VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
DAVID H. N. BEAN

VSB DOCKET NO. 02-070-1395

ORDER OF SUSPENSION

This matter came on to be heard on December 10, 2004, before a panel of the Virginia State Bar Disciplinary Board (the "Board") composed of James L. Banks, Jr., Chair Designate, Bruce T. Clark, Glenn M. Hodge, Robert E. Eicher, and W. Jefferson O'Flaherty, lay member.

The Virginia State Bar ("VSB") was represented by Paul D. Georgiadis, Assistant Bar Counsel ("Bar Counsel"). David H. N. Bean (the "Respondent") appeared in person and represented himself. Valerie L. Schmit, Registered Professional Reporter, of Chandler & Halasz, Post Office Box 9349, Richmond, Virginia 23227, 804.730.1222, having been duly sworn by the Chair Designate, reported the hearing and transcribed the proceedings.

The Chair Designate inquired of the members of the panel whether any of them had any personal or financial interest or any bias which would preclude any of them from hearing the matter fairly and impartially. Each member of the panel and the Chair Designate answered the inquiry in the negative.

The matter came before the Board on an Amended Certification from the Seventh District Committee of the VSB and the Respondent's answer. On November 30, 2004, the Respondent filed a motion for continuance of the hearing in this matter. The Chair Designate denied the motion for continuance on December 1, 2004. The Respondent stated at the hearing that he was ready to go forward. Following opening statements by Bar Counsel and the Respondent, Bar Counsel offered VSB Exhibits A and A-1 through A-14, VSB Exhibit B, and VSB Exhibits C

and C-1 through C-10. The Respondent's pre-hearing objection to VSB Exhibit B and VSB Exhibits C and C-1 through C-10 was overruled by the Chair Designate in an order entered December 1, 2004. At the hearing the Respondent renewed his objection to VSB Exhibits C and C-1 through C-10. The Chair Designate overruled his objection, and all of the VSB Exhibits were admitted into evidence. Bar Counsel then called the following persons who testified as witnesses for the Bar: Ann G. Scher, Andrea H. Wynn, M.D., and William D. Cremmins. Bar Counsel rested the VSB's case-in-chief, and the Respondent then testified on his own behalf. The Respondent offered in evidence the transcripts of the deposition testimony of James R. Anderson and his wife, taken in the *Anderson* case, and audio tapes the Respondent represented to be a recording of his conversations with his client. Neither the transcripts nor the tapes had been pre-filed as exhibits as required by the Pre-Hearing Order entered on August 13, 2004. Bar Counsel objected, and the Chair Designate sustained the objection. The Respondent proffered the transcripts, which were then marked as Respondent's Proffered Exhibits 1 and 2, respectively, for the record in the proceeding. The Respondent then rested his defense, and Bar Counsel presented no rebuttal evidence. Bar Counsel and the Respondent presented closing argument.

I. FINDINGS OF FACT

Upon consideration of the foregoing, the Board finds that the following facts have been proved by clear and convincing evidence:

1. At all relevant times the Respondent has been a lawyer duly licensed to practice law in the Commonwealth of Virginia and his address of record with the Bar has been 258 West King Street, Strasburg, Virginia 22657. The Respondent has been licensed since 1968.

2. The Respondent was properly served with notice of this proceeding in accordance with Part Six, § IV, ¶ 13(E) and (I)(a) of the Rules of the Supreme Court of Virginia.

Anderson v. Winchester Surgical Clinic, Ltd., et al.

3. The Respondent was counsel of record for James R. Anderson in a medical malpractice action brought against Westchester Surgical Clinic, Ltd., and Thomas W. Daugherty, M.D., in the Circuit Court of Warren County, Virginia, Case No. L216-00.

4. Orthopedist Andrea H. Wynn, M.D. saw the Respondent's client, James R. Anderson, on September 2, 1999. Mr. Anderson complained of right shoulder pain. After examining Mr. Anderson and reviewing x-rays he brought, Dr. Wynn recommended that he see Dr. Neviaser, who was a shoulder specialist, to do a specialized procedure to rebuild the musculature of the shoulder.

5. Dr. Wynn saw Mr. Anderson on September 1, 2000, regarding an injury to his hand. She inquired about his shoulder. He replied that Dr. Naviaser had performed surgery, and that it was helping him regain some function.

6. Dr. Wynn never spoke with the Respondent, or anyone in his office, about her findings or any opinion regarding his client's medical condition or the cause of or prognosis for the client's medical condition.

7. Dr. Wynn never spoke with the Respondent, or anyone in his office, about serving as an expert witness for Mr. Anderson in the case.

8. On August 29, 2001, Respondent served a Notice of Designation of Experts on counsel for the defendants in which he designated Dr. Wynn as an expert witness to testify on behalf of Mr. Anderson and summarized her expected testimony that Mr. Anderson's shoulder surgery preceding her examination of him was below the standard of care for such surgery and

involved technical error, and that the surgeon who performed the surgery failed to elicit an informed consent from Mr. Anderson.

9. On October 4, 2001, before the commencement of her deposition, Dr. Wynn handed the Respondent a notarized writing in which she stated "I will not serve as an expert witness in this case."

10. The night before Dr. Wynn's deposition on October 4, 2001, the Respondent had his client's medical files delivered to Dr. Wynn with a request that she review them. Dr. Wynn testified that she did not review the files because she had not agreed to serve as an expert witness for Mr. Anderson.

11. Dr. Wynn's deposition on October 4, 2001, was the first occasion that she had seen or spoken with the Respondent.

12. At her deposition Dr. Wynn examined the portion of the Notice of Designation of Experts summarizing her expected testimony and testified that neither the Respondent nor anyone in his office spoke with her about the opinions summarized or whether she held those opinions. In fact, Dr. Wynn did not hold the opinions summarized in her expected testimony, and she had never authorized her designation as an expert witness.

13. At the deposition of Dr. Wynn, the Respondent said to her "Doctor, I realize that you were not apprized [*sic.*] of the fact that you were designated as an expert, . . . Sometimes the designation is done with or without permission. Usually you like to get permission."

14. The Respondent states that he designated Dr. Wynn as an expert witness based on what his client told him Dr. Wynn had said during his client's office visits with her. For her part, Dr. Wynn denies expressing any medical opinion to the Andersons regarding his prior surgery, a

deviation from the standard of care, or informed consent. Indeed, Dr. Wynn states that she could not form an opinion because she had not seen the medical records of the prior surgery.

15. The Respondent designated two other physicians as experts on behalf of Mr. Anderson in the Notice of Designation of Experts, David G. Urquia, M.D., and Thomas Neviaser, M.D., and included a summary of their expected testimony.

16. Dr. Urquia's deposition was taken on October 9, 2001. Dr. Urquia had agreed with the Respondent to review medical records that the Respondent was to send to him. Dr. Urquia received incomplete medical records and informed the Respondent that no review would be made until all of the medical records were received. Dr. Urquia did not receive any further medical records and never made a review.

17. Dr. Urquia never formed any medical opinions regarding Mr. Anderson and never agreed to serve as an expert witness or to be designated as an expert witness.

18. Dr. Neviaser's deposition was taken on October 18, 2001. He had not agreed to serve as an expert witness for Mr. Anderson. He did not know that the Respondent had designated him as an expert in the Notice of Designation of Experts until he received the portion of it pertinent to himself after it had been served on August 29, 2001. Contrary to the summary of Dr. Neviaser's expected testimony in the Notice of Designation of Experts, Dr. Neviaser testified that he would not give testimony regarding the prior surgeon's standard of care.

Mary Ann Carroll v. Winchester Regional Health Systems, Inc., et al.

19. The Respondent was counsel of record for Mary Ann Carroll in a medical malpractice action brought against Winchester Regional Health Systems, Inc., *et al.*, in the Circuit Court of Warren County, Virginia, Case No. 00-134.00.

20. On November 8, 2001, the Respondent served a detailed, ten-page expert witness designation in which he identified five physicians as standard of care witnesses and set forth the substance of their expected testimony that the defendant radiologist had violated the standard of care.

21. On December 17, 2001, the Court ordered the Respondent to require each of his designated expert witnesses to sign an endorsement of the expert witness designation stating "I have reviewed the Plaintiff's designation of my testimony, and I hereby affirm that the contents are true and correct to the best of my knowledge and belief, and that I hold the opinions therein expressed."

22. On January 17, 2002, the Respondent withdrew his previous designation of experts and filed a supplemental expert witness designation in which only two of the originally designated five physicians were named. None of the new designations contained any reference to any deviation from the standard of care by the radiologist-defendant. The Respondent non-suited Mr. Carroll's case.

23. The Honorable John E. Wetzel, Jr., was the presiding judge in both the *Anderson* case and the *Carroll* case and imposed sanctions on the Respondent in each case.

24. In *Anderson*, on November 20, 2001, Judge Wetzel ordered the Respondent to pay $11,192 to Winchester Surgical Clinic and Thomas W. Daugherty, M.D., and $11,192 to Warren Memorial Hospital in attorneys' fees. In addition, Judge Wetzel barred the Respondent and his firm from representing Mr. Anderson if the nonsuited case were to be re-filed. Judge Wetzel also ordered that any designated expert witness must endorse all of the Respondent's expert witness designations and interrogatories.

25. In *Carroll*, on April 3, 2002, Judge Wetzel ordered the Respondent to pay $7,165 in attorney's fees and costs to defendant-Dr. Miller. Judge Wetzel also ordered that the Respondent may not file a medical malpractice action in the Commonwealth of Virginia "unless prior to the filing of the action, he has retained an expert witness who has stated in writing that the health care provider has violated the standard of care."

Atkins v. John A. Spratt, M.D.

26. The Respondent was counsel of record for Ronnie Ray Atkins in a medical malpractice action brought against John A. Spratt, M.D., in the Circuit Court of the City of Richmond, Virginia, Case No. LX-1789.

27. On December 6, 1995, the Respondent served his Second Supplemental Designation of Expert and therein identified A. Robert Tucker, M.D., as an expert witness for Mr. Atkins and summarized Dr. Tucker's expected testimony. Dr. Tucker's counsel, Ann G. Scher, inquired of the Respondent for the specifics of any deviation from the standard of care on Dr. Tucker's part. The Respondent informed her that he could not give specifics because he had not yet talked with Dr. Tucker.

28. Dr. Tucker's deposition was taken on January 5, 1996. Dr. Tucker had agreed with the Respondent that he would review Mr. Atkins' medical records but informed the Respondent that because he did not consider himself an expert in Mr. Atkins' particular condition, he would not testify as an expert witness for Mr. Atkins. Contrary to the Respondent's summary of the expected testimony of Dr. Tucker, Dr. Tucker believed Mr. Atkins' surgical procedure was excellent, and that there was no malpractice on Dr. Spratt's part.

29. In the *Atkins* case the Respondent was sanctioned $4,010.80 for designating Dr. Tucker as an expert witness when the Respondent knew that Dr. Tucker had refused to testify as an expert witness for Mr. Atkins.

30. The Respondent has paid the monetary sanctions, imposed on him in *Anderson, Carroll,* and *Atkins*.

31. Rule 4:1(b)(4)(A)(i) of the Rules of the Supreme court of Virginia provides, as follows:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. . . .

32. Rule 4:1(e) of the Rules of the Supreme Court of Virginia provides, as follows:

> A party who has responded to a request for discovery is under a duty to supplement or correct the response to include information thereafter acquired in the following circumstances.
>
> (1) A party is under a duty promptly to amend and/or supplement all responses to discovery requests directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony, when additional or corrective information becomes available.

33. Code of Virginia § 8.01-271.1 (1950), as amended, provides as follows, in pertinent part.

> The signature of an attorney or party constitutes 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 reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) 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. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

34. Bradley v. Poole, 187 Va. 432, 439, 47 S.E.2d 341, 344 (1948), states the following with respect to the relationship with an expert witness:

> When a litigant seeks the opinion and aid of an expert in a trial the relationship between the parties is different from that of an ordinary witness summoned to testify to some pertinent fact known to him. *In the former case the duty of the witness to attend the trial and give testimony, or otherwise aid the litigant, is created by contract.* In the latter case the duty of the witness to attend the trial and testify is a duty created by law and arises out of necessity in the administration of justice. . . .

(italics supplied.)

35. The Respondent's explanation of his conduct is that the "rules" did not require him to have personal communication with the physicians before his expert witness designations of them, that personal communication was prudent but not required, and that it was proper for him to rely on his clients, his examination of their medical records, and the texts he examined in serving his expert witness designations on opposing counsel.

II. DISPOSITION

The Board retired to a closed session to deliberate. Following its deliberation, the Board reconvened in open session and the Chair Designate announced it had unanimously found by clear and convincing evidence that the Respondent's conduct constitutes a violation of the following Virginia Rules of Professional Conduct, effective January 1, 2000, in the *Anderson* and *Carroll* matters, and the Disciplinary Rules of the Virginia Code of Professional Responsibility, effective before January 1, 2000, in the *Atkins* matter, to wit:

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:

(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; or

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

DR 1-102. Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law.

DR 7-102. Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(5) Knowingly make a false statement of law or fact.

DR 7-105. Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

The Chair Designate then announced that the board had unanimously found that the VSB had failed to prove by clear and convincing evidence a violation of the following: Rule 3.3(a)(4), Rule 3.4(c), Rule 3.4(i), Rule 4.4, DR 7-102(A) (3), (4), or (6), and DR 7-105(C) (5) and (6).

III. SANCTION

Thereupon, the Board called for evidence in mitigation or in aggravation. Bar Counsel stated that the Respondent had no prior disciplinary record. Bar Counsel presented the testimony of Andrea H. Wynn, M.D. The Respondent presented his own testimony.

Thereupon the Board heard argument from Bar Counsel and the Respondent and retired to a closed session for deliberation of sanctions. Following its deliberation, the Board

reconvened in open session and announced it had unanimously determined that the Respondent's license to practice law in the Commonwealth of Virginia should be suspended for a period of two years, effective February 1, 2005.

Accordingly it is ORDERED that the license of the Respondent, David H. N. Bean, to practice law in the Commonwealth of Virginia be and hereby is SUSPENDED for a period of two years, effective February 1, 2005.

The Board notes that the Respondent's misconduct implicated and adversely affected innocent people, particularly Dr. Wynn who testified to her embarrassment and the strain on her professional relationships in her medical practice. The Board also notes that, but for the absence of a prior disciplinary record, the monetary sanctions previously imposed in Richmond Circuit Court and Warren County Circuit Court, and the Respondent's professed acceptance of the lesson from those courts, the sanction imposed would be more severe. The Board observes that a lack of candor and trustworthiness between opposing counsel, as well as with witnesses, ill-serves the profession and the adversary system of justice. The Board also observes that zealous representation of clients is inexorably circumscribed by the Virginia Rules of Professional Conduct.

It is further ORDERED that Respondent must comply with the requirements of Part Six, § IV, ¶ 13(M) of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within fourteen days of the

effective date of the suspension, and make such arrangements as are required herein within forty-five days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13 (M) shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

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

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to the Respondent at his address of record with the Virginia State Bar, 258 West King Street, Strasburg, Virginia 22657, by certified mail, return receipt requested, and by hand to Paul D. Georgiadis, Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Enter this Order this 20th day of December, 2004.

VIRGINIA STATE BAR DISCIPLINARY BOARD

James L. Banks, Jr., Chair Designate

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