

VIRGINIA:

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BEFORE THE SEVENTH DISTRICT COMMITTEE
OF THE VIRGINIA STATE BAR

JUL 20 2010

IN THE MATTER OF
HENRY L. CARTER

VS B CLERK'S OFFICE

VS B Docket No. 08-070-074634

DISTRICT COMMITTEE DETERMINATION
(PUBLIC DISMISSAL *DE MINIMIS*)

On June 8, 2010, a hearing in this matter was held before a duly convened Seventh District panel consisting of David A. Penrod, Esq., Samuel R. Walker, Esq., William A. Bassler, Esq., D. Brook Green, Esq., Richard E. Carter, Esq., Richard E. Lyons, Lay Member, and William H. Atwill, Jr., Esq., presiding.

Respondent Henry L. Carter, Esq., appeared in person and with his counsel, Timothy Joseph Battle. Alfred L. Carr, Assistant Bar Counsel, appeared as counsel for the Virginia State Bar.

Pursuant to Part 6, Section IV, Paragraph 13-16.X.1 of the Rules of the Virginia Supreme Court, the Seventh District Committee of the Virginia State Bar hereby serves upon the Respondent the following Public Dismissal *De Minimis*:

I. FINDINGS OF FACT

1. At all times relevant hereto, Henry L. Carter, Esq., ("Respondent"), has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. In May of 1991, Mr. Lose, acting as Executor of his deceased Mother's estate, contacted Frank Somerville, Esq., of Orange, Virginia, to sell 12.75 acres of undeveloped land in Orange County, Virginia pursuant to her expressed desire to keep the land in her family.
3. In July of 1991, Mr. Somerville replied to Mr. Lose and requested a five hundred (\$500) advanced legal fee to hire the law firm and initiate the process to sell the 12.75 acres of raw land to a coparceners, but preferably to him.

4. On or about May 16, 1995, William Lose¹ hired Frank Somerville, Esq., to file a partition lawsuit on his behalf.

5. On or about June 7, 1995, Mr. Lose paid five hundred dollars (\$500) in advanced legal fees to the law firm of Atwell, Somerville & Associates to prosecute the partition lawsuit.

6. In April of 1997, Mr. Lose paid two thousand five hundred dollars (\$2,500) in additional advance legal fees to Somerville's law firm to cover expenses and further prosecute the partition lawsuit on his behalf.

7. In May of 1994, Richard K. Wilkinson, Esq., joined the Somerville law firm.

8. On or about May 1, 1998, the law firm was renamed Somerville, Sellers, & Wilkinson, LTD.

9. Mr. Somerville was the first attorney to work on the case until his appointment to the Juvenile and Domestic Relations District Court in 1994.

10. After Mr. Somerville departed the law firm, Pamela Sellers, Esq., became the responsible attorney in the firm to prosecute the lawsuit.

11. From 1995 through her departure from the firm in February of 1998, Ms. Sellers prosecuted the lawsuit.

12. In a letter dated February 18, 1998, Mr. Wilkinson had informed Mr. Lose that he was the attorney responsible for the legal matter in which he had hired the law firm in 1995.

13. In a letter dated February 25, 1998, addressed to Mr. Wilkinson, Mr. Lose expressed his disappointment and bewilderment in the lack of progress made in the case by Ms. Sellers.

14. In March of 1998, Mr. Wilkinson filed the partition lawsuit in the Circuit Court of Orange County on behalf of Mr. Lose, as the plaintiff, and named Mr. Sherwin, Ms. Bick, and others, as the respondents.

¹ In 1995, Mr. Lose resided in California, but now resides in Florida.

15. In July of 1998, as respondents adverse to Mr. Lose, Mr. Sherwin and Ms. Bick hired Respondent, Mr. Carter, to protect their legal interests concerning the partition lawsuit filed by Mr. Wilkinson.

16. In February of 2000, Respondent withdrew as counsel for Mr. Sherwin and Ms. Bick.

17. On or about May 10, 2000, Respondent filed a warrant in debt and successfully obtained a judgment against Mr. Sherwin and Ms. Bick to collect his unpaid legal fees, each owing Respondent for one-half of the total legal bill.

18. On or about June 5, 2000, Mr. Sherwin paid Respondent one thousand one hundred thirty nine dollars and twenty-five cents (\$1,139.25), to settle his account and terminated Mr. Carter as his attorney in the partition lawsuit.

19. At some point in 2003, Respondent joined Mr. Wilkinson's law firm and on January 1, 2004, they formed a new law firm called Somerville, Carter & Wilkinson, LTD.

20. On March 5, 2003, the Circuit Court of Orange County served notice on the Somerville, Wilkinson and Wheeler law firm to appear on March 31, 2003, at 1:30 p.m. to show cause why the Court should not strike the partition lawsuit from the docket for lack of activity for more than two (2) years pursuant to Sec. 8.01-335A, Code of Virginia, 1950, as amended.

21. On March 31, 2003, Mr. Wilkinson filed a Motion to Amend and the order granting motion to amend for the Court's signature.

22. On or about July 8, 2004, Frank A. Thomas, III, Esq., the Commissioner in Chancery appointed by the Court, informed Mr. Wilkinson that he had the burden to move the case forward. He further expressed his obligation to report to the Court that this case was suitable for dismissal under the two (2) year rule.

23. In a letter dated February 6, 2006, Respondent informed Mr. Lose that he had become a law partner with Mr. Wilkinson, that the case became his responsibility to prosecute, and asked for Mr. Lose's permission to do so.

24. On February 27, 2006, Mr. Lose asked Respondent whether it is a conflict of interest for Respondent to represent him after he had represented his adversaries, Mr. Sherwin and Ms. Bick, in the same legal matter and inquired of the status of the lawsuit.

25. On March 24, 2006, Respondent replied no, that a conflict of interest did not exist, and he could now represent Mr. Sherwin, Ms. Bick, and Mr. Lose in the same partition lawsuit.

26. On or about April 20, 2006, Mr. Lose, in reliance upon Respondent's representation that a conflict did not exist, acquiesced to his request to continue with the case as the lead attorney.

27. However, in a letter dated June 19, 2006, Respondent asked Frank Thomas, Esq., the court appointed Commission in Chancery, for his legal opinion whether it was a conflict of interest to now represent his former adversary, Mr. Lose, as well as his two former clients that had adverse interests to Mr. Lose in the very same legal matter – the partition lawsuit.

28. Additionally, Respondent had obtained a judgment against his two former clients for legal representation in the very same legal matter.

29. On April 11, 2006, three years after the first rule to show cause on March 5, 2003, for lack of activity on the case, the Court removed the partition lawsuit from the docket because of inactivity for more than three (3) years and so notified the Somerville, Carter & Wilkinson law firm, as well as the other attorneys listed as counsel of record in the case -- the Commissioner in Chancery had held the first hearing on March 19, 1999.

30. In July of 2006, Respondent contacted his former client, Ms. Bick, by letter to get her consent to represent Mr. Lose and waive the conflict of interest created by his having had represented her as an adverse party to Mr. Lose in the same legal matter – the partition lawsuit.

31. Ms. Bick had died, however, her husband signed and returned the letter to Respondent that provided her consent for the dual representation and waived the conflict of interests and Respondent informed Mr. Lose.

32. Respondent had not informed Mr. Lose that the Court had dismissed the case on April 11, 2006.

33. In a letter dated August 22, 2006, addressed to both Mr. Lose and to Mr. Bick, Respondent only then informed them that he had to reinstitute the suit because the Court had dismissed the case “due to no action having been taken on it for two years.”

34. By letter dated September 20, 2006, Respondent advised Mr. Lose that he had reviewed all the correspondence, pleadings, and family information and was ready to update the family tree to include newly discovered coparceners, which he had discovered in March of 1999 as counsel for Ms. Bick, to institute a new suit for partition of the 12.75 acres.

35. On or about September 24, 2006, Mr. Lose, acknowledges receipt of Respondent’s letters dated August 22, 2006, and September 20, 2006, and stated further that he is “disappointed and confused as to how this court proceeding could be dismissed while having Somerville, Carter & Wilkinson representing me and me not being advised of this.”

36. On or about January 24, 2007, Respondent contacted Mr. Lose to explain further that Mr. Bick had waived the conflict of interest and that he could proceed prosecuting the case as the attorney for both he and Mr. Bick and ask that he reply by February 17, 2007, with his permission to do so.

37. On February 1, 2007, Mr. Lose responded and asked whether Mr. Sherwin had consented to the dual representation and waived the conflict of interest, as Respondent's letters were silent on this issue.

38. On February 21, 2007, Respondent mailed Mr. Sherwin a letter, certified, return receipt requested, seeking his consent for the dual representation and waiver of the conflict of interest. Mr. Sherwin signed for the certified letter, but did not respond to it.

39. In a letter dated April 12, 2007, Respondent informed Mr. Sherwin that his silence or nonresponsiveness to the February 21, 2007, and/or April 12, 2007, letters was deemed as his consent to the dual representation and a waiver of the conflict of interests.

40. On April 30, 2007, Respondent informed Mr. Lose that he had resolved the problem with Mr. Sherwin, even though he had not received a response from him.

41. On May 5, 2007, Mr. Lose, again, in reliance on Respondent's representation that a conflict did not exist, acquiesced to his request to continue with the case as the lead attorney.

42. On June 8, 2010, the Seventh District Committee found, by clear and convincing evidence, that Respondent did have a concurrent conflict of interest because Mr. Lose and Respondent did have an attorney/client relationship.

II. NATURE OF MISCONDUCT

Such conduct by Respondent, Henry L. Carter, Esq., constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

1. **RULE 1.7 Conflict of Interest: General Rule**

(b) Notwithstanding the existence of a concurrent of interest under paragraph(a), lawyer may represent a client if each affected client consents after consultation, and:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) the consent from the client is memorialized in writing.

III. DISMISSAL DE MINIMIS

Accordingly, it is the decision of the Seventh District Committee that Respondent receive a Dismissal *De Minimis* pursuant to Paragraph 13-16.X.1 of the Rules of Court.

Pursuant to Paragraph 13-9.E., the Clerk of the Disciplinary System shall assess costs.

SEVENTH DISTRICT COMMITTEE
OF THE VIRGINIA STATE BAR

By: 

William H. Atwill, Jr.
Chair, Seventh District Committee

CERTIFICATE OF MAILING

I certify that on ~~June~~^{July 20}, 2010, I caused to be mailed by Certified Mail, Return Receipt Requested, a true and complete copy of the District Determination Public Dismissal *De Minimis* to Henry L. Carter, Respondent, at Somerville, Carter & Wilkinson, Ltd., 113 West Main Street, P.O. Box 629, Orange, VA 22960, his last address of record with the Virginia State Bar, and to Timothy Joseph Battle, Respondent's Counsel, at Law Office of Timothy J. Battle, P.O. Box 320593, Alexandria, VA 22320-4593.


