

VIRGINIA:

BEFORE THE FIRST DISTRICT SUBCOMMITTEE  
OF THE VIRGINIA STATE BAR

IN THE MATTER OF  
Blanche Miclat Garber

VSB Docket No. 15-010-100970

SUBCOMMITTEE DETERMINATION  
(PUBLIC REPRIMAND WITHOUT TERMS)

On November 24, 2015 a meeting was held in this matter before a duly convened First District Subcommittee consisting of Everett Cleve Harris (lay member), Jennifer Lynn Smith, Esquire, and Brian Dean Lytle, Esquire, Chair, presiding. During the meeting, the Subcommittee voted to approve an agreed disposition for a Public Reprimand without Terms pursuant to Part 6, § IV, ¶ 13-15.B.4 of the Rules of the Supreme Court of Virginia. The agreed disposition was entered into by the Virginia State Bar, by Edward L. Davis, Bar Counsel, and Blanche Miclat Garber, Respondent, and Michael L. Rigsby, Esquire, counsel for Respondent.

WHEREFORE, the First District Subcommittee of the Virginia State Bar hereby serves upon Respondent the following Public Reprimand without Terms:

FINDINGS OF FACT

1. At all times relevant hereto, Blanche Miclat Garber ("Respondent"), has been an attorney licensed to practice law in the Commonwealth of Virginia, having been admitted to practice on October 8, 1981.
2. On May 12, 1993, the Circuit Court for the City of Newport News entered a final decree of divorce in the matter of *Kimberly A. Carrithers v. Roy M. Carrithers*, Chancery Number 19859-WS.
3. The final decree ordered Roy M. Carrithers ("Mr. Carrithers") to pay Ms. Carrithers \$325 in monthly child support in addition to medical and dental expenses for their child.

4. In 2006, Ms. Carrithers (now Ms. Harrah) filed a motion and notice of judgment for arrearages against Mr. Carrithers in the Newport News Juvenile and Domestic Relations District Court (J&DR).
5. On March 9, 2006, the J&DR court awarded payment of arrearages to Ms. Harrah in the amount of \$62,096.06 plus interest. The court's order reflects that the original motion and notice were served upon Mr. Carrithers while he was incarcerated in Florida, and that a guardian ad litem was appointed to represent him at the proceedings.
6. The judgment was recorded against property inherited by Mr. Carrithers and paid when that property was sold.
7. On October 4, 2010, Mr. Carrithers, represented by Respondent, filed a motion in the same J&DR to vacate the judgment for lack of jurisdiction. Respondent's contention was that Mr. Carrithers was not served with the motion and notice of arrearage filed in 2006 (§ 4, supra) in accordance with Rules of Court, Rule 8:4. Consequently, the J&DR court lacked personal jurisdiction under Code of Virginia § 16.10278.18 to enter its judgment for arrearage against Mr. Carrithers.
8. By order, entered December 14, 2010, the J&DR court dismissed the motion, stating: "Its jurisdiction was proper."
9. On December 14, 2010, Mr. Carrithers, represented by counsel other than Respondent, noted an appeal to the Circuit Court for the City of Newport News.
10. On appeal *de novo*, the circuit court entered an Order on March 29, 2011, in which the circuit court found that the JDR Court had jurisdiction to enter its March 9, 2006 Order against Mr. Carrithers and remanded the case to the JDR court.
11. On August 30, 2011 Mr. Carrithers, represented by Respondent, filed a notice of appeal to the Court of Appeals of Virginia. Each side briefed the appeal and argued the matter before the Court of Appeals on February 7, 2012. Respondent was assisted in the appeal by co-counsel. In a published opinion, dated April 17, 2012, the Court of Appeals held that the appeal was not timely filed and dismissed it accordingly.
12. On April 20, 2012 Mr. Carrithers, represented by Respondent, filed a second motion to vacate the judgment of the Newport News J&DR court on the same grounds, lack of jurisdiction. The J&DR court held that the matter was barred by the doctrine of res judicata and dismissed it accordingly. The J&DR also ordered Mr. Carrithers to pay \$4,500 to compensate Ms. Harrah's legal fees.
13. On September 10, 2012, Mr. Carrithers, represented by Respondent, appealed the matter *de novo* to the Circuit Court for the City of Newport News which, by order entered February 26, 2013, held that the matter was barred by the doctrine of res judicata, dismissed the case with prejudice, ordered \$2,000 in sanctions against Respondent's client and ordered the posting of a

\$20,000 appeal bond if there were to be any further appeal. The Circuit Court's *de novo* Order nullified the foregoing JDR Court Order and attorney fee award.

14. On March 8, 2013, Respondent moved for a reduction of the appeal bond. On March 14, 2013, the court heard the matter and reduced the bond to \$10,000 by order, entered March 26, 2013, stating, "But that's it, don't file another reduction request because I'm not going to entertain it." Respondent contended at argument that Mr. Carrithers was essentially indigent, receiving Social Security Disability Income as his only source of income and whatever assets he had were in a special needs trust.
15. The next day, March 27, 2013, on the basis that her client was indigent, Respondent filed a \$500 bond with the Court of Appeals of Virginia, stating that the appeal bond was in accordance with Virginia Code Section 8.01-676.1.<sup>1</sup> (See endnote.)
16. Respondent later testified and told the bar through counsel that she spoke with the Chief Deputy Clerk at the Court of Appeals who advised her that to challenge the \$10,000 appeal bond under Virginia Code Section 8.01-676.1 and Rule 5A:17<sup>ii</sup>, she could "...file the \$500 statutory appeal bond and wait for opposing counsel to object to the bond, and have prepared a motion to reduce bond to file in the clerk's office and that—and further the Court of Appeals is not concerned about the bond."
17. Respondent, however, simply gave opposing counsel notice that she had posted bond as required by Rules of Court, Rule 5A:7(b), with no details as to the amount. She never gave opposing counsel notice that the bond she posted was only \$500, although she had filed the bond separately with the trial court Clerk clearly setting forth the \$500 amount.
18. Once again both sides briefed and argued the matter before the Court of Appeals of Virginia which, by order entered September 2, 2014, held that the circuit court applied the doctrine of *res judicata* correctly, and awarded appellate attorneys' fees against Mr. Carrithers.
19. In its order, the Court of Appeals stated, "His later attempt to relitigate the unlitigable violated traditional *res judicata* law as well as our application of it to the very same dispute between the very same parties." The Court of Appeals noted that the circuit court concluded that husband was engaging in abusive litigation, "...just the kind for which the remedies in Code [Section] 8.01-271.1 were meant to deter. We agree."
20. Citing a previous case, the Court of Appeals utilized language similar to Rules 3.1 and 3.4(j) of the Rules of Professional Conduct. Specifically, the court stated, "By any objectively reasonable measure, Carrithers's latest collateral attack on the 2006 JDR court support arrearage award was not 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' Nor can he persuasively say that it was 'not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.'"

Respondent advised the bar that she thought a good faith basis existed for the second litigation (§§ 12, 13, 18, *supra*). She acknowledged understanding the principle of *res*

*adjudicata*, but thought *Garrity v. Virginia Department of Social Services*, 296 S.E.2d 150, 11 Va. App. 39 (1990) gave guidance for proceeding as she had.

21. On remand from the Court of Appeals, opposing counsel filed a billing to recover appellate attorney fees in which he stated that he received and began review of the appellate record on June 13, 2013. The \$500.00 bond was included in the Trial Record filed in the appeal at pages 198-199. Thereafter, Ms. Harrah's counsel learned for the first time that Respondent had posted only a \$500 appeal bond and, on October 23, 2014, moved for sanctions against Respondent in the circuit court. The sanctions motion was settled by agreement between the parties and the circuit court took no further action regarding the motion.

## II. NATURE OF MISCONDUCT

Such conduct by Respondent constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

*By repeatedly bringing a cause of action that was barred by res judicata, raising the same arguments (involving the same facts, parties, and legal issues) previously rejected on the merits and left undisturbed on appeal, causing her and her client to suffer repeated adverse awards of attorneys' fees and sanctions, as well as repeated rebukes from the courts; in obtaining a groundless appeal at the Court of Appeals by posting a \$500 appeal bond when she knew that the required bond was \$10,000, in disobedience of the trial court's order of bond, and without informing opposing counsel that she had not filed the required appeal bond, when the Court of Appeals of Virginia had informed her that she could file the \$500 bond on the basis that opposing counsel could object to it accordingly, Respondent violated the following 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:

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

**RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(c) engage in conduct involving ... misrepresentation which reflects adversely on the lawyer's fitness to practice law;

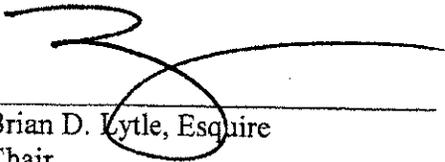
**III. PUBLIC REPRIMAND WITHOUT TERMS**

In entering this Agreed Disposition, the parties have considered the following mitigating factors set forth in the American Bar Association Standards For Imposing Lawyer Sanctions ("Standards"):

1. The absence of any prior disciplinary record during Ms. Garber's thirty four (34) years of practicing law;
2. The absence of a dishonest or selfish motive;
3. Ms. Garber's full and free disclosure of the facts and cooperative attitude towards the disciplinary process;
5. The payment by Ms. Garber to Kimberly A. Harrah of- appellee's counsel fees and costs incurred in the second appeal. (¶¶ 12, 13, 18 supra);
6. Ms. Garber's demonstrable remorse.

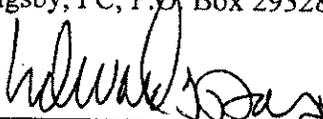
Accordingly, having approved the agreed disposition, it is the decision of the Subcommittee to impose a Public Reprimand Without Terms and Blanche Miclat Garber is hereby so reprimanded. Pursuant to Part 6, § IV, ¶ 13-9.E of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs.

FIRST DISTRICT SUBCOMMITTEE  
OF THE VIRGINIA STATE BAR

By:   
Brian D. Lytle, Esquire  
Chair

CERTIFICATE OF MAILING

I certify that on November 30, 2015, a true and complete copy of the Subcommittee Determination (Public Reprimand Without Terms) was sent by certified mail to Blanche Miclat Garber, Respondent, at 21 Oakland Drive, Newport News, Virginia 23601, her address of record with the Virginia State Bar, and by first class mail, postage prepaid to Michael L. Rigsby, counsel for Respondent, at Michael L. Rigsby, PC, P.O. Box 29328, Henrico, VA 23242.



Edward L. Davis  
Bar Counsel

**§ 5.1-575.1. Security for appeal. —**

A. Security for costs of appeal of right to Court of Appeals. - A party filing a notice of an appeal of right to the Court of Appeals shall simultaneously file an appeal bond or irrevocable letter of credit in the penalty of \$500, or such sum as the trial court may require, subject to subsection E, conditioned upon paying all costs and fees incurred in the Court of Appeals and the Supreme Court if it takes cognizance of the claim. If the appellant wishes suspension of execution, the security shall also be conditioned and shall be in such sum as the trial court may require as provided in subsection C.

B. Security for costs on petition for appeal to Court of Appeals or Supreme Court. - An appellant whose petition for appeal is granted by the Court of Appeals or the Supreme Court shall (if he has not done so) within 15 days from the date of the Certificate of Appeal file an appeal bond or irrevocable letter of credit in the same penalty as provided in subsection A, conditioned on the payment of all damages, costs, and fees incurred in the Court of Appeals and in the Supreme Court.

C. Security for suspension of execution. - An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall, subject to the provisions of subsection J, file an appeal bond or irrevocable letter of credit conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension, and except as provided in subsection D, execution shall be suspended upon the filing of such security and the timely prosecution of such appeal. Such security shall be continuing and additional security shall not be necessary except as to any additional amount which may be added or to any additional requirement which may be imposed by the courts.

D. Suspension of execution in decrees for support and custody; injunctions. - The court from which an appeal is sought may refuse to suspend the execution of decrees for support and custody, and may also refuse suspension when a judgment refuses, grants, modifies, or dissolves an injunction.

E. Increase or decrease in penalty or other modification of security. - The Court of Appeals or the Supreme Court, when it considers a petition for appeal, may order that the penalty or any other terms or requirements of the security for the appeal or of the security for the suspension of execution of a judgment be modified for good cause shown if such request is made in the brief of any party filed in the Court of Appeals, or in the Petition for Appeal or the appellee's Brief in Opposition filed in the Supreme Court or the Court of Appeals. Affidavits and counter-affidavits may be filed by the parties containing facts pertinent to such request. Any increase or decrease in the amount of or other modification of the security so ordered shall be effected in the clerk's office of the trial court within 15 days of the order of the Court of Appeals or the Supreme Court. If an increase so ordered is not effected within 15 days, the appeal shall be dismissed, in the case of the security required under subsection A, or the suspension of execution of a judgment shall be discontinued, in the case of the security required under subsection C. Such increase or decrease in the penalty of or other modification of the security may also be considered and ordered by the trial court for good cause shown, on motion of either party, at any time until the Court of Appeals or the Supreme Court

acts upon any similar motion, and failure to increase such penalty as hereinabove provided shall also cause the appeal to be dismissed, in the case of the security required under subsection A, or the suspension of execution of a judgment to be discontinued, in the case of the security required under subsection C.

F. By whom executed. - Each bond filed shall be executed by a party or another on his behalf, and by surety approved by the clerk of the court from which appeal is sought, or by the clerk of the Supreme Court or the clerk of the Court of Appeals if the bond is ordered by such Court. Any letter of credit posted as security for an appeal shall be in a form acceptable to the clerk of the court from which appeal is sought, or by the clerk of the Supreme Court or the Court of Appeals if the security is ordered by such court. The letter of credit shall be from a bank incorporated or authorized to conduct banking business under the laws of this Commonwealth or authorized to do business in this Commonwealth under the banking laws of the United States, or a federally insured savings institution located in this Commonwealth.

G. Appeal from State Corporation Commission; security for costs. - When an appeal of right is entered from the State Corporation Commission to the Supreme Court, and no suspension of the order, judgment, or decree appealed from is requested, such appeal bond or letter of credit shall be filed when and in the amount required by the clerk of the Supreme Court, whose action shall be subject to review by the Supreme Court.

H. Appeal from State Corporation Commission; suspension. - Any judgment, order, or decree of the State Corporation Commission subject to appeal to the Supreme Court may be suspended by the Commission or by the Supreme Court pending decision of the appeal if the Commission or the Supreme Court deems such suspension necessary for the proper administration of justice but only upon the written application of an appellant after reasonable notice to all other parties in interest and the filing of a suspending bond or irrevocable letter of credit with such conditions, in such penalty, and with such surety thereon as the Commission or the Supreme Court may deem sufficient. But no surety shall be required if the appellant is any county, city or town of this Commonwealth, or the Commonwealth.

I. Forms of bonds; letters of credit; where filed. - The Clerk of the Supreme Court shall prescribe separate forms for appeal bonds, one for costs alone, one for suspension of execution, and one for both and a form for irrevocable letters of credit, to which the bond or bonds or irrevocable letters of credit given shall substantially conform. The forms for each bond and the letter of credit shall be published in the Rules of Court. It shall be sufficient if the bond or letter of credit, when executed as required, is filed with the trial court, clerk of the Virginia Workers' Compensation Commission, or the clerk of the State Corporation Commission, whichever is applicable, and no personal appearance in the trial court, Virginia Workers' Compensation Commission, or State Corporation Commission by the principal, the surety on the bond or the bank issuing the letter of credit shall be required as a condition precedent to its filing.

J. In any civil litigation under any legal theory, the amount of the appeal bond or irrevocable letter of credit to be furnished during the pendency of all appeals or discretionary reviews of any judgment granting legal, equitable, or any other form of relief in order to stay the execution thereon during the entire course of appellate review by any courts shall be set in accordance with applicable laws or court rules, except that the total appeal bond or irrevocable letter of credit that is required of an appellant and all of its affiliates shall not exceed \$25 million, regardless of the value of the judgment.

J1. Any objection to or motion for modification of the form, amount, or issuer of any letter of credit or bond may be made to, and decided by, the Court of Appeals or the Supreme Court. Any objection to or motion for modification of the form, amount, or issuer of any letter of credit or bond may also be made to, and decided by, the court or commission whose decision is being appealed at any time until the Court of Appeals or the Supreme Court acts upon any similar motion.

K. Dissipation of assets. - If the appellee proves by a preponderance of the evidence that a party bringing an appeal, for whom the appeal bond or irrevocable letter of credit requirement has been limited or waived pursuant to subsection J, is purposefully dissipating its assets or diverting assets outside the jurisdiction of the United States courts for the purpose of evading the judgment, the limitation or waiver granted pursuant to subsection J shall be rescinded and a court may require the appellant to post a bond or irrevocable letter of credit in an amount up to the full amount of the judgment. Dissipation of assets shall not include those ongoing expenditures made from assets of the kind that the appellant made in the regular course of business prior to the judgment being appealed, such as the payment of stock dividends and other financial incentives to the shareholders of publicly owned companies, continued participation in charitable and civic activities, and other expenditures consistent with the exercise of good business judgment.

L. For good cause shown, a court may otherwise waive the filing of an appeal bond or irrevocable letter of credit as to the damages in excess of, or other than, the compensatory damages.

M. Exemption. - When an appeal is proper to protect the estate of a decedent or person under disability, or to protect the interest of the Commonwealth or any county, city, or town of this Commonwealth, no security for appeal shall be required.

N. Indigents. - No person who is an indigent shall be required to post security for an appeal bond.

O. Virginia Workers' Compensation Commission. - No claimant who files an appeal from a final decision of the Virginia Workers' Compensation Commission with the Court of Appeals shall be required to post security for costs as provided in subsection A or B if such claimant has not returned to his employment or by reason of his disability is unemployed. Such claimant shall file an affidavit describing his disability and employment status with the Court of Appeals together with a motion to waive the filing of the security under subsection A or B.

P. Time for filing security for appeal. - The appeal bond or letter of credit prescribed in subsections A and B is not jurisdictional and the time for filing such security in cases before the Court of Appeals or the Supreme Court may be extended by a judge or justice of the court before which the case is pending on motion for good cause shown and to attain the ends of justice.

Q. Consideration of appeal bond or letter of credit by Court of Appeals or Supreme Court. - A determination on an issue affecting an appeal bond or letter of credit in a case before the Court of Appeals or the Supreme Court may be considered by an individual judge of such court rather than by a panel of judges.

R. This section applies to injunction bonds required pursuant to § 8.01-631. (1984, c. 703; 1986, c. 89; 1987, cc. 460, 684; 1988, c. 883; 1996, c. 77; 2000, c. 100; 2004, cc. 328, 356; 2010, c. 494; 2012, cc. 8, 77.)

ii **RULE 17. Security for Appeal. —**

(a) Form for Security. All security for appeal required under Code § 8.01-676.1 shall substantially conform to the forms set forth in the Appendix to this Part Five A.

(b) Security for Appeal; Defects. Whenever an appellant files an appeal bond or irrevocable letter of credit, he shall contemporaneously give notice in writing of said filing to counsel for appellee. No appeal shall be dismissed because of defect in any bond or irrevocable letter of credit unless an appellee, within 21 days after the giving of such notice, files with the clerk of the Court of Appeals a statement in writing of the defects in the bond or irrevocable letter of credit, and unless the appellant fails to correct such defects, if any, within 21 days after such statement is filed. If the appellant fails to correct such defects within 21 days, an appellee may move that the appeal be dismissed and it shall be dismissed unless the appellant satisfies the Court of Appeals that the bond or irrevocable letter of credit, either as originally given or as amended, has been filed as required by law.

**AMENDMENTS:**

**By Order dated April 30, 2010, effective July 1, 2010, language was added to subsection (a) as follows:**

(a) *Form for Security.* All security for appeal required under Code § 8.01-676.1 shall substantially conform to the forms set forth in the Appendix to this Part Five A.