VIRGINIA:

DEC 9 2004

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
CHARLES EVERETT MALONE

VSB DOCKET NO. 04-010-0765
04-010-1444

ORDER OF SUSPENSION WITH TERMS

This matter came to be heard on December 7, 2004, upon an Agreed Disposition between the Virginia State Bar and the Respondent, Charles Everett Malone.

A duly convened panel of the Virginia State Bar Disciplinary Board consisting of Janipher W. Robinson, Esquire, Robert E. Eicher, Esquire, Glen M. Hodge, Esquire, Werner Quasebarth, Lay Member, and James L. Banks, Jr., Esquire, Acting Chair, considered the matter by telephone conference. The Respondent, Charles Everett Malone, Esquire, appeared *pro se*. Edward L. Davis, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar.

Upon due deliberation, it is the decision of the board to accept the Agreed Disposition, subject to an amendment to the term as set forth herein. The Stipulations of Fact, Disciplinary Rule Violations, and Disposition agreed to by the Virginia State Bar and the Respondent, as modified, are incorporated herein as follows:

I. STIPULATIONS OF FACT

1. During all times relevant hereto, the Respondent, Charles Everett Malone (hereinafter Respondent or Mr. Malone) was an attorney licensed to practice law in the Commonwealth of Virginia.

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Complainant: VSB/Trust Account

2. On June 10, 2003, Zack Pippins sold a parcel of property to Arnold L. Shands and Eldret

Watson. The settlement agent was Home Title & Escrow of Virginia Beach, Virginia. Mr. Malone received $267.50 in attorney's fees from each of the parties, according to line 1107 of the settlement statement.

3. The settlement statement indicates on line 603 that cash to the seller (Mr. Pippins) was $31,702.58.

4. Among the settlement documents was an escrow agreement between the buyers, sellers, and Mr. Malone as escrow agent containing the following paragraph:

> *1. Escrow Agent and Account: Charles E. Malone will serve as Escrow Agent to whom Buyers shall deposit, at settlement of the transfer in accordance with the Contract, the balance of the sale price of $32,000.00. Charles E. Malone shall deposit and hold in his non-interest-bearing Trust Account the $32,000.00 until June 29, 2003 on which date Escrow agent shall deliver a check to the seller for $32,000.00*

5. On July 3, 2003, check number 3-19992 in the amount of $31,702.58, drawn upon the account of Home Title & Escrow Insurance Agency, Inc., was paid "To the order of Charles Malone, in Trust for Zack Pippins."

6. On July 7, 2003, Mr. Malone deposited the check into his attorney trust account. Prior to the deposit, his trust account had a balance of one dollar.

7. On July 12, 2003, Mr. Malone disbursed check number 101, drawn on the same trust account, and payable to himself in the amount of $5,000. He annotated "Pippins fee" on the check.

8. On July 15, 2003, the check cleared, resulting in a balance of $26,702.58 in Mr. Malone's trust account. The balance remained under $31,702.58 until August 6, 2003.

9. On August 6, 2003, Mr. Malone's trust account balance was $195,707.58, resulting from a deposit on that day of $169,005.00 in an unrelated matter. By August 8, 2003, the balance was $170,525.08. On August 19, 2003, the balance was $26,702.58.

10. On August 25, 2003, Mr. Malone wrote check number 1008 in the amount of $31,702.58 from his trust account to Zack Pippins, despite the fact that his trust account ledger showed only $26,702.58 on account for Zack Pippins.

11. Mr. Pippins negotiated the check; however, when the check was presented to Mr. Malone's bank, there were insufficient funds to pay it. The bank paid the check nonetheless, causing a negative balance of $1,374.80 in the trust account.

12. The bank reported the overdraft to the Virginia State Bar. Mr. Malone failed to respond to the bar's inquiry about the overdraft.

13. Mr. Malone advised the Virginia State Bar investigator that he recognized a possibility that there would not be enough funds in the account to cover the check when he presented the check to Mr. Pippins, but that he was hopeful some checks he had previously disbursed had not yet cleared, so there might be sufficient funds for Mr. Pippins' check to clear.

14. Mr. Malone's trust account continued to carry a negative balance until September 3, 2003, when he deposited $1,060.

15. Zack Pippins advised the Virginia State Bar investigator that he never authorized Mr. Malone to disburse $5,000 from the funds he held in trust, and never agreed to pay any legal fees to Mr. Malone above the $267.50 he paid to him at the closing.

16. Mr. Malone explained that the $5,000 represented fees for assisting Rev. Pippins in a dispute that developed with the sellers after closing over the grading of land. He said that he did not obtain Rev. Pippins' authorization to take the $5,000, and did not discuss a fee with him.
17. Rev. Pippins said that Mr. Malone did not negotiate any settlement in the dispute, that the negotiations took place between him and the buyers, and that Mr. Malone played no part.

18. Rev. Pippins said that in July 2003, realizing that he had not received his money, he contacted Mr. Malone's office, but was told that he had to talk to Malone after he returned from out of town. He did not receive his funds until the end of the following month.

II. NATURE OF MISCONDUCT *(04-010-0765)*

The parties agree that the foregoing facts give rise to violations of the following Rules of Professional Conduct:

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 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

RULE 1.5 Fees

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

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 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:

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

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;

(c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;

I. STIPULATIONS OF FACT (Continued)

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Complainant: Mrs. Vivian L. Warren

19. On February 26, 2002, the Circuit Court for Southampton County sentenced Elijah M. Warren to several years of incarceration on his convictions of burglary, grand larceny, armed robbery and use of a firearm during the commission of a robbery.

20. On March 18, 2002, Mr. Warren noted an appeal through his hired attorney, Dwayne B. Strothers.

21. On May 20, 2002, the court appointed Mr. Strothers to prosecute the appeal, Mr. Warren being unable to pay Mr. Strothers.

22. Mr. Strothers perfected the appeal, and the Court of Appeals denied it on August 21. 2002.

23. Meanwhile, during May 2002, Mr. Warren's Aunt, Vivian Warren, consulted with Mr. Malone about prosecuting her son's appeal in place of Mr. Strothers, and Mr. Malone agreed to do so.

24. On May 6, 2002, Mrs. Warren paid Mr. Malone $560 for the purpose of reviewing the trial transcript and file. On June 3, 2002, she paid him $1,500 cash as partial payment for the appeal. On June 21, 2002, she paid him an additional $500 in cash and $500 by check for the balance of the appeal fee.

25. On June 28, 2002, Mr. Malone filed a "Motion for Extension to File Petition for Appeal" with the Court of Appeals of Virginia.

26. In the motion, Mr. Malone acknowledged that the Court had already appointed Mr. Strothers for the appeal, but said that the Petitioner was not satisfied with Mr. Strothers' representation at trial and sentencing, and desired to have another lawyer represent him. He said further that the Petitioner's family, "after much solicitation," raised and delivered the necessary funds to Mr. Malone on June 21, 2002. He said that he did not have time to prepare, complete and file a petition for appeal by June 24, 2002. Finally, he said that the Petitioner's aunt had advised Mr. Strothers that he did not desire Mr. Strothers' services as they had hired Mr. Malone.

27. Despite the fact that he knew Mr. Strothers was counsel of record, Mr. Malone never filed a motion or order allowing him to substitute himself as counsel or allowing Mr. Strothers to withdraw.

28. By letter, dated June 28, 2002, the Court of Appeals responded to Mr. Malone's motion, stating that Mr. Malone had no standing to file his motion because Mr. Strothers was counsel of record, that Mr. Strothers had already timely filed a petition for appeal, and that the Court, accordingly, would take no action on Mr. Malone's motion.

29. Thereafter, Mr. Malone never entered the case, and never took any further action in the matter, although it was eventually concluded at the Supreme Court of Virginia.

30. Mr. Malone never advised Ms. Warren about the letter from the Court of Appeals, and Mrs. Warren never learned the outcome of the appeal until she wrote to the Court of Appeals herself.

31. Mr. Malone never refunded any of the $3,060 advanced to him by Mrs. Warren, despite repeated requests by her, including a letter, dated March 1, 2004, and his advice to the Virginia State Bar investigator that he would do so.

32. A review of Mr. Malone's trust account records revealed that he never deposited Mrs.

Warren's advanced fees into his attorney trust account, except possibly the $560 in May 2002, and possibly a $500 portion of the $1,500 cash payment on June 10, 2002. Due to lack of records, however, he could not confirm if Ms. Warren's funds were the source of these deposits.

33. Mr. Malone acknowledged that he may not have deposited any of the funds into his attorney trust account, saying that there were problems with his trust account during that time period.

34. Further investigation revealed that he endorsed Ms. Warren's $500 check to Arlene Malone, who deposited it into a non-trust account at the Chartway Federal Credit Union on June 22, 2002.

35. Mr. Malone did not respond to the bar complaint.

II. NATURE OF MISCONDUCT *(04-010-1444)*

The parties agree that the foregoing facts give rise to violations of the following Rules of Professional Conduct:

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 1.3 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.

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

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

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

(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 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:

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of

information otherwise protected by Rule 1.6; or

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;

III. DISPOSITION

In accordance with the Agreed Disposition, Charles Everett Malone's license to practice law in the Commonwealth of Virginia is hereby **Suspended** for a period of **two (2) years**, effective December 10, 2004, subject to the following terms and conditions:

1. By June 10, 2005, The Respondent, Charles Everett Malone, will issue a refund in the amount of $3,060 (three thousand and sixty dollars) to Vivian L. Warren. (The Respondent and the bar agreed during the telephone conference to amend the amount owed to $3,060.)

Failure to comply with the foregoing term will result in the imposition of the alternate sanction, the Suspension of the Respondent's license to practice law in the Commonwealth of Virginia for an additional two-year period (an aggregate suspension of four years).

The imposition of the alternate sanction will not require a hearing before the Three-Judge Court or the Virginia State Bar Disciplinary Board on the underlying charges of misconduct stipulated to in this Agreed Disposition if the Virginia State Bar discovers that the Respondent has violated any of the foregoing terms and conditions. Instead, the Virginia State Bar shall issue and serve upon the Respondent a Notice of Hearing to Show Cause why the alternate sanction should not be imposed. The sole factual issue will be whether the Respondent has violated the terms of this Agreed Disposition without legal justification or excuse. The imposition of the alternate sanction shall be in addition to any other sanctions imposed for misconduct during the probationary period. All issues concerning the Respondent=s compliance with the terms of this Agreed Disposition shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

Upon the suspension of his license, the Respondent must comply with the requirements of Part 6, Section IV, Paragraph 13.M of the Rules of the Supreme Court of Virginia and notify all appropriate persons about the suspension of his license if he is handling any client matters at the time. If the Respondent is not handling any client matters on the effective date of his license 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.

The court reporter who transcribed these proceedings is Tracy Stroh, RPR, of Chandler & Halasz, Registered Professional Reporters, Post Office Box 9349, Richmond, Virginia 23227. (804) 730-1222.

Pursuant to Part 6, Sec. IV, Para. 13.B.8(c) of the Rules, the Clerk of the Disciplinary System shall assess costs.

ENTERED THIS 7th DAY OF December, 2004

THE VIRGINIA STATE BAR DISCIPLINARY BOARD

By _____
James L. Banks, Jr., Esquire
Acting Chair