN8] the purpose of debtor's [*727] signature on the petition is not merely to affirm that the information contained in the petition is true and correct. Logic dictates that only the debtor can state under oath that the information provided in his or her petition is true and correct. *See In re Harrison, 158 B.R. 246, 248 (Bankr. M.D. Fla. 1993)* (holding that "no one can grant authority to verify under oath the truthfulness of statements contained [**18] in the documents and to verify facts that they are true when the veracity of these facts are unique and only within the ken of the declarant"). Moreover, debtor's signature indicates debtor's consent to the bankruptcy filing, consent which can only be given by debtor. [8]

8 By signing the petition debtor states: "I declare under penalty of perjury that the information provided in this petition is true and correct .... *I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.*" Chapter 13 Bankruptcy Petition, Official Form 1, Form B1, page 2 (rev. 9/01) (emphasis added).

Further, *Rule 9011* [9] [HN9] imposes obligations on both attorneys and debtors to sign certain documents, and specifically prohibits attorneys from signing a debtor's name to the lists, schedules and statement of financial affairs. [10]

9 *Federal Rule of Bankruptcy Procedure 9011*, which governs the signing of pleadings and papers, provides, in pertinent part, that:

(a) [HN10] Signing of papers

Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney ... shall be signed by at least one attorney of record in the attorney's individual name ....

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, - (1) it is not being presented for any improper purpose, ... (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or ... are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed R. Bankr. P. 9011(a)-(b).

[**19]

10 *Federal Rule of Bankruptcy Procedure 1008* requires that these documents be verified by the debtor and states that [HN11] "all petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in *28 U.S.C. ß 1746*." *Fed. R. Bankr. P. 1008*.

The ramifications of Kane's action reach far beyond this case. [HN12] Attorneys serve as officers of the court, which obligates them: 1) to be candid with the court, 2) to bring only non-frivolous matters before the court, and 3) to maintain a professional and courteous demeanor before the court. *Virginia Rules of Prof'l Conduct* R. 3.1, 3.3 (2001).

Attorneys should not take their position lightly because they have a "special responsibility for the quality of justice" and a "duty to uphold [the] legal process." *Virginia Rules of Prof'l Conduct*, Preamble P 1, 4 (2001). Further, "the integrity of the judicial process in any court depends to a large extent on the veracity and integrity of the attorneys who practice before it. Absent the trust those virtues inspire, the system cannot [**20] function." *In re Carlton House of Brockton, Inc.*, 1996 Bankr. LEXIS 170, 93-21122, 1996 WL 442734, at *5 (Bankr. D. Mass. Feb. 20, 1996).

[*728] The court is aware that Kane faced a difficult situation when he caused the petition to be filed on January 3. Nevertheless, this was not an excuse for rules to be bent, much less ignored. The court's rules are in place to provide a concrete answer in difficult situations. The very integrity of the judicial system depends on the court's ability to trust its officers to uphold such rules. Making the decision to sanction an attorney is one of the most grievous duties of a judge. However, it is nonetheless necessary when rules are violated.

The court finds that Kane violated *Federal Rule of Bankruptcy Procedure 9011* because there could not have been a belief that the filing of a petition with what amounts to a forged debtor's signature (or a petition with no signatures for that matter) was proper or warranted under existing law or a good faith argument to extend the law. [HN13] Upon finding a violation of *Rule 9011*, a court may impose sanctions. [11] *Federal Rule of Bankruptcy Procedure 9011(c)(2)* gives the court wide latitude in imposing sanctions to include non-monetary [**21] or monetary penalties.

11 *Fed. R. Bankr. P. 9011(c)*.

The court finds that Kane's actions impeded and disrupted the bankruptcy process and caused this court to incur unnecessary expense. This conduct is sanctionable under the equitable powers granted this court under *11 U.S.C. ß 105*, and the court will impose an appropriate sanction.

A separate order will be entered.

Signed this 16th day of July, 2002

Douglas O. Tice, Jr.

Judge

ERIC JOSEPH LIVINGSTON v. VIRGINIA STATE BAR

Record No. 122144

SUPREME COURT OF VIRGINIA

286 Va. 1*; *744 S.E.2d 220*; *2013 Va. LEXIS 75

June 6, 2013, Decided

SUBSEQUENT HISTORY: As Amended June 18, 2013.

PRIOR HISTORY: [***1]
FROM THE VIRGINIA STATE BAR DISCIPLINARY BOARD.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The attorney appealed from an order of the Virginia State Bar Disciplinary Board (Disciplinary Board), which determined that he violated *Va. Sup. Ct. R. pt. 6, ß II, R. 1.1*, 3.1, and 3.8(a).

OVERVIEW: The attorney appealed after the Disciplinary Board found that he violated *Va. Sup. Ct. R. pt. 6, ß II, R. 1.1*, 3.1, and 3.8(a) of the Virginia Rules of Professional Conduct. Because the supreme court found such evidence only with regard to the violation of *Va. Sup. Ct. R. pt. 6, ß II, R. 1.1*, it affirmed in part and reversed in part and remanded for consideration of a proper sanction. During the prosecution of a criminal defendant, the attorney, a prosecutor, failed to provide the thoroughness and preparation reasonably necessary for the representation of his client, the Commonwealth. Even if an attorney has the necessary legal knowledge and skill, thoroughness and preparation required the competent handling of a particular matter, which included 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.

OUTCOME: The finding that the attorney violated *Va. Sup. Ct. R. pt. 6, ß II, R. 1.1* was affirmed and the finding that he violated *Va. Sup. Ct. R. pt. 6, ß II, R. 3.1* and 3.8(a) was reversed. The sanction was vacated and remanded for consideration of an appropriate sanction for his violation of *Va. Sup. Ct. R. pt. 6, ß II, R. 1.1*.

LexisNexis(R) Headnotes

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN1] The Virginia State Bar (VSB) has the burden to prove by clear and convincing evidence that an attorney violated the Rules of Professional Conduct. In reviewing the Disciplinary Board's decision, the Supreme Court of Virginia conducts an independent examination of the entire record. The court reviews the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the VSB, as a prevailing party. The court gives factual findings substantial weight and view them as prima facie correct. The factual conclusions are not given the weight of a

jury verdict, but they will be sustained unless it appears they are not justified by a reasonable view of the evidence or are contrary to law.

Legal Ethics > Client Relations > Effective Representation
[HN2] *Va. Sup. Ct. R. pt. 6, ß II, R. 1.1* provides that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. To determine whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In addition, competent handling of a particular matter 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. It also includes adequate preparation.

Legal Ethics > Client Relations > Effective Representation
[HN3] Whether an attorney is subject to discipline for failing to provide competent representation is a matter decided on a case by case basis. Negligence without more, or incorrect legal research alone, or practicing law in a manner that is not the preferred way does not support a finding of incompetent representation.

Legal Ethics > Client Relations > Effective Representation
[HN4] Even if an attorney has the necessary legal knowledge and skill, thoroughness and preparation require the competent 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. pt. 6, ß II, R. 1.1*.

Legal Ethics > Professional Conduct > Frivolous Claims
[HN5] *Va. Sup. Ct. R. pt. 6, ß II, R. 3.1* states that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. The term "frivolous" has been defined to mean as of little weight or importance, having no basis in law or fact: light, slight, sham, irrelevant, superficial. It has also been defined as lacking a legal basis or legal merit; not serious; not reasonably purposeful.

Legal Ethics > Prosecutorial Conduct
[HN6] Pursuant to *Va. Sup. Ct. R. pt. 6, ß II, R. 3.8(a)*, a prosecutor may not file or maintain a charge that the prosecutor knows is not supported by probable cause. A prosecutor is prohibited from initiating or maintaining a charge once he knows that the charge is not supported by even probable cause. The term "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview
[HN7] An indictment is a written accusation of crime, prepared by the attorney for the Commonwealth, *Va. Code Ann. ß 19.2-216.*

COUNSEL: William J. Dinkin (Stone, Cardwell & Dinkin, on briefs), for appellant.

Farnaz Farkish, 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.

JUDGES: OPINION BY CHIEF JUSTICE CYNTHIA D. KINSER.

OPINION BY: CYNTHIA D. KINSER

OPINION

[*5] [**221] PRESENT: All the Justices.

OPINION BY CHIEF JUSTICE CYNTHIA D. KINSER

In this appeal of right by an attorney from an order of the Virginia State Bar Disciplinary Board (Disciplinary Board), we conduct an independent review of the record to determine whether there is clear and convincing evidence that Eric Joseph Livingston violated *Rules 1.1*, *3.1*, and *3.8(a)* of the Virginia Rules of Professional Conduct. Because we find such evidence only with regard to the violation of *Rule 1.1*, we will affirm in part and reverse in part the Disciplinary Board's order and remand for consideration of an appropriate sanction.

I. RELEVANT FACTS AND PROCEEDINGS

Pursuant to *Part 6, Section IV, Paragraph 13-16(A)* of the Rules of this Court, the Virginia State Bar (VSB) served Livingston with a Charge of Misconduct, alleging that he violated *Rule 1.1* requiring competent representation, *Rule 3.1* regarding assertion of frivolous claims or contentions, and *Rule 3.8(a)* addressing additional responsibilities of a prosecutor. The Charge of Misconduct related to [***2] Livingston's conduct, as an Assistant Commonwealth's Attorney in Prince George County, during his prosecution of James Collins on drug-related offenses.

Collins was arrested after he purchased 50 pills of what he believed were 80 mg Oxycontin from an undercover police officer at [*6] a park within 1,000 feet of a public school in Prince George County. The pills that Collins purchased were imitations of the actual prescription drug and were made especially for undercover drug operations.

Collins initially agreed to work with police narcotics investigators as an informant, but after he stopped doing so, Livingston obtained two direct indictments against Collins. In the first indictment, a grand jury charged that Collins "did manufacture, sell, give, distribute or possess with the intent to manufacture, sell, give, or distribute, a controlled substance listed in Schedule I or Schedule II of the Drug Control Act namely Oxycodone, in violation of" *Code ß 18.2-248*.[1] In the second indictment, the grand jury charged that Collins

> did manufacture, sell or distribute or possess with intent to sell, give or distribute any controlled substance, imitation controlled substance or marijuana while upon the [***3] property, including buildings and grounds, of any public or private elementary, [**222] secondary, or post secondary school, or any public or private two-year or four-year institution of higher education; or upon public property or any property open to public use within 1,000 feet of such school property, in violation of [*Code ß 18.2-255.2*].

1 Oxycodone is the generic name for Oxycontin. See *Startin v. Commonwealth, 281 Va. 374, 376, 706 S.E.2d 873, 875 (2011)*.

Collins was tried on both indictments in a bench trial in the Circuit Court of Prince George County. During the trial, Livingston called a surveillance narcotics officer and the undercover police officer as witnesses. The undercover police officer testified that she sold Collins the 50 pills in exchange for $500. The surveillance narcotics officer testified that after Collins' arrest, Collins initially stated that he intended to keep all 50 pills for himself but, in a subsequent interview, admitted he could sell each pill for $80.

After Collins moved to dismiss both charges at the close of the Commonwealth's evidence and again at the close of all the evidence, the parties submitted to the trial court memoranda addressing two issues: (1) [***4] whether Collins was guilty of possession with the intent to distribute a controlled substance when he was unaware that the item possessed was an imitation controlled substance; and (2) whether the Commonwealth must prove that Collins actually intended to distribute [*7] the imitation controlled substance within 1,000 feet of public school property.

As to the first issue, Livingston conceded in his memorandum that it would be error for the trial court to find Collins guilty of possession with the intent to distribute Oxycodone because the pills he purchased were an imitation controlled substance. Livingston, nevertheless, asserted that factual impossibility was not a defense to an attempted crime.

Accordingly, Livingston moved to amend the indictment to the charge of "attempt to possess with the intent to distribute a controlled substance."

On the second issue, Livingston argued that the decision in *Toliver v. Commonwealth, 38 Va. App. 27, 561 S.E.2d 743 (2002)*, was not controlling. He maintained that unlike the defendant in Toliver, who was chased onto school property, Collins' purchase of the imitation controlled substance and his subsequent statement to a police officer that he could sell [***5] each pill for approximately $80 established that, while within 1,000 feet of a public school, Collins possessed the pills and had the intent to distribute them.

The trial court denied Livingston's motion to amend the first indictment, finding that the "motion [was] untimely" and stating that if Livingston believed it appropriate, he could "reindict" Collins. The trial court entered an order dismissing the first and second indictments; however, in the order, the court referred to the charge in the second indictment as "possession with intent to distribute marijuana on or near school property." Collins moved to amend that portion of the order by substituting the phrase "imitation controlled substance" for the word "marijuana." Because of concerns about possible res judicata or collateral estoppel arguments that Collins might raise, Livingston opposed the wording of Collins' requested amendment but agreed to an amendment of the order substituting the exact language of the offense as charged in the indictment for the word "marijuana." The trial court agreed and entered an order adopting Livingston's proposed wording.

Livingston subsequently presented a third indictment to a grand jury, which [***6] charged that Collins "did manufacture, sell, give, or distribute an imitation controlled substance which imitates a schedule I or II controlled substance, namely, Oxycodone, in violation of" *Code ß 18.2-248*. Collins moved to dismiss that indictment on the basis of, among other things, double jeopardy. At the hearing on the motion, Livingston referred to the charge in the third indictment as [*8] "possession with intent to distribute" even though the indictment charged a different offense, i.e., "manufacture, sell, give, or distribute." Livingston never moved to amend the third indictment to charge possession with the intent to distribute, and the trial court granted Collins' motion to dismiss it.

Livingston challenged the trial court's judgment dismissing the third indictment in an appeal to the Court of Appeals of Virginia. The Court of Appeals dismissed the appeal because Livingston failed to file a timely petition for appeal. In his "brief" filed in the Court of Appeals, Livingston again incorrectly [**223] referred to the charge in the third indictment as "possession with intent to distribute" while at the same time quoting the charge in the indictment verbatim.

Based on these facts, the VSB [***7] charged that Livingston was "incompetent" in approving the issuance of the first indictment and proceeding to trial because it charged possession with the intent to distribute a controlled substance, Oxycodone, when Livingston knew that the pills Collins purchased were an imitation controlled substance. The indictment, according to the VSB, was not supported by probable cause. In the Charge of Misconduct, the VSB further alleged that Livingston was "incompetent and obtained an indictment not supported by probable cause when he obtained the third indictment" because Livingston knew there was no evidence that Collins actually manufactured or distributed the pills. Furthermore, the VSB claimed that Livingston repeatedly and incorrectly referred to the third indictment as charging possession with the intent to distribute. The VSB also charged that Livingston was "incompetent" when he filed the petition for appeal late. Finally, the VSB alleged that Livingston "maintained an argument that was frivolous in objecting to the substitution of the words 'imitation controlled substance'" for the word "'marijuana.'"

In a hearing before the Third District Committee, Section I of the VSB (District [***8] Committee), Livingston testified that he has worked as a prosecutor since he obtained his license to practice law in 2007. He acknowledged that he has handled hundreds of cases involving drug-related offenses, including charges of possession with the intent to distribute. With regard to the first indictment, Livingston admitted that in other instances involving a controlled buy of an imitation controlled substance, he had always charged the suspect with possession with the intent to distribute the imitation controlled substance. Livingston explained that he previously had not charged possession with [*9] the intent to distribute the controlled substance because he "never had the person actually handling it, examining it, being satisfied that it's Oxycodone, and having such a good statement where he intends to sell it for $80 a pill." Also, after researching the issue of factual and legal impossibility, Livingston believed he had probable cause to indict Collins for possession with the intent to distribute the actual controlled substance. According to Livingston, he did not realize he had misanalysed the law until he prepared the post-trial memorandum.[2]

2 Livingston testified that when he [***9] researched the issue of factual and legal impossibility, he "glazed over the section" and did not recognize that the cases he was reviewing involved charges of attempted offenses, not completed crimes.

As to the second indictment, Livingston admitted that he had not read the decision in Toliver when he presented that indictment to the grand jury. In fact, Livingston did not read that opinion until after Collins' attorney discussed it in his brief to the trial court. Livingston also acknowledged that he could not prove where Collins intended to distribute the pills. But, Livingston asserted, *Code ß 18.2-255.2* could be interpreted to require only a showing that when Collins was within 1,000 feet of public school property, he possessed the pills with the intent to distribute them, even if the distribution was to be accomplished elsewhere. According to Livingston, he did not have to prove that Collins intended to distribute the pills within the prohibited school zone.[3]

3 Contrary to Livingston's argument, the Court of Appeals in Toliver clearly held that *Code ß 18.2-255.2* "does not state that it prohibits possession of a controlled substance while upon school property, or within 1,000 feet [***10] thereof, with the intent to sell, give or distribute the substance elsewhere." *38 Va. App. at 32, 561 S.E.2d at 746*.

With regard to the third indictment, evidence presented at the hearing showed that Livingston instructed his staff to prepare an indictment for possession with the intent to distribute an imitation controlled substance. Livingston admitted that he never reviewed the indictment for accuracy before presenting it to a grand jury and that he repeatedly referred to the charge as possession with the intent to distribute, even though the indictment charged a different offense. Livingston claimed that he did not realize the [**224] mistake until he received the Charge of Misconduct from the VSB.

At the conclusion of the hearing, the District Committee found that Livingston violated *Rules 1.1*, *3.1*, and *3.8(a)* and sanctioned [*10] him by imposing a public reprimand with terms.[4] Livingston appealed the District Committee's determination, in accordance with *Part 6, Section IV, Paragraph 13-17(A)*, to the Disciplinary Board. After hearing argument from the parties and reviewing the parties' briefs along with the record from the District Committee hearing, the Disciplinary Board found that "there [***11] is substantial evidence in the record upon which the District Committee could reasonably have found as it did." The Disciplinary Board thus affirmed the District Committee's determination that Livingston violated *Rules 1.1*, *3.1*, and *3.8(a)* and imposed the same sanction. Pursuant to *Part 6, Section IV, Paragraph 13-26* of the Rules of this Court, Livingston appeals the Disciplinary Board's Memorandum Order dated October 5, 2012 and challenges the Disciplinary Board's determination that substantial evidence exists in the record to support the District Committee's findings.

4 The terms required Livingston to complete two hours of Continuing Legal Education on the subject of ethics, in addition to the two hours required annually, and to certify completion of such hours to the VSB no later than December 9, 2012.

II. ANALYSIS

A. Standard of Review

[HN1] The VSB has the burden to prove by clear and convincing evidence that an attorney violated the Rules of Professional Conduct. *Weatherbee v. Virginia State Bar, 279 Va. 303, 306, 689 S.E.2d 753, 754 (2010)*. In reviewing the Disciplinary Board's decision, "we conduct an independent examination of the entire record." *Williams v. Virginia State Bar, 261 Va. 258, 264, 542 S.E.2d 385, 389 (2001)*; [***12] accord *Northam v. Virginia State Bar, 285 Va. 429, 435, 737 S.E.2d 905, 908 (2013)*. We review the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the VSB, the prevailing party. *El-Amin v. Virginia State Bar, 257 Va. 608, 612, 514 S.E.2d 163, 165 (1999)*. We give factual findings substantial weight and view them as prima facie correct. Id. The factual conclusions are not given the weight of a jury verdict, but they "will be sustained unless it appears they are not justified by a reasonable view of the evidence or are contrary to law." Id. (internal quotation marks and citation omitted).

[*11] B. Rule 1.1 - Competence

[HN2] *Rule 1.1* provides that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." To determine "whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include . .

. the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, [***13] or associate or consult with, a lawyer of established competence in the field in question." *Va. Sup. Ct. R., Part 6, ß II, R. 1.1, cmt. 1*. In addition, "[c]ompetent handling of a particular matter 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. It also includes adequate preparation." Id. at cmt. 5.

[HN3] "Whether an attorney is subject to discipline for failing to provide competent representation is a matter decided on a case by case basis." *Barrett v. Virginia State Bar, 272 Va. 260, 272, 634 S.E.2d 341, 347 (2006)*. For example, in Barrett, we considered charges of misconduct that arose from an attorney's failure to file or settle a personal injury lawsuit prior to the expiration of the statute of limitations, filing a special plea based on incorrect legal research, and delay in reading responsive pleadings and withdrawing the special plea. *Id. at 271, 634 S.E.2d at 347*. The Court concluded that the attorney's conduct, while negligent or in error, nevertheless did not constitute clear and convincing evidence of incompetence under *Rule 1.1*. *Id. at 272, 634 S.E.2d at 347-48*. [***14] [**225] We explained that "negligence without more," or "incorrect legal research alone," or practicing law in a manner that is not the "preferred way" did not support a finding of incompetent representation. Id.

However, in *Green v. Virginia State Bar, 274 Va. 775, 652 S.E.2d 118 (2007)*, we affirmed a judgment holding that an attorney violated *Rule 1.1* when he filed an appeal in the wrong court and did not advise his client that the appeal had been dismissed, and when he failed to timely file another appeal and again did not inform his client that the appeal had been dismissed. *Id. at 781-91, 652 S.E.2d at 120-26*; see also *Motley v. Virginia State Bar, 260 Va. 251, 263-64, 536 S.E.2d 101, 106-07 (2000)* (imposing discipline for incompetence under former DR 6-101 when an attorney permitted his client [*12] to sign a promissory note that did not reflect the parties' agreement and caused consequences the attorney did not understand).

In this case, Livingston concedes that he made three "mistakes" in his prosecution of Collins: (1) reaching an incorrect legal conclusion about the law of factual impossibility and thus erroneously charging Collins with possession with the intent to distribute the actual [***15] controlled substance; (2) obtaining the third indictment for distribution of an imitation controlled substance rather than for possession with the intent to distribute and failing to recognize that mistake during the trial and on appeal; and (3) missing the deadline for filing the petition for appeal in the Court of Appeals.[5] Livingston argues, however, that while these mistakes might constitute negligence, they do not rise to the level of clear and convincing evidence of incompetent representation in violation of *Rule 1.1*.

> 5 Livingston does not acknowledge any mistake with regard to the second indictment charging possession with the intent to distribute an imitation controlled substance within 1,000 feet of public school property or his failure to read the decision in Toliver until after Collins' attorney cited it to the trial court.

Based on our "independent examination of the entire record," giving the District Committee's factual findings "substantial weight and view[ing] them as prima facie correct," we find no error in the Disciplinary Board's order holding that Livingston violated *Rule 1.1*. *Williams, 261 Va. at 264, 542 S.E.2d at 389*. During the prosecution of Collins, he failed [***16] to provide the "thoroughness and preparation reasonably necessary for the representation" of his client, the Commonwealth. *Rule 1.1*. [HN4] 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, ß 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 [*13] 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 [***17] evidence that Livingston failed to provide competent representation to his client in the prosecution of Collins.

C. Rule 3.1 - Meritorious Claims and Contentions

In relevant part, [HN5] *Rule 3.1* states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." We have defined the term "frivolous" as "[o]f little weight or

importance, having no basis in law or fact: light, slight, sham, irrelevant, superficial." *Weatherbee, 279 Va. at 309, 689 S.E.2d at 756* (internal quotation marks and citation omitted); see also Black's Law Dictionary 739 (9th ed. 2009) (defining the term [**226] "frivolous" as "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful").

The Charge of Misconduct alleged that Livingston "maintained an argument that was frivolous in objecting to the substitution of the words 'imitation controlled substance' for 'marijuana,'" because "he anticipated that [Collins] would then argue to dismiss the third indictment due to collateral estoppel and double jeopardy."[6] However, [***18] the record shows that Livingston did not oppose the amendment of the order dismissing the second indictment. Instead, Livingston stated to the trial court that "the Commonwealth doesn't oppose [the] motion to modify, the Commonwealth opposes [the] motion to modify [*14] as written." Moreover, the trial court adopted Livingston's position and amended the order to include the language that Livingston urged.

> 6 The VSB also argues that Livingston violated *Rule 3.1* by obtaining three indictments against Collins that had no basis in law or fact. However, the VSB did not make that argument at the District Committee hearing. Not until questioning by members of the Disciplinary Board did the VSB take the position that it was not relying solely on Livingston's objection to the proposed amended wording of the dismissal order as the basis for the charge that he violated *Rule 3.1*. Even in its brief to the Disciplinary Board, the VSB did not argue that Livingston's conduct in pursuing indictments that lacked probable cause violated *Rule 3.1*. Although a proceeding to discipline an attorney is an informal proceeding, an attorney nevertheless is entitled to be informed of the nature of the charge against him. [***19] See *Moseley v. Virginia State Bar, 280 Va. 1, 3, 694 S.E.2d 586, 589 (2010)*; *Virginia State Bar v. Gunter, 212 Va. 278, 284, 183 S.E.2d 713, 717 (1971)*. Given the language of the Charge of Misconduct and the VSB's position at the District Committee hearing when evidence was presented, we conclude that Livingston was not fairly informed that the VSB was including his conduct with regard to the three indictments as a basis for the charge that he violated *Rule 3.1*. So, in determining whether there is clear and convincing evidence that Livingston violated *Rule 3.1*, we will consider only his response to the motion to amend the order dismissing the second indictment.

Based on our independent review of the record, we do not find clear and convincing evidence that Livingston violated *Rule 3.1*. The argument he asserted in response to Collins' motion to amend the language of the order dismissing the second indictment was not frivolous. Thus, the portion of Disciplinary Board's order finding that Livingston violated *Rule 3.1* was in error.

D. Rule 3.8 - Additional Responsibilities of a Prosecutor

[HN6] Pursuant to *Rule 3.8(a)*, a prosecutor may "not file or maintain a charge that the prosecutor knows is [***20] not supported by probable cause." A prosecutor is prohibited "from initiating or maintaining a charge once he knows that the charge is not supported by even probable cause." *Va. Sup. Ct. R., Part 6, ß II, R. 3.8, cmt. 1a*. The term "knows" "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." *Va. Sup. Ct. R., Part 6, ß II, Preamble*.

Livingston argues that he did not initiate or maintain any indictment against Collins with actual knowledge that it was not supported by probable cause. He asserts, instead, that his "negligence" led to the mistakes in the indictments.

As we have already discussed, Livingston's erroneous and/or complete lack of legal research along with his failure to examine the evidence in conjunction with the elements of the respective offenses resulted in his belief, albeit erroneous, that he had probable cause to initiate and maintain the first and second indictments. After he ultimately realized that he could not charge Collins with possession with the intent to distribute the actual controlled substance, he moved to amend the first indictment to the charge of "attempt to possess with the intent to distribute a controlled [***21] substance." Livingston proceeded with the second indictment without reading the decision in Toliver. When he did read it, Livingston, nevertheless, surmised that Toliver could be distinguished on its facts, leading to his erroneous belief that he did not need to prove Collins intended to distribute the pills within the prohibited school zone. While this evidence supports the determination that Livingston was "incompetent" under *Rule 1.1*, it does not constitute clear and convincing evidence that Livingston violated *Rule 3.8(a)*. In other words, Livingston's incompetent representation [*15] of his client in [**227] pursuing the first and second indictments actually demonstrates that he did not initiate and maintain those indictments with actual knowledge that they were not supported by probable cause.

With regard to the third indictment, evidence introduced at the District Committee hearing established that Livingston instructed his staff to prepare an indictment charging the correct offense, possession with the intent to distribute an

imitation controlled substance. Livingston admitted that he never reviewed the indictment for accuracy before presenting it to a grand jury. Accordingly, the District [***22] Committee determined that Livingston "did not read the indictment carefully before submitting it to the grand jury" and "did not realize the indictment did not contain the language 'possession with intent to distribute' until a few weeks before the District Committee hearing." Viewing these factual findings as prima facie correct, we conclude that they are "justified by a reasonable view of the evidence" and are not "contrary to law," meaning Livingston did not initiate or maintain the third indictment with actual knowledge that it was not supported by probable cause. *El-Amin, 257 Va. at 612, 514 S.E.2d at 165* (internal quotation marks and citation omitted).

But, we must point out that [HN7] "[a]n indictment is a written accusation of crime, prepared by the attorney for the Commonwealth." *Code ß 19.2-216* (emphasis added). Livingston quoted the charge in the third indictment verbatim in his brief to the Court of Appeals, i.e., that Collins did "manufacture, sell, give, or distribute an imitation controlled substance . . . in violation" of *Code ß 18.2-248*. And, he signed that brief as the attorney of record for the Commonwealth. See *Code ß 8.01-271.1*. His signature constituted "a certificate" [***23] that he had read the brief, and having done so, he then should have realized that the third indictment contained the wrong charge. Id. As with the first and second indictments, these circumstances likewise support the determination that Livingston did not provide competent representation to his client as required by *Rule 1.1*. But, in light of the District Committee's factual findings, we cannot infer from these circumstances Livingston's actual knowledge that the third indictment lacked probable cause to support it. See *Va. Sup. Ct. R., Part 6, ß II, Preamble*.

Thus, with regard to all three indictments, the record does not contain clear and convincing evidence that Livingston violated [*16] *Rule 3.8(a)*. The portion of the Disciplinary Board's order finding a violation of this Rule was in error.

III. CONCLUSION

For these reasons, we will affirm the portion of the Disciplinary Board's order finding that Livingston violated *Rule 1.1* and reverse the part of the order finding that he violated *Rules 3.1* and *3.8(a)*. Because the sanction imposed by the Disciplinary Board was a single sanction for violation of all three Rules, we will vacate the sanction and remand for further consideration of an appropriate [***24] sanction for Livingston's violation of *Rule 1.1*. See *Barrett, 272 Va. at 273, 634 S.E.2d at 348*.

Affirmed in part, reversed in part, and remanded

Isaiah Lester, Administrator of the Estate of Jessica Lynn Scott Lester, deceased v. Allied Concrete Co. and William Donald Sprouse; Isaiah Lester v. Allied Concrete Co. and William Donald Sprouse

Case No. CL08-150, Case No. CL09-223

CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE, VIRGINIA

80 Va. Cir. 454*; *2010 Va. Cir. LEXIS 153

June 28, 2010, Decided

SUBSEQUENT HISTORY: Findings of fact/conclusions of law at, Sanctions allowed by, Motion denied by, Remittitur granted *Lester v. Allied Concrete Co., 2011 Va. Cir. LEXIS 245 (Va. Cir. Ct., Sept. 6, 2011)*

CASE SUMMARY:

PROCEDURAL POSTURE: After plaintiff's counsel accused defense counsel of "hacking" into plaintiff's Facebook account at a hearing on a motion for continuance and in responses to requests for production of documents, defendant filed a motion for sanctions and a motion to strike.

OVERVIEW: At a hearing on a motion for continuance, plaintiff's counsel maintained that defense counsel had "hacked" into plaintiff's Facebook account or had otherwise accessed the account without permission. Aside from a photograph and the plaintiff's bare assertion that he believed his account had been accessed without permission, counsel presented no evidence as the basis for the claim of unauthorized access. Reasonable inquiry by counsel would have revealed that there was no reasonable ground for such charges based on the facts available to him. The court held that counsel violated *Va. Sup. Ct. R. pt. 6, § II, R. 3.3(a)* (2010) and *Va. Code Ann. § 8.01-271.1* by maintaining and certifying the accusation that defense counsel hacked into or made unauthorized access to plaintiff's Facebook account during the hearing based on no inquiry into the relevant facts beyond the bare, unsubstantiated assertions of his client. Similar allegations in plaintiff's responses to defense counsel's Requests for Production of Documents violated *Va. Sup. Ct. R. pt. 6, § II, R. 4.1(a)* (2008).

OUTCOME: Plaintiff's counsel was ordered to pay reasonable costs and attorneys' fees incurred by defendants in drafting and filing the Motion for Sanctions and Motion to Strike, drafting and filing the Reply brief, and attending a hearing.

LexisNexis(R) Headnotes

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > Misrepresentations
Legal Ethics > Professional Conduct > Tribunals
[HN1] *Va. Sup. Ct. R. pt. 6, § II, R. 3.3(a)* (2010), Candor Toward the Tribunal, prohibits an attorney from knowingly: (1) making a false statement of fact or law to a tribunal and (4) offering evidence that the lawyer knows to be false. Under *Va. Sup. Ct. R. pt. 6, § II, R. 3.3(a)(4)*, the attorney must take reasonable remedial measures if he or she learns of such false material evidence in order to stay in compliance with the Rule.

Civil Procedure > Sanctions > Baseless Filings > Certification Requirements
Legal Ethics > Professional Conduct > Frivolous Claims
[HN2] Comment three to *Va. Sup. Ct. R. pt. 6, § II, R. 3.3* indicates that *Rule 3.3* is an exception to the general rule that attorneys need not have personal knowledge of matters asserted in documents prepared for litigation. Comment three points out that, under *Va. Code Ann. § 8.01-271.1* (1950 & Supp. 2008), the lawyer's signature on a pleading is a certification that, after reasonable inquiry, the lawyer believes that there is a factual and legal basis for the pleading, and also that an assertion purporting to be on the lawyer's own knowledge, as in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

Civil Procedure > Sanctions > Baseless Filings > Signing Requirements
[HN3] See *Va. Sup. Ct. R. pt. 6, § II, R. 4.1* (2008).

Civil Procedure > Discovery > Misconduct
Civil Procedure > Sanctions > Baseless Filings > Certification Requirements
[HN4] Though literally "other papers" as used in *Va. Sup. Ct. R. pt. 6, § II, R. 4.1* (2008) falls within the ambit of *Va. Code Ann. § 8.01-271.1*, certification requirements for discovery papers should be governed by new *Rule 4.1(g)*, the specific provision for pretrial discovery.

Civil Procedure > Sanctions > Baseless Filings > Certification Requirements
[HN5] See *Va. Code Ann. § 8.01-271.1*.

Civil Procedure > Sanctions > Baseless Filings > Bad Faith Motions
[HN6] Under *Va. Code Ann. § 8.01-271.1*, an oral motion made by an attorney in court constitutes a representation by him that (i) to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Civil Procedure > Sanctions > Baseless Filings > Bad Faith Motions
[HN7] *Va. Code Ann. § 8.01-271.1* provides the basis for sanctions such as attorney's fees against a party litigant or counsel when oral motions are made in violation of that section.

Civil Procedure > Sanctions > Baseless Filings > Bad Faith Motions
[HN8] For violations of *Va. Code Ann. § 8.01-271.1*, the court shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion including a reasonable attorney's fee.

Civil Procedure > Sanctions > Baseless Filings > Certification Requirements
Legal Ethics > Professional Conduct > Frivolous Claims
[HN9] *Va. Code Ann. § 8.01-271* correlates the Code of Virginia with the Rules of the Virginia Supreme Court by making clear that pleadings must be in accordance with the court rules, but subject to the provisions of *Va. Code Ann. § 8.01-271*. Therefore, though generally the court rules govern pleadings, the Code will generally provide the more specific rules with which attorneys and parties must comply when the rules and enactments are in conflict.

Civil Procedure > Sanctions > Baseless Filings > Certification Requirements

[HN10] The mandatory language of *Va. Code Ann. § 8.01-271.1* requires the court to impose sanctions when an attorney makes a certification in violation of the certification requirements. *Va. Code Ann. § 8.01-271.1*. Further, should there be any variance between a General Assembly enactment under the Code and a Supreme Court rule, the variance must be construed to give effect to the enactment over the rule. *Va. Code Ann. § 8.01-3*.

Civil Procedure > Sanctions > Baseless Filings > Certification Requirements
Legal Ethics > Professional Conduct > Frivolous Claims
[HN11] An attorney's conduct should be judged on an objective standard of reasonableness as to whether a reasonable inquiry was made such that the attorney could have formed a reasonable belief that a response to a request for production of documents was well grounded in fact and warranted under existing law. *Va. Code Ann. § 8.01-271.1*.

Civil Procedure > Sanctions > Baseless Filings > Certification Requirements
Legal Ethics > Professional Conduct > Frivolous Claims
[HN12] Even if the pleadings, motions, or other papers meet the requirement of *Va. Code Ann. § 8.01-271.1* that the certified document is warranted by existing law, each pleading, motion, or other paper must be well grounded in fact based on the best of the attorney's knowledge, information, and belief formed after a reasonable inquiry. The trial court may consider any relevant and admissible evidence tending to show the attorney's knowledge at the time in question.

Civil Procedure > Sanctions > Baseless Filings > Certification Requirements
[HN13] A violation of any of the certifications of *Va. Code Ann. § 8.01-271.1* must result in a sanction, so an attorney need not also violate (iii), that the motion, pleading, or other paper has not been interposed for any improper purpose.

Civil Procedure > Sanctions > Baseless Filings > Bad Faith Motions
[HN14] Contemptuous language and distorted representations in a pleading never serve a proper purpose and inherently render that pleading as one interposed for an improper purpose within the meaning of clause (iii) of the second paragraph of *Va. Code Ann. § 8.01-271.1*.

Computer & Internet Law > Criminal Offenses > Data Crimes & Fraud
[HN15] The Virginia Computer Crimes Act, *Va. Code Ann. §§ 18.2-152.1 et seq.*, defines "without authority," such that a person acts without authority when he knows or reasonably should know that he has no right, agreement, or permission or acts in a manner knowingly exceeding such right, agreement, or permission. *Va. Code Ann. § 18.2-152.2*.

Computer & Internet Law > Criminal Offenses > Data Crimes & Fraud
[HN16] Under the Virginia Computer Crimes Act, Computer Fraud is defined as use of a computer or computer network without authority to either obtain property or services by false pretenses, embezzle or commit larceny, or convert the property of another. *Va. Code Ann. § 18.2-152.3*. Under the Virginia Computer Crimes Act, acting without authority is also an element of the crimes of Computer Invasion of Privacy, *Va. Code Ann. § 18.2-152.5*, and Theft of Computer Services, *§ 18.2-152.5*.

Computer & Internet Law > Criminal Offenses > Computer Fraud & Abuse Act
[HN17] Under the federal Computer Fraud and Abuse Act, *18 U.S.C.S. § 1030*, the ability to charge a person with a violation of the Act often turns on whether that person has acted "without authority." *18 U.S.C.S. § 1030(a)(1)*, Obtaining National Security Information; *18 U.S.C.S. § 1030(a)(2)*, Compromising Confidentiality; *18 U.S.C.S. § 1030(a)(4)*, Accessing to Defraud and Obtain Value; *18 U.S.C.S. § 1030(a)(5)(A)(ii)*, Damaging Without Authorization; *18 U.S.C.S. § 1030(a)(5)(A)(iii)*, Intentionally Accessing and Causing Damage. *18 U.S.C.S. § 1030*.

HEADNOTES

Attorneys are prohibited from knowingly making false statements of fact or law to a court and offering evidence that the lawyer knows to be false.

Certification requirements for discovery papers are governed by *Rule 4:1(g)*, the specific provision for pretrial discovery.

JUDGES: [**1] EDWARD L. HOGSHIRE, JUDGE.

OPINION BY: EDWARD L. HOGSHIRE

OPINION

[*454] By Judge Edward L. Hogshire

This cause came on the 27th day of May 2010 for hearing on Defendants' Motion for Sanctions and Motion to Strike. Upon consideration of the representations and arguments of counsel for all parties and after review of the Motion with accompanying exhibits, Plaintiff's Opposition thereto and accompanying exhibits, and Defendants' [*455] Reply and accompanying exhibits, the Court hereby renders the following Findings and Conclusions.

Findings of Fact

During a hearing on March 3, 2010, on Defendants' Second Motion for Continuance, Plaintiff's counsel, Matthew B. Murray, Esq., maintained that Defense counsel, David Tafuri, Esq., had "hacked" into Mr. Lester's Facebook account or had otherwise accessed the account without permission. (Hr'g Tr. 39:4-9; 40:25, 42:13-15, 85:20, March 3, 2010.) Mr. Murray stated that he intended to use the word "hack" to be synonymous with "no-permission access." (Hr'g Tr. 85:18-21.) Mr. Murray offered this evidence to the Court in support of his argument that the Defendants' Second Motion for Continuance should be denied.

In response to the Court's question with regard to the basis for his claim, [**2] Mr. Murray stated that the evidence for his claim constituted the photograph attached to the Defendants' Request for Production of March 25, 2009. (Hr'g Tr. 39:25-40:2.)

During the hearing, Mr. Murray told the Court that he did not know how Defense counsel had accessed the account (Hr'g Tr. 40:5-6), but that he "assumed" the account had been "hacked." (Hr'g Tr. 39:4-6, 40:25.) Mr. Murray stated further that he and his client "assumed" that opposing counsel "had" the Facebook page and that "the only purpose of the request for production was to legitimize that which they had acquired without permission." (Hr'g Tr. 39:6-9.)[1] At the hearing, Mr. Murray repeatedly acknowledged that he had no familiarity with Facebook prior to the proceedings of this case. (Hr'g Tr. 37:13-16, 60:24-25.)

1 During an exchange between the Court and Plaintiff's counsel at the March 3, 2010, hearing, Mr. Murray also accused Mr. Tafuri of having "lied" to Judge Sheridan with regard to previous mediation proceedings and of having misrepresented facts to Mr. Murray himself during the mediation proceedings (Hr'g Tr. 58:8-17; 59:11-12), accusations which the Motion for Sanctions in question does not address.

On November [**3] 13, 2009, Defense counsel, Mr. Tafuri, informed Mr. Murray that the Plaintiff had sent Mr. Tafuri a Facebook message on January 9, 2009. (Ex. B, C to Defs.' Reply to Pl.'s Opp'n to Defs.' Mot. for Sanctions and Mot. to Strike, May 26, 2010; Hr'g Tr. 79:9-80:7.)

Mr. Tafuri's facsimile correspondence with Mr. Murray on November 13, 2009, confirmed a telephone conversation between Mr. Tafuri and Mr. Murray during which Mr. Murray had asked whether Mr. [*456] Lester had sent a Facebook message to Defense counsel, since the Plaintiff remembered sending such a message. (Ex. B to Defs.' Reply.) On December 14, 2009, Mr. Tafuri sent Mr. Murray a copy of the Facebook "message" of January 9, 2009, via facsimile and certified mail. (Ex. C to Defs.' Reply.)

On February 23, 2010, John Zunka, Esq., counsel for Defendant, sent Mr. Murray a letter referring Mr. Murray to copies of the correspondence on November 13, 2009, and December 14, 2009, reiterating the basis for Mr. Tafuri's access to the photograph in question, and referencing the relevant Facebook privacy rule in effect on January 9, 2009. (Ex. E to Defs.' Mot. for Sanctions and Mot. to Strike, March 2, 2010.)

In an e-mail dated February 24, 2010, [**4] Mr. Murray declined to comply with Defense counsels' requests to strike Mr. Tafuri from the Plaintiff's witness list and to retract the "hacking" comment. (Ex. 1 to Pl.'s Opp'n to Defs.' Mot. for Sanctions and Mot. to Strike, May 20, 2010.)

On February 25, 2010, Mr. Tafuri sent an e-mail to Mr. Murray notifying him that Defense counsel would file a Motion for Sanctions if Mr. Murray did not comply with the requests contained in Mr. Zunka's February 23, 2010, letter based on Defense counsel's explanations therein. (Ex. G to Defs.' Mot. for Sanctions.)

At the hearing on March 3, 2010, Mr. Murray said that he first learned of his client's Facebook "message" during the hearing on February 8, 2010. (Hr'g Tr. 41:21-42:6.)

In the Plaintiff's Responses to the Defendant William D. Sprouse's Fifth Request for Production of Documents (Defendant Allied Concrete's Sixth Request), dated May 10, 2010, signed by Mr. Murray, the Plaintiff twice asserted that Mr. Tafuri had made "unauthorized access" to the Plaintiff's Facebook account. (Ex. B to Defs.' Reply.)

In the Plaintiff's Responses to Defendant William D. Sprouse's Second Request for Production of Documents (Allied Concrete's Third Request), dated [**5] May 10, 2010, signed by Mr. Murray, the Plaintiff referred to "unauthorized access" of his Facebook account on five separate occasions. (Ex. C to Defs.' Reply.)

Mr. Murray has since offered the Affidavit of Mr. Lester, stating that, based on Mr. Lester's understanding, the Facebook contract did not grant Mr. Tafuri access to the account, as evidence for his claim of unauthorized access. (Ex. 1 to Pl.'s Opp'n.) Aside from the photograph in question and the Plaintiff's bare assertion that he believed his account had been accessed without permission, Mr. Murray has presented no evidence [*457] to the Court as the basis for the claim of unauthorized access. During the hearing on May 27, 2010, with regard to sanctions, Plaintiffs' counsel did not address Facebook's default privacy settings or counsel's inquiry into any such matters.

Mr. Murray argues that "hacking" is not a crime (Pl.'s Opp'n 2-3), that he did not intend the word "hacking" to be used to accuse Defense counsel of a crime ((Pl.'s Opp'n 3; Hr'g Tr. 85:17-20), and that therefore "no harm to any reputation has been done and none can be claimed" (Pl.'s Opp'n 4). To support the argument that "hacking is not a crime," Plaintiff's counsel [**6] has offered an article from www.wisegeek.com entitled, *What Is Computer Hacking?*, and thirteen pages of user comments discussing the article and computer "hacking" generally. (Ex. 2 to Pl.'s Opp'n to Defs.' Mot. for Sanctions.)

If Mr. Murray and Mr. Tafuri, in fact, discussed Mr. Lester's Facebook "message" to Mr. Tafuri on or around November 13, 2009, Mr. Murray would have had approximately three and a half months before the hearing on March 3, 2010, during which he could have investigated his "unauthorized access" or "hacking" claims. Even if Mr. Murray did not, as he said during the hearing, learn of his client's Facebook "message" until February 8, 2010, he would have had approximately one month before the hearing on March 3, 2010, during which he could have investigated his "unauthorized access" or "hacking" claims.

Conclusions of Law

A. *Rule 3.3 of the Virginia State Bar Rules of Professional Conduct: Candor Toward the Tribunal*

[HN1] *Rule 3:3(a) of the Virginia State Bar Rules of Professional Conduct*, Candor Toward the Tribunal, prohibits the attorney from "knowingly: (1) mak[ing] a false statement of fact or law to a tribunal ... and (4) offer[ing] evidence that the lawyer knows to be [**7] false." *Va. Sup. Ct. R. Pt. 6, § II, 3.3* (2010). Under *Rule 3.3(a)(4)* the attorney must take reasonable remedial measures if he or she learns of such false material evidence in order to stay in compliance with the Rule. *Id.*

[HN2] Comment three to *Rule 3:3* indicates that this rule is an exception to the general rule that attorneys need not have personal knowledge of matters asserted in documents prepared for litigation. *Id.* at Cmt. 3. Comment three points out that, under *Virginia Code § 8.01-271.1* (1950 & Supp. 2008), the lawyer's signature on a pleading is a certification that, [*458] after reasonable inquiry, the lawyer believes that there is a factual and legal basis for the pleading, and also that "an assertion purporting to be on the lawyer's own knowledge, as in ... a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." *Id.*

B. *Rule 4:1(g) of the Virginia Supreme Court; Sanctions for Violations of Certification Requirements During Pretrial Discovery*

Va. Code § 8.01-271.1 provides the model for *Supreme Court Rule 4:1*, which governs sanctions for violations of the Supreme Court of [**8] Virginia's discovery *rules. Sup. Ct. R. 4:1* (2008). Under *4:1(g)*, the attorney's signature on any response is a certification that the attorney has read the response, and that:

> [HN3] [O]n the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these Rules and warranted by existing law ... (2) not interposed for any improper [*459] purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive. . . .

Id. at *Rule 4:1(g)*.

[HN4] Though literally "other papers" falls within the ambit of *Va. Code § 8.01-271.1*, certification requirements for discovery papers should be governed by new *Rule 4:1(g)*, the specific provision for pretrial discovery.

C. *Virginia Code § 8.01-271.1 Sanctions*

Under *Va. Code § 8.01-271.1*, an attorney's signature on pleadings, motions, and other paper of represented parties:

> [HN5] [C]onstitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information, and belief, formed after a reasonable inquiry, it is well grounded in fact and is warranted by existing law ... and (iii) [**9] it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Va. Code § 8.01-271.1.

Further, [HN6] under this Section an oral motion made by an attorney in court:

> [C]onstitutes a representation by him that (i) to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law ... and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id.

[HN7] *Virginia Code § 8.01-271.1* provides the basis for sanctions such as attorney's fees against a party litigant or counsel when *oral motions* are made in violation of that section. *Obrist v. Lantz, 73 Va. Cir. 80, 82 (2007)* (deciding that a party litigant who disregarded the advice of counsel and insisted on making a motion in open court for improper purposes should be sanctioned under *Va. Code § 8.01-271.1*).

[HN8] For violations of this Rule, the court:

> [S]hall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the [**10] other party or parties the amount of the reasonable expenses incurred because of the filing of the ... motion ... including a reasonable attorney's fee.

Id.

[HN9] *Va. Code § 8.01-271* correlates the Code of Virginia with the Rules of the Virginia Supreme Court by making clear that pleadings must be in accordance with the court rules, but "[s]ubject to the provisions of this title. . . ." *Va. Code § 8.01-271*. Therefore, though generally the court rules govern pleadings, the Code will generally provide the more specific rules with which attorneys and parties must comply when the rules and enactments are in conflict. *Id.*

Rule 4:1(g) remains undeveloped in case law, but since *Va. Code § 8.01-271.1* is virtually identical to the Supreme Court Rule, cases [*460] construing the Code's sanction provision should provide insight into the scope of the Rule.

However, even if *Rule 4:1(g)* does not control the disposition of this case, [HN10] the mandatory language of *Va. Code § 8.01-271.1* requires the court to impose sanctions when an attorney makes a certification in violation of the certification requirements. *Va. Code § 8.01-271.1*. Further, should there be any variance between a General Assembly enactment under the Code [**11] and a Supreme Court rule, the variance must be construed to give effect to the enactment over the rule. *Va. Code § 8.01-3*.

[HN11] An attorney's conduct should be judged on an objective standard of reasonableness as to whether a reasonable inquiry was made such that the attorney could have formed a reasonable belief that a response to a request for production of documents was well grounded in fact and warranted under existing law. *Va. Code § 8.01-271.1*; *Flora v. Shulmister, 262 Va. 215, 220, 546 S.E.2d 427, 429 (2001)*; *Tullidge v. Board of Supervisors of Augusta County, 239 Va. 611, 614, 391 S.E.2d 288, 289-90, 6 Va. Law Rep. 2182 (1990)* (whether the "warranted by existing law" portion of *Va. Code § 8.01-271.1* has been violated should be determined on an objective standard of reasonableness).

In *Flora*, the Supreme Court of Virginia found that the circuit court had abused its discretion in imposing sanctions against an attorney when the attorney in question could have formed a reasonable belief that she was in compliance with the court rules and the court's scheduling order (with regard to the "warranted by existing law" portion of *Va. Code § 8.01-271.1*). *Flora, 262 Va. at 221, 223, 546 S.E.2d at 430-31*.

[HN12] Even if the [**12] pleadings, motions, or other papers meet the requirement that the certified document is warranted by existing law, each pleading, motion, or other paper must be well grounded in fact based on the best of the attorney's knowledge, information, and belief formed after a reasonable inquiry. *Ford Motor Co. v. Benitez, 273 Va. 242, 250-51, 639 S.E.2d 203, 207 (2007)*. The trial court may consider any relevant and admissible evidence tending to show the attorney's knowledge at the time in question. *Id. at 251, 639 S.E.2d at 207*.

In *Ford Motor*, the Supreme Court of Virginia upheld a trial court's finding that defense counsel had violated the "well grounded in fact" requirement of *Va. Code § 8.01-271.1* with regard to defensive pleadings, when the attorney admitted at a subsequent hearing that he did not have sufficient information on which to base his pleadings at the time of the hearing. *Id.* The Supreme Court of Virginia further found that the trial court did not abuse its discretion in determining that the attorney had [*461] violated the "reasonable inquiry" requirement as to whether the pleading was "well grounded in fact" under *Va. Code § 8.01-271.1* when, based on defense counsel's deposition [**13] of the plaintiff, no factual basis existed for the pleadings signed by defense counsel. [HN13] A violation of any of the certifications of *Va. Code § 8.01-271.1* must result in a sanction, so an attorney need not also violate (iii), that the motion, pleading, or other paper has not been "interposed for any improper purpose." *Id.*

However, [HN14] "contemptuous language and distorted representations in a pleading never serve a proper purpose and inherently render that pleading as one 'interposed for [an] improper purpose,' within the meaning of clause (iii) of the second paragraph of *Code § 8.01-271.1*." *Williams & Connolly, L.L.P. v. People for the Ethical Treatment of Animals, Inc., 273 Va. 498, 519, 643 S.E.2d 136, 146 (2007)*.

D. *No-Authority Access to Computer Files*

Limiting a claim of computer misuse to "unauthorized access" or "no-permission access" of a computer account does not preclude the possibility of an allegation of conduct that could result in criminal liability, but rather is an essential element required for many causes of action for computer crimes in Virginia.

a. [HN15] The Virginia Computer Crimes Act, *Va. Code §§ 18.2-152.1 et seq.*, defines "without authority," such that a person acts without [**14] authority "when he knows or reasonably should know that he has no right, agreement, or permission or acts in a manner knowingly exceeding such right, agreement, or permission." *Va. Code § 18.2-152.2*.

b. [HN16] Under the Virginia Computer Crimes Act, Computer Fraud is defined as use of a computer or computer network without authority to either obtain property or services by false pretenses, embezzle or commit larceny, or convert the property of another. *Va. Code § 18.2-152.3*. Under the Virginia Computer Crimes Act, acting "without authority" is also an element of the crimes of Computer Invasion of Privacy, *Va. Code § 18.2-152.5*, and Theft of Computer Services, *§ 18.2-152.5*.

Similarly, [HN17] under the federal Computer Fraud and Abuse Act, *18 U.S.C. § 1030*, the ability to charge a person with a violation of the Act often turns on whether that person has acted "without authority." *See 18 U.S.C. § 1030(a)(1)*, Obtaining National Security Information; *18 U.S.C. § 1030(a)(2)*, Compromising Confidentiality; *18 U.S.C. § 1030(a)(4)*, Accessing to Defraud and Obtain Value; *18 U.S.C. § 1030(a)(5)(A)(ii)*, [*462] Damaging Without Authorization; *18 U.S.C. § 1030(a)(5)(A)(iii)*, Intentionally Accessing and Causing Damage. *18 U.S.C. § 1030*.

Reasonable [**15] inquiry by Plaintiff's counsel would have revealed that there was no reasonable ground for such charges based on the facts available to him.

Plaintiff's counsel violated *Rule 3:3(a)* of the Virginia State Bar Rules of Professional Conduct and *§ 8.01-271.1 of the Code of Virginia* by maintaining and certifying the accusation that Defense counsel "hacked into" and/or made unauthorized access to Plaintiff's Facebook account during the hearing in open court on March 3, 2010, based on no inquiry into the relevant facts beyond the bare, unsubstantiated assertions of his client.

Plaintiff's counsel violated *Rule 4:1(g) of the Rules of the Supreme Court of Virginia* and *§ 8.01-271.1 of the Code of Virginia* by maintaining and certifying the false accusation that Defense counsel "hacked into" and/or made unauthorized access to Plaintiff's Facebook account in the May 10, 2010, Responses to Defense counsel's Requests for Production of Documents based on substantial inquiry into the relevant facts.

Therefore, the court hereby orders the following.

Defense counsel, David M. Tafuri, by agreement of Plaintiff's counsel in open court, is stricken from Plaintiff's Witness list.

Plaintiff's counsel is ordered [**16] to pay reasonable costs and attorneys' fees incurred by Defendants in drafting and filing the Motion for Sanctions and Motion to Strike, drafting and filing the Reply brief, and attending the hearing on May 27, 2010. Within seven days of the issuance of this Order, Defense counsel will submit an affidavit and schedule of the reasonable fees and costs incurred. Plaintiff's counsel will have seven days from the filing of this affidavit and schedule to submit any objections to Defense counsel's schedule of fees and costs.

Objections of counsel are noted for the reasons stated in their argument and memoranda filed with the Court. Endorsements of counsel are dispensed with pursuant to *Rule 1:13 of the Supreme Court of Virginia.* The clerk is directed to send a copy of these Findings of Fact and Conclusions of Law to all counsel of record.

Isaiah Lester, Administrator of the Estate of Jessica Lynn Scott Lester, deceased v. Allied Concrete Co. and William Donald Sprouse; Isaiah Lester v. Allied Concrete Co. and William Donald Sprouse

Case No. CL08-150, Case No. CL09-223

CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE, VIRGINIA

83 Va. Cir. 308*; *2011 Va. Cir. LEXIS 245

September 6, 2011, Decided

SUBSEQUENT HISTORY: Costs and fees proceeding at, Dismissed by *Lester v. Allied Concrete Co., 2011 Va. Cir. LEXIS 132, 83 Va. Cir. 308 (2011)*
Appeal granted by *Allied Concrete Co. v. Lester, 2012 Va. LEXIS 110 (Va., June 1, 2012)*
Appeal granted by *Lester v. Allied Concrete Co., 2012 Va. LEXIS 111 (Va., June 1, 2012)*
Affirmed in part and reversed in part by *Allied Concrete Co. v. Lester, 2013 Va. LEXIS 8 (Va., Jan. 10, 2013)*

PRIOR HISTORY: *Lester v. Allied Concrete Co., 2010 Va. Cir. LEXIS 153, 80 Va. Cir. 454 (2010)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a surviving husband, the administrator of his deceased wife's estate, was awarded $6,227,000, plus interest. Plaintiff other injured family members were also awarded damages. In post-trial motions, defendant company sought the dismissal of the claims, or in the alternative, a new trial on liability and damages or a new trial on damages alone, or finally, an order of remittitur. The company alleged misconduct.

OVERVIEW: Both the husband and his attorney engaged in misconduct. The attorney had to be held accountable for the spoliation in regard to deliberately deleting Facebook photos that were responsive to a pending discovery request. The court held the company was entitled to sanctions against them for spoliation. The attorney violated *Va. Code ß 8.01-271.1*, *Va. Sup. Ct. R. 4:1(g)*, and *Va. Sup. Ct. R. 4:12* by omitting an e-mail and by his failure to submit the subject e-mail to the Court for in camera inspection. Because the jury's award was grossly disproportionate to the $1,000,000 given to the decedent's parents, and the disproportionality of the husband's award was further highlighted when seen in light of the fact that he had been married less than two years before his wife's death, and that his behavior in the tragic aftermath was characterized by extensive social activities and traveling, remittitur was granted. Despite the acts of spoliation and in the face aggressive challenges to the husband's character and credibility, the evidence established that the husband suffered personal injuries, both physical and mental and should be compensated with an award of $2,350,000.

OUTCOME: The motion for sanctions was granted. The motion for mistrial was denied. The motion for additur was granted.

LexisNexis(R) Headnotes

Civil Procedure > Sanctions > General Overview
[HN1] The moving parties in seeking sanctions bear the burden of proving by a preponderance of the evidence facts establishing misconduct warranting an award of sanctions.

Civil Procedure > Sanctions > Baseless Filings > Signing Requirements
[HN2] An attorney's signature on an answer to discovery constitutes a certification that the attorney has read the pleading and that to the best of his knowledge, information, and belief, formed after a reasonable inquiry the answer was (1) consistent with Part IV of Rules of the Supreme Court of Virginia and warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. *Va. Sup. Ct. R. 4:1(g)*.

Civil Procedure > Sanctions > Baseless Filings > Signing Requirements
[HN3] If a pleading, motion, or other paper is signed or made in violation of the signing rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee. *Va. Sup. Ct. R. 4:1(g)*.

Evidence > Relevance > Spoliation
Legal Ethics > Professional Conduct > General Overview
[HN4] *Va. Sup. Ct. R. pt. 6, ß II, R. 3.4(a)* mandates that a lawyer shall not counsel or assist his client to alter, destroy, or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. The apparent violation of this Rule will be referred to the Virginia State Bar for any action it deems appropriate.

Civil Procedure > Judgments > Relief From Judgment > Additurs & Remittiturs > Remittiturs
[HN5] The Court is empowered to set aside or remit a jury verdict that is excessive or is the product of passion, bias, sympathy, or prejudice. *Va. Code Ann. ßß 8.01-383, 8.01-383.1*. The evidence, however, must be considered in the light most favorable to the prevailing plaintiff, and the court must determine whether the amount of recovery bears a reasonable relation to the damages proven by the evidence.

Civil Procedure > Judgments > Relief From Judgment > Additurs & Remittiturs > Remittiturs
[HN6] A court should award remittitur when a verdict is so excessive as to shock the conscience of the court and to create the impression that the jury has been influenced by passion, corruption, or prejudice. Similarly, it is the duty of the judge to correct any injustice that results from an award so out of proportion to the injuries suffered to suggest that it is not the product of a fair and impartial decision.

HEADNOTES

A lawyer cannot counsel or assist a client to alert, destroy, or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence.

Lawyers and parties are liable to sanctions for the bad faith spoliation of evidence.

A court can set aside or remit a jury verdict that is excessive or is the product of passion, bias sympathy, or prejudice.

JUDGES: [**1] EDWARD L. HOGSHIRE, JUDGE.

OPINION BY: EDWARD L. HOGSHIRE

OPINION

[*308] BY JUDGE EDWARD L. HOGSHIRE

On the 27th day of May 2011, came the parties, Isaiah Lester ("Lester"), Administrator of the Estate of Jessica Lynn Scott Lester, by his counsel, Malcolm P. McConnell, III, Esq., and Defendants Allied Concrete Company ("Allied") and William Donald Sprouse, by their counsel, David M. Tafuri, Esq., Rory E. Adams, Esq., John W. Zunka, Esq., Richard H. Milnor, Esq., and John M. Roche, Esq., and came the beneficiaries, Gary C. Scott and Jeannine Scott, by their counsel, Joseph A. Sanzone, and came Matthew B. [*309] Murray, Esq., by his counsel, Thomas Williamson, Esq., and Marlina Smith, by her counsel, M. Bryan Slaughter, Esq., and Malcolm P. McConnell, III, Esq., by his counsel, Robert T. Hall, Esq., for a hearing upon Defendants' Post-Trial Motions, including Motions for Sanctions against Matthew B. Murray and Isaiah Lester, and Defendants' Post-Trial Motion for Mistrial for Newly Discovered Juror Bias. After careful review of the record in this case, including, but not limited to, deposition, trial and hearing transcripts and accompanying exhibits, legal memoranda, and arguments of counsel, the Court hereby renders the [**2] following findings and conclusions.

I. *Procedural Background*

These civil actions, seeking monetary damages for personal injuries and wrongful death from an accident which occurred on June 21, 2007, were consolidated for trial in this Court by virtue of an Order dated August 3, 2009. Plaintiff Lester alleges that the Defendants, Allied and Sprouse, were negligent in causing an accident which resulted in the death of Jessica Lynn Scott Lester, Lester's wife, and which caused injury to himself. Lester filed suit as Administrator and beneficiary of his wife's estate, as well as on his own behalf, for injuries suffered in the accident of June 21, 2007, and has named as additional statutory beneficiaries the parents of Jessica Scott Lester, Gary C. Scott and Jeannine Scott.

Soon after the cases were consolidated, disputes over discovery-related issues and disagreements between counsel intensified, resulting in the Court's granting Defendants' initial Motion for Continuance. As the second trial date approached, Defendants filed a Second Motion for Continuance, premised in part on Plaintiff's failure to disclose the contents of Lester's Facebook account. In a hearing on March 3, 2009, relating [**3] to that motion, Murray accused Tafuri, co-counsel for Defendants, of "hacking" into Lester's Facebook account.

Denying Murray's accusations regarding hacking, Defendants filed a Motion for Sanctions against Murray under *Virginia Code ß 8.01-271.1* and *Rule 4:1(g) of the Rules of the Supreme Court of Virginia.*

Asserting that Murray had not complied with certain discovery requests, specifically Request No. 10 of Defendants' Fourth Interrogatory and Requests for Production of Documents, which sought the contents of Lester's Facebook account, Defendants filed a Motion to Compel Plaintiffs to file a complete response.

Following a May 14, 2009, *ore tenus* hearing, the Court entered an Order on June 28, 2010, in which the Court found that "[r]easonable inquiry by Plaintiff's counsel [Murray] would have revealed that there was no reasonable ground for such charges based on the facts available to him," and that such unfounded accusations violated *Virginia Code ß 8.01-271.1* as well as *Rule 4:1(g) of the Rules of the Supreme Court of Virginia.* [*310] Murray was ordered to pay reasonable costs and attorneys' fees associated with defending the groundless accusations and prosecuting the motion for sanctions, [**4] the total sum to be determined at a later date. This sanction will be heard with respect to costs and fees due along with remaining issues to be resolved at the hearing on September 23, 2011.

Discovery progressed until August 18, 2010, when Defendants filed a Motion for Sanctions for Plaintiff's Spoliation of Evidence, alleging deliberate destruction of evidence which should have been supplied in response to Request No. 10 of Defendants' Fourth Interrogatory and Request for Production of Documents to Plaintiff.

On November 22, 2010, the Court conducted an *ore tenus* hearing on Defendants' Motion for Sanctions for Plaintiff's Spoliation of Evidence. Joshua Scotson, an expert in internet technology retained by Defendants, testified without contradiction that, based upon his review of the Facebook logs and phone records of Lester and paralegal Smith, an employee of the Allen Firm, Lester had deleted sixteen photos from his Facebook page on May 11, 2009. Scotson further attested that he was able to recover fifteen of the deleted photos and that there was a high probability that the sixteenth photo was subsequently provided to defense counsel by the Plaintiff. (All of these photographs were [**5] available to the Defendants prior to trial, and Defendants suffered no prejudice from the spoliation at trial.) H'rg Tr. Nov. 22, 2010, at 125-26, 128, 161.

During the hearing on November 22, 2010, Lester, through his counsel Murray, admitted that there had been spoliation of evidence which should have been provided pursuant to the March 25, 2009, discovery request. H'rg Tr. Nov. 22, 2010, at 153:22-154:2. In an Order reflecting the findings from the hearing on November 22, 2010, entered December 6, 2010, while overruling a Defense motion for another continuance of the trial, then set to begin December 7, 2010, the Court found that "there had been spoliation of evidence by the Plaintiff, Isaiah Lester, and that the actions of his counsel and their agents in that spoliation remain the subject of further findings of fact at a future date." The December 6, 2010, Order also provided that an "adverse inference" instruction be given to the jury in relation to the acts of spoliation by the Plaintiff and that Plaintiff and his counsel would remain subject to further findings of fact and possible sanctions at a future date, including the payment of Defendants' fees and costs incurred related [**6] to the sanctions motion.

The cases were tried before a jury on December 7-9, 2010. After hearing all the evidence, the jury awarded the sum of $2,350,000, plus interest, to Lester in compensation for his personal injuries, the sum of $6,227,000, plus interest, to Lester as beneficiary of the estate of Jessica Lynn Scott Lester, the sum $1,000,000, plus interest, to Gary C. Scott, as beneficiary of the estate of Jessica Scott Lester, and the sum of $1,000,000, plus interest, to Jeannine Scott, as beneficiary of the estate of Jessica Lynn Scott Lester.

[*311] During the week following trial, Plaintiff filed a Notice of Presentation of Final Order, to which Defendants responded with a Motion to Quash Notice of Entry of Final Order and Request to Schedule Post-Trial Motions. Following a hearing on those post-trial motions on December 22, 2010, the Court ordered on February 4, 2011, that entry of the final order on the jury verdict would be deferred and that the Plaintiff must produce all e-mails "previously produced for *in camera* inspection described in Plaintiff's November 29, 2010, privilege log to Defendants" and produce to Defendants all other e-mails or documents previously requested regarding [**7] the spoliation of evidence by Plaintiff and his attorneys.

The February 4, 2010, Order also established the schedule for the filing of additional post-trial motions, addressed discovery issues, compelled production of previously subpoenaed documents, and declared that the "attorney-client privilege" and the "work product doctrine" do not apply to any actions or statements by Plaintiff, his counsel, his counsel's legal assistants, or concerning the Defendants' March 25 Request for Production of Documents, the responses to that request for production of documents, any other aspect of Plaintiff's Facebook account, and any and all actions taken relating to spoliation of evidence from the Facebook account or the producing of information in discovery related to the spoliation of evidence from the Facebook account.

On January 18, 2011, Defendants filed a number of motions, including, *inter alia,* a Motion for Monetary Sanctions against Matthew B. Murray, Esq., as Principal to Smith, Motion for Monetary Sanctions against Isaiah Lester, Motion for Monetary Sanctions against Matthew B. Murray, Esq., Motion for Sanctions for Plaintiffs' Counsel's Improper Disclosure of Confidential Mediation Discussions, [**8] Defendants' Post-Trial Motions, with Appendix attached, Defendants' Memorandum of Costs and Fees Related to Motion for Sanctions for Plaintiffs' Spoliation of Evidence, and Defendants' Motion for Mistrial for Newly Discovered Juror Bias.

In these post-trial motions, Defendants seek the dismissal of Plaintiffs' claims, or in the alternative, a new trial on liability and damages or a new trial on damages alone, or finally, an order of remittitur.

Defendants assert that such remediation is warranted by virtue of the actions of Plaintiff Lester and his counsel Murray in the spoliation of evidence and the cover-up by counsel of his deceptive behavior, the failure of Murray to disclose the longstanding relationship that he and his firm had with the jury foreperson, Murray's intemperate behavior at trial, including, *inter alia,* his invoking God and prayer as well as crying during open and closing presentations to the jury, his violation of the Court's pre-trial ruling barring mention to the jury that Defendants had originally asserted that Lester was contributorily negligent, Murray's production of "sympathy-inducing" testimony, and Murray's "coaching of a witness." While this argument appears [**9] in the January 18, 2011, filings, it was not argued in the [*312] May 27, 2011, hearing, and this Court has received no evidence nor heard argument on the issue. Since this argument has apparently been abandoned by the Defendants, the Court declines to make any finding regarding it.

Defendants assert that Murray, by these actions, "followed a consistent and purposeful strategy of converting a judicial proceeding . . . into a tainted proceeding whereby the jury rendered an excessive verdict based on an incomplete record and motivated by bias and raw emotion." Defs.' Post-Trial Mots., Summ. of Arg., Jan. 18, 2011, at 2

Plaintiff Lester, through attorney McConnell of the Allen Firm, Murray, through his counsel, Mr. and Mrs. Scott, through their counsel, and Smith, through her counsel, then filed responses to these motions.

The Court conducted an *ore tenus* hearing addressing all pending motions on May 27, 2011, in which the Defendants introduced evidence in support of their allegations. McConnell on behalf of Lester presented evidence and argument in defense of the motions, and Murray, through his counsel Thomas Williamson, Esq., presented evidence and argument. Murray testified on his own behalf [**10] and admitted that he had committed most of the transgressions alleged by Defendants but denied having instructed Lester to delete the contents of his Facebook page on May 11, 2009. Murray also denied any wrongdoing relating to his role in the selection of the jury. H'rg Tr. May 27, 2010, at 187-223.

At the conclusion of the hearing on May 27, 2011, the Court requested counsel to submit any final arguments in writing to the Court, accompanied by proposed findings of fact and conclusions of law. Subsequent to the hearing, the Allen Firm, through its counsel, Hugh M. Fain, III, Esq., of Spotts Fain, P.C., filed its objection to being held responsible for the actions of Murray during the course of Murray's representation of the Plaintiff in these cases. What follows is the Court's ruling on the issues presented.

II. *Findings of Fact*

A. Preliminary Findings

Murray, as counsel for Plaintiff and the statutory beneficiaries, along with Joseph Sanzone, Esq., of Sanzone and Baker, P.C., were the lead attorneys in filing and prosecuting these cases. Murray, at all times while acting as lead attorney for the Plaintiff, was the managing principal of the Charlottesville office of the Allen Firm, and [**11] all actions taken by him were taken in that capacity. At all times relevant to this action, Smith has been a paralegal employed by the Allen Firm and worked under the direction of Murray.

While there have been accusations of wrongdoing involving paralegal Smith and attorney McConnell, both employed by the Allen Firm, Defendants have not requested that either be sanctioned for their actions [*313] in these cases. Consequently, no findings regarding their behavior will be addressed herein.

B. *Lester's Deposition Misrepresentations Unrelated to Spoliation*

Lester was clearly evasive and possibly untruthful about his history of depression and his past use of antidepressants during the discovery phase of these cases. Lester alleged that he suffered from serious Post-Traumatic Stress Disorder and "Major Depressive Disorder, Single Episode, Severe," as a result of the accident. *See Lester v. Allied Concrete Co.*, No. CL09-251, Compl. ∂ 6.

On July 7, 2009, Lester told his psychiatrist, Dr. John P. D. Shemo, during an examination that "he had previously been given a low dose of what he had recalled as being Lexapro while in college by a practitioner whose identity he does not recall." Dr. John P. D. Shemo [**12] Dep. 62:1-6, July 30, 2010. In breach of his obligation to cooperate with discovery requests, Lester failed to disclose the details relating to his admitted use of Lexapro. Isaiah Lester Dep. 25-26, Dec. 16, 2009.

Lester also admitted that he was not truthful when he stated, in response to discovery requests that he volunteered at the Boys & Girls Club. App. to Defs.' Post-Trial Mots., Jan. 18, 2011, Ex. A, Oct. 27, 2009, Interrog. Resp. No. 3; Lester Dep. 137:19-24, Dec. 16, 2009.

C. *Response to Defendants' Fourth Interrogatory and Request for Production of Documents and May 11, 2009, Spoliation of Evidence*

On the afternoon of March 25, 2009, Defendants served Murray by facsimile Defendants' Fourth Interrogatory and Request for Production of Documents to Plaintiff. Matthew B. Murray, Esq., Ex., May 27, 2010, Hr'g Materials, (hereinafter "Murray") May 27, 2011, Ex. 4. This pleading sought discovery relating to the contents of Lester's Facebook account and attached was a photo obtained by Tafuri from Lester's Facebook page. The photo depicts Lester clutching a beer can, wearing a T-shirt emblazoned with "I [hearts] hot moms" and in the company of other young adults. Tafuri gained access to Lester's [**13] Facebook page via Facebook message on January 9, 2009.

On the evening of March 25, 2009, Murray notified Lester via e-mail about the receipt of the "I [hearts] hot moms" photo and the related discovery request. Murray May 27, 2011, Ex. 2.

On the morning of March 26, 2009, Murray met with Smith and brought to her attention Defendants' Fourth Interrogatory and Request for Production of Documents and requested Smith to retrieve what the Defendants were seeking in that request. Smith Dep. 22-23, Feb. 28, 2011. During the course of their discussion, Murray questioned how the De-

fendants had obtained [*314] the "I [hearts] hot moms photo." Smith said she thought the photo likely came from Facebook. Smith accessed Lester's Facebook page, and, after seeing the Facebook photo, Murray instructed Smith to tell Lester to "clean up" his Facebook because "we don't want blowups of this stuff at trial." Smith Dep. 15-16, Feb. 28, 2011; Matthew B. Murray Dep. 38-39, Feb. 28, 2011; H'rg Tr. May 27, 2010, at 192-93, 244.

Following Murray's instructions, Smith e-mailed Lester at 9:54 a.m. and 3:49 p.m. on March 26, 2009. The first e-mail requested information from Lester to answer the interrogatory seeking the identities of the [**14] individuals in the "I [hearts] hot moms" photo. After informing Lester that the "I [hearts] hot moms photo" was on his Facebook page, Smith stated there are "some other pics that should be deleted." The second e-mail exhorted Lester to "clean up" his Facebook page because "we do NOT want blow ups of other pics at trial; so please, please clean up your facebook and myspace." Murray May 27, 2011, Ex. 6, 7.

Between March 26 and April 15, 2009, Murray and Smith worked with Lester to respond to Defendants' Fourth Interrogatory and Request for Production of Documents to Plaintiff. Murray May 27, 2011, Ex. 8-13.

On March 26, 2009, Murray began developing a response to Request No. 10, which sought production of "screen print copies on the day this request is signed of all pages from Isaiah Lester's Facebook page, including but not limited to all pictures, his profile, his message board, status updates, and all messages sent or received." Instead of providing what was sought, Murray created a scheme to take down or deactivate Lester's Facebook page and to respond by stating that Lester had no Facebook page as of the date the response was signed. H'rg Tr. May 27, 2010, at 194-95; Murray May 27, 2011, Ex. 6. [**15] Murray communicated this plan to Lester who, following the directions of his counsel, deactivated his Facebook page on April 14. Murray May 27, 2011, Ex. 6, 8, 12, 14.

On April 15, 2009, Murray, knowing he was acting deceptively, signed and served upon Defendants Plaintiff's Answer to Defendants' Fourth Interrogatory and Responses to Request for Production of Documents. In this pleading, Murray responded as follows to the Request for Production seeking Facebook screen-prints: "I do not have a Facebook page on the date." This is signed April 15, 2009.

Defense counsel promptly complained to Murray about the Response, threatening to file a motion to compel if screen-prints of the Lester Facebook page "on the day this request is signed" were not produced. Murray May 27, 2011, Ex. 19. When Murray refused, Defendants filed a Motion to Compel Discovery and noticed the Motion for hearing on May 14, 2009.

On April 23, 2009, Murray contacted Melinda South, Esq., a lawyer employed by the Allen Firm as a "research attorney," seeking advice about the Defendants' entitlement to screen-prints of the Facebook page. Ms. South advised Murray about the January 1, 2009, addition to *Rule 4:9 of the Rules of the Supreme Court of Virginia*, [**16] [*315] expressly governing e-discovery. H'rg Tr. May 27, 2010, at 197; Murray May 27, 2011, Ex. 22. Murray then decided to produce the requested screen-prints of Lester's Facebook page, and on May 11, 2009, he instructed Smith to obtain screen-prints of its contents to produce to the Defendants. H'rg Tr. May 27, 2010, at 197-99; Smith Dep. 44-46, Feb. 28, 2011.

At 1:34 p.m. that afternoon, Smith e-mailed Lester inquiring about the date he deactivated his Facebook account, and Lester replied, "The day before the questions were due [April 15, 2009.]" H'rg Tr. May 27, 2010, at 197-99; Murray May 27, 2010, Ex. 24.

At 2:11 p.m., Lester and Smith spoke by phone. Smith requested Lester to reactivate his Facebook account. Lester claims to have reactivated and deactivated his Facebook account confirming his capability to restore his Facebook page for the requested screen-printing. At 3:43 p.m., Lester telephoned Smith and informed her that he could reactivate his Facebook account. Smith Dep. 46-47, Feb. 28, 2011. Lester was at his place of employment and could not cooperate with the effort to screen-print his Facebook page until after his work day concluded. Smith Dep. 46-47, Feb. 28, 2011.

At the time [**17] he left the Allen Firm offices on the afternoon of May 11, Murray had been informed that the Lester Facebook page could be recovered. H'rg Tr. May 27, 2010, at 200-01; Murray May 27, 2011, Ex. 47.

On the evening of May 11, 2009, between 6:46 p.m. and 7:07 p.m., Smith spoke with Lester by phone from her home and accessed and screen printed Lester's Facebook page. Smith Dep. Ex. 15, Feb. 28, 2011. On the evening of May 11, in the 6:49 p.m. time frame, Lester deleted sixteen photos from his Facebook page, an act consistent with the earlier directive from Murray to "clean up" his Facebook account. H'rg Tr. Nov. 22, 2010, at 125-26, 128, 161; Smith Dep. Ex. 15, Feb. 28, 2011.

Smith maintains that she did not know Lester had deleted the 16 photos at the time she printed the contents of Lester's Facebook page on May 11, 2009. Smith Dep. 96-98, Feb. 28, 2011; H'rg Tr. May 27, 2011, at 259-60.

On May 12, 2009, Lester e-mailed Smith inquiring if she "got everything [she] needed" and expressing his desire to give defense counsel "all they wanted" to avoid any trial delay. Murray May 27, 2011, Ex. 26, 27. Murray e-mailed Smith on May 13, 2009, asking if she had gotten the Facebook screen-prints and [**18] if there was "[a]nything of interest?" Smith replied the screen-prints were in Murray's box and there was "[n]othing crazy." Murray May 27, 2011, Ex. 28.

When Murray returned to his office on May 14, he reviewed Plaintiff's First Supplemental Response to Defendants' Request for Production of Documents and "skimmed" the attached screen-prints including the numerous thumbnail-sized copies of photos. Murray then signed the response and served it on defense counsel prior to the hearing on May 14. [*316] H'rg Tr. May 27, 2010, at 206-07; Murray May 27, 2011, Ex. 29. Murray insists that he did not know at the time he delivered this response to defense counsel on May 14, that Lester, on May 11, had deleted the sixteen photos. H'rg Tr. May 27, 2010, at 205.

At the hearing on May 14, 2009, the Court deferred ruling on the Motion to Compel Discovery pending Defendants' review of this response, received shortly before the hearing commenced. H'rg Tr. May 14, 2009, at 23-24.

On October 12, 2009, Murray served upon Defendants Plaintiff's First Supplemental Response to Defendants' Request for Production of Documents providing additional screen-prints of the Lester Facebook page. Murray May 27, 2011, Ex. 30. [**19] Lester, testifying under oath about his Facebook page at a deposition on December 16, 2009, stated that he had never deactivated or taken down his page. But Lester's e-mails and later testimony appear to show that he knew this statement was false. Lester Dep. 59:7-16, 61:2-7, 61:20-25, 62:13-64:11, 69:3-25, 70:12-17, 77:10-78:3, 83:10-25, 84:15-23, 104:18-24, Dec. 16, 2009. Lester persisted in denying the deactivation during his testimony at trial. Trial Tr. Dec. 8, 2010, at 542-46.

On March 1, 2010, Murray forwarded to counsel for Defendants Lester's Facebook IP logs sent to Murray by counsel for Facebook. Defs.' Mot. for Sanctions for Pl.'s Spoliation of Evidence, August 18, 2010, (hereinafter "Spoliation") at 8.

On August 3, 2010, counsel for Defendants hired Joshua Scotson, H'rg Tr. Nov. 22, 2010, at 44-45, and on August 18, 2010, Murray received the Scotson opinion that spoliation had transpired on May 11, 2009. Murray and McConnell engaged K. Gus Dimitrelos, an IT expert, to scrutinize the methodology of Scotson. Dimitrelos agreed with Scotson that Lester had deleted sixteen photos on the evening of May 11, 2009. Murray Dep. 28, Ex. 14, Feb. 28, 2011; H'rg Tr. May 27, 2010, at [**20] 208-09.

Based upon the opinion of Dimitrelos and the Scotson deposition, Murray and McConnell, by October 16, 2010, knew that expert opinion would confirm that Lester had deleted the photos on May 11, 2009. Malcolm McConnell, III, Dep. 17-18, Ex. 3, May. 5, 2011.

Lester testified in his deposition on November 17, 2010, that he alone, without input from anyone, made the decision to delete the photos from his Facebook page. Lester Dep. 48, Nov. 17, 2009.

D. *Privilege Log Misrepresentations*

On September 28, 2010, Defendants served on Smith a subpoena *duces tecum* commanding the production of any and all e-mails between herself and Lester between March 25 and May 15, 2009. Claiming attorney-client privilege, Plaintiff's counsel moved to quash this subpoena, and, on October [*317] 19, 2010, Defendants filed a Motion to Require Compliance with Subpoena *Duces Tecum.*

On October 21, 2010, the Plaintiff's counsel agreed to the production of all e-mails between Smith and Lester referencing Facebook in response to the March 25, 2009, Request for Production of Documents unless subject to a claim of privilege, in which event, the e-mails would be produced for *in camera* inspection by the Court.

During the course [**21] of a hearing on November 17, 2010, the Court ordered Plaintiff to file a privilege log listing everything Plaintiff claimed was privileged and the basis for the claim. H'rg Tr. Nov. 17, 2010, at 39-40. On November 18, 2010, Murray, on behalf of Plaintiff, filed a spoliation privilege log with the Court. During the hearing on November 22, 2010, the Court declared the privilege log filed by Murray to be inadequate and ordered Plaintiff to file by Monday, November 28, 2010, an amended privilege log setting forth in detail why each document identified in the

privilege log was protected by the claimed privilege and to deliver to the Court everything Plaintiff claimed to be privileged without redaction. H'rg Tr. Nov. 22, 2010, at 166-67.

On November 28, 2010, Murray filed with the Court the Enhanced Privilege Log and produced *in camera* the e-mails identified in the Enhanced Privilege Log. Murray intentionally omitted from the Privilege Log and the Enhanced Privilege Log the March 26, 2009, 9.54 a.m. e-mail from Smith to Lester and willfully failed to deliver it to the Court for *in camera* inspection. Murray concealed the e-mail from the Court out of fear that the Court would grant yet another [**22] continuance of the trial, scheduled to begin on December 7, 2010.

After the trial, Murray furnished the March 26, 2009, 9:54 a.m. e-mail to the Court on December 14, 2010. In his letter of transmittal, Murray falsely represented to the Court that the omission of this now notorious e-mail was caused by the mistake of a paralegal then employed by the Allen Firm, when, in fact, Murray knew his own misconduct caused the omission. Murray Dep. 23-29, 94-98, 101-04, Feb. 28, 2011; H'rg Tr. May 27, 2010, at 187.

E. *Redaction of Smith Cell Phone Records*

On November 10, 2010, M. Bryan Slaughter, Esq., counsel for Smith, produced Smith's personal cell phone records in response to a subpoena seeking documentation of phone calls between Smith and Lester in the time frame of Lester's deletion of Facebook photos. Smith Dep. 16-19, Feb. 28, 2011. After the production, Smith discovered that she had redacted a May 11, 2009, phone call with a number which, unknown to her when redactions were made, was Lester's cell phone number. On Friday, November 12, Smith notified McConnell of the error upon discovering it. Smith Dep. 60, Feb. 28, 2011.

[*318] On the afternoon of November 12, Murray, with Smith's assistance, [**23] prepared a draft e-mail disclosing the inadvertent redaction and sent it to McConnell, who was in the midst of communicating with defense counsel on other issues. Murray May 27, 2011, Ex. 39; Smith Dep. 66, Feb. 28, 2011.

Slaughter, upon learning of the inadvertent redaction, e-mailed to defense counsel on Tuesday, November 16, 2010, a copy of the phone records without the redaction. Murray May 27, 2011, Ex. 40.

There was no prejudice to the Defendants caused by this error.

F. *Coe E-mail Redaction*

In December, 2010, Murray requested Thomas Coe, the Information Technology Director at the Allen Firm, to redact two portions of e-mail chains, telling Coe that they were not responsive and were protected by privilege, and the redactions were made. Coe Dep. 78-79; Murray Dep. 99-101, Feb. 28, 2011. No evidence established that the redactions made by Coe related to the Facebook spoliation controversy.

The only redaction clearly identified in documents produced by Coe and his counsel is a Lester e-mail of 9:09 a.m. April 7, 2009, in a chain of earlier e-mails. This redaction related to liability and bore no relationship to the Facebook spoliation controversy. Murray May 27, 2011, Ex. 45, Reinhardt [**24] 110519 Ltr. Attach 1-3.

G. *Murray Letter Re Lexapro Usage*

At the request of Murray, a psychiatrist, John P. D. Shemo, M.D., agreed to examine Lester and review his records. Shemo Dep. 32, July 30, 2010. According to Dr. Shemo's July 7, 2009, examination notes, Lester told Dr. Shemo that he had taken the medication Lexapro in the summer of his freshman year in college. Shemo Dep. 163, July 30, 2010. In an effort to ascertain the source of the Lexapro, Murray spoke by telephone with Veronica C. Ballard, Lester's mother. Based upon the telephone conversation and the information imparted to him by Ms. Ballard, Murray authored and sent to counsel for Defendants a letter dated February 24, 2010, in which Murray stated:

> I have spoken to Isaiah's mother, Veronica Ballard, who has a recollection of these events. Ms. Ballard told me that Isaiah came home to Texas on a break and was in a bad mood because he had lost his track scholarship. Ms. Ballard mentioned this to her physician who gave her samples of Lexapro to try. Ms. Ballard recalls Isaiah took the pills for a few days and discontinued them because they made him feel poorly. Shortly [*319] thereafter, he snapped out of what was bothering him and [**25] returned to Ohio University.

Pl.'s Opp. to Defs.' Second Mot. for Continuance, February 26, 2010, Ex. A.

On May 10, 2010, Ms. Ballard was deposed. In her deposition, Ms. Ballard testified that she knew that her son had indeed received some samples of Lexapro, tried them a short time, did not like the Lexapro, and then returned to school. She could not remember how he received the samples, but denied that she had told Murray that she provided the samples to her son. She did confirm the phone conversation with Murray in which she was "trying to brainstorm" the source of the Lexapro that she furnished. Veronica Ballard Dep. 33-37, 44-46

Defendants characterize Murray's February 24, 2010, letter as "false and misleading" because of its erroneous assertion that the documentation of Lexapro usage was derived from the records of Liza Gold, M.D., psychiatric expert retained by Defendants, instead of Dr. Shemo and the deposition testimony of Ms. Ballard denying that she was the source of the samples.

The discrepancy between the Murray letter of February 24, 2010, and the Ballard deposition testimony as to the source of the Lexapro was raised in the July 7, 2010, hearing regarding Defendants' Motion [**26] for Spoliation Remedy, at which time Murray accepted responsibility for the discrepancy, stating that it was based on a "misunderstanding."

Although troublesome, there is insufficient evidence to establish that Murray willfully made false statements or intended to mislead opposing counsel and the Court in the letter of February 24, 2010.

H. *Allegation of Juror Misconduct*

On the morning of December 7, 2010, trial of these actions commenced, and potential jurors, including Amanda Hoy, were called and sworn. Trial Tr. Dec. 7, 2010, at 8-9.

During *voir dire,* the Court posed the following question to the prospective jurors, including Hoy, during their examination under oath:

> THE COURT: All right. Are any of you related by blood or marriage to any of the attorneys? Do you know them or have significant involvement with them or their law firms?

Hoy verbalized no response to the Court's question. *See* Trial Tr. Dec. 7, 2010, at 71.

The evidence does not establish that Hoy's failure to respond in the affirmative to the question was dishonest and a violation of her oath. [*320] The evidence is insufficient to prove that Murray had any knowledge of improper conduct by Hoy. Murray has testified that he had never [**27] met or spoken with Hoy prior to December 7, 2010. H'rg Tr. May 27, 2010, at 217.

The only evidence of any contact between Murray and Hoy was the one e-mail exchange of May 12-13, 2010, initiated by Hoy, inquiring if Murray would be willing to serve on the Board of Meals on Wheels, Hoy's former employer. This invitation was not accepted by Murray.

There has been insufficient evidence to establish that Hoy, on the date of trial, had a "significant involvement" with the Allen Firm. The meaning of "significant involvement" is subjective and to be determined by an examination of the state of mind of Hoy. No evidence has been adduced as to Hoy's state of mind or how she interpreted the term "significant involvement" at the time of *voir dire.* Her employment with Meals on Wheels had terminated in May of 2010, approximately seven months prior to the trial of this action. Grzegorczyk Dep. 14; Emily Krause Dep. 58, May 20, 2011.

Hoy could have honestly considered her involvement through Meals on Wheels with the Allen Firm to be insignificant at the time of trial.

I. *Murray's Behavior at Trial*

Murray's conduct at trial included a number of actions designed to inflame the passions and play upon the [**28] sympathy of the jury. These actions include the following:

a. Weeping during opening statement and closing argument;

b. Stating on two occasions to the jury, in one form or another, that defendant David Sprouse, the driver of the truck, "killed" the plaintiff; Trial Tr. Dec. 7, 2010, Dec. 9, 2010, 875:14-15;

c. Violating a pre-trial ruling from this Court by exclaiming in the jury's presence that the Defendants had asserted that Lester was contributorily negligent in causing his wife's death; Trial Tr. Dec 7, 2010, Dec, 8, 2010, 403:22-405:20;

d. Repeatedly invoking the name of God or religion by referring to the Plaintiff as one who attends church with his parents and by four times mentioning prayer. Trial Tr. Dec 7, 2010, Dec. 9, 2010, 889:5-14, 889:9-10.

Significantly, with the exception of (c), above, at no time did defense counsel object to any of the above-described behavior.

Defense counsel moved for a mistrial after Murray blurted out to the jury that Defendants had accused Lester of having been guilty of "contributory negligence." The Court overruled the motion contemporaneously and declines to revisit the issue post trial except as relates to remittitur, discussed below.

[*321] III. *Conclusions* [**29] *of Law*

A. *Motion for Monetary Sanctions against Matthew B. Murray*

[HN1] Defendants, as the moving parties in seeking sanctions, bear the burden of proving by a preponderance of the evidence facts establishing misconduct warranting an award of sanctions. *See United Dentists, Inc. v. Commonwealth, 162 Va. 347, 358, 173 S.E. 508 (1934)* (party has the burden of proof who seeks to move the court to act in his favor).

When Murray was served with Defendants' Fourth Interrogatory and Request for Production of Documents to Plaintiff, he had a duty to produce the documents and electronically stored information described in Request No. 10 which were in the possession, custody, or control of Plaintiff, absent timely assertion of a well-founded objection. *Va. Sup. Ct. R. 4:9*.

[HN2] Murray's signature on Plaintiff's Answer to Defendants' Fourth Interrogatory and Responses to Request for Production of Documents constituted a certification that he had read the pleading and that to the best of his knowledge, information, and belief, formed after a reasonable inquiry the answer was (1) consistent with Part IV of Rules of the Supreme Court of Virginia and warranted by existing law or a good faith argument for extension, modification, [**30] or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. *Va. Sup. Ct. R. 4:1(g)*.

Murray, when he signed and served upon Defendants Plaintiff's Answer to Defendants' Fourth Interrogatory and Responses to Request for Production of Documents, violated *Va. Sup. Ct. R. 4:1(g)* by stating in response to Request No. 10 that Lester did "not have a Facebook page on the date this is signed, April 15, 2009." If Murray had, after a reasonable inquiry, believed Request No. 10 was objectionable, consistent with Part IV Rules of the Supreme Court of Virginia and warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, he could have legitimately served an objection to Request No. 10. Murray, however, chose to obstruct production of the requested screen-prints by drafting a deceptive response to Request No. 10 and then instructing [**31] his client to take down his Facebook page.

[HN3] If a pleading, motion, or other paper is signed or made in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee. *Va. Sup. Ct. R. 4:1(g)*.

[*322] The Court will impose upon Murray, as an appropriate sanction, the reasonable expenses, including a reasonable attorney's fee, incurred by Defendants because of Murray's violation of *Va. Sup. Ct. R. 4:1(g)*, which would include but not be limited to, the expense of communicating with Murray seeking voluntary production of the requested screen-prints without the necessity of filing a motion to compel production, the preparation and filing of Motion to Compel Discovery, and preparation for the May 14, 2009, hearing on Motion to Compel Discovery, including the costs of retaining and deposing witnesses, expert witness fees.

[HN4] *Rule 3.4(a) of the Virginia Rules of Professional Conduct* [**32] mandates that a lawyer shall not counsel or assist his client to alter, destroy, or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. The apparent violation of this Rule will be referred to the Virginia State Bar for any action it deems appropriate.

Both Lester and Murray must be held accountable for the spoliation. Lester did what Murray told him to do, deliberately delete Facebook photos that were responsive to a pending discovery request. Defendants are entitled to sanctions against Murray and Lester for the spoliation that occurred on May 11, 2009, as previously ordered.

Murray violated *Va. Code ß 8.01-271.1*, *Va. Sup. Ct. R. 4:1(g)*, and *Va. Sup. Ct. R. 4:12* by omitting Smith's March 26, 2009, 9:54 a.m. e-mail from the Privilege Log and Enhanced Privilege Log submitted to the Court and by his failure to submit the subject e-mail to the Court for *in camera* inspection. Murray concedes by counsel that his behavior also violated *Rules 3.3* and *3.4* of the Virginia Rules of Professional Conduct. The Court will refer this issue to the Virginia Bar.

Murray violated *Va. Code ß 8.01-271.1* by falsely representing [**33] to the Court in his letter of December 14, 2010, that a mistake of a paralegal and not his own misconduct caused the subject omission from the privilege logs. Murray concedes by counsel that his behavior also violated Rules 3.3 and 3.4 of the Virginia Rules of Professional Conduct. The Court will refer this issue to the Virginia Bar.

The Court imposes upon Murray, as an appropriate sanction, the reasonable expenses, including a reasonable attorney's fee, incurred by Defendants because of Murray's violations of *Va. Code ß 8.01-271.1*, *Va. Sup. Ct. R. 4:1(g)*, and *Va. Sup. Ct. R. 4:12* arising out his above described misconduct relating to the privilege logs.

IV. *Motion for Monetary Sanctions against Isaiah Lester*

Defendants, as the moving parties in seeking sanctions, bear the burden of proving by a preponderance of the evidence facts establishing misconduct by Lester that warrant an award of sanctions. *See United Dentists, 162 Va.* [*323] *at 358* (party has the burden of proof who seeks to move the court to act in his favor).

Lester's misconduct, established by a preponderance of evidence, includes the following:

a. Deactivating his Facebook account and claiming he did not have one in a misleading [**34] response to Defendants' discovery request;

b. Deleting Facebook photos on May 11, 2010, prior to the production printed later that day by his counsel;

c. Misrepresenting in deposition that he was currently volunteering for the Boys and Girls Club;

d. Misrepresenting in deposition that he never deactivated or deleted his Facebook page;

e. Claiming on the stand at trial that he never deleted Facebook photos despite previously admitting to the same.

The foregoing actions, with the exception of (e) above, were known to the Court and Defendants prior to trial. His actions relating to spoliation have been addressed by a previous order. They related solely to the issue of damages and were mitigated, to the extent appropriate, by an adverse jury instruction; thus, they do not affect the validity of the verdict as to liability.

The Court will refer the allegations of perjury to the Commonwealth's Attorney for the City of Charlottesville for his review and consideration for any action he deems appropriate.

V. *Motion for Sanctions for Plaintiff Counsel's Improper Disclosure of Confidential Mediation Discussions*

Defendants have alleged that Murray improperly disclosed details of mediation to the media [**35] following trial, but, since no evidence has been produced in the support of the motion, it appears to have been abandoned and, accordingly, will be dismissed.

VI. *Remittitur*

[HN5] This Court is empowered to set aside or remit a jury verdict that is excessive or is the product of passion, bias, sympathy, or prejudice. *See Va. Code ßß 8.01-383, 8.01-383.1*; *Baldwin v. McConnell, 273 Va. 650, 655, 643 S.E.2d 703, 705 (2007)* ("Setting aside a verdict as excessive . . . is an exercise of the inherent discretion of the trial court. . . ."

(quoting *Shepard v. Capitol Foundry of Va., Inc., 262 Va. 715, 721, 554 S.E.2d 72, 75 (2001))*. The evidence, however, must be considered in the light most favorable to the prevailing plaintiff, and the court must determine whether the amount of recovery bears a reasonable relation to the damages proven by the evidence. *Shepard, 262 Va. at 721, 554 S.E.2d at 75*.

[*324] [HN6] A court should award remittitur when a "verdict is so excessive as to shock the conscience of the court and to create the impression that the jury has been influenced by passion, corruption, or prejudice." *Condominium Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc., 281 Va. 561, 580, 709 S.E.2d 163, 175 (2011)* [**36] (quoting *Smithey v. Sinclair Refining Co., 203 Va. 142, 146, 122 S.E.2d 872, 875 (1961))*. Similarly, it is the duty of the judge to correct any injustice that results from an "award . . . so out of proportion to the injuries suffered to suggest that it is not the product of a fair and impartial decision. . . ." *Smithey, 203 Va. at 146, 122 S.E.2d at 876*.

After considering all of the evidence in the light most favorable to the Plaintiff, this Court finds that the jury's award of $6,227,000 to Lester as the beneficiary of his wife's estate was grossly disproportionate to the $1,000,000 given to the decedent's parents.

When compared to the award given to the decedent's parents, both of whom had a loving and long-lasting relationship with their daughter, it is clear that the award granted to Lester bears no reasonable relation to the damages proven by the evidence and that the award is so disproportionate to the injuries suffered that it is likely the product of an unfair and biased decision. The disproportionality of Lester's award is further highlighted when seen in light of the fact that Lester had been married less than two years before his wife's death, Trial Tr. Dec. 8, 2010, at 484:25, [**37] and that his behavior in the tragic aftermath was characterized by extensive social activities and travelling, both in the United States and overseas. *See* Trial Tr. Dec. 8, 2010, at 541-75.

After considering the evidence in the light most favorable to the Plaintiff, this Court also finds that the amount of the verdict in this case is so excessive on its face as to suggest that it was motivated by bias, sympathy, passion, or prejudice, rather than by a fair and objective consideration of the evidence.

Contributing substantially to the jury's excessive verdict was Murray's actions geared toward inflaming the jury. As witnessed by the Court and detailed above, Murray injected passion and prejudice into the trial, shouting objections and breaking into tears when addressing the jury. Most of Murray's actions in this respect were suffered without objections from defense counsel, who focused their defense upon the denial of liability (despite Defendant Sprouse's admission to having pleaded guilty to manslaughter in connection with the accident, Trial Tr. Dec. 9, 2010, at 642:12) and upon aggressive, but obviously ineffectual, attacks upon Lester's credibility and character. This defense strategy [**38] produced the extreme opposite of its desired effect, serving to create additional passion and sympathy for Lester and anger towards the Defendants.

Given the foregoing, finding the award given to Lester as the beneficiary of his wife's estate so grossly disproportionate to the injuries actually suffered that it suggests that the award was not the product of a fair and [*325] impartial decision and so excessive so as to shock the conscience of the Court and create the impression that the award was influenced by passion or prejudice, the Court will remit $4,127,000 of the $6,227,000 awarded to Lester as beneficiary, leaving him with an award of $2,100,000, adjusted for interest.

Since Lester suffered economic loss not sustained by Jessica Lester's parents, an award of $2,100,000 as beneficiary, clearly larger than that of each parent, is justified by the evidence. Lester's economic loss properly accounts for this differential and bears "a reasonable relation to the damages disclosed by the evidence." *Shepard, 262 Va. at 721, 554 S.E.2d at 75*.

Despite the acts of spoliation, combined with an adverse presumption instruction, and in the face aggressive challenges to Lester's character and credibility, [**39] the evidence was more than sufficient to establish that Lester suffered substantial personal loss from the accident, apart from the loss of his wife, and demonstrated at trial that he suffered personal injuries, both physical and mental; thus, he was properly compensated for these injuries by the jury with an award of $2,350,000. This award will stand without modification.

Defendants argue that Isaiah Lester may have been twice compensated for his mental anguish. Defendants had every opportunity to make such arguments and take precautions against such misunderstandings during the Court's deliberations over jury instructions. The Court will not revisit the instructions on this basis.

The award of $1,000,000 to the parents of Jessica Lester, Gary C. Scott and Jeannie Scott, was fair and clearly supported by the evidence. This award should not be disturbed.

Defendants additionally lament in their brief that this Court should consider the alleged unfairness of allowing beneficiaries Gary C. Scott and Jeannie Scott to have their own representation at trial and that said representation injected improper considerations into the proceedings. This argument was addressed prior to trial and found [**40] to be without merit. It will not be reconsidered here.

VII. *Motion for Mistrial for Newly Discovered Juror Bias*

Hoy, while being examined under oath pursuant to *Va. Code ß 8.01-358*, had a duty to not willfully swear falsely in her responses to questions posed to her by the Court and counsel during *voir dire. Va. Code ß 18.2-434*. The evidence is insufficient to establish that Hoy swore falsely by her silence in response to questioning by the Court.

[*326] VIII. *Order*

Consequently, the Court orders the following:

1. As set forth above, Defendant's Motion for Monetary Sanctions against Matthew B. Murray, is hereby granted;

2. Defendant's Motion for Monetary Sanctions against Isaiah Lester for his role in the spoliation of evidence is granted;

3. Defendant's Motion for Mistrial for Newly Discovered Juror Bias is denied;

4. The Court further orders the remittance of $4,127,000 by Isaiah Lester of the amount awarded to him as a beneficiary of Jessica Lynn Scott Lester, leaving the Defendants to pay Lester a total of $4,450,000, adjusted for interest as determined at trial. The jury's verdict shall remain undisturbed in all other respects.

5. This Court will hear argument on September 23, 2011, to determine [**41] the amount of the sanctions to be levied against Lester and Murray, as well as to the liability of the Allen Firm for the actions of Murray.

6. The Court will refer allegations that Murray violated the Code of Professional Responsibility in multiple respects to the Virginia State Bar and matters relating to allegations of perjury on the part of Lester to the Commonwealth's Attorney for the City of Charlottesville. Endorsements are dispensed with pursuant to *Rule 1:13 of the Supreme Court of Virginia.* The Clerk is directed to mail a true copy of this Order to counsel of record, James M. McCauley, Esq., Ethics Counsel, Virginia State Bar, and to Warner D. Chapman, Esq., Commonwealth's Attorney for the City of Charlottesville. And this cause is continued for further action as set forth above.

TIMOTHY MARTIN BARRETT v. VIRGINIA STATE BAR

Record No. 042336

SUPREME COURT OF VIRGINIA

269 Va. 583; 611 S.E.2d 375; 2005 Va. LEXIS 45

April 22, 2005, Decided

SUBSEQUENT HISTORY: Related proceeding at *Barrett v. Va. State Bar, 272 Va. 260, 634 S.E.2d 341, 2006 Va. LEXIS 84 (2006)*

PRIOR HISTORY: [***1] FROM THE VIRGINIA STATE BAR DISCIPLINARY BOARD.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant attorney appealed from a ruling of the Virginia State Bar Disciplinary Board finding that he violated Va. Sup. Ct. R. pt. 6, ß II, R. 3.1, 3.4(i), 3.5(e), 4.3(b), and 8.4(b), and suspending his license to practice law for three years.

OVERVIEW: The instant action arose out of the attorney's conduct during his divorce. The supreme court first found that the attorney's communications with his wife did not violate Va. Sup. Ct. R. pt. 6, ß II, R. 4.3(b) because they expressed opinions that he held a superior legal position and did not purport to give legal advice. The supreme court further concluded that the attorney violated Va. Sup. Ct. R. pt. 6, ß II, R. 3.4(j) when he personally attacked opposing counsel but not when he allegedly attempted to file numerous motions against a court order. In those attacks, the attorney violated Va. Sup. Ct. R. pt. 6, ß II, R. 3.4(i), as the threats were made in an attempt to force opposing counsel to withdraw from representing the attorney's wife. The supreme court next concluded that the attorney violated Va. Sup. Ct. R. pt. 6, ß II, R. 3.1 when he claimed he was not married to the plaintiff in the divorce action based on alleged error in her name in the pleadings. Finally, the supreme court concluded that there was no showing of a nexus between the attorney's failure to pay child support and his fitness to practice law and, thus, no violation of Va. Sup. Ct. R. pt. 6, ß II, R. 8.4(b).

OUTCOME: The determination that the attorney violated Va. Sup. Ct. R. pt. 6, ß II, R. 4.3(b) and 8.4(b) was set aside and that he violated See Va. Sup. Ct. R. pt. 6, ß II, R. 3.4(j) was set aside in part. The Board's order that the attorney violated Va. Sup. Ct. R. pt. 6, ß II, R. 3.1, 3.4(i), and 3.5(e) was affirmed and that he violated Va. Sup. Ct. R. pt. 6, ß II, R. 3.4(j) was affirmed in part. The case was remanded.

LexisNexis(R) Headnotes

Administrative Law > Agency Adjudication > Hearings > Evidence > General Overview
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals

[HN1] In reviewing the Board's decision in a disciplinary proceeding, the supreme court conducts an independent examination of the entire record. The supreme court considers the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the prevailing party in the Board proceeding. The supreme court gives the factual findings of the Virginia State Bar Disciplinary Board substantial weight and view them as prima facie correct. While the supreme court does not give the Board's conclusions the weight of a jury verdict, the supreme court will sustain those conclusions unless it appears they are not justified by a reasonable view of the evidence or are contrary to law.

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings
[HN2] A violation of disciplinary rules must be established by clear proof.

Legal Ethics > Professional Conduct > Opposing Counsel & Parties
[HN3] See Va. Sup. Ct. R. pt. 6, ß II, R. 4.3(b).

Legal Ethics > Professional Conduct > Frivolous Claims
[HN4] See Va. Sup. Ct. R. pt. 6, ß II, R. 3.4(j).

Governments > Courts > Rule Application & Interpretation
Legal Ethics > Professional Conduct > Frivolous Claims
Legal Ethics > Professional Conduct > Opposing Counsel & Parties
[HN5] Harassing ad hominem attacks on opposing counsel are prohibited under Va. Sup. Ct. R. pt. 6, ß II, R. 3.4(j).

Civil Procedure > Counsel > General Overview
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > General Overview
Legal Ethics > Professional Conduct > Frivolous Claims
[HN6] Va. Sup. Ct. R. pt. 6, ß II, R. 3.4(i) prohibits lawyers from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

Legal Ethics > Professional Conduct > Frivolous Claims
[HN7] See Va. Sup. Ct. R. pt. 6, ß II, R. 3.1.

Legal Ethics > Professional Conduct > Tribunals
[HN8] See Va. Sup. Ct. R. pt. 6, ß II, R. 3.5(e).

Legal Ethics > Professional Conduct > Illegal Conduct
Torts > Malpractice & Professional Liability > Attorneys
[HN9] See Va. Sup. Ct. R. pt. 6, ß II, R. 8.4(b).

COUNSEL: Michael L. Rigsby (Carrell, Rice & Rigsby, on briefs) for appellant.

James W. Hopper, Senior Assistant Attorney General (Jerry W. Kilgore, Attorney General; Judith Williams Jagdmann, Deputy Attorney General; Edward M. Macon, Senior Assistant Attorney General, on brief) for appellee.

JUDGES: PRESENT: Hassell, C.J., Keenan, Koontz, Kinser, Lemons, and Agee, JJ., and Compton, S.J. OPINION BY JUSTICE G. STEVEN AGEE. JUSTICE KEENAN, with whom CHIEF JUSTICE HASSELL and SENIOR JUSTICE COMPTON join, concurring in part and dissenting in part.

OPINION BY: G. STEVEN AGEE

OPINION

[*587] [**377] OPINION BY JUSTICE G. STEVEN AGEE

This case presents an appeal of right from a ruling of the Virginia State Bar Disciplinary Board (" the Board"). Timothy M. Barrett challenges the Board's order of August 5, 2004, suspending his license to practice law in the Commonwealth for a period of three years based upon findings that Barrett violated *Rules 3.1, 3.4(i), 3.4(j), 3.5(e), 4.3(b),* and *8.4(b) of the Virginia Rules of Professional Conduct*. [1]

1 The Board dismissed charges that Barrett violated *Rules 4.2* and *4.4*.

[***2]

> [HN1] In reviewing the Board's decision in a disciplinary proceeding, 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 Board proceeding. We give the Board's factual findings substantial weight and view them as prima facie correct. While we do not give the Board's conclusions the weight of a jury verdict, we will [*588] sustain those conclusions unless it appears they are not justified by a reasonable view of the evidence or are contrary to law.

Williams v. Virginia State Bar, 261 Va. 258, 264, 542 S.E.2d 385, 389 (2001) (citations omitted). [HN2] A violation of disciplinary rules must be established by clear proof. *See, e.g., Blue v. Seventh Dist. Comm., 220 Va. 1056, 1062, 265 S.E.2d 753, 757*. We separately review each of the alleged Rule violations below.

I. *Rule 4.3(b)*

Timothy M. Barrett and Valerie Jill Rhudy were married in 1990. Barrett was admitted to practice law in the Commonwealth of Virginia in 1996 and operates as a sole practitioner in the City of Virginia Beach. Rhudy [***3] served as his secretary during their marriage.

In the summer of 2001, Barrett and Rhudy separated. She took the couple's six children and moved from the marital home in Virginia Beach to her parents' home in Grayson County.

Rule 4.3(b) provides as follows:

> [HN3] A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

The Board found that Barrett violated this rule because it concluded certain statements in two electronic mail ("e-mail") communications he wrote to Rhudy after the separation, but before she retained counsel, constituted legal advice. On July 25, 2001, Barrett sent an e-mail to Rhudy containing the following:

> Venue will not be had in Grayson County. Virginia law is clear that venue is in Virginia Beach.
>
> . . . .
>
> Under the doctrine of imputed income, the Court will have to look at your skills and experience and determine their value in the marketplace. . . . You can easily get a job . . . [making] $2,165.00 per month. . . .
>
> In light of the fact that you [***4] are living with yourparents and have no expenses . . . this income will be more than sufficient to meet your needs. I . . . just make enough to pay my own [*589] bills . . . Thus, it is unlikely that you will . . . obtain spousal support from me.

> I . . . will file for . . . spousal support to have you help me pay you [sic] fair share of our $200,000+ indebtedness. Since I [**378] am barely making it on my income and you have income to spare, you might end up paying me spousal support. . . .
>
> In light of the fact that . . . I . . . am staying in the maritial [sic] home . . . I believe that I will obtain the children. . . . You will have to get a job to pay me my spousal support. . . . The Court will prefer the children staying with a [parent], . . . there is no question that I can set up a home away from home and even continue to home school our kids. Therefore, it is likely that you will lose this fight. And of course, if I have the kids you will be paying me child support. . . .
>
> I am prepared for the fight.

("July e-mail").

Barrett sent Rhudy another e-mail on September 12, 2001, in which he included the following: [2]

> I will avail myself of every substantive [***5] law and procedural and evidentiary rule in the books for which a good faith claim exists. This means that you, the kids and your attorney will be in Court in Virginia Beach weekly. ..You are looking at attorney's expenses that will greatly exceed $10,000. . . . I will also appeal . . . every negative ruling . . . causing your costs to likely exceed $30,000.00. . . .
>
> You have no case against me for adultery . . . .[The facts] show[] that you deserted me. . . . Your e-mails . . . show . . . that you were cruel to me. This means that I will obtain a divorce from you on fault grounds, which means you can say goodbye to spousal support. . . .
>
> I remain in the marrital [sic] home . . . I have all the kids [sic] toys and property, that your parents' home is grossly insufficient for the children, that I can home school the older kids while watching the younger whereas you will have to put the [*590] younger in day care to fulfill your duty to financially support the kids, I believe that I will get the kids no problem. . . .
>
> The family debt . . . is subject to equitable distribution, which means you could be socked with half my lawschool [sic] debt, half the credit care [***6] [sic] debt, have [sic] my firm debt, etc.

("September e-mail").

> 2 On July 30, 2001, Rhudy retained attorney Karen Loftin of Galax, Virginia to represent her, but Loftin notified Barrett that she had withdrawn from representation on August 10, 2001.

The foregoing e-mail passages were interwoven with many requests from Barrett to Rhudy to return home, professing his love for her and the children and exhorting Rhudy for reasons of faith to reunite the family because it was God's will. For example, the September e-mail included the following:

> You know that it is God's will that we be reconciled . . . . I am begging you again to forgive me as God forgives you, to give me that 1000th chance He gave you today, to start over with me with a clean slate, to come home.

In finding that Barrett gave unauthorized legal advice to an unrepresented person in violation of *Rule 4.3(b)*, the Board opined that "Barrett cannot send those two e-mails stating what he did." Barrett contends that *Rule 4.3(b)* was [***7] not meant to bar communications between a husband and wife, and that construing it as such interferes with the sanctity of marriage. He further contends the e-mails only stated his opinions and were not advice to Rhudy.

Prior decisions of the Board reveal that conduct usually found to be in violation of *Rule 4.3(b)* is much more egregious than Barrett's conduct in this case. In October 1990, the Board entered an order suspending the license of Grant Paul Jones. *In re Jones*, VSB Docket No. 87-070-1177 (Oct. 17, 1990). [3] The Board found that Jones had provided family counseling to the complainant's family through his church. Complainant's ex-husband was charged with incest and Jones agreed to represent him on the criminal charge. Jones paid an unannounced visit to the complainant and her

daughter, and without disclosing that he represented the father in the criminal proceedings, he held a [**379] "counseling" session with them, designed to elicit incriminating [*591] testimony. While this conduct unquestionably violated the Rules, the Board particularly found Jones in violation of former DR 7-103(A)(2), the predecessor of *Rule 4.3(b)*, when he returned to the unrepresented complainant to advise [***8] her as to how she should respond to inquiries that might be directed at her concerning the "counseling" session.

3 This order became the subject of a District of Columbia Court of Appeals case in which that Court reviewed the Board's decision to determine if reciprocal sanctions were warranted against Jones in the District of Columbia. *See In re Jones, 599 A.2d 1145, 1147-48 (D.C. 1991).*

While Jones did not appeal the Board's decision to this Court, we note that his conduct in that case was the type *Rule 4.3(b)* is intended to prohibit. Comment [1] to *Rule 4.3 of the Virginia Rules of Professional Conduct* cautions that "an unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law."

Jones, without disclosing his representation of the husband, gave specific legal advice to an adverse party. The complainant had no reason to believe that Jones, who had also been her [***9] counselor, represented interests adverse to hers. In the case at bar, however, Barrett expressed only his opinion that he held a superior legal position on certain issues in controversy between himself and Rhudy. His statements may have been intimidating, but he did not purport to give legal advice. Rhudy knew that Barrett was a lawyer and that he had interests opposed to hers. We find that the concern articulated by the Comment to *Rule 4.3* is not borne out in this case.

While the Bar argues that there is no "marital" exception to *Rule 4.3(b)*, neither does it ask us to set out a per se rule that all communication by a lawyer, to his or her unrepresented spouse in a divorce proceeding discussing legal issues pertinent to the divorce, is prohibited under *Rule 4.3(b)*. We do not find there is such a per se rule, but it is otherwise unnecessary for us to address that point because upon our independent review of the entire record, we find that there was not sufficient evidence to support the Board's finding that Barrett's e-mail statements to Rhudy were legal advice rather than statements of his opinion of their legal situation. Therefore, we will set aside the Board's finding that Barrett [***10] violated *Rule 4.3(b).*

II. *Rule 3.4(j)*

Rule 3.4(j) provides that a lawyer may not

> [HN4] assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or [*592] when it is obvious that such action would serve merely to harass or maliciously injure another.

The Board found Barrett in violation of *Rule 3.4(j)* based on his correspondence with Rhudy's attorney and his filing of motions without prior notice to the court, contrary to a prior court order. We will affirm the Board's disposition that Barrett violated *Rule 3.4(j)* by his harassing statements to Rhudy's attorney, but we do not find sufficient evidence to support the Board's finding that Barrett acted in violation of the Rule by violating a trial court order requiring notification before filing motions.

In the fall of 2001, Rhudy retained Lanis L. Karnes to represent her in the divorce proceedings in Virginia Beach Circuit Court. For several months thereafter in numerous letters, Barrett wrote to Karnes but referred to her by her former married name of "Price." Barrett testified that he did not believe Karnes had the right to change her name based upon his religious [***11] beliefs. According to Barrett, referring to Karnes by her former husband's name was a way to honor Karnes' former husband. Barrett indicated to the Board's investigator that it was a means for him to protest Karnes' role as Rhudy's counsel. Additionally, Barrett's letters to Karnes contained the following comments:

> Words cannot express the disappointment I feel towards you, one who ostensibly claims Christ as her savior, in that you would represent one Christian in their suit against another, let alone a wife verses [sic] a husband, in violation of the Word of God . . . causing that Word to be defamed. . . . Shame on you.
>
> Please pass on to your client the fact that it has not escaped my notice the irony that my wife, who just weeks ago was feigning [**380] contempt for the feminism of her friends, has retained one of the

> worst examples of "Christian" feminism ever to pollute the campus of Regent University. You two will make a lovely pair.
>
> I look forward to hearing from you shortly as to the matters raised in this letter and seeing you this Friday for the beginning of what will be a series of hearings that will not conclude until the Virginia Supreme Court has passed [***12] on the matter of *Barrett v. Barrett*.
>
> [*593] You are inept. . . . I beg you to start zealously representing your client with competence and stop wasting her money and my time.

According to the commentary accompanying *Rule 3.4(j)*, the Bar is concerned with "conduct that could harass or maliciously injure another" such that it "brings the administration of justice into disrepute." Comment [6], *Rule 3.4*. Additional comments describe the conduct the Rule was designed to prohibit:

> The duty of [a] lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. . . .
>
> In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Comments [7]-[8], [***13] *Rule 3.4*.

Barrett's foregoing statements to Karnes did not address the legal issues in the divorce action, but personally attacked opposing counsel. Karnes testified that she found these comments to be "offensive and derogatory." By his own admission, Barrett referred to Karnes by her former married name "as a way of protest."

Barrett argues that *Rule 3.4(j)* does not apply to communications between lawyers, but merely addresses actions taken, not words used, in the litigation context. We disagree. A preponderance of authorities interpreting the model rule upon which former DR 7-102(A)(1) was based, and from which *Rule 3.4(j)* was derived, have found that [HN5] harassing ad hominem attacks on opposing counsel are prohibited under the Rule. *See, e.g., Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1323 (11th Cir. 2002)*; *In re Vollintine, 673 P.2d 755, 758-59 (Alaska 1983)*.

We agree with the Supreme Court of Kansas that

> attorneys are required to act with common courtesy and civility at all times in their dealings with those concerned with the [*594] legal process. . . . An attorney who exhibits the lack of civility, good manners and common courtesy [***14] . . . tarnishes the entire image of what the bar stands for.

In re Gershater, 270 Kan. 620, 17 P.3d 929, 935-936 (Kan. 2001) (citations omitted). There is sufficient evidence in the record to support the Board's finding that Barrett's comments to Karnes were "other action" under *Rule 3.4(j)* meant to harass her in her capacity as Rhudy's attorney.

However, we find that the Board erred in determining a violation of *Rule 3.4(j)* on the basis of motions alleged to have been filed without first notifying the trial court, in violation of a prior order. On January 24, 2002, Judge H. Thomas Padrick, Jr., of the Virginia Beach Circuit Court, entered an order requiring Barrett and Karnes to "arrange a conference call with the Court to discuss any relevant issue," and that this was to be done "prior to filing a motion." The Board found that despite this order, Barrett "attempted to file numerous motions in a hearing before Judge Shockley of the Circuit Court of the City of Virginia Beach without any prior conference call with the court."

There are no motions in the record dated after Judge Padrick's January 24, 2002, order. The only evidence to substantiate the Board's [***15] finding is Karnes' testimony that Barrett "tried to circumvent that order and began filing things with Judge Shockley." [**381] There is nothing in the record to show what "things" Barrett is alleged to have

filed or how the "things" violated Judge Padrick's order. The record contains no evidence that any alleged action by Barrett in violation of the order was ever brought to the attention of the trial court.

Without actual proof of the motions filed in violation of the order, we cannot agree that the Board's finding that Barrett violated *Rule 3.4(j)* on this ground is "justified by a reasonable view of the evidence." *Williams, 261 Va. at 264, 542 S.E.2d at 389*. Because we find that there was sufficient evidence that Barrett intended to harass Karnes, we will approve the Board's determination of misconduct under *Rule 3.4(j)* on that ground, but will set aside that portion of the Board's Order under that Rule which was based on violating Judge Padrick's order of January 24, 2002.

III. *Rule 3.4(i)*

The Board found Barrett violated[HN6] *Rule 3.4(i)*, which prohibits lawyers from "presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in [***16] a civil matter." [*595] In the course of his correspondence with Karnes, Barrett threatened her with a disciplinary complaint or sanctions four times.

> I also ask that you stop attempting to deceive the court in your pleadings . . . . This conduct violates *Rule 3.3 of the Rules of Professional Conduct*. If you insist on continuing this unethical conduct, I will seek to have you disbarred.
>
> Should you continue to present motions that lack a firm foundation in the law and display an utter lack of proofreading, I will continue to file for sanctions pursuant to *Section 8.01-271.1 of the Code of Virginia*.
>
> Should you not immediately begin to proofread your letters/pleadings to insure [sic] both textual accuracy and legal faithfulness, I will report you the Virginia State Bar for your violation of *Rule 1.1 of the Rules of Professional Conduct*. [sic]
>
> Please send me a letter informing me as to how you can ethically justify charging your client for the time you will be traveling across the states of Virginia and Tennessee instead of advising her to retain local counsel? [sic] I ask since your conduct appears to be in violation of *Rule 1.5* of the [***17] Rules of Professional Conduct as to the reasonableness of fees.

Barrett testified that he believed "typographical errors are a basis for a Bar complaint." While he did not file a complaint against Karnes, he did make a motion for sanctions based on typographical errors, which was denied. Barrett argues, however, that these "threats" were not made "solely to obtain an advantage in a civil matter." We disagree.

We find that the succession of threats without a good faith basis supports the Board's conclusion that Barrett made these statements "solely to obtain an advantage" in his divorce proceeding. It is clear from Barrett's letters that his motivation in threatening Karnes with sanctions and disciplinary complaints was to force her to withdraw from representing Rhudy. Barrett admits as much in letters to Karnes:

> I did indirectly threaten you with a malpractice action over the incompetent way you have handled this matter thus far. I did this to encourage [Rhudy] that she can retrieve from you the money she has wasted on your services to date and to save me from her appeal on the basis of inadequacy of counsel.
>
> [*596] I ask that you either familiarize yourself with this [***18] area of the law and present pleading [sic] that are in conformity with the law or comply with your duties under *Rule 1.1* and withdraw as counsel in this matter.
>
> Please advise [Rhudy] not to call me again unless she has terminated you.

Indeed, Barrett testified that he "was terribly upset that Ms. Barrett had gotten Ms. Karnes involved in [the] case" because he "knew that Ms. Karnes had it in for [him]." Thus, we find the evidence sufficient to support the Board's finding that Barrett threatened Karnes with disciplinary complaints in order to obtain an advantage in the divorce and custody proceedings in violation of *Rule 3.4(i)*.

[**382] IV. *Rule 3.1*

Rule 3.1 provides that [HN7] "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous." On October 19, 2001, Barrett filed a motion to strike the pleadings asserting that he did not know and was not married to the plaintiff, Valerie Jill Rhudy Barrett. Barrett asked that the pleadings be stricken, that the case be dismissed and that he be awarded costs. The motion was denied. Barrett testified before the Board that he filed the motion because [***19] "Valerie Jill Barrett is Jill's legal name, not Valerie Jill Rudy [sic] Barrett."

Barrett argues that the Board's Order of Suspension does not state a basis for determining that the motion was frivolous and that the filing of the motion was never specifically connected to the Board's conclusion that he violated *Rule 3.1*. Although the Board's Order does not directly tie the *Rule 3.1* violation to the motion to strike the pleadings, we find that the record clearly supports a finding that Barrett violated the Rule.

Barrett's motion to strike the pleadings is the only pleading which the Bar argues proves its contention that he violated *Rule 3.1*. The Bar argued that Barrett clearly knew Rhudy's maiden name, and that Barrett himself used multiple versions of Rhudy's name in his own motions. This obviates Barrett's claim that he was concerned with consistency in the pleadings. Thus we find that the record supports the Board's finding that Barrett violated *Rule 3.1*.

[*597] V. *Rule 3.5(e)*

Rule 3.5(e) prohibits ex parte contact by lawyers with the court:

> [HN8] In an adversary proceeding, a lawyer shall not communicate . . . as to the merits of the cause with a judge . . . except: . . . (2) [***20] in writing if the lawyer promptly delivers a copy of the writing to opposing counsel.

On April 2, 2002, Barrett sent a letter to Judge Padrick arguing that Rhudy was unfit to have custody of the children and that he should be awarded custody. The letter indicates that copies were sent to the children's court-appointed psychologist and the guardian ad litem. There is no indication that the letter was sent to Karnes. Karnes testified that she first became aware of the letter after a telephone call from the court.

Barrett's counsel admitted to the Board that he could not "say categorically that [Barrett] sent [the] letter to [Karnes]." On appeal, Barrett declined to ask this Court to set aside the Board's finding as to his violation of *Rule 3.5(e)*. Thus, we will affirm the Board's finding that Barrett violated *Rule 3.5(e)* for an ex parte communication with the trial court.

VI. *Rule 8.4(b)*

In November 2001, Judge Shockley entered an order in the Virginia Beach Circuit Court requiring Barrett to pay $1704 per month in child support. In February 2002, Judge Padrick entered another order requiring Barrett to pay Rhudy $1000 per month in spousal support. Between November 2001 [***21] and July 2004, Barrett missed ten payments and made six payments in amounts less than the monthly amount due. When Barrett did make payments, he often paid in excess of the monthly amount due in order to make up arrearages. Barrett testified that he "paid when [he] had the ability" and that he never had "a willful desire to [disregard the child support order]."

On August 14, 2002, Judge Padrick found Barrett in contempt of court for failure to timely pay his support obligations. On March 24, 2003, Judge Tompkins of the Grayson County Juvenile and Domestic Relations District Court also held Barrett in contempt for failure to pay child support. Both contempt orders sentenced Barrett to confinement in jail, but were suspended upon condition he pay the arrearages. On the basis of these two contempt charges, the Board [*598] found Barrett in violation of *Rule 8.4(b)*. [4] In so finding, the Board cited Barrett's ability to make $900 monthly payments [**383] on a new Corvette sports car from October 2001 through April 2004 and his representation that he would lose $1400 per day if he had "to travel from Virginia Beach to Grayson County for court proceedings."

> 4 On argument before this Court, the Bar conceded that it did not seek a rule that contempt of court for failure to pay child support is per se a violation of *Rule 8.4(b)*. We do not find there is such a per se rule, but it is unnecessary to further address that point because we resolve the issue of violating *Rule 8.4(b)* on other grounds.

[***22] *Rule 8.4(b)* states that[HN9] "it is professional misconduct for a lawyer to: . . . commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law." Barrett

maintains that a finding of contempt for failure to meet his support obligations does not constitute a criminal act in this case, was not a deliberately wrongful act and does not necessarily reflect adversely on his honesty, trustworthiness or fitness to practice law.

In response, the Bar cites *Code ß 63.2-1937*, which includes lawyers in the class of state-licensed professionals who can lose their licenses for failing to pay child support. Thus, the Bar argues that consistency with the statutory obligations requires a finding that Barrett's failure to meet his support obligations in conjunction with his ownership of the Corvette was a deliberate, wrongful act reflecting adversely on his trustworthiness and fitness to practice law.

There is nothing in the record to show Barrett was guilty of criminal contempt as opposed to civil contempt. Thus, we must examine the record to determine whether, in this case, the Bar proved that Barrett's [***23] contempt convictions were the result of a "deliberately wrongful act," i.e. disregarding his obligation to pay child support, which reflects adversely on his honesty, trustworthiness and fitness to practice law. We find that connection lacking on this record.

Barrett testified that he purchased the Corvette in October of 2001, a month before his support obligations began, and then unsuccessfully attempted to sell the car. He also missed several car payments, and maintains that he never missed a support payment so he could make a car payment.

Barrett also argues that his representation that he would lose $1400 per day if he were compelled to attend court proceedings in Grayson County, was not based on actual earnings, but on his billable rate of $175.00 per hour over an eight hour day, although he primarily operates on a contingent fee basis. The Bar presented no [*599] evidence that Barrett earned $1400 daily, or what law practice expenses would be paid from such earnings. Barrett provided the only evidence as to his financial situation. Thus, we find that there is no basis for the Board's reliance on the supposition that Barrett had the ability to pay his support obligations because [***24] he earned $1400 per day.

The Bar presented no evidence that Barrett's failure to pay child and spousal support was willful or intentional. Barrett showed that he made payments when he settled cases and received his contingency fee, which is the nature of his law practice. He also maintained that he never made payments on the promissory note he obtained to purchase the Corvette when he could not make his support payments. Barrett also testified he tried to sell the Corvette but "could not liquidate it for whatever [he] owed on it." To make his support payments, Barrett had to borrow money from his grandmother. Eventually, Barrett filed for bankruptcy. The Bar presents no evidence to the contrary. Thus, we do not find sufficient evidence in the record to support a finding by the Board of a "deliberately wrongful act" within the meaning of *Rule 8.4(b)*.

Further, the Bar did not establish a nexus between the failure to pay child support and Barrett's fitness to practice law. Instead the Bar relied upon conclusory statements:

> In terms of relating [the contempt charge] to Mr. Barrett as an attorney, the contempt finding is a finding . . . that he could have . . . abided by [***25] a court order and failed to do so. Surely that reflects on his fitness to practice, if not his trustworthiness.

The required nexus between the contempt convictions and Barrett's honesty, trustworthiness and fitness to practice law has not been established by these conclusory statements. We will therefore set aside the finding of the Board that Barrett violated *Rule 8.4(b)*.

[**384] VII. Conclusion

The Board's suspension order of Barrett's license to practice law for three years was based on Barrett's violations of *Rule 3.1*, *Rule 3.4(i)*, *Rule 3.4(j)*, *Rule 3.5(e)*, *Rule 4.3(b)*, and *Rule 8.4(b)*. For the reasons set forth above, we will set aside the Board's determination that Barrett violated *Rule 4.3(b)*, *Rule 8.4(b)*, and *Rule 3.4(j)*, in part. We will affirm that portion of the Board's Order that [*600] Barrett violated *Rule 3.1*, *Rule 3.4(i)*, *Rule 3.5(e)*, and *Rule 3.4(j)*, in part.

Accordingly, the Order of the Board, dated August 5, 2004, will be affirmed in part, reversed in part, and the case will be remanded for reconsideration of any sanction for Barrett's violations of *Rule 3.1*, *Rule 3.4(i)*, *Rule 3.5(e)*, and *Rule 3.4(j)*, in part.

Affirmed in part, reversed in part, and remanded [***26] .

CONCUR BY: KEENAN

DISSENT BY: KEENAN

DISSENT

JUSTICE KEENAN, with whom CHIEF JUSTICE HASSELL and SENIOR JUSTICE COMPTON join, concurring in part and dissenting in part.

I respectfully dissent from the majority's holding that Barrett did not violate *Rule 4.3(b)*. In my opinion, the majority's holding effectively creates a "spousal exception" to the Rule and permits a lawyer to engage in otherwise prohibited conduct dispensing legal advice as long as the lawyer's spouse, rather than an unrelated person, is the affected pro se party. I also dissent from the majority's holding that Barrett did not violate *Rule 8.4(b)* which, among other things, recognizes as professional misconduct any deliberately wrongful act that reflects on a lawyer's trustworthiness. I would hold that Barrett violated this Rule by twice being held in contempt of court for nonpayment of court-ordered support. I concur in the balance of the majority's opinion.

In reaching its conclusion that Barrett did not violate *Rule 4.3(b)*, the majority states that Barrett "did not purport to give [his wife] legal advice." A brief review, however, of the statements considered by the majority leads me to the opposite conclusion.

In his statements [***27] to his estranged wife, Barrett advised her that under Virginia law, all court proceedings would be held in Virginia Beach. With regard to the issue of spousal support, Barrett explained that the court would employ the legal doctrine of imputed income to determine the value of her skills and experience "in the marketplace."

Barrett further stated that "spousal support is based on the maxim [of] . . . the needs of the one versus the other's ability to pay." Citing facts relating to the parties' situation, Barrett then offered his judgment that it was "unlikely" that his wife would be able to obtain court-ordered support. With regard to the issue of child custody, Barrett told his wife that the "court will prefer the children [*601] staying with a [parent]," rather than with a substitute caregiver during working hours.

I would hold that these explanations constituted legal advice intended to influence the conduct of a party who had conflicting legal interests and who was not represented by counsel. Without question, Barrett's conduct would have been a violation of *Rule 4.3(b)* had he communicated this advice to a pro se litigant whose spouse Barrett was representing. Thus, the majority's [***28] conclusion necessarily implies that there is a "spousal exception" to *Rule 4.3(b)*, under which an attorney may attempt to influence his or her spouse's conduct by imparting legal advice in a harassing manner regarding the parties' conflicting legal interests.

Such a conclusion, however, is contrary to the plain language of *Rule 4.3(b)*, which provides no "spousal exception." Moreover, Barrett's use of legal advice as a "sword" in his marital conflict is clearly a type of conduct that *Rule 4.3(b)* is designed to discourage. It is hard to imagine a situation in which an attorney would be in a stronger position to improperly influence another's conduct by giving legal advice.

With regard to Barrett's alleged violation of *Rule 8.4(b)*, the majority states that the Bar "presented no evidence that Barrett's failure to pay child and spousal support was willful or intentional." The majority fails to explain why findings by two judges, holding Barrett in contempt of court and imposing suspended jail sentences for his failure to comply with court orders, is not evidence of [**385] deliberately wrongful conduct reflecting adversely on Barrett's trustworthiness.

Contempt findings manifest more than a [***29] mere arrearage in court-ordered support payments, which can result even when a person is doing everything possible to comply with a court order. The contempt findings and suspended jail sentences imposed in Barrett's case necessarily reflect the judges' conclusions Barrett was not diligently attempting to meet his support obligations, and that his explanations for failing to do so were incredible or otherwise unacceptable. I would hold that these repeated contempt findings are sufficient evidence to support the Board's conclusion that Barrett violated *Rule 8.4(b)*.

Therefore, I would conclude that the Bar's findings that Barrett violated *Rules 4.3(b)* and *8.4(b)* are supported by a reasonable view of the evidence and are in accordance with the law. *See Williams v. Virginia State Bar, 261 Va. 258, 264, 542 S.E.2d 385, 389 (2001)*; *Myers v. Virginia State Bar, 226 Va. 630, 632, 312 S.E.2d 286, 287 (1984)*.

TIMOTHY MARTIN BARRETT v. VIRGINIA STATE BAR, EX REL. SECOND DISTRICT COMMITTEE

Record No. 060248

SUPREME COURT OF VIRGINIA

272 Va. 260*; *634 S.E.2d 341*; *2006 Va. LEXIS 84

September 15, 2006, Decided

SUBSEQUENT HISTORY: Related proceeding at *Barrett v. Va. State Bar ex rel. Second Dist. Comm., 277 Va. 412, 675 S.E.2d 827, 2009 Va. LEXIS 56 (2009)*

PRIOR HISTORY: [***1] FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH. William N. Alexander, II, William H. Ledbetter, and H. Selwyn Smith, Judges Designate.
Barrett v. Va. State Bar, 269 Va. 583, 611 S.E.2d 375, 2005 Va. LEXIS 45 (2005)

DISPOSITION: Affirmed in part, reversed in part, and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The Virginia State Bar filed a complaint against an attorney consolidating three charges of misconduct against the attorney. The Circuit Court of the City of Virginia Beach (Virginia) found that the attorney violated Va. Sup. Ct. R. pt. 6, ß II, R. 4.4, 8.4(b), 3.1, 3.4(j), 1.1, and 3.1, and suspended the attorney's license to practice law for 30 months. The attorney appealed.

OVERVIEW: The supreme court first concluded that the trial court was correct in concluding that dismissal of a complaint against a lawyer on demurrer was not permissible. The supreme court disagreed with the attorney's contention that his representation of himself made Va. Sup. Ct. R. pt. 6, ß II, R. 1.1, 3.1, 3.4(j), and 4.4 inapplicable. Finally, the attorney contended that the Bar did not establish by clear and convincing evidence that the attorney violated the Rules alleged in any of the circumstances charged. The supreme court disagreed as to all but the charges relating to the attorney's representation of a client. The evidence supported the finding that the attorney's attempt to subpoena his former employer had no purpose other than to get the employer to release a lien claim. In addition, the tenuous nature of the attorney's suspicion that his ex-wife had a romantic relationship with her counsel was reflected in the attorney's agreement to drop a request for opposing counsel to testify in the divorce action. However, the evidence was insufficient to support the charges relating to the personal injury action for a client.

OUTCOME: The judgment of the trial court finding that the attorney violated Va. Sup. Ct. R. pt. 6, ß II, R. 4.4, 8.4(b), 3.1 and 3.4 was affirmed. The judgment of the trial court holding that the attorney's actions in conjunction with the attorney's representation of a client and in the legal malpractice action violated Va. Sup. Ct. R. pt. 6, ß II, R. 1.1 and 1.3 was reversed. The case was remanded for consideration of an appropriate sanction.

LexisNexis(R) Headnotes

Legal Ethics > Professional Conduct > General Overview
[HN1] Va. Sup. Ct. R. pt. 6, ß II, R. 4.4 requires an attorney to respect rights of third parties when representing a client and not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Legal Ethics > Professional Conduct > General Overview
[HN2] Va. Sup. Ct. R. pt. 6, ß II, R. 8.4(b), states that an attorney is guilty of professional misconduct when he or she commits a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

Legal Ethics > Professional Conduct > Frivolous Claims
[HN3] Va. Sup. Ct. R. pt. 6, ß II, R. 3.1 mandates a lawyer assert only non-frivolous claims.

Legal Ethics > Client Relations > Effective Representation
[HN4] Va. Sup. Ct. R. pt. 6, ß II, R. 1.1 requires a lawyer to provide competent representation to a client including legal knowledge, skill, thoroughness, and preparation.

Legal Ethics > Professional Conduct > General Overview
[HN5] See Va. Sup. Ct. R. pt. 6, ß II, R. 3.4(j)

Governments > Legislation > Interpretation
[HN6] Rules of statutory construction provide that language should not be given a literal interpretation if doing so would result in a manifest absurdity.

Legal Ethics > General Overview
[HN7] An attorney who represents himself or herself in a proceeding acts as both lawyer and client.

Civil Procedure > Appeals > Standards of Review > General Overview
[HN8] In reviewing the decision of the three-judge court, the supreme court conducts 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 gives the factual findings of the three-judge court substantial weight, viewing them as prima facie correct. The factual conclusions, while not carrying the weight of a jury verdict, will be sustained unless they are not justified by the evidence or are contrary to law.

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN9] Va. Sup. Ct. R. pt. 6, ß IV, R. 13(I)(2)(e)(2) provides that at a disciplinary hearing before the Bar Disciplinary Board, Bar Counsel must present clear and convincing evidence to prove a violation of the Rules. *Va. Code Ann. ß 54.1-3935(B)* makes this same evidentiary standard applicable to proceedings before a three-judge court.

Legal Ethics > Client Relations > Effective Representation
Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview
[HN10] Disciplining an attorney on the basis of incompetent representation under Va. Sup. Ct. R. pt. 6, ß II, R. 1.1, as reflected in the commentary, involves attorney performance that extends significantly beyond mere attorney error.

Legal Ethics > Client Relations > Effective Representation
Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview
[HN11] Whether an attorney is subject to discipline for failing to provide competent representation is a matter decided on a case by case basis.

Legal Ethics > Professional Conduct > Frivolous Claims
[HN12] The failure to timely file a lawsuit does not implicate Va. Sup. Ct. R. pt. 6, ß II, R. 3.1.

Legal Ethics > Professional Conduct > Frivolous Claims
[HN13] An erroneous position is not necessarily a frivolous position.

COUNSEL: *Timothy M. Barrett,* Pro se.

Catherine Crooks Hill, Assistant Attorney General (*Robert F. McDonnell, Attorney General*; *Maureen Riley Matsen, Deputy Attorney General*; *Peter R. Messitt, Senior Assistant Attorney General*, on brief), for appellee.

JUDGES: OPINION BY JUSTICE ELIZABETH B. LACY.

OPINION BY: ELIZABETH B. LACY

OPINION

[*265] [**343] Present: All the Justices

OPINION BY JUSTICE ELIZABETH B. LACY

Timothy Martin Barrett appeals the imposition of a 30-month suspension of his license to practice law.

A Subcommittee of the Second District, Section II, of the Virginia State Bar certified three charges of misconduct to the State Bar Disciplinary Board. Barrett requested a three-judge court and the Virginia State Bar (the Bar) filed a Complaint with that court pursuant to *Part 6, ß IV, P 13.I.1.a.(1)(b) of the Rules of the Supreme Court* consolidating the certifications. The three-judge court considered the three certified charges in a one-day ore tenus hearing.

All three certifications were based on actions Barrett took during litigation in which he was a named party and in which he represented himself. The first certification involved Barrett's divorce proceeding against his wife, Jill Barrett. In that litigation, Barrett procured a witness subpoena for [***2] his former employer, Hayden I. DuBay, alleging DuBay had information regarding his wife's earning capacity. Barrett sent two letters to DuBay's attorney reciting the expense and inconvenience that DuBay would incur if he had to appear and testify and then offered to release DuBay from the subpoena if DuBay would withdraw a claim for an attorney's lien DuBay had filed against Barrett. The three-judge court found that these actions violated *Rules 4.4*. and *8.4(b) of the Rules of Professional Conduct*. [1]

1 [HN1] *Rule 4.4* requires an attorney to respect rights of third parties when representing a client and not "use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person," and [HN2] *Rule 8.4(b),* states that an attorney is guilty of professional misconduct when he or she "commit[s] a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer."

[**344] The [***3] second certification also related to the divorce proceeding. At that trial, Barrett called opposing counsel, Martin L. Davis, as an adverse witness because Barrett "ha[d] reason to believe that Mr. Davis and Ms. Barrett have a romantic relationship." When Davis denied the allegations, Barrett abandoned his request to call Davis as a witness. The three-judge court found that Barrett violated *Rules 3.1* and *3.4(j)* by these actions. [2]

2 [HN3] *Rule 3.1* mandates a lawyer assert only non-frivolous claims, and *Rule 3.4(j)* precludes a lawyer from asserting a position on behalf of a client that "would serve merely to harass or maliciously injure another."

The final certification related to an action a former client, Debra Eller, brought against Barrett and his law firm, The Injury Law Institute of Virginia, PLC, in which Eller alleged negligence and malpractice [*266] based on Barrett's failure to file her personal injury lawsuit prior to the expiration of the statute of limitations. Barrett filed a special plea of immunity claiming [***4] that he was immune from liability because he practiced as a professional limited company. Eller's counsel filed a response citing the statutory provisions that specifically affirm the personal liability of attorneys who are members of professional limited companies. Barrett declined to withdraw his plea until the trial court convened to hear the motion. The three-judge court held that these actions constituted a violation of *Rules 1.1* and *3.1* of the Rules of Professional Conduct. [3]

3 [HN4] *Rule 1.1* requires a lawyer to "provide competent representation to a client [including] legal knowledge, skill, thoroughness and preparation."

The three-judge court issued an opinion and final order imposing a 30-month suspension of Barrett's license to practice law based on these violations. Barrett assigns seventeen errors to the rulings of the three-judge court.

DEMURRER

First, Barrett claims that the three-judge court erred in dismissing the demurrer he filed in response to the Bar's Complaint. The three-judge court dismissed [***5] Barrett's demurrer holding that the Rules governing these proceedings contained no provision for a demurrer and, in any event, the demurrer failed on the merits because the complaint and accompanying certifications sufficiently informed Barrett of the charges against him. The three-judge court was correct in concluding that the Rules applicable to these proceedings do not authorize a reviewing body to dismiss a complaint against a lawyer on demurrer. *See Va. Sup. Ct. R., Part 6, ß IV, P 13(I)(1)*. Barrett does not directly dispute this conclusion but argues that the failure to allow such a challenge left him "unable to mount a proper defense in violation of his rights to due process of law." The record does not support Barrett's position.

The certification listed the specific acts that were the basis for the alleged Rule violations. Furthermore, as required by the Rules, Barrett received a copy of the investigative report considered by the Subcommittee when it referred the case to the three-judge panel. *Va. Sup. Ct. R., Part 6, ß IV, P 13(D)(1)(b)*. This information was sufficient to put Barrett on notice of the claims against him.

[*267] SUBCOMMITTEE CONFLICT OF INTEREST

Next Barrett [***6] claims that the three-judge panel erred in denying his motion to dismiss all charges against him because a member of the subcommittee that certified the charges, Bobby W. Davis, was not impartial. Barrett claims Davis was biased because a former client of Davis' retained Barrett and Barrett forced Davis to complete some work for the client without remuneration. Barrett raised this issue for the first time before the three-judge court. That court correctly held that Barrett waived this issue because he did not raise it before the subcommittee, although he was aware of the alleged conflict at that time.

[**345] ATTORNEY AS CLIENT

Barrett claims that the three-judge court erred in finding him in violation of *Rules 1.1*, *3.1*, *3.4(j)*, and *4.4* because these Rules apply only when a lawyer is representing a client, not when a lawyer represents himself in a proceeding. Barrett argues that the language of *Rules 1.1*, *3.4(j)* and *4.4* specifically limit their application to actions an attorney takes while representing clients. Those Rules state in pertinent part:

Rule 1.1

A lawyer shall provide competent representation to a client.

Rule 3.4(j)

[HN5] A lawyer shall not: . . . assert a position [***7] . . . or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Rule 4.4

In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person . . . .

Barrett also maintains that *Rule 3.1*, although not explicitly referring to representation of a client, was intended to apply only in the course of such representation based on the commentary to that Rule.

[HN6] Rules of statutory construction provide that language should not be given a literal interpretation if doing so would result in a manifest absurdity. *Crawford v. Haddock, 270 Va. 524, 528, 621 S.E.2d* [*268] *127, 129 (2005)*. Applying these Rules in the manner Barrett suggests would result in such an absurdity. The Rules of Professional Conduct are designed to insure the integrity and fairness of the legal process. It would be a manifest absurdity and a distortion of these Rules if a lawyer representing himself commits an act that violates the Rules but is able to escape accountability for such violation solely because the lawyer is representing [***8] himself. *Attorney Grievance Commission v. Alison, 317 Md. 523, 565 A.2d 660, 668 (Md. Ct. App. 1989)* (intent and purpose of Maryland's version of *Rule 4.4* served only by applying construction that lawyer is representing client when he represents self); *Montgomery County Bar Ass'n v. Hecht, 456 Pa. 13, 317 A.2d 597, 601-02 (Pa. 1974)* (anomalous to condemn lawyer's knowing participation in introduction of perjured testimony by client and condone giving such testimony by lawyer himself).

Furthermore, [HN7] 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. *See In re Glass, 309 Ore. 218, 784 P.2d 1094, 1097 (Ore. 1990)* (lawyer appearing in proceeding pro se is own client); *In re Morton Allan Segall, 117 Ill. 2d 1, 509 N.E.2d 988, 990, 109 Ill. Dec. 149 (Ill. 1987)* ("attorney who is himself a party to the litigation represents himself when he contacts an opposing party"); *Pinsky v. Statewide Grievance Committee, 216 Conn. 228, 578 A.2d 1075, 1079 (Conn. 1990)* (restriction [***9] on attorneys contacting represented parties limited to instances where attorney is representing client, not where attorney represents himself).

The three Rules at issue here address acts Barrett took while functioning as an attorney and thus the three-judge panel correctly held that such acts are subject to disciplinary action.

SUFFICIENCY OF THE EVIDENCE

We turn now to Barrett's contention that the Bar did not establish by clear and convincing evidence that he violated the relevant Rules in any of the circumstances charged. [4] [HN8] In reviewing the decision of the three-judge court, we conduct an independent examination of the record, considering the evidence and all reasonable inferences therefrom in the light most favorable to the prevailing [*269] party below, and we give the factual findings of the three-judge court substantial weight, viewing them as prima facie [**346] correct. *Anthony v. Virginia State Bar, 270 Va. 601, 608-09, 621 S.E.2d 121, 125 (2005)*. The factual conclusions, while not carrying the weight of a jury verdict, will be sustained unless they are not justified by the evidence or are contrary to law. *Id. at 609, 621 S.E.2d at 125*.

4 [HN9] *Part 6, Section IV, Paragraph 13, Section (I)(2)(e)(2)* of the Rules provides that at a disciplinary hearing before the Bar Disciplinary Board, Bar Counsel must present clear and convincing evidence to prove a violation of the Rules. *Code ß 54.1-3935(B)* makes this same evidentiary standard applicable to proceedings before a three-judge court.

[***10] 1. *Witness subpoena for DuBay*

Barrett argues that because DuBay had employed Barrett's former wife, Jill, DuBay had information regarding her earning capacity, and he alleged that DuBay would not provide certain employment records. Therefore, Barrett asserts he issued a lawful subpoena to a material witness and did not engage in actions that had "no purpose other than to embarrass, delay, or burden a third person," *Rule 4.4*, or reflected "adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer," *Rule 8.4(b)*.

The record shows that Jill worked for DuBay for a total of approximately 30 hours and was paid $ 10 an hour. DuBay had provided Jill's attorney with Jill's employment records. He never received a subpoena or written request for those records from Barrett, although he testified he believed that Barrett sought the records from Jill's attorney.

Even though DuBay's information may have been relevant in Barrett's divorce action, Barrett's two letters containing offers to release DuBay from the witness subpoena if DuBay would waive the attorney's lien claim were not designed to secure DuBay's testimony regarding Jill's employment. The clear intent of Barrett's [***11] letters was to

harass DuBay and compel him to waive the lien. This record provides clear and convincing evidence that Barrett violated both *Rules 4.4* and *8.4(b)*, and the three-judge court did not err in finding such violations. [5]

5 We also reject Barrett's claim that the three-judge court erred in admitting testimony and letters regarding Barrett's interaction with his former client, Wade Bell. *Part 6, Section IV, Paragraph 13(E) (3)* adopted in three-judge court proceedings pursuant to *54.1-3935(B)* sets the evidentiary standard: "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." Barrett's treatment of Bell bore on the question whether Barrett had committed "a deliberately wrongful act that reflects adversely on the lawyer's honesty" in violation of *Rule 8.4(b)*. DuBay had personal knowledge of these dealings; thus, the three-judge court properly admitted this evidence.

[***12] [*270] 2. *Calling Opposing Counsel as a Witness*

Barrett argues that the Bar did not establish by clear and convincing evidence that he violated *Rules 3.1* and *3.4(j)* when he called opposing counsel, Martin Davis, as a witness in the divorce proceeding. These two Rules prohibit an attorney from asserting a position that is frivolous and from taking action designed "merely to harass or maliciously injure another," respectively.

Barrett maintains that he called Davis as a witness because he had a reasonable belief that Davis had a romantic relationship with Jill, Barrett's former wife, and therefore Davis' testimony regarding child rearing would be relevant to the custody issues in the proceeding.

Prior to the hearing, Barrett sent a letter to Davis describing Barrett's perception of a romantic relationship. Davis did not respond to the letter. At trial, Barrett called Davis as a witness stating that he believed Davis had "knowledge as to this matter that is outside of his attorney-client relationship." In response, Davis objected referring to rules that state an attorney cannot continue representation of a client if he is going to be a witness in an adversarial proceeding and claiming [***13] that he had no knowledge of matters at issue other than those acquired in the course of his representation of Jill, which were protected by the attorney-client privilege. Barrett then revealed his suspicion of a romantic relationship and stated that if Davis would state on the record that there was no romantic relationship, "I have no reason to talk to him." Davis denied the existence of such a relationship, and Barrett ended his attempt to call Davis as a witness.

The record shows that Barrett's "reasonable belief" of a romantic relationship was based on statements made by his current wife who was his girlfriend at the time of the [**347] divorce proceeding. She testified that she considered the interaction between Jill and Davis, which she observed during the divorce proceedings, as "romantic flirtation." Barrett stated that he had concluded "the same thing." Davis testified at the disciplinary proceeding that he and Jill had eaten dinner together once during the divorce proceeding. The tenuous nature of Barrett's suspicions is reflected in Barrett's agreement to drop his request upon Davis' statement denying such a relationship. Barrett made no attempt to challenge Davis' statement nor [***14] to disclose to any information that would contradict the denial. The lack of any investigation into the relationship at issue prior to or further inquiry at trial reinforces the notion that Barrett had no purpose other than engaging in a frivolous act or harassing Davis. Furthermore, [*271] Davis' dinner with Jill was not proof of a "romantic relationship," nor was it shown to have been a factor upon which Barrett relied when he called Davis as a witness. [6]

6 Barrett also claimed that his belief was based on statements from his children that their mother had dinner with Davis but these statements were not submitted or admitted as evidence in the proceeding.

At trial, the Bar emphasized the extraordinary and disruptive measure of calling an adverse counsel to testify in the middle of a hearing. Under such circumstances counsel generally must cease representation of the client and the client must secure new counsel. *See Rule 3.7*. Furthermore, the basis of Barrett's actions in this case - an alleged romantic relationship [***15] between Davis and his client - impugned the personal and professional reputation of the attorney. *Rule 1.7*, Comment 11 ("A lawyer's romantic or other intimate personal relationship can also adversely affect representation of a client."). Calling Davis as a witness under these circumstances qualified as action taken to harass or injure another. Accordingly, we conclude that the three-judge court did not err in finding that these actions violated *Rules 3.1* and *3.4(j)*.

3. *Pleadings in the Malpractice Litigation*

The three-judge court concluded that Barrett violated *Rule 1.1* and *Rule 3.1* by the following acts which occurred in conjunction with the Barrett's representation of Eller and her legal malpractice action against him: failing to file or settle a lawsuit within the two year statute of limitations period, filing a special plea of immunity that "was not warranted by existing law or the good faith argument for the extension, modification, or reversal of existing law," and failing to read the motion to strike the plea and memorandum in support thereof until the day of the hearing on the motion at which time he withdrew the plea. Barrett argues that these facts are insufficient [***16] to establish by clear and convincing evidence that he violated either Rule. We agree.

Rule 1.1 requires that a lawyer provide "competent representation" to a client, which requires "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." [HN10] Disciplining an attorney on the basis of incompetent representation under *Rule 1.1*, as reflected in the commentary, involves attorney performance that extends significantly beyond mere attorney error. *See Motley v. Virginia State Bar, 260 Va. 251, 262-64, 536 S.E.2d 101, 106-07 (2002)* (imposing discipline under former [*272] DR 6-101 for incompetence when attorney allowed client to sign promissory note to complete a real estate transaction which did not reflect parties' agreement and the consequences of which attorney did not understand).

[HN11] Whether an attorney is subject to discipline for failing to provide competent representation is a matter decided on a case by case basis. In this case, Barrett admitted that his failure to file or settle the personal injury lawsuit within the limitations period was negligent; nevertheless, such negligence without more is not clear and convincing evidence of incompetence [***17] under *Rule 1.1*. Similarly, discipline of Barrett under *Rule 1.1* is not justified based on research that results in the wrong legal conclusion because incorrect legal research alone, although attorney error, is not clear and convincing evidence of incompetence for purposes of that Rule.

[**348] Finally, Barrett's failure to read responsive pleadings in a more timely manner and his delay in withdrawing the special plea, while not the preferred way of practicing law, do not support a finding of incompetent representation in this case. Barrett filed his special plea on January 30, 2003; opposing counsel filed the motion to strike and supporting memorandum on February 18; and Barrett withdrew the plea on March 18, the date of the hearing on various motions in the case including the special plea and motion to deny the special plea. The delay itself was less than a month, and Barrett withdrew the plea before the court was required to consider it. Accordingly, we conclude that this delay does not provide clear and convincing evidence that Barrett violated *Rule 1.1*.

We next turn to violations of *Rule 3.1*. That rule prohibits a lawyer from advancing a position that is frivolous. [7] [HN12] The failure to [***18] timely file a lawsuit does not implicate this rule. Thus, violation of this rule had to be based on the three-judge court's finding that Barrett asserted an erroneous legal position that was not a good faith argument for extension of the law, and that he failed to timely read opposing pleadings and withdraw his special plea.

7 Compare *Code ß 8.01-271.1* allowing sanctions against an attorney who signs a pleading that is not "grounded in fact," "warranted by existing law or a good faith argument" for a change in the law, or filed for an "improper purpose" such as delay, harassment, or increasing the cost of litigation.

[HN13] An erroneous position is not necessarily a frivolous position. In this case, Barrett produced evidence, accepted by the three-judge court, that his position, although erroneous, was based on principles he learned in his law school classes, on legal research he had conducted [*273] on the issue, and on a "misunderstanding of the law." This evidence does not support a finding [***19] that filing the special plea was a frivolous act in violation of *Rule 3.1*. *Compare Barrett v. Virginia State Bar, 269 Va. 583, 596, 611 S.E.2d 375, 382 (2005)* (imposing discipline for filing frivolous pleading where attorney moved to strike wife's divorce pleadings solely because of minor mistake in wife's legal name, and attorney clearly knew correct name and had himself used multiple versions of it in own motion).

Similarly Barrett's delay in reading opposing counsel's memorandum and refusal to withdraw his special plea at an earlier time do not constitute asserting a position that is frivolous.

In summary, we find that the record does not present clear and convincing evidence that Barrett violated *Rules 1.1* and *3.1* when he failed to file or settle a lawsuit within the limitations period, filed a special plea asserting an erroneous legal position, or delayed in reading responsive pleadings and withdrawing the special plea. [8]

8 In light of this holding, we need not address Barrett's other challenges to evidence admitted in conjunction with these charges.

[***20] CONCLUSION

For the reasons stated, we will affirm that part of the judgment of the three-judge court finding that Barrett's actions in conjunction with his divorce proceeding violated *Rules 4.4*, *8.4(b)*, *3.1* and *3.4*. We will reverse that part of the judgment of the three-judge court holding that Barrett's actions in conjunction with his representation of Eller and in the legal malpractice action violated *Rules 1.1* and *1.3*. Consequently, because the 30-month suspension of Barrett's license to practice law was a single sanction imposed for all violations found by the three-judge court, we will vacate that sanction and remand the case for further consideration of an appropriate sanction for the remaining violations. [9]

9 Because the case will be remanded for consideration of an appropriate sanction, we need not address Barrett's remaining challenges regarding the sanction previously imposed.

Affirmed in part, reversed in part, and remanded.

Timothy M. Barrett, Appellant, against Virginia State Bar, ex rel. Second District Committee, Appellee.

Record No. 081935

SUPREME COURT OF VIRGINIA

277 Va. 412*; *675 S.E.2d 827*; *2009 Va. LEXIS 56

April 17, 2009, Decided

PRIOR HISTORY: [***1]
Upon an appeal of right from a judgment rendered by the Circuit Court of York County. Circuit Court No. CL08-1511.
Barrett v. Va. State Bar, 272 Va. 260, 634 S.E.2d 341, 2006 Va. LEXIS 84 (2006)

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant attorney appealed a judgment by the Circuit Court of York County (Virginia) that disbarred him for violating *Va. Sup. Ct. R. pt. 6, § II, R. 3.1*; the attorney claimed that because he was a suspended lawyer, the rules of professional conduct did not apply, and that his equal protection rights were violated.

OVERVIEW: The violations occurred in the course of prolonged litigation between the attorney and his former wife, in which the attorney represented himself. The attorney repeatedly asserted that, because his ex-wife was awarded sole legal and physical custody of the children, he was no longer responsible for the payment of any support for them under *Va. Code § 20-108.2*. The state supreme court held that the panel had jurisdiction to apply the rules professional conduct to the attorney in his suspended status. The attorney made no claim that he was being treated unlike other lawyers whose licenses to practice had been suspended. Accordingly, his argument that applying the Rules to him violated the Equal Protection Clause was rejected. Because the attorney's argument that he was no longer required to support his children was completely frivolous, he was properly disbarred for violating *Rule 3.1*.

OUTCOME: The judgment was affirmed.

LexisNexis(R) Headnotes

Legal Ethics > Professional Conduct > Frivolous Claims
[HN1] See *Va. Sup. Ct. R. pt. 6, § II, R. 3.4*.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN2] In reviewing a judicial panel's decision of attorney misconduct, the Supreme Court of Virginia conducts an independent examination of the record, considering the evidence and the inferences fairly deducible therefrom in a light most favorable to the State Bar, the prevailing party below, and gives the panel's factual findings substantial weight and

consider them as prima facie correct. While not given the weight of a jury verdict, the panel's conclusions will be sustained unless they are not justified by the evidence or are contrary to law.

Governments > Legislation > Interpretation
[HN3] Rules of statutory construction provide that language should not be given a literal interpretation if doing so would result in a manifest absurdity.

Legal Ethics > Professional Conduct > Tribunals
[HN4] The Rules of Professional Conduct are designed to insure the integrity and fairness of the legal process. It would be a manifest absurdity and a distortion of these Rules if a lawyer representing himself commits an act that violates the Rules but is able to escape accountability for such violation solely because the lawyer is representing himself.

Legal Ethics > Sanctions > Suspensions
[HN5] 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.

Legal Ethics > Sanctions > Disbarments
Legal Ethics > Sanctions > Suspensions
[HN6] An attorney may be disbarred for conduct that occurs during the time his license to practice law is suspended.

Legal Ethics > Sanctions > Disbarments
Legal Ethics > Sanctions > Suspensions
[HN7] Disbarment is the severance of the status and privileges of an attorney, whereas suspension is the temporary forced withdrawal from the exercise of office, powers, prerogatives, and privileges of a member of the bar.

Civil Procedure > Parties > Self-Representation > General Overview
[HN8] An attorney representing himself is not alike in all aspects to a pro se non-lawyer litigant by virtue of the fact that the lawyer is a lawyer and is so by choice.

Civil Procedure > Parties > Self-Representation > General Overview
Legal Ethics > General Overview
[HN9] Lawyers whose licenses to practice have been suspended are of a class unto themselves and they are subject to the Rules of Professional Conduct while non-lawyers who represent themselves are of an entirely different class and not subject to the Rules.

Constitutional Law > Equal Protection > Scope of Protection
[HN10] Under the Equal Protection Clause, an act is not invalid if within the sphere of its operation all persons subject to it are treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

Family Law > Child Custody > Awards > Legal Custody > Joint Legal Custody
Family Law > Child Custody > Awards > Legal Custody > Sole Legal Custody
Family Law > Child Support > Obligations > General Overview
[HN11] *Va. Code Ann. § 20-108.2(B)* applies to parents who have joint custody of their children and thus have joint responsibility for their support. On the other hand, when sole custody is involved, *§ 20-108.2(G)* applies.

Family Law > Child Custody > Awards > Legal Custody > Sole Legal Custody
Family Law > Child Support > Obligations > General Overview
[HN12] See *Va. Code Ann. § 20-108.2(G)(1)*.

Family Law > Adoption > General Overview
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview
[HN13] Parental rights may be terminated only by adoption or by following the procedures for terminating such rights outlined in *Code §§ 16.1-278.3* and *16.1-283*.

OPINION

[**828] [*412] Upon consideration of the record, the briefs, the argument of the appellant in proper person, and the argument of counsel for the Virginia State Bar, ex rel. Second District Committee, the Court is of opinion there is no error in the judgment appealed from.

On December 19, 2007, the Second District Subcommittee of the Virginia State Bar certified two charges of misconduct against Timothy M. Barrett involving violations of *Rules 3.1* and *3.4 of the Rules of Professional Conduct* and served him with a copy of the certification. He requested that the case be heard by a three-judge court pursuant to *Code § 54.1-3935*. The Virginia State Bar then filed a complaint against Barrett in the Circuit Court of York County, pursuant to Part VI, § IV, Para. 13.I.1.a(1)(b) of the Rules of the Supreme Court. A three-judge panel (the Panel), consisting of Judge Cleo E. Powell, Judge Robert G. O'Hara, and Judge Arthur B. Vieregg, was designated to hear the case, with Judge Powell presiding.

The matter was heard by the Panel on July 31, 2008. At the conclusion of the hearing, the Panel held that [***2] the State Bar had failed to prove a violation of *Rule 3.4* and dismissed that charge. However, the Panel found that Barrett had violated *Rule 3.1*, which provides in pertinent part as follows:

> [HN1] A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

[*413] For the violation of this Rule, the Panel imposed a sanction of "[r]evocation of [Barrett's] license to practice law in the Commonwealth of Virginia, effective immediately."

STANDARD OF REVIEW

[HN2] In our review of the Panel's decision, we conduct an independent examination of the record, considering the evidence and the inferences fairly deducible therefrom in the light most favorable to the State Bar, the prevailing party below, and we give the Panel's factual findings substantial weight and consider them as prima facie correct. *Anthony v. Virginia State Bar, 270 Va. 601, 608-09, 621 S.E.2d 121, 125 (2005)*. While not given the weight of a jury verdict, the Panel's conclusions will be sustained unless they are not justified by the evidence or are contrary to [***3] law. *Id. at 609, 621 S.E.2d at 125*.

BACKGROUND

At the time of the hearing before the Panel, Barrett was serving the second of two suspensions of his license to practice law, totaling fifty-one months, for previous violations of the Rules of Professional Conduct (the Rules). The violations occurred in the course of prolonged litigation between Barrett and his former wife, Jill Barrett, in [**829] which Barrett represented himself. The litigation commenced with the filing of a divorce case in the Circuit Court of the City of Virginia Beach after the parties separated in 2001 and continued in the Circuit Court of Grayson County during many hearings when Jill Barrett and the couple's six children later moved to her parents' home in that county. Along the way, the couple appeared before the Court of Appeals of Virginia several times, as reflected in unpublished opinions, and Barrett visited this Court several times, including appearances in *Barrett v. Virginia State Bar, 269 Va. 583, 611 S.E.2d 375 (2005)* (*Barrett I), and Barrett v. Virginia State Bar, 272 Va. 260, 634 S.E.2d 341 (2006)* (Barrett II).

MOTION TO DISMISS

Barrett also appeared pro se in the hearing before the Panel in the present case. [***4] At the commencement of the hearing, he made a motion to dismiss based upon two grounds, (1) because Barrett's license to practice law was suspended, he was a non-lawyer and therefore the "Court lack[ed] jurisdiction to try a non-lawyer under the rules of professional conduct," and (2) because the application of [*414] the "rules of professional conduct to a lawyer who represents himself would violate the protection laws of the *14th Amendment to the U.S. Constitution*." The Panel denied the motion to dismiss.

Jurisdiction

Barrett should be quite familiar with this Court's treatment of the interaction of the Rules and lawyers representing themselves. In Barrett II, this Court upheld the finding of a three-judge court that Barrett violated *Rule 3.1* for "engaging in a frivolous act" in asserting that opposing counsel and Barrett's wife were involved in a romantic relationship. *272 Va. at 270-71, 634 S.E.2d at 347*. Representing himself, Barrett argued that the Rules "apply only when a lawyer is representing a client, not when a lawyer represents himself in a proceeding." *Id. at 267, 634 S.E.2d at 345*. This Court responded as follows:

> [HN3] Rules of statutory construction provide that language should not [***5] be given a literal interpretation if doing so would result in a manifest absurdity. Applying these Rules in the manner Barrett suggests would result in such an absurdity. [HN4] The Rules of Professional Conduct are designed to insure the integrity and fairness of the legal process. It would be a manifest absurdity and a distortion of these Rules if a lawyer representing himself commits an act that violates the Rules but is able to escape accountability for such violation solely because the lawyer is representing himself.

Id. at 267-68, 634 S.E.2d at 345. (Citations omitted.) It would also be a manifest absurdity and a distortion of the Rules if they are applied in the manner Barrett suggests here: A lawyer would be able to escape accountability for a violation of the Rules by using a license suspension as a permit to offend even more.

We hold that [HN5] 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. We are not alone in this view.

In the case of *In re Morrissey, 305 F.3d 211 (4th Cir. 2002)*, Morrissey, a lawyer licensed to practice in Virginia, was disbarred by the United States District Court for the Eastern District [***6] of Virginia for violations of the Virginia Code of Professional Responsibility occurring while his license was suspended. Like Barrett here, Morrissey [*415] argued that "the three judge . . . panel had no jurisdiction over [him] to inquire into conduct which occurred while [he] was suspended from the practice of law before the district court." *Id. at 215*. The Fourth Circuit affirmed Morrissey's disbarment and stated as follows:

> While none of the federal courts of appeals seem to have considered this matter, and the opinion of no district court on the subject has come to our attention, we note that all of the States which have considered the question have come to the same conclusion, which is that [HN6] an attorney may be disbarred for conduct which occurred during the time his license to practice law is suspended.

Id. at 216. The decisions of ten states were cited, including *State ex rel Nebraska State Bar Ass'n v. Butterfield, 172 Neb. 645, 111 N.W.2d 543 (Neb. 1961)*. The Fourth Circuit then stated as follows:

> [**830] The distinction between disbarment and suspension made in the Butterfield case is apt, and we adopt it: [HN7] "Disbarment is the severance of the status and privileges of an attorney, whereas suspension is the [***7] temporary forced withdrawal from the exercise of office, powers, prerogatives, and privileges of a member of the bar."

Id. (quoting *Butterfield, 111 N.W.2d at 546*). We also consider the *Butterfield* distinction apt, and we adopt it and hold that the Panel had jurisdiction to apply the Rules to Barrett in his suspended status.

Equal Protection

Barrett argues that "applying the Rules of Professional Conduct to [him] while exercising his fundamental and inalienable right to represent himself burdens him with additional strictures that do not bind any other litigant under the exact same circumstances, a burden that is forbidden by the *Equal Protection Clause of the 14th Amendment to the U.S. Constitution*." Barrett argues further that "while the *Equal Protection Clause* does not forbid government classifications, it does keep government decision makers from treating differently persons who are in all relevant respects alike."

However, as the Panel noted in its order disbarring Barrett, [HN8] "an attorney representing himself is not alike in all aspects to a *pro se* [*416] non-lawyer litigant by virtue of the fact that the lawyer is a lawyer and is so by choice." [HN9] Lawyers whose licenses to practice have been [***8] suspended are of a class unto themselves and they are subject to the Rules of Professional Conduct while non-lawyers who represent themselves are of an entirely different class and not subject to the Rules.

The important consideration is whether a lawyer whose license to practice has been suspended is treated like other lawyers whose licenses have been suspended. This Court noted in a previous case involving a claim that an act of the General Assembly violated the *Equal Protection Clause* that "[HN10] [a]n act is not invalid if within the sphere of its operation all persons subject to it are 'treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.'" *Bryce v. Gillespie, 160 Va. 137, 146, 168 S.E. 653, 656 (1933)* (quoting *Hayes v. Missouri, 120 U.S. 68, 71-72, 7 S. Ct. 350, 30 L. Ed. 578 (1887))*; see also *Truax v. Corrigan, 257 U.S. 312, 333, 42 S. Ct. 124, 66 L. Ed. 254 (1921))*.

Barrett makes no claim that he is being treated unlike other lawyers whose licenses to practice have been suspended. Accordingly, we reject his argument that applying the Rules to him violates the *Equal Protection Clause*.

RULE 3.1

Barrett is also familiar with the *Rule 3.1* prohibition against frivolous assertions [***9] not only from his visit here in Barrett II but also from Barrett I, where this Court upheld his violation of the Rule for asserting during his divorce case that he did not know and was not married to Jill Barrett. In the present case, the issue Barrett is charged with frivolously asserting arose from an order entered March 9, 2006, by the Circuit Court of Grayson County involving the Barretts' children. The order provided that "Jill Barrett have sole legal and physical custody of the children and that Timothy Barrett have visitation with the children once every six weeks either on a Saturday or a Sunday from 8:00 a.m. to 6:00 p.m." *

* On October 12, 2005, the custody of one of the six children was placed with the Grayson County Department of Social Services so only the five remaining children were affected by the March 9, 2006 order.

Following entry of the March 9, 2006 order, Barrett repeatedly asserted in the Circuit Court of Grayson County and in the Court of Appeals of Virginia that, because the mother of the children was [*417] awarded their "sole legal and physical custody," he is no longer responsible for the payment of any support for them. He makes the same assertion here. Barrett [***10] states that "[i]n the case of child support, the whole issue has been subsumed by statute," and "[t]hus, the merits or frivolity of [my] argument rises or falls on the statute, not the Common Law."

Barrett cites *Code § 20-124.1*, which is entitled "Definitions" and defines the term "[j]oint custody" as meaning "joint legal custody where both parents retain joint responsibility for the care and control of the child [**831] and joint authority to make decisions concerning the child." The section defines the term "[s]ole custody" as meaning that "one person retains responsibility for the care and control of a child and has primary authority to make decisions concerning the child."

Barrett also cites *Code § 20-108.2* which is entitled "Guidelines for determination of child support" and which in *subsection (B)* contains extensive schedules for determining the amount of child support which defines the term "Number of children" as meaning "the number of children for whom the parents share joint responsibility and for whom support is being sought." Barrett then argues that "joint legal responsibility" is equated with "joint legal custody" and that, since the March 9, 2006 order vested sole legal custody [***11] of the children in his ex-wife, "he had no legal custody and thus, no shared legal responsibility to support any of his children under *Section 20-108.2 of the Code of Virginia*."

We disagree with Barrett that *subsection (B) of Code § 20-108.2* relieves him of responsibility for supporting his children. In our opinion, [HN11] *subsection (B)* applies to parents who have joint custody of their children and thus

have joint responsibility for their support, with the amount of support being determined from the extensive tables of "MONTHLY BASIC CHILD SUPPORT OBLIGATIONS," which use combined monthly income of the parents and the number of children involved as defined by the language, "'Number of children' means the number of children for whom the parents share joint legal responsibility and for whom support is being sought."

On the other hand, when, as here, sole custody is involved, *subsection (G) of Code § 20-108.2* applies. Indeed, *subsection (B)* expressly recognizes that "subdivision G 1" applies to child support obligation in sole custody cases. *Subsection (G)(1)*, entitled "Sole custody support," provides as follows:

> [*418] [HN12] The sole custody total monthly child support obligation shall be established by adding [***12] (i) the basic monthly child support obligation, as determined from the schedule contained in subsection B, (ii) costs for health care coverage to the extent allowable by subsection E, and (iii) work-related child-care costs and taking into consideration all the factors set forth in subsection B of § 20-108.1. The total monthly child support obligation shall be divided between the parents in the same proportion as their monthly gross incomes bear to their monthly combined gross income. The monthly obligation of each parent shall be computed by multiplying each parent's percentage of the parents' monthly combined gross income by the total monthly child support obligation.
>
> However, the monthly obligation of the noncustodial parent shall be reduced by the cost for health care coverage to the extent allowable by subsection E when paid directly by the noncustodial parent. Unreimbursed medical and dental expenses shall be calculated and allocated in accordance with subsection D.

(Emphasis added.)

Further indication that *subsection (B) of Code § 20-108.2* is intended to apply to joint custody cases is provided by the presence in the Code section of *subsection (G)(2)*, which applies to "Split custody [***13] support," and *subsection (G)(3)*, which applies to "Shared custody support," with each providing a different means of determining the amount of support. Thus, the General Assembly has run the full gamut of types of custody, with each treated differently.

Barrett would have us treat him as a stranger to his children and as one whose parental rights have been terminated. But Barrett is not a stranger to his children; the March 9, 2006 order entered by the Circuit Court of Grayson County explicitly granted him the important privilege of visitation with his children. And [HN13] parental rights may be terminated only by adoption or by following the procedures for terminating such rights outlined in *Code §§ 16.1-278.3* and *16.1-283*. Neither course has been pursued here.

CONCLUSION

We hold that for Barrett to assert persistently and repeatedly in the Circuit Court of Grayson County and in the Court of Appeals of [*419] Virginia that he is no longer required to support his children is completely frivolous, in light of the facts and the law of this case. [**832] Accordingly, we will affirm the Panel's order revoking Barrett's license to practice law in this Commonwealth. The appellant shall pay to the appellee thirty [***14] dollars damages.

This order shall be published in the Virginia Reports and shall be certified to the said circuit court.