

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF DAVID McCrory ESTABROOK
VSB Docket No. 08-052-071266**

MEMORANDUM ORDER

This matter came on June 20, 2011, to be heard on the Agreed Disposition of the Virginia State Bar and the Respondent, David McCrory Estabrook, based upon the Certification of a Fifth District—Section II Subcommittee of the Virginia State Bar. The Agreed Disposition was considered by a duly convened panel of the Virginia State Bar Disciplinary Board consisting of Stephen A. Wannall, lay member, Raighne C. Delaney, Peter A. Dingman, Glenn M. Hodge, and Pleasant S. Brodnax, III, presiding Chair.

Seth M. Guggenheim, Senior Assistant Bar Counsel, representing the Bar, and the Respondent, David McCrory Estabrook, represented by Stephen R. Pickard, presented an endorsed Agreed Disposition, entered into on June 16, 2011, reflecting the terms of the Agreed Disposition. The court reporter for the proceeding was Jennifer L. Hairfield, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222.

Having considered the Certification and the Agreed Disposition, it is the decision of the Board that the Agreed Disposition be accepted, and the Virginia State Bar Disciplinary Board finds by clear and convincing evidence as follows:

1. At all times relevant to the conduct set forth herein, David McCrory Estabrook (“Respondent”) was an attorney licensed to practice law in the Commonwealth of Virginia.
2. The Respondent, with other counsel, represented the defendants in a civil suit in the Fairfax County, Virginia, Circuit Court, styled *Ana G. Ruiz Arias, et al. v. Jokers Wild, Inc.*,

et al., Civil Action No. CL 2005-2513. The matter was set for a four-day trial to commence on Monday, July 17, 2006.

3. The Respondent attended a deposition in the matter on June 1, 2006. On or about June 22, 2006, the Respondent made a formal complaint to the Virginia State Bar that one of plaintiffs' counsel in the aforesaid case, Kevin Byrnes ("Complainant"), challenged the Respondent to a fight at the June 1, 2006, deposition, and that the Respondent suspected that the Complainant failed to disclose his employment and medical history to the Virginia State Bar at the time Complainant made application to become a member of the Virginia State Bar.

4. The bar complaint, which was dismissed on June 28, 2007, was filed as part of a scheme designed to secure a continuance of the scheduled trial date by forcing Complainant's withdrawal from case.

5. On July 7, 2006, the Respondent sent an e-mail to the Complainant, which *inter alia*, stated "I will be filing a motion to stay this case. I would prefer to send it to you confidentially and file it under seal. Please advise me how you prefer it to be sent; I would suggest email if one of your addresses is private. Please advise. I can hand-deliver it to you at calendar control if you prefer. I will appear early next week at calendar control to request the filing of the motion under seal for counsels' eyes only and a hearing on the motion."

6. After e-mails and a phone message requesting that Respondent acquaint the Complainant with the substance of his motion, the Respondent forwarded the motion and a revision thereof to the Complainant. The motion was entitled "Defendant's Motion for Stay," and contained the allegation regarding Complainant's behavior at the June 1, 2006, deposition, and a chronology of litigated matters related to Complainant's termination from his prior employment, and associated alleged mental health issues.

7. The said Motion alleged, without basis in fact, that “[c]ircumstances suggest” that the Complainant “may not have disclosed” the adverse information detailed in the Motion on the Complainant’s application for the Virginia Bar Examination.

8. With neither basis in fact nor law for such a contention, the Respondent advanced the argument in his said Motion that if the Complainant had made a material omission on his application for a Virginia law license the Respondent’s clients were at risk “that this case will be declared a nullity after trial, and that this case will be refiled and tried again.”

9. Respondent’s contention that “this case will be declared a nullity” was without legal support, was made at a time when the Complainant was a member in good standing of the Virginia State Bar, and was made at a time when the plaintiffs in the civil action were also represented by other members of the Complainant’s law firm.

10. On July 10, 2006, a member of the Complainant’s law firm faxed the Respondent a letter providing detailed information and documentary support which by any objective standard should have satisfied the Respondent that his said Motion was inaccurate and baseless. Nonetheless, the Respondent failed or refused promptly to withdraw his threat to file the said Motion, and compelled the Complainant and a member of his firm to appear pursuant to the Court’s calendar control procedure on July 11, 2006.

11. The Respondent did not thereafter file the threatened Motion, but, instead faxed a letter to the Complainant on July 13, 2006, attaching a “draft statement” which was to serve as the basis of Respondent’s continuance motion to be made at calendar control on Friday, July 14, 2006, the last business day immediately preceding the scheduled trial date.

12. The draft statement made reference to “[an] incident in this case on June 1” which led to the opening of a bar complaint and stated, *inter alia*, that “Because of the disruption caused by the Bar Complaint and the recriminations in response to the Bar Complaint, added to

the relatively high level of animosity between the parties and counsel in this case and the total of thirty-three (33) three [*sic*] fact witnesses (including the individual parties) identified, as well as four (4) motions in limine filed by the Plaintiffs, the trial that is set for four (4) days is likely to take longer.” The Respondent went on to assert in the draft statement that a trial of more than four days would “conflict with important personal commitments” and a circuit court trial in another jurisdiction.

13. On July 13, 2006, a member of Complainant’s firm sent an e-mail to the Respondent demanding that the Respondent “not include any reference to the disciplinary charge or your claims as they involve perceived disciplinary issues.” The Respondent was further advised in the e-mail that “the inclusion of such matters before the tribunal in which this case is to be heard it [*sic*] is a patently obvious attempt to misuse the disciplinary process and the use of a disciplinary charge to gain advantage in a civil proceeding.”

14. The Respondent subsequently revised his draft statement in support of a motion for continuance so as to omit references to the bar complaint and alleged animosity, alleging that the number of witnesses, exhibits, and lack of stipulations would likely require a trial longer than four days, which would conflict with Respondent’s “family commitment” and circuit court trial in a different jurisdiction.

15. On July 14, 2006, the Respondent presented his motion for continuance, based on the revised draft statement, to the calendar control judge, who denied it. The matter proceeded to trial, and the Complainant’s clients prevailed and were awarded compensatory and punitive damages as well as attorney’s fees.

16. As to the determination of the amount to be assessed as attorney's fees in favor of Complainant's clients, the Court granted leave to conduct limited discovery, pursuant to which the Respondent propounded interrogatories, among which was the following:

19. If any person billing or participating in billing the attorney's fees claimed suffers from a disability or disabilities, identify the person or persons and state what if any accommodation was made for their disability or disabilities in billing the attorney's fees claimed.

17. The interrogatory was interposed for improper purposes, inasmuch as it had no relevance to the determination of a proper award of attorney's fees. The interrogatory served as a veiled threat by the Respondent to force disclosure, in the event of a motion to compel discovery, of sensitive personal matters concerning the Complainant as contained in "Defendant's Motion for Stay," which the Respondent had earlier threatened to file "under seal," as detailed above.

18. Despite formal objection to interrogatory 19 and the additional efforts of members of Complainant's firm to have Respondent withdraw it, the Respondent persisted, stating, *inter alia*, in a letter dated August 28, 2007, that he would not withdraw the interrogatory and would be filing a motion to compel unless "**the parties and counsel have a written stipulation accepted by the Court** that no claim of disability or accommodation for a disability or lack thereof will be presented by Plaintiffs or their counsel for any purpose whatsoever in this case, including without limitation, as an excuse or a justification for the condition of records on which Plaintiffs' counsel intends to rely for the attorneys' fee claim remaining to be determined." (Emphasis is supplied.) The Respondent subsequently filed a Motion to Compel, to be heard on October 5, 2007, which included interrogatory 19. The Motion to Compel was summarily denied in open court, without argument.

19. A hearing on attorneys' fees and interest was conducted before the Court on October 18, 2007. As of the date of the hearing, the matter of the Respondent's bar complaint against the Complainant, as well as the Respondent's threatened, but unfiled, motion came to the attention of the Court. Although the Complainant's firm made no claim for such an award, the Court nonetheless awarded the sum of \$15,000.00 to cover 50 hours of legal work associated with the bar complaint which the Respondent had filed against the Complainant. The Court stated that Respondent's conduct was

the single most naked use of the disciplinary system I have ever seen to gain a tactical advantage in litigation. Mr. Estabrook, in my opinion, your conduct in filing this complaint and your preparation of a continuance motion, your signing that motion, your service of that motion but not filing the motion on Mr. Byrnes, was conduct that actually shocks the conscience of this Court and I can honestly say that I am not easily shocked, particularly having served almost for 10 years in the disciplinary system either on the Disciplinary Committee or ultimately as Vice Chairman of the Disciplinary Board. *** [H]ad the [motion] been actually filed with the Court instead of Mr. Wade apparently persuading you not to file it, it certainly would have been subject to a 271.1 sanction, because as I said, I have never seen a use of the disciplinary system so egregious to gain a tactical advantage in litigation.

The Board finds by clear and convincing evidence that Respondent's aforesaid conduct constitutes a violation of the following provision of the Virginia Rules of Professional Conduct:

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 3.4 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.
- (i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.
- (j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a . . . deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law[.]

Upon consideration whereof, it is ORDERED as that the Respondent shall receive a PUBLIC REPRIMAND, WITH TERMS effective June 20, 2011, provided he complies with the Terms set forth below. The Terms are as follows:

Within thirty (30) days following June 20, 2011, the date of approval of the parties' Agreed Disposition by the Disciplinary Board, the Respondent shall send a letter of apology to the Complainant stating that he sincerely apologizes for having subjected the Complainant to distress, inconvenience, and expense by engaging in the misconduct detailed above. The Respondent shall contemporaneously deliver a copy of the letter to Respondent to Senior Assistant Bar Counsel Seth M. Guggenheim.

Upon Respondent's compliance with the Terms set forth herein, a PUBLIC REPRIMAND, WITH TERMS, shall be imposed. If, however, Respondent violates any of the Terms set forth herein, then, and in such event, this Board shall, as an alternative disposition to a Public Reprimand, with Terms, impose a suspension of the Respondent's license to practice law in the Commonwealth of Virginia for a period of sixty (60) days.

Pursuant to Part Six, Section IV, Paragraph 13-9E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against the Respondent.

It is further ORDERED that an attested copy of this Order shall be mailed by Certified Mail, to the Respondent, David McCrory Estabrook, at his address of record with the Virginia State Bar being 6037 20th Street North, Arlington, VA 22205-3403, and a copy by regular mail to Respondent's counsel, Stephen R. Pickard, 115 Oronoco Street, Alexandria, VA 22314, and a copy to Seth M. Guggenheim, Senior Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219.

ENTERED this 30th day of June, 2011.



Pleasant S. Brodnax, III,
2nd Vice Chair
Virginia State Bar Disciplinary Board