

VIRGINIA:

BEFORE THE THIRD DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTERS OF
DAVID GLENN HUBBARD

VS. Docket Nos. 07-032-1466 [Fulton]
07-032-062224 [Hargrove]

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITHOUT TERMS)

On April 16, 2010, a hearing in this matter was held before a duly convened Third District Subcommittee consisting of Judith G. Napier, Lay member; Alana M. Ritenour, Esq.; and Esther J. Windmueller, Esq., Secretary, presiding.

Pursuant to Part 6, Section IV, Paragraph 13-15.E. of the Rules of the Virginia Supreme Court, the Third District Subcommittee of the Virginia State Bar hereby serves upon the Respondent the following Public Reprimand:

1. At all times relevant hereto, Respondent David Glenn Hubbard [Hubbard], has been an attorney licensed to practice law in the Commonwealth of Virginia.

VS. Docket No. 07-032-1466 [Fulton]:

I. FINDINGS OF FACT

2. Complainant Travis Dudley Fulton [Fulton] had been convicted of felony petty larceny (previous) and received a sentence which included, *inter alia*, suspended incarceration time, supervised probation and random drug screens. He was reported to the Circuit Court of Chesterfield, County, Virginia, [court] for failure to adhere to the terms of his probation.

3. On June 20, 2006, the court issued a show cause order in case number CR05A00307-01 for the issuance of a capias for Fulton to show cause why the previously imposed suspended sentence should not be revoked and Fulton sentenced to serve the un-expired term. A capias to show cause was issued on June 21, 2006.

4. On July 5, 2006, Hubbard was court-appointed to represent Fulton in the matter of the probation revocation.

5. On August 2, 2006, the show cause came on for hearing and was amended to include a new charge in the City of Richmond. The proceeding was continued to September 7, 2006. On September 7, 2006, Fulton was found in contempt of the court's sentencing order on the petit larceny/previous conviction, and the matter was continued to September 21, 2006, for disposition.

6. On September 21, 2006, Fulton was sentenced to active time of seven months in the Department of Corrections.

7. Fulton immediately wanted to appeal the decision of the court. According to Hubbard, he talked to Fulton after the hearing and told him there was no basis for an appeal.

8. By letter dated September 26, 2006, to Fulton, The Honorable Judge Herbert C. Gill, Jr. acknowledged receipt of what the court considered to be an improper *ex parte* communication from Fulton. The court indicated, *inter alia*, that it would take no action on Fulton's request and by copy of the letter, was notifying the prosecutor and Fulton's attorney in order that they may take whatever action they deemed appropriate. The letter showed a carbon copy to Hubbard.

9. By letter to Fulton dated October 2, 2006, Deputy Clerk Pond enclosed a certified copy of the show cause revocation order and stated that Fulton should contact Hubbard "to discuss your intent to appeal so that the proper documents are filed. We have noted your appeal as of September 26, 2006." The letter showed a carbon copy to Hubbard at an East Hundred Road, Chester, Virginia, address.

10. Pond's letter was in Hubbard's file which he ultimately provided the bar for his representation of Fulton. Hubbard's file also contained an undated handwritten letter from Fulton to Hubbard in which Fulton stated, *inter alia*, he wanted an appeal ASAP and he had been trying to contact Hubbard ever since the September 21, 2006, court date.

11. According to Hubbard, he spoke to Fulton once over the telephone and told him that he could not file an appeal. Hubbard states he did receive one undated letter from Fulton and believes he wrote Fulton a letter, but cannot prove that he did so.

12. Hubbard did not pursue an appeal of the probation revocation decision.

13. On February 13, 2007, the Virginia Court of Appeals entered an order in Record No. 3097-06-2, Circuit Court No. CR05A00307-01, dismissing an appeal by Fulton. The Court recited that its January 3, 2007, order required the appellant to show cause why the appeal should not be dismissed by stating any questions which could be considered without resort to a transcript or statement of facts. No response to the show cause was filed. Hubbard was attorney of record for the appeal.

14. Upon receipt of the bar complaint filed by Fulton, the bar sent Hubbard a letter dated November 16, 2006, demanding a response to the complaint within 21 days. The letter stated, *inter alia*, that pursuant to Rule 8.1(c), Hubbard had a duty to comply with the bar's lawful

demands for information not protected from disclosure by Rule 1.6. Hubbard did not respond to the letter.

15. By letter dated January 3, 2007, the bar informed Hubbard that Fulton's complaint was being referred to the Third District Committee for investigation. The letter stated, *inter alia*, that pursuant to Rule 8.1(c), Hubbard had a duty to comply with the lawful demands of the bar for information not protected by Rule 1.6; and an investigator's demands for information constituted lawful demands under Rule 8.1(c).

16. During the bar investigation, a subpoena *duces tecum* was issued and served on January 5, 2007. The subpoena *duces tecum* required the production of Hubbard's files, records and reports relating to his representation of Fulton on a probation revocation. Production was required on or before January 29, 2007.

17. During the bar investigation, a second subpoena *duces tecum* was issued and served on February 1, 2007. The subpoena *duces tecum* also required the production of Hubbard's files, records and reports relating to his representation of Fulton on a probation revocation. Production was required on or before February 23, 2007.

18. Hubbard did not respond to either subpoena *duces tecum*.

19. During the bar investigation of this matter, Hubbard was interviewed by Investigator Robert Heinzman, Jr. [Heinzman] on August 21, 2007. In the interview, Hubbard told Heinzman he did not respond to the bar's two subpoenas *duces tecum* because he had several unopened letters from the bar and he assumed the letters simply addressed the complaint. He did not open the letters and thus never saw the subpoenas. Hubbard promised that he would mail to Heinzman a copy of his file regarding Fulton, and he would notify the bar of his most current address.

20. On August 24, 2007, Heinzman sent Hubbard two letters. One letter was addressed to Hubbard at the Richmond post office box address to which the subpoenas *duces tecum* had been sent. The second identical letter was sent to Hubbard at a Boone Boulevard, Vienna, Virginia address. Both letters sought Hubbard's file regarding the representation of Fulton. The letters were sent by certified mail, return receipt requested. The letter addressed the Richmond post office box address was returned unclaimed. The bar received a signed postal return receipt for the letter addressed to the Vienna, Virginia address. Heinzman received Hubbard's file on September 4, 2007.

21. Hubbard informed Heinzman during the bar interview that at a point in time after the hearing date in the probation revocation matter, he attended a continuing legal education seminar and learned that he could have filed an appeal for Fulton with an *Anders* brief. Hubbard admitted it was a mistake not to file the appeal for Fulton, and he knew he was wrong for not doing so.

22. An attorney court-appointed to represent a defendant in a probation revocation case must appeal the case through the Virginia Court of Appeals and the Virginia Supreme Court upon request of the client. The attorney may not refuse to file the appeal which he deems to be

without basis. Instead, he must follow the procedure outlined in *Anders v. California*, 386 U.S. 738 (1967). See *Dodson v. Director, Dept. of Corrections*, 233 Va. 303(1987), Virginia Code Sections 19.2-157, 19.2-159 and 19.2-326.

23. By not appealing the probation revocation, Hubbard essentially withdrew from the representation without obtaining leave of court to do so.

II. NATURE OF MISCONDUCT

Such conduct by David Glenn Hubbard constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.3 Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.

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.

RULE 1.16 Declining Or Terminating Representation

- (c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable rules of court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer already admitted to the bar, in connection with a bar admission application, any certification required to be filed as a condition of maintaining or renewing a license to practice law, or in connection with a disciplinary matter, shall not:

- (c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

I. FINDINGS OF FACT

24. According to Hubbard, he was court-appointed on or about May 19, 2005, to represent Complainant Wendell Hargrove [Hargrove] on two criminal charges in Chesterfield County, Virginia. One charge ended by *nolle prosequi*. The second charge resulted in a conviction for attempted prescription fraud after a second jury trial before the Circuit Court of Chesterfield County.

25. Hargrove asked Hubbard to file an appeal of the conviction.

26. Hubbard appealed the conviction to the Virginia Court of Appeals. The Court of Appeals denied the petition for appeal on the merits of the case by order entered November 22, 2006. The order recited that Hubbard was counsel for the appellant.

27. On December 21, 2006, Hubbard filed a notice of appeal in the Court of Appeals to take the appeal to the Virginia Supreme Court. However, Hubbard did not proceed further with an appeal to the Virginia Supreme Court.

28. Hubbard was interviewed during the bar investigation of this matter by Investigator Robert Heinzman, Jr. [Heinzman] on September 17, 2008. Hubbard stated to Heinzman that he would not have filed an appeal with the Virginia Supreme Court without the approval of Hargrove. Hubbard also indicated he did not know why he did not proceed with an appeal to the Virginia Supreme Court.

29. According to Hubbard, he recalls a three way conversation with Hargrove in which Hargrove said he did not want to pursue an appeal to the Virginia Supreme Court, Hargrove was unhappy with Hubbard and wanted to get another attorney to file a *habeas corpus* appeal for him.

30. Hubbard failed to seek court approval to withdraw from the Hargrove appeal.

31. An attorney court-appointed to represent a defendant in a criminal case in which the possible penalty is confinement in a state correctional facility or jail must appeal the case through both the Virginia Court of Appeals and the Virginia Supreme Court unless the attorney is granted court approval to withdraw from the representation. See *Anders v. California*, 386 U.S. 738 (1967); *Dodson v. Director, Dept. of Corrections*, 233 Va. 303(1987); Virginia Code Sections 19.2-157, 19.2-159 and 19.2-326; and Legal Ethics Opinion 1005.

32. Upon receipt of the complaint filed by Hargrove, Assistant Intake Counsel Mary Martelino [Martelino] sent Hubbard a letter dated May 9, 2007, requiring Hubbard to communicate with Hargrove, answer his questions about the status of his appeal, and provide written documentation to the bar regarding the communication. The letter stated, *inter alia*, that pursuant to Rule 8.1(c), Hubbard had a duty to comply with the bar's lawful demands for information not protected from disclosure by Rule 1.6. Hubbard did not respond to the letter.

33. By letter to Hubbard dated May 23, 2007, Martelino stated, *inter alia*, that no response to the first letter had been received from Hubbard and asked Hubbard to contact her immediately.

34. By letter to Hubbard dated June 6, 2007, Martelino stated no response had been received from Hubbard of any kind, and the matter was being assigned for further investigation.

35. By letter to Hubbard dated June 7, 2007, the bar demanded a response to the complaint within 21 days. The letter stated, *inter alia*, that pursuant to Rule 8.1(c), Hubbard had a duty to comply with the bar's lawful demands for information not protected from disclosure by Rule 1.6. Hubbard did not respond to the letter.

36. By letter to Hubbard dated September 12, 2007, the bar informed Hubbard that Hargrove's complaint was being referred to the Third District Committee for investigation. The letter stated, *inter alia*, that pursuant to Rule 8.1(c), Hubbard had a duty to comply with the lawful demands of the bar for information not protected by Rule 1.6; and an investigator's demands for information constituted lawful demands under Rule 8.1(c).

37. During the bar investigation, a subpoena *duces tecum* was issued and served on September 14, 2007. The subpoena *duces tecum* required the production of Hubbard's files, records and reports relating to his representation of Hargrove. Production was required on or before October 5, 2007. The subpoena *duces tecum* was received at Hubbard's office. Hubbard did not comply with the subpoena *duces tecum*.

38. By letter to Hubbard dated October 11, 2007, the bar stated that Hubbard had not responded to the September 14, 2007, subpoena *duces tecum*, that his failure to comply could result in an interim suspension of his license to practice law in the Commonwealth of Virginia, and Hubbard was given until October 22, 2007, to comply.

39. By letter to Hubbard dated January 11, 2008, the bar reviewed the prior correspondence and stated nothing had been received in response to the subpoena *duces tecum*. Hubbard was given until January 31, 2008, to comply or a notice of noncompliance would be filed with the Disciplinary Board with a request that Hubbard's license be suspended on an interim basis.

40. On February 5, 2008, the bar filed with the Clerk of the Disciplinary System a Notice of Noncompliance and Request for Interim Suspension and copied the filing to Hubbard. The mailing was received at Hubbard's office on February 6, 2008.

41. On February 15, 2008, the bar received Hubbard's file and a petition to withhold entry of an interim suspension in which Hubbard represented that his submission included copies of all of his files, records and reports in his possession, custody or control pertaining to his representation of Hargrove.

42. Heinzman asked Hubbard why he did not respond to the bar's inquiries. Hubbard said he put the letters aside and just failed to answer them. When he received a later mailing regarding the subpoena *duces tecum*, he realized he had been putting off the complaint and needed to address the issues and, therefore, he complied with the subpoena *duces tecum*.

43. During Hubbard's interview with Heinzman, Hubbard could not recall notifying Hargrove of the move of his law office to a Vienna, VA address.

44. The file provided by Hubbard to the bar for his representation of Hargrove contains no correspondence to Hargrove notifying him of a change of address in Vienna, VA.

45. Hargrove provided the bar with a copy of a letter to Hubbard dated August 6, 2007, by which Hargrove indicated he requested a copy of his file. The letter was addressed to Hubbard at a post office box in Richmond, VA.

46. Hargrove's August 6, 2007, letter was not in the file which Hubbard provided to the bar for the representation.

47. In his interview with Heinzman, Hubbard stated he had no recollection of Hargrove asking for a copy of his file. Hubbard told Heinzman he recalled a conversation with Hargrove in which Hargrove asked for a copy of his trial transcripts, and Hubbard sent Hargrove a copy of the appeal.

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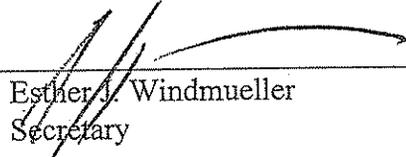
III. PUBLIC REPRIMAND

Accordingly, it is the decision of the subcommittee to impose a Public Reprimand and the Respondent is hereby so reprimanded.

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

THIRD DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By _____


Esther J. Windmueller
Secretary

CERTIFICATE OF SERVICE

I certify that on April 26, 2010, I caused to be mailed by Certified Mail, Return Receipt Requested, a true and correct copy of the Subcommittee Determination (Public Reprimand Without Terms) to David Glenn Hubbard, Esquire, Respondent, at, Leiser, Leiser & Hennessy, PLLC, Suite 310, 8229 Boone Boulevard, Vienna, VA 22182-2623, his last address of record with the Virginia State Bar.