

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
HENRY ST. JOHN FITZGERALD

VSB Docket No. 11-041-087804

MEMORANDUM ORDER OF FOUR-YEAR SUSPENSION

This matter came on to be heard on December 19, 2012 by the Disciplinary Board of the Virginia State Bar (the Board) by teleconference upon an Agreed Disposition between the parties, which was presented to a panel of the Board consisting of Rev. Dr. Theodore Smith, Lay Member, Michael S. Mulkey, Samuel R. Walker, Esther J. Windmueller, and Tyler E. Williams, III, 2nd Vice Chair presiding (the Panel).

Renu Mago Brennan, Assistant Bar Counsel, appeared as counsel for the Virginia State Bar, and Respondent, Henry St. John Fitzgerald, appeared in person *pro se*.

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

The Chair swore the Court Reporter and polled the members of the Panel 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 Chair, verified they had no such interests.

The Panel heard argument from counsel and reviewed Respondent's prior disciplinary record with the Bar and thereafter retired to deliberate on the Agreed Disposition. Having considered all the

evidence before it, Panel unanimously accepted the Agreed Disposition.

I. FINDINGS OF FACT

The Disciplinary Board finds the following facts by clear and convincing evidence:

1. At all times referenced herein, Respondent Henry St. John FitzGerald (Respondent) was an attorney licensed to practice law in the Commonwealth of Virginia.
2. In April 2008, on behalf of several plaintiffs, Respondent filed suit in the United States District Court, Alexandria Division against Merrifield Town Center Limited Partnership (Merrifield) and other defendants alleging violations of Title 15, Section 1703, United States Code, the Interstate Land Sales Full Disclosure Act ("ILSA") (the Litigation).
3. On May 1, 2008, Complainant Mahbod (Mike) Hashemzadeh and Respondent entered into a written retainer agreement pursuant to which Respondent agreed to represent Mr. Hashemzadeh in the Litigation.
4. On May 12, 2008, Respondent amended the complaint in the Litigation to add Mr. Hashemzadeh, and others, as plaintiffs.
5. During the course of the Litigation, Merrifield served discovery requests on each of the plaintiffs.
6. Mr. Hashemzadeh timely responded to Merrifield's discovery requests.
7. Other plaintiffs failed to timely respond to Merrifield's discovery requests, and Merrifield moved to compel responses from the non-responsive plaintiffs.
8. On September 25, 2009, the District Court ordered the non-responsive plaintiffs to respond to discovery by 5 p.m. on October 2, 2009 or risk sanctions including dismissal of their claims.
9. The trial date for the Litigation was November 18, 2009. Also, on November 18, 2009, the District Court was to hear a pending motion to dismiss the Litigation for failure to respond to discovery.
10. In a September 30, 2009 deposition, Respondent asserted that he learned or had reason to believe that Merrifield was conveying its assets to related entities.
11. On the date that the discovery responses were due, October 2, 2009, Respondent sought an extension to respond to the discovery. Merrifield's counsel refused Respondent's request.

12. In his interview with the Bar's investigator, Respondent asserted that he trusted his paralegal, John Pasierb, now deceased and a former attorney who consented to the revocation of his license to practice law in 2007, with timely responding to discovery. Respondent has stated that he may have mistakenly trusted Mr. Pasierb to contact his clients regarding the discovery.
13. At 4:41 p.m., on October 2, 2009, Respondent obtained a stay of the Litigation by filing an involuntary bankruptcy petition (Petition) against Merrifield in the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division. On that same date, Respondent filed a Notice of Involuntary Petition with the District Court requesting the District Court stay the Litigation.
14. Without informing Mr. Hashemzadeh or obtaining Mr. Hashemzadeh's consent and authorization, Respondent named Mr. Hashemzadeh as a petitioning creditor on the Petition with a claim of \$74,808.00 based on illegal contract.
15. Mr. Hashemzadeh did not know that Respondent filed the Petition.
16. Mr. Hashemzadeh did not authorize Respondent to file the Petition.
17. Respondent named Zhifeng Long and Ziuling Long, a married couple, as the other two petitioning creditors. Respondent did not enter into a representation agreement with the Longs until November 17, 2009, several weeks after the filed the Petition as their attorney and agent.
18. Respondent signed the Petition as attorney and agent for Mr. Hashemzadeh and for the Longs.
19. Mr. Hashemzadeh did not sign the Petition.
20. The Longs did not sign the Petition.
21. The claim on which the involuntary bankruptcy petition was based cannot be the subject of a bona fide dispute. See 11 U.S.C. § 303(b).
22. Three days prior to filing the Petition, the Magistrate Judge John F. Anderson issued a Report and Recommendation which demonstrated the issues and facts the plaintiffs would need to show in order to prevail in the Litigation and which demonstrated his belief as to those issues still subject to bona fide dispute.
23. By order of December 2, 2009, the Bankruptcy Court dismissed the Petition on the grounds that (1) the Longs' claims constituted a single claim and thus did not meet the requirement of 11 U.S.C. § 303(b)(1) that an involuntary petition be filed by three or more creditors holding

- claims against the debtor aggregating at least \$13,475 (the amount increased to \$14,425 after April 1, 2010) that are neither contingent nor subject to bona fide dispute as to either liability or amount; (2) the claims of all three petitioning creditors were subject to bona fide dispute; and (3) the Petition had been filed in a bad faith attempt to secure a tactical advantage in the Litigation.
24. The Bankruptcy Court retained jurisdiction to consider Merrifield's request for an award of costs, attorney's fees, and damages against the petitioning creditors (the Longs and Mr. Hashemzadeh).
 25. Respondent on his own behalf and on behalf of the petitioning creditors, and without advising Mr. Hashemzadeh, moved the Bankruptcy Court to reconsider the dismissal of the Petition.
 26. Merrifield moved for its attorney's fees and sanctions against Mr. Hashemzadeh, the Longs, and Respondent.
 27. Respondent did not inform Mr. Hashemzadeh that Merrifield requested attorney's fees and sanctions against him.
 28. On March 18, 2010, the Bankruptcy Court heard the motions for reconsideration and for attorney's fees and sanctions.
 29. Respondent did not inform Mr. Hashemzadeh of the hearing on the motions for reconsideration and for attorney's fees and sanctions.
 30. By order entered December 3, 2010, the Bankruptcy Court denied the motion for reconsideration.
 31. By order entered December 3, 2010, in *In re Merrifield Town Center L.P.*, 2010 Bankr. LEXIS 4434, 2010 WL 5015006 (Bankr. E.D. Va. 2010), the Bankruptcy Court, pursuant to 11 U.S.C. § 303(i), granted Merrifield a judgment jointly and severally against Mr. Hashemzadeh and the Longs in the amount of \$25,000.00 for a portion of Merrifield's attorney's fees incurred in defending the Petition.
 32. Also, by order entered December 3, 2010, in *In re Merrifield Town Center L.P.*, 2010 Bankr. LEXIS 4434, 2010 WL 5015006 (Bankr. E.D. Va. 2010), the Bankruptcy Court sanctioned Respondent in the amount of \$25,000.00 pursuant to Fed. R. Bankr. P. 9011. Any payment of the sanctions against Respondent was to operate as a credit against the \$25,000.00 award entered against Mr. Hashemzadeh and the Longs. Likewise, any payment of the attorney's fees award of \$25,000.00 was to act as a credit against the sanctions against Respondent.

33. Although Respondent met with Mr. Hashemzadeh and other plaintiffs in the Litigation regarding the status of the Litigation in December 2010, Respondent did not tell Mr. Hashemzadeh about the filing of the Petition, the motion for sanctions and hearing thereon, or the existence of the judgment against Mr. Hashemzadeh.
34. In February 2011, Mr. Hashemzadeh learned of a judgment entered against another plaintiff in the Litigation for failure to provide timely discovery responses. Accordingly, on February 21, 2011, Mr. Hashemzadeh tried to contact Respondent by e-mail. Around the same time, Mr. Hashemzadeh received notice from the Clerk of the Fairfax County Circuit Court regarding the December 3, 2010, bankruptcy judgment entered against him, the Longs, and Respondent. Mr. Hashemzadeh did not realize that the bankruptcy judgment was different than the previously received judgment.
35. Mr. Hashemzadeh subsequently received a summons to answer interrogatories in aid of judgment. The summons referenced a court date of May 20, 2011.
36. On April 7, 2011, Mr. Hashemzadeh sent Respondent an e-mail inquiring about the summons and stating that he had been trying in vain to reach Respondent. That same day, April 7, 2011, Mr. Hashemzadeh and another plaintiff went to Respondent's home, where Respondent told him and the other plaintiff that the judgment would "go away" if the plaintiffs would pool together \$100.00 each, which Mr. Hashemzadeh tendered to Respondent. Mr. Hashemzadeh advised Respondent that he had to leave the country to be in Germany for medical treatment for his ailing wife and that he could not attend court on May 20, 2011, as referenced in the summons. Respondent advised Mr. Hashemzadeh that he would handle the matter.
37. Prior to April 7, 2011, Mr. Hashemzadeh only spoke to Respondent on three occasions, when he hired Respondent in the spring 2008; at a hearing in the Litigation; and finally at the December 2010 meeting on the status of the Litigation, in which Respondent did not mention the Petition, hearing, or bankruptcy judgment.
38. Despite Mr. Hashemzadeh's attempts to contact Respondent, Respondent did not communicate with Mr. Hashemzadeh. Instead, John Pasierb was Mr. Hashemzadeh's primary contact. When Mr. Hashemzadeh made calls to Respondent and visited the office, it was Mr. Pasierb who returned his calls and met with Mr. Hashemzadeh. Mr. Pasierb advised Mr. Hashemzadeh that he was an attorney.
39. On April 18, 2011, Virginia Commerce Bank, where Mr. Hashemzadeh maintained an account, was served with a garnishment summons, and the bank placed a hold on \$25,270.28 in the account.

40. Mr. Hashemzadeh subsequently consulted with an attorney who, by letter dated April 28, 2011, demanded that Respondent satisfy the judgment so that the bank would release Mr. Hashemzadeh's funds.
41. By response letter dated May 1, 2011, Respondent stated that he could not pay the sanctions as requested because his practice had collapsed, but if he prevailed on appeal of the Litigation, he "would be happy to pay all sanctions."
42. On May 17, 2011, Respondent filed a Chapter 7 Bankruptcy Petition to prevent his own funds from being garnished to pay the judgment.
43. The funds garnished from Mr. Hashemzadeh's bank account were turned over to Merrifield in full satisfaction of the judgment.
44. After garnishing Mr. Hashemzadeh's account for the full amount of the attorney's fees, Merrifield took no further action against Respondent or the Longs.
45. On June 4, 2011, Respondent's bankruptcy petition was dismissed for his having failed to timely file a creditor matrix. Respondent made no effort to re-file for bankruptcy.
46. Mr. Hashemzadeh filed a motion for relief from the judgment entered December 3, 2010.
47. On August 12, 2011, the Bankruptcy Court held an evidentiary hearing on Mr. Hashemzadeh's motion for relief.
48. During the evidentiary hearing, Respondent admitted under oath that he did not advise Mr. Hashemzadeh that the Petition had been dismissed, and further that Respondent did not personally advise Mr. Hashemzadeh of the judgment until April 2011.
49. The Bankruptcy Court examined the specific issue of whether or not the bankruptcy judgment was void because Mr. Hashemzadeh never authorized Respondent to file the Petition.
50. As part of its inquiry, and after hearing the testimony of Respondent, Mr. Hashemzadeh, and other witnesses, the Bankruptcy Court found that Respondent "neither informed Hashemzadeh of his intention to file the involuntary petition nor obtained his affirmative consent to being named as a petitioning creditor." See *In re Merrifield Town Center L.P.*, 2011 Bankr. LEXIS 3524, *15 (Bankr. E.D. Va., September 14, 2011). The Bankruptcy Court determined that "because, he (Hashemzadeh), unlike most of the plaintiffs, had responded to Merrifield's discovery, he was in no immediate peril of having his claims dismissed for procedural default. Thus, it seems unlikely that, had he been fully advised of the risks and benefits of being one of the petitioning creditors, he would have consented to doing so. His testimony that he did not expressly agree is certainly buttressed by the fact that

he did not personally sign the petition. Rather, FitzGerald signed for him as attorney and agent. Hashemzadeh's testimony paints a distressing picture – which FitzGerald does not convincingly rebut—of an attorney who consistently failed to provide him with updates as to what was happening in the District Court litigation and did not provide him with copies of pleadings filed in the lawsuit. FitzGerald admits that he did not advise Hashemzadeh that the involuntary petition had been dismissed and did not advise him of the sanctions judgment. Given that rather astonishing failure, the court finds FitzGerald's testimony that he nevertheless personally spoke with Hashemzadeh to be less than credible." *Id.* at 16 and 17. The Bankruptcy Court, however, did not relieve Mr. Hashemzadeh from the judgment because it did not find that Respondent's filing the Petition without properly consulting with Mr. Hashemzadeh deprived the Bankruptcy Court of personal jurisdiction over Mr. Hashemzadeh or otherwise rendered the judgment void.

51. The Bankruptcy Court emphasized that in making its ruling it was not deciding whether Mr. Hashemzadeh was properly or competently represented, nor was it deciding whether Respondent's failure to consult with Mr. Hashemzadeh and to explain the risks attendant to the filing of the Petition constituted violations of the Virginia Rules of Professional Responsibility as those issues were best addressed in other forums. *See In re Merrifield Town Center L.P.*, 2011 Bankr. LEXIS 3524, *20,21 (Bankr. E.D. Va., September 14, 2011).

II. NATURE OF MISCONDUCT

The Disciplinary Board finds that such conduct by Henry St. John Fitzgerald constitutes misconduct in violation 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 1.2 Scope of Representation

- (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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.
- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

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 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:

- (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 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm

- has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
 - (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyers fitness to practice law;

III. IMPOSITION OF SANCTION

Having considered all the evidence before it and determined to accept the Agreed Disposition, the Disciplinary Board **ORDERS** that, effective December 19, 2012, Respondent's license to practice law in the Commonwealth of Virginia is suspended for four years. Factors considered in approving the Agreed Disposition include Respondent's assertion that Respondent became eighty years of age on August 7, 2010, and was experiencing medical problems such that he should either have suspended legal

practice or engaged substantial additional assistance to handle the matters which produced this Bar Complaint, but he failed to do so.

It is further **ORDERED** that Respondent must comply with the requirements of Part Six, Section IV, Paragraph 13-29 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(s). Respondent shall give such notice within 14 days of the effective date of the suspension, and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 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 13-29 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, as agreed by Respondent, this Order is final and non-appealable.

It is further **ORDERED** that costs shall be assessed by the Clerk of the Disciplinary System pursuant to the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-9.E.

It is further **ORDERED** that the Clerk of the Disciplinary System shall send an attested copy of

this order by certified mail to Henry St. John Fitzgerald at his last address of record with the Virginia State Bar, 1620 N. George Mason Dr., Arlington, VA 22205, and hand-delivered to Renu M. Brennan, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219.

Jennifer L. Hairfield, P.O. Box 9349, Richmond, Virginia 23227, (804)730-1222, was the court reporter for the hearing and transcribed the proceedings.

ENTERED: December 19, 2012

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 
TYLER E. WILLIAMS, III
SECOND VICE-CHAIR