

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

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VIRGINIA STATE BAR *EX REL*  
FOURTH DISTRICT COMMITTEE SECTION I

JAN 31 2011

Complainant,

Case No. 10-1607

v.

VSB Docket No. 09-041-076478

VSB CLERK'S OFFICE

HENRY ST. JOHN FITZGERALD, ESQUIRE

Respondent

MEMORANDUM ORDER OF PUBLIC REPRIMAND

On the 11<sup>th</sup> day of January, 2011, this matter came before the Three-Judge Court by telephone conference call to said Three-Judge Court empaneled by the Supreme Court of Virginia on December 22, 2010, by Order of the Supreme Court of Virginia pursuant to §54.1-3935 Code of Virginia (1950 *as amended*) consisting of the Honorable H. Harrison Braxton, Jr., Retired Judge of the Fifteenth Judicial Circuit, the Honorable Lon Edward Farris, Chief Judge of the Nineteenth Judicial Circuit, and the Honorable Cheryl V. Higgins, Chief Judge of the Sixteenth Judicial Circuit and Chief Judge of the Three-Judge Court. The hearing was transcribed by Terry S. Griffith, Chandler & Halasz, P.O. Box 9349, Richmond, VA 23227, telephone (804) 730-1222, transcribed the proceedings.

Kathleen M. Uston, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar, and the Respondent, Henry St. John FitzGerald, Esquire, personally appeared represented by counsel, Bernard J. DiMuro, Esquire.

Pursuant to the Rules of the Supreme Court of Virginia, Part VI, Section IV, Paragraph 13-6.H, the Bar and the Respondent entered into a written proposed Agreed

Disposition and presented same to the Court.

The Chief Judge administered an oath to the Court Reporter and polled the members of the court to determine whether any member had a personal or financial interest that might affect or reasonably be perceived to affect his or her ability to be impartial in these matters. Each member, including the Chief Judge, verified they had no such interests.

The Court heard argument from counsel and, thereafter, retired to deliberate on the Agreed Disposition. Having considered all the evidence before it, the Court accepted the Agreed Disposition, and the Court finds by clear and convincing evidence as follows.

I. FINDINGS OF FACT

1. At all times relevant hereto, Henry St. John FitzGerald, Esquire (hereinafter "Respondent"), has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. Mr. Fitzgerald was first licensed in September 1956. He served as Assistant U.S. Attorney from September 1956 to June 1960. Since that time, he has had a long career in private practice.
3. On January 22, 2008, Sam S. Garbia, Esquire, filed suit against Respondent's client, Ms. Lucy Lu, in Fairfax County Circuit Court, and provided a courtesy copy of that pleading to Respondent on January 23, 2008. Ms. Lu was subsequently served at her residence in the District of Columbia by posting on February 14, 2008.
4. Prior to suit having been filed, Respondent had been engaged by Ms. Lu to assist her with settlement negotiations with Mr. Garbia in an attempt to settle the case

short of litigation. In addition, while settlement negotiations were ongoing, Respondent was also attempting to secure counsel in Maryland to file suit preemptively on Ms. Lu's behalf in that jurisdiction to forestall any Virginia proceedings, but he was unable to do so prior to the Fairfax suit being filed.

5. After suit had been filed, however, Respondent did not file an Answer to the Motion for Judgment as he did not intend to enter an appearance as counsel for Ms. Lu in the Fairfax case. Respondent also counseled Ms. Lu that, since service upon her by posting was insufficient under D.C. law, it was not necessary that she file any responsive pleading to the Fairfax suit.

6. Because no Answer had been filed, Mr. Garbia filed a Motion for Default Judgment and set that motion for hearing on April 4, 2008. Mr. Garbia provided a courtesy copy of the Motion for Default Judgment to the Respondent who did not file a response thereto and did not appear at the subsequent hearing on the motion.

7. On April 4, 2008, the court granted Mr. Garbia's Motion and entered default judgment against Ms. Lu, who was not present at the hearing.

8. Thereafter, on April 18, 2008, the Respondent retained co-counsel for Mr. Lu and they filed a Motion to Set Aside Default and Extend Time to Answer, setting that Motion for hearing on April 25, 2008.

9. In support of his Motion to Set Aside the default, the Respondent argued that his client had not filed a responsive pleading to the Motion for Judgment since service upon her by posting was legally ineffective in the District of Columbia. The Respondent also noted that Ms. Lu acted quickly to appear before the court once she became aware of the Order granting default judgment.

10. The Respondent's Motion was heard on April 25, 2008, at which time the court suspended the April 4, 2008, Default Order until such time as the court could more fully consider the Respondent's Motion to Set Aside Default. The Default Order was suspended further on May 16, 2008, and on May 22, 2008, the court granted the Respondent's Motion to Set Aside Default, upon certain conditions.

11. On June 24, 2008, with the case set for trial by jury in October, Ms. Lu terminated the Respondent's services and retained Stephen A. Bamberger, Esquire, to represent her. Mr. Bamberger wrote to the Respondent on June 25, 2008, enclosed a copy of Ms. Lu's June 24, 2008, letter of termination, and requested that Respondent forward to him all of his file materials on Ms. Lu's case. The Respondent did not respond.

12. On July 31, 2008, Mr. Bamberger wrote again to Respondent demanding Ms. Lu's file. The Respondent did not respond, although Respondent states that he did attempt, unsuccessfully, to contact Mr. Bamberger by telephone. On August 20, 2008, Mr. Bamberger wrote to Respondent to advise that if he failed to return Ms. Lu's file on or before August 25, 2008, he would be forced to notify the Virginia State Bar. Mr. Bamberger also advised the Respondent that his failure to turn over the file might require that a continuance of October trial date be sought. The Respondent did not respond.

13. Mr. Bamberger thereafter served the Respondent with a subpoena *duces tecum* demanding that he produce Ms. Lu's file for inspection and copying on or before September 5, 2008. The Respondent did not respond to the subpoena *duces tecum*, and he did not produce Ms. Lu's file as demanded.

14. On September 8, 2008, Mr. Bamberger filed a Rule to Show Cause against the Respondent for his failure to turn over the file, averring therein that on the afternoon of September 5, 2008, the return date of the subpoena *duces tecum*, the Respondent telephoned Mr. Bamberger's office to advise that he would turn over the file if Mr. Bamberger paid for the copying costs.

15. On September 19, 2008, the court granted Mr. Bamberger's Motion for a Rule to Show Cause and ordered that the Respondent appear on October 3, 2008, and show cause why he should not be held in contempt for his failure to comply with the subpoena *duces tecum* for Ms. Lu's file. The Respondent provided Mr. Bamberger with his files on Ms. Lu's case on September 19<sup>th</sup>. All the claims against Ms. Lu were ultimately non-suited by the plaintiff.

## II. NATURE OF MISCONDUCT

**THE THREE-JUDGE COURT** finds by clear and convincing evidence that the aforementioned conduct on the part of the Respondent constitutes a violation of the following provisions of the Rules of Professional Conduct:

### **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).
- (e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the

client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer/client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

### III. IMPOSITION OF SANCTION

**UPON CONSIDERATION WHEREOF**, having considered all the evidence before it and determined to accept the Agreed Disposition, the Three-Judge Court hereby **ORDERS** that the Respondent shall be publicly reprimanded and the Respondent is herewith so **PUBLICLY REPRIMANDED**. Factors to be considered in mitigation of the misconduct, and to be considered in assessing the appropriate sanction, include cooperative attitude towards the disciplinary process, and Respondent's declaration to Assistant Bar Counsel that he will take retirement status in the Virginia State Bar in accordance with Part 6, Section IV, Para. 3(d) of the Rules of the Supreme Court of Virginia within ninety (90) days following approval of this Agreed Disposition.

**IT IS FURTHER ORDERED**, upon entry of this Memorandum Order, this case

shall be closed.

**IT IS FURTHER ORDERED**, that the Clerk of the Disciplinary System shall assess costs in this matter pursuant to Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-9.E.

**IT IS FURTHER ORDERED**, that a copy teste of this Order shall be served by the Clerk of the Circuit Court for Arlington County upon Respondent, Henry St. John FitzGerald, Esquire, by certified mail, return receipt requested, at 1620 North George Mason Drive, Arlington, Virginia, 22205, his address of record with the Virginia State Bar, and by regular mail to his counsel, Bernard J. DiMuro, Esquire, at 908 King Street, Suite 200, Alexandria, Virginia, 23214, and to Kathleen M. Uston, Assistant Bar Counsel, at Post Office Box 320193, Alexandria, Virginia, 22320, and Barbara S. Lanier, Clerk of the Disciplinary System of the Virginia State Bar, at 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED: January 26, 2011

CIRCUIT COURT OF THE ALBERMARLE CIRCUIT COURT

By Cheryl V. Higgins  
Cheryl V. Higgins, Chief Judge

a true copy TESTE:  
DEBRA M. SHIPP, CLERK  
by: Debra M. Shipp  
Deputy Clerk

Signature of Counsel waived on the record.