

VIRGINIA:

BEFORE THE SIXTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF KENNETH PAUL MERGENTHAL, ESQUIRE
VSB Docket No. 06-060-0300

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On the 11th day of December, 2007, a meeting in this matter was held before a duly convened subcommittee of the Sixth District Committee consisting of Jean Patricia Dahnk, Esq., John E. Graham, lay person, and Jennifer Lee Parrish, Esq., presiding.

Pursuant to Part 6, Section IV, Paragraph 13 (G)(1)(d) of the Rules of Virginia Supreme Court, a subcommittee of the Sixth District Committee of the Virginia State Bar hereby serves upon the Respondent the following Public Reprimand with Terms:

I. STIPULATIONS OF FACT

1. At all times relevant hereto, the Respondent, Kenneth Paul Mergenthal, Esquire, (hereinafter the Respondent), has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. The Respondent had not been the trial counsel for the Complainant, Marcellus Berryman. Following completion of the trial, the trial counsel filed a Notice of Appeal and withdrew from representation of the Complainant.
3. In April of 2003, the Respondent was appointed by the Circuit Court of the City of Fredericksburg to represent Mr. Berryman, (hereinafter the Complainant), on appeal of his criminal convictions of multiple crimes. The Respondent timely filed a Petition for Appeal.
4. On October 30, 2003, the Court of Appeals denied the appeal on the grounds that the issue on which the appeal turned had not been properly preserved for reconsideration.

5. The Respondent states that he sent a letter to the Complainant at that time informing him of the denial of the appeal. The Complainant alleges he never received such a letter, and the Respondent was unable to produce a copy of the referenced correspondence.

6. In June of 2005, the Complainant wrote the Respondent, threatening to file a bar complaint unless the Respondent provided information about the outcome of the appeal. After receipt of that correspondence from the Complainant, the Respondent wrote to the Complainant informing him of the denial of the appeal sixteen (16) months prior.

7. The Complainant filed a bar complaint alleging failure to communicate, failing to provide a copy of the Complainant's file and other documents, and failure to further appeal to the Supreme Court of Virginia. The complaint was received by the Virginia State Bar on August 1, 2005.

8. On August 10, 2005, bar counsel sent a copy of the complaint to the Respondent accompanied by a letter stating in pertinent part,

Pursuant to Rule of Professional Conduct 8.1(c), you have a duty to comply with the bar's lawful demands for information not protected from disclosure by Rule 1.6. **As part of my preliminary investigation of the complaint, I demand that you submit a written answer to the complaint within 21 days of the date of this letter. Send me the original and one copy of your signed answer and any attached exhibits.** [Bold typeface in original document].

9. The Respondent failed to respond to the August 10, 2005, correspondence from the bar.

10. On September 7, 2005, the matter was referred to formal investigation, and was assigned to a bar investigator. The investigator left a message on the Respondent's office telephone answering machine on November 28, 2005, to which the Respondent did not respond. The investigator then sent a letter to the Respondent via facsimile and first class mail dated

December 2, 2005, requesting that the Respondent call the investigator to set up a meeting for an interview about the matter. The Respondent failed to respond to the investigator's December 2nd correspondence.

11. Also on September 7, 2007, the bar issued a subpoena *duces tecum* to the Respondent, requesting a copy of the entire client file, with a return date of September 30th. The subpoena was served on the Respondent by the Sheriff's office on September 12, 2005. The Respondent failed to respond to the subpoena.

12. On December 13, 2005, bar counsel issued a Notice of Noncompliance and a Request for Interim Suspension to the Respondent based on his failure to respond to the subpoena *duces tecum* issued on September 7th. On December 28, 2005, the Virginia State Bar Disciplinary Board entered an order suspending the Respondent's license to practice law in the Commonwealth of Virginia.

13. Bar counsel received correspondence from the Respondent on January 3, 2006, stating that he had not been able to deliver the client file in accordance with the subpoena request as he had not been able to locate the file.

II. NATURE OF MISCONDUCT

The subcommittee finds that such conduct by Kenneth Paul Mergenthal 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 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]

III. PUBLIC REPRIMAND WITH TERMS

Accordingly, it is the decision of the Subcommittee to impose a Public Reprimand With Terms on the Respondent, Kenneth Paul Mergenthal, and he is hereby so reprimanded. The terms and conditions which shall be imposed are:

1. The Respondent shall forthwith withdraw as counsel from all criminal matters in which he serves as court appointed counsel.
2. The Respondent shall certify in writing to bar counsel on or before February 1, 2008, that he has withdrawn from all current representation as court appointed counsel in pending criminal matters.
3. In addition to the certification referenced in paragraph 2, *supra*, the Respondent shall present to bar counsel on or before February 1, 2008, copies of orders of withdrawal and/ or motions for withdrawal for all criminal matters in which he serves as court appointed counsel.
4. In addition to the certification referenced in paragraph 2, *supra*, the Respondent shall confirm on or before February 1, 2008, that he has removed his name from the list of attorneys available for appointment for representation of criminal defendants in all of the courts in which he accepts such court appointments, by presenting to bar counsel letters of notification to those courts.

5. The Respondent shall not accept any new court appointments to serve as counsel in criminal matters until January 1, 2011.

Upon satisfactory proof that the above noted terms and conditions have been complied with, in full, this matter shall be closed.

If, however, the Respondent fails to comply with any of the terms set forth herein, as and when his obligation with respect to any such Term has accrued, bar counsel shall serve notice requiring the Respondent to show cause why the alternative disposition set forth below should not be imposed. Such show cause proceeding shall be set for hearing before the Sixth District Committee, and the burden of proof shall be on the Respondent to show by clear and convincing evidence timely compliance and timely certification.

By entering into this Agreed Disposition, the Respondent agrees that should the Respondent fail to comply with any of the terms set forth herein when his obligation with respect to any such Term has accrued, and fail to carry burden of proof at a show cause hearing, pursuant to the Rules of the Virginia Supreme Court, Part Six, Section IV, Paragraph 13(G)(5)(b), the case shall be certified to the Disciplinary Board for imposition of the alternative disposition of the SUSPENSION of the Respondent's license to practice law in the Commonwealth of Virginia for a period of six (6) months, to commence on a date determined by the Board.

The Respondent further agrees that in the event that this matter is certified to the Disciplinary Board for imposition of the alternative disposition, the Respondent shall be deemed to have stipulated to the Statement of Facts and the Violations of the Rules of Professional Conduct as set forth above in sections I and II of this Agreed Disposition.

IV. COSTS

Pursuant to Part Six, Section IV, Paragraph 13 (B)(8)(c)(1) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.

SIXTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By  _____
Chair Designate

CERTIFICATE OF SERVICE

I certify that I have this ⁸ 8th day of January, 200~~7~~⁸, mailed a true and correct copy of the Subcommittee Determination (Public Reprimand With Terms) by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the Respondent, Kenneth Paul Mergenthal, Esq., at 806 Princess Anne Street, Fredericksburg, VA 22401, his last address of record with the Virginia State Bar.

Marian Beckett

Marian L. Beckett
Assistant Bar Counsel