

VIRGINIA :

BEFORE THE THREE-JUDGE COURT PRESIDING  
IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

VIRGINIA STATE BAR, *ex rel.*  
FIFTH DISTRICT- SECTION III COMMITTEE,

Complainant/Petitioner,

v.

MARK STEVEN WEISS, ESQ.,

Respondent.

Chancery No. 57041  
[VSB Docket No.: 04-053-0083]

ORDER OF SUSPENSION, WITH TERMS

This matter came before the Three-Judge Court empaneled on August 10, 2005, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to §54.1-3935 of the 1950 Code of Virginia, as amended. A fully endorsed Agreed Disposition, dated the 12<sup>th</sup> day of September, 2005, was tendered by the parties, and was considered by the Three-Judge Court, consisting of the Honorable J. Warren Stephens and James E. Kulp, retired Judges of the Seventh and Fourteenth Judicial Circuits, respectively, and by the Honorable Joanne F. Alper, Judge of the Seventeenth Judicial Circuit and Chief Judge of the Three-Judge Court.

Having considered the Agreed Disposition, it is the decision of the Three-Judge Court that the Agreed Disposition be accepted, and said Court finds by clear and convincing evidence as follows:

1. At all times relevant hereto, Mark Steven Weiss, Esquire (hereafter

“Respondent”), has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On or about September 15, 1994, Ms. Barbara A. Dunkley retained the Respondent’s law firm to represent her and her minor daughter Monica’s interests in their respective medical malpractice claims. The Complainant’s daughter, Monica, born on February 3, 1994, was at all times severely and profoundly disabled due to birth-related neurological injuries. The two legal matters were initially the responsibility of the Respondent’s then law partner, but were transferred to Respondent for handling as of October 1995.

3. On or about February 2, 1996, the Respondent filed a suit on the Complainant’s behalf respecting her individual claim in the Prince William County, Virginia, Circuit Court, claiming damages in the sum of One Million Dollars (\$1,000,000.00) against health care providers who had rendered health care to the Complainant.

4. The Respondent took no further action with regard to the suit that he had filed, and the Circuit Court entered an Order on March 24, 1999, discontinuing the case because the matter had been pending without activity for more than three years.

5. The Respondent did not advise the Complainant that her suit had been discontinued. The Complainant learned that the suit had been discontinued only after traveling to the courthouse and securing the assistance of a clerk. The Complainant telephoned the Respondent, who advised her that he was not aware that the suit had been dismissed. The Complainant would testify that he promised to reinstitute the litigation, but he failed to do so and never discussed the Complainant’s case with her again; the Respondent would testify that he promised the Complainant only that he would explore the possibility of having the litigation reinstated.

6. On or about January 16, 2002, the Respondent filed a medical malpractice suit in the Prince William County, Virginia, Circuit Court on behalf of the Complainant's minor child, Monica, against two health care providers and a related business entity. The suit claimed damages in the sum of One Million Dollars (\$1,000,000.00) for injuries sustained at the time of Monica's birth.

7. As of the time the Respondent instituted the suit on Monica's behalf, he had secured an expert opinion regarding the standard of care applicable to the claim that he had filed, and that opinion was, according to information provided by the Respondent to the Virginia State Bar, that the expert "did not find evidence of a breach of the ordinary standard of care within a reasonable degree of medical certainty."

8. On or about February 15, 2002, defense counsel served interrogatories and a request for production of documents upon the Respondent. The Respondent failed to respond to the discovery thus propounded within the time prescribed by law or at any time thereafter.

9. On or about May 22, 2002, defense counsel filed a "Motion to Refer." The defendants sought referral of the case to the Worker's Compensation Commission "for purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act."

10. The Respondent was unaware of the Act's existence until it was brought to his attention by counsel defending Monica's lawsuit. A child eligible for coverage under the Act can receive a lifetime of medical care and many other entitlements, including housing and transportation assistance and, between the ages of 18 and 65, coverage similar to that available for worker's compensation claimants. No proof of negligence committed by a health care

provider is needed for an eligible child to secure coverage under the Act.

11. Monica was, in fact, eligible for coverage under the Act, and a claim for benefits thereunder could have been made by the Respondent on her behalf at or near the time the Respondent was retained in 1994. The Respondent did not advise the Complainant that the Motion to Refer had been filed; did not at any time provide her with any advice or information respecting the applicability of the Act to Monica's circumstances; and did not seek her permission either to oppose or consent to Defendant's Motion that the case be referred to the Workers' Compensation Commission.

12. On June 21, 2002, the Circuit Court entered an Order granting the Motion to Refer and stayed the action in that Court. On April 14, 2003, the Worker's Compensation Commission, to which Monica's claim had been referred by the Court, entered an Order directing the Respondent to file an address for Monica's parent within twenty-one days following that date. The Respondent failed to provide the Commission with the Complainant's address within twenty-one days, or at any time thereafter.

13. It was at all times in Monica's best interests that at the earliest possible time she be declared eligible for benefits under the Virginia Birth-Related Neurological Injury Compensation Act. Such a determination required that Monica's medical records sufficient for an eligibility assessment be provided for review to a panel of physicians acting at the request of the Workers' Compensation Commission.

14. Notwithstanding defense counsel's repeated telephone requests and letters to the Respondent, seeking Monica's updated medical records and/or a release to allow defense counsel to procure them directly from health care providers, the Respondent failed to provide such

records. He did, however, induce and foster defense counsel's belief that he, the Respondent, was working on getting the requested records. He at one time falsely stated to defense counsel that he had a meeting scheduled with the Complainant.

15. Having received no voluntary cooperation from Respondent, defense counsel applied on or about June 27, 2003, to the Workers' Compensation Commission for leave to propound written discovery to Complainant and to take Complainant's deposition. Leave was granted, as requested, by the Workers' Compensation Commission on July 2, 2003, and defense counsel propounded discovery on her clients' behalf.

16. On July 8, 2003, the Workers' Compensation Commission mailed a letter to the Respondent, which, *inter alia*, reminded him that he had been directed on April 14, 2003, to provide Monica's parent's address.

17. On July 18, 2003, the Respondent wrote to the Chief Deputy Commissioner at the Workers' Compensation Commission, stating in such letter, in pertinent part, the following:

I am writing to seek permission to withdraw my appearance in this matter. Barbara A. Dunkley, the mother and next friend of Monica Dunkley, has failed to maintain contact with my office and I have not been able to reach her. Ms. Dunkley's failure to maintain contact with my office has prevented me from providing information previously requested by the Commission and other counsel. Insofar as I cannot effectively represent Monica L. Dunkley under these circumstances, I am seeking leave to withdraw and will file a corresponding motion with the Circuit Court of Prince William County.

18. Although Respondent would testify to the contrary, the Bar's evidence is that the Respondent had made no effort to contact the Complainant since approximately February 25 of 2002.

19. The Deputy Commissioner to whom the Respondent addressed his July 18, 2003, letter wrote to the Respondent and other interested parties on July 23, 2003, stating, *inter alia*, the following:

I write to ask for your advice and assistance in the referenced matter because of an unusual set of circumstances. Mr. Weiss has advised me that he is unable to reach Barbara A. Dunkley, the mother and next friend of Monica Dunkley. As you have seen in my earlier correspondence, I have attempted to find an address for Ms. Dunkley so that I can provide her with copies of all pleadings and correspondence.

Unless one of you knows how to contact Ms. Dunkley, I see no way to go forward with this proceeding. If you have suggestions or advice in regard to this issue, I would appreciate hearing from you at your earliest convenience.

I am sending a copy of this letter to Barbara Dunkley at an address found in the medical records. If Ms. Dunkley receives this letter, I would ask that she contact my office immediately.

20. The Complainant received a copy of the Deputy Commissioner's July 23, 2003, letter. Promptly following her receipt of the Deputy Commissioner's letter, the Complainant telephoned the Workers' Compensation Commission offices.

21. The Deputy Commissioner wrote to the Complainant on July 28, 2003, acknowledging the Complainant's telephone call, forwarding a copy of the Commission's file in the matter, confirming that the Complainant no longer wished to have the Respondent represent her, and urging her to retain new counsel immediately should she wish to be represented in the matter.

22. The Complainant engaged new counsel in early August of 2003. The Complainant's new counsel promptly secured the required medical records and provided them to

defense counsel, responded to outstanding discovery requests, and otherwise cooperated with defense counsel and the Commission such that an Order was entered by the Commission on October 22, 2003, declaring Monica to be entitled to compensation under the Act and directing the Birth-Related Neurological Injury Compensation Fund “to pay all amounts and expenses” provided by law for Monica’s benefit.

23. It came to defense counsel’s attention that the Respondent had failed to withdraw from the Circuit Court action consistent with his representation to the Deputy Commissioner by letter dated July 18, 2003, that he would “file a corresponding motion [to withdraw] with the Circuit Court of Prince William County.” Accordingly, defense counsel wrote to Respondent on November 19, 2003, reminding him of the representation to the Deputy Commissioner contained in his July 18, 2003, letter.

24. During an interview of the Respondent conducted by a Virginia State Bar investigator on January 16, 2004, the Respondent stated that he believed he had sent the Complainant a letter and refund of the unexpended portion of a costs advance that she had provided to him, and which he had placed in escrow. The Bar’s evidence would show, however, that it was not until March 25, 2004, that any refund of costs advanced was provided to the Complainant via a check drawn on Respondent’s trust account and sent to the Complainant on that date by Respondent’s counsel.

25. In mitigation, the evidence would show that Respondent’s conduct was not motivated by the prospect of pecuniary gain.

THE THREE-JUDGE COURT finds by clear and convincing evidence that such conduct on the part of the Respondent, Mark Steven Weiss, Esquire, constitutes a violation of the

following provisions of the revised Virginia Code of Professional Responsibility and the Rules of Professional Conduct:

**DR 6-101. Competence and Promptness.**

- (A) A lawyer shall undertake representation only in matters in which:
  - (1) The lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters, or
  - (2) The lawyer has associated with another lawyer who is competent in those matters.
- (B) A lawyer shall attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client.
- (C) A lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered.
- (D) A lawyer shall inform his client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

**DR 7-101. Representing a Client Zealously.**

- (A) A lawyer shall not intentionally:
  - (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
  - (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-108, DR 5-102, and DR 5-105.
  - (3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 4-101(D).

## **RULE 1.1 Competence**

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

## **RULE 1.2 Scope of Representation**

- (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

## **RULE 1.3 Diligence**

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

## **RULE 1.4 Communication**

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

### **RULE 1.15 Safekeeping Property**

- (c) A lawyer shall:
  - (3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and
  - (4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

### **RULE 1.16 Declining Or Terminating Representation**

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
  - (3) the lawyer is discharged.
- (c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable rules of court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

### **RULE 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.

### **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[.]

### **RULE 3.4 Fairness To Opposing Party And Counsel**

A lawyer shall not:

- (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.
- (e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

### **RULE 4.1 Truthfulness In Statements To Others**

In the course of representing a client a lawyer shall not knowingly:

- (a) Make a false statement of fact or law[.]

### **RULE 8.1 Bar Admission And Disciplinary Matters**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact[.]

### **RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

- (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer; [or]
- (c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation[.]

UPON CONSIDERATION WHEREOF, the Three-Judge Court hereby ORDERS as follows:

1. Subject to the provisions of Paragraph 3 set forth below, the Respondent shall receive

a five (5) year suspension of his license to practice law in the Commonwealth of Virginia, to commence on the date of entry of this Order, as representing an appropriate sanction if this matter were to be heard.

2. In addition to those terms set forth in the then-applicable Rules of the Supreme Court of Virginia which Respondent must meet as a condition of having his license to practice law in the Commonwealth of Virginia reinstated following the five (5) year suspension, the Respondent shall take and pass the written portion (essay and Virginia short answers portion) of the Virginia State Bar examination. The Respondent shall not be eligible to sit for the written portion of the Virginia State Bar examination prior to January of 2010.

3. If, following the five (5) year period of law license suspension, the Respondent makes application to the Virginia State Bar for reinstatement of his license to practice law in the Commonwealth of Virginia without having first taken and passed the written portion the Virginia State Bar examination, then, and in that event, the Virginia State Bar Disciplinary Board shall, as an alternative disposition to the license suspension otherwise provided for herein, REVOKE the Respondent's license to practice law in the Commonwealth of Virginia; and it is further

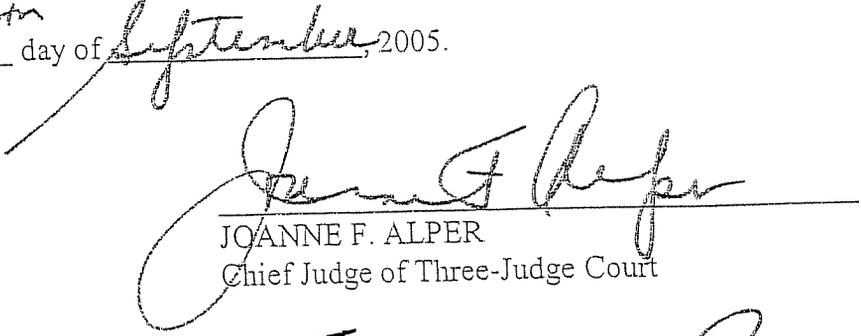
ORDERED that pursuant to the provisions of Part Six, § IV, ¶ 13.M. of the Rules of the Supreme Court of Virginia, the Respondent shall forthwith give notice, by certified mail of his suspension to all clients for whom he is currently handling matters and to all opposing attorneys and the presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. The Respondent shall give such notice within fourteen (14) days of the effective date of his suspension and make such arrangements as are required herein within forty-five (45) days of

the effective date of the suspension. Respondent shall also furnish proof to the Bar within sixty (60) days of the effective date of his suspension that such notices have been timely given and such arrangements made for the disposition of matters. The Virginia State Bar Disciplinary Board shall decide all issues concerning the adequacy of the notice and arrangements required herein, and the Board may impose a sanction of revocation or additional suspension for failure to comply with Part Six, § IV, ¶ 13.M. of the Rules of the Supreme Court of Virginia; and it is further

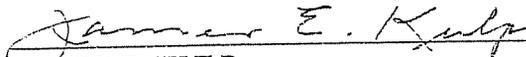
ORDERED that pursuant to Part Six, § IV, ¶ 13B.8.c. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against the Respondent; and it is further

ORDERED that four (4) copies of this Order be certified by the Clerk of the Circuit Court of Prince William County, Virginia, and be thereafter mailed by said Clerk to the Clerk of the Disciplinary System of the Virginia State Bar at 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, for further service upon the Respondent and Bar Counsel consistent with the rules and procedures governing the Virginia State Bar Disciplinary System.

ENTERED this 29<sup>th</sup> day of September, 2005.

  
JOANNE F. ALPER  
Chief Judge of Three-Judge Court

  
J. WARREN STEPHENS  
Judge of Three-Judge Court

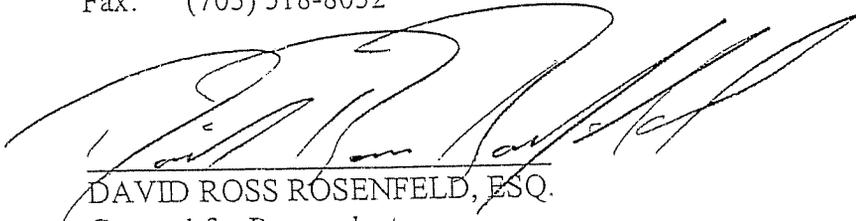
  
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JAMES E. KULP  
Judge of Three-Judge Court

WE ASK FOR THIS:

  
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SETH M. GUGGENHEIM  
VSB No. 16636  
Assistant Bar Counsel  
Virginia State Bar  
100 N. Pitt Street, Suite 310  
Alexandria, Virginia 22314  
Phone: (703) 518-8045  
Fax: (703) 518-8052

  
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DAVID ROSS ROSENFELD, ESQ.  
Counsel for Respondent  
VSB No. 2982  
David Ross Rosenfeld, P.C.  
Second Floor  
118 South Royal Street  
Alexandria, Virginia 22314-3392  
Phone: (703) 548-2600  
Fax: (703) 549-8664