

VIRGINIA:

Before the Virginia State Bar Disciplinary Board

In the Matter of

Dennis Joseph McCarty

Attorney at Law

On August 26, 2010, came Dennis Joseph McCarty and presented to the Board a ~~letter/petition tendering resignation~~ ^{consent to revocation} of his/her license to practice law in the courts of this Commonwealth. By ~~tendering his/her resignation~~ ^{consenting to his revocation} at a time when disciplinary charges are pending, petitioner admits that the charges in the attached Notice of Hearing/Certification are true. ^{Amended}

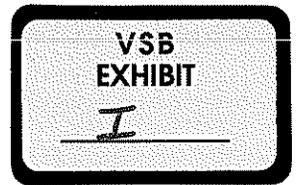
The Board having considered the ~~said letter/petition~~ ^{consent to revocation} accepts petitioner's ~~resignation~~ ^{revocation}.

Accordingly, it is ordered that the license to practice law in the courts of this Commonwealth heretofore issued to the said Dennis Joseph McCarty be and the same hereby is revoked, and that the name of the said Dennis Joseph McCarty be stricken from the Roll of Attorneys of this Commonwealth.

Enter this Order this 26th day of August, 2010

Virginia State Bar Disciplinary Board

By [Signature]
Chair



VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTERS OF
DENIS JOSEPH MCCARTHY**

**VSB Docket Nos. 09-031-076135; 09-031-077245; 09-031-079279
10-031-080381; 10-031-081999; 10-031-082265 and 10-000-082305**

AFFIDAVIT DECLARING CONSENT TO REVOCATION

Denis Joseph McCarthy, after being duly sworn, states as follows:

1. That Denis Joseph McCarthy was licensed to practice law in the Commonwealth of Virginia on 05/18/1988;
2. That Denis Joseph McCarthy submits this Affidavit Declaring Consent to Revocation pursuant to Rule of Court, Part 6, Section IV, Paragraph 13-28.
3. That Denis Joseph McCarthy's consent to revocation is freely and voluntarily rendered, that Denis Joseph McCarthy is not being subjected to coercion or duress, that Denis Joseph McCarthy has had an opportunity to review this consent to revocation with counsel of his choosing, and that Denis Joseph McCarthy is fully aware of the implications of consenting to the revocation of his license to practice law in the Commonwealth of Virginia;
4. Denis Joseph McCarthy is aware that there are currently pending a complaints and a proceeding involving, allegations of misconduct, the docket number(s) for which is set forth above, and the specific nature of which is here set forth:

ADMITTED W/OUT OBJECTION SEA
ADMITTED OVER OBJECTION _____
REFUSED _____
DATE 8-26-10
DOCKET NUMBER See above
SIGNATURE [Signature]

- a. **VSB Docket Nos. 09-031-076135; 09-031-077245; 09-031-079279
10-031-080381; 10-031-081999; 10-031-082265**

The factual allegations and the charges of Misconduct are set forth in the Amended Subcommittee Determination of Certification issued by the Third District Committee Section I, dated July 1, 2010, which is attached as VSB Ex. 1.

- b. **VSB Docket No. 10-000-082305**

The factual allegations and the charges of Misconduct are set forth in the Notice of Alleged Violations of the Virginia Consumer Real Estate Settlement Protection Act dated June 29, 2010, which is attached as VSB Ex. 2.

5. Denis Joseph McCarthy acknowledges that the material facts upon which the allegations of misconduct are predicated are true; and

6. Denis Joseph McCarthy submits this Affidavit and consents to the revocation of his license to practice law in the Commonwealth of Virginia because he knows that if the disciplinary proceedings based on the said alleged misconduct were brought or prosecuted to a conclusion, that the Virginia State Bar would be able to prove the alleged misconduct by clear and convincing evidence.

Executed and dated on _____

8/26/10



Denis Joseph McCarthy
Respondent



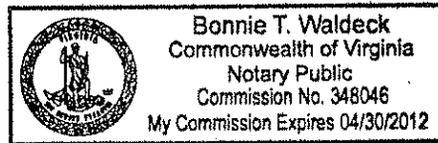
F. Neil Cowan, JR
V.B.# 28665
COUNSEL FOR RESPONDENT

COMMONWEALTH OF VIRGINIA
CITY OF RICHMOND, to wit:

The foregoing Affidavit Declaring Consent to Revocation was subscribed and sworn to
before me by Denis Joseph McCarthy on August 26, 2010.

Bonnie Waldeck
Notary Public

My Commission expires: 4/30/12.



VIRGINIA:

**BEFORE THE THIRD DISTRICT SECTION I SUBCOMMITTEE
OF THE VIRGINIA STATE BAR**

**IN THE MATTERS OF
DENIS JOSEPH MCCARTHY**

**VS B Docket Nos. 09-031-076135; 09-031-077245; 09-031-079279
10-031-080381; 10-031-081999; 10-031-082265**

**AMENDED SUBCOMMITTEE DETERMINATION
(CERTIFICATION)**

On June 2, 2010 a meeting in VS B Docket Nos. 09-031-076135; 09-031-077245; 09-031-079279; 10-031-080381; 10-031-081999; 10-031-082265 was held before a duly convened Third District Section I Subcommittee consisting of Joseph P. Rapisarda, Jr., Chair, Victoria N. Pearson, Esquire and William Manns, lay person to consider additional information received by the Virginia State Bar's Investigator relating to Respondent's conduct with respect to his Trust Account and to consider the request of Bar Counsel to Amend the Certification dated May 4, 2010.

Pursuant to Part 6, Section IV, Paragraph 13-15.B.3. of the Rules of the Virginia Supreme Court, the Third District Section I Subcommittee of the Virginia State Bar hereby serves upon the Respondent the following Amended Certification:

**VS B Docket No. 09-031-076135
Complainant: John M. Boswell, Commissioner of Accounts**

I. FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed and in good standing to practice law in the Commonwealth of Virginia.
2. Respondent was admitted to the practice of law in the Commonwealth of Virginia on May 18, 1988.

**VS B
EXHIBIT**

1

3. Respondent qualified as executor of the estate of Ray E. Reid on May 1, 2000. The filing deadline for the inventory of an estate is 4 months after qualification. (September 1, 2000) The first accounting is due 16 months after qualification. (July 1, 2001) Respondent filed an inventory of the estate with Mr. Boswell in May of 2001.
4. On July 18, 2002, The Commissioner of Accounts for Nottoway County, John M. Boswell, wrote to Respondent advising him that the bond was insufficient to cover the assets listed on the inventory.
5. On March 11, 2003, Mr. Boswell's assistant advised Respondent that the bond had still not been increased.
6. Mr. Boswell's assistant contacted Respondent again on September 26, 2003 advising that Respondent had still not increased the bond.
7. Mr. Boswell wrote to Respondent on October 28, 2003 listing problems with the estate that needed to be resolved.
8. On November 19, 2003, Mr. Boswell wrote to Respondent indicating that he had written and called on two occasions to discuss problems with the estate and that Boswell had still not received a response.
9. Mr. Boswell wrote to Respondent again on December 9, 2003 stating that Respondent had not responded to the three or four times Boswell had attempted to contact him, and that further inaction would result in the issuance of a Rule to Show Cause.
10. Respondent contacted Mr. Boswell after his December 9, 2003 correspondence and agreed to meet with a CPA to determine the tax liability of the estate and to file an amended inventory. Mr. Boswell wrote to Respondent on December 17, 2003 memorializing their agreement.
11. Mr. Boswell approved the amended inventory on December 19, 2003, which was recorded in the court December 23, 2003.
12. On January 13, 2004, Respondent gave Mr. Boswell an "update" on the estate. Mr. Boswell wrote to Margie Nevins, (the attorney-in-fact for Lelia Reid, the widow of Ray E. Reid) on January 13, 2004 informing her of Respondent's progress.
13. Thereafter, Respondent failed to continue keeping the necessary parties apprised of progress and had not filed the proper accounting.
14. Due to Respondent's continued inaction, Mr. Boswell wrote to Respondent on June 24, 2004 to advise him that he was prepared to file a show cause.

15. On June 28, 2004, Mr. Boswell wrote to the Clerk of the Nottoway Circuit Court asking that a show cause be issued against Respondent.

16. On July 2, 2004, Respondent filed the first accounting with Mr. Boswell.

17. On July 7, 2004, Mr. Boswell wrote to Respondent stating that the July 2, 2004 accounting was deficient. Boswell further warned Respondent that although the Rule to Show Cause had been withdrawn, he expected Respondent to be prompt from this point forward.

18. On August 6, 2004, Mr. Boswell wrote to Respondent stating he had received a call from Ms. Nevins inquiring about the status of the estate and again requesting an update so the parties may be properly advised.

19. On September 14, 2004, Mr. Boswell wrote to Respondent advising him that Ms. Nevins was upset due to the fact that Respondent had done nothing with the estate.

20. On September 28, 2004, Mr. Boswell wrote to Respondent and advised him that he needed to file his final accounting and surrender all assets to the Trustee by October 15, 2004.

21. On October 14, 2004, Mr. Boswell wrote to Respondent reminding him that the final accounting was due on 15th. Mr. Boswell stated his hope that Respondent would not disappoint him again.

22. Respondent filed an accounting with Mr. Boswell on October 15, 2004. On October 18, 2004, Mr. Boswell wrote to Respondent advising him of deficiencies/issues in the filing and objecting to Respondent's commission in the amount of \$12,871.04.

23. On November 1, 2004, Ms. Nevins wrote to Mr. Boswell objecting to several items on Respondent's accounting and requesting all tax filings done on behalf of the estate.

24. On November 19, 2004, Ms. Nevins again wrote to Mr. Boswell. Ms. Nevins this time advised Mr. Boswell that if she had not received all the information she had previously requested in her November 1, 2004 correspondence by noon on November 29, 2004, she would instruct her attorney to move forward.

25. On November 19, 2004, Mr. Boswell wrote to Respondent noting that he had not received a response to his October 18, 2004 correspondence, and threatened to file a show cause which would not be withdrawn until the matter concluded.

26. Ms. Nevins wrote to Mr. Boswell on November 29, 2004 complaining that the deadline for Respondent to provide information had come and gone without response. Mr. Boswell advised Ms. Nevins that he had heard from Respondent and was hoping for the information by the end of the day.

27. On November 30, 2004, Respondent wrote to Mr. Boswell providing the "final supporting documents" for the accounting and answers to questions on the accounting.

28. On January 10, 2005, Dana Fitzsimons, Jr., attorney for Lelia Reid, wrote to Mr. Boswell and Respondent stating that he had reviewed the proposed final accounting. Mr. Fitzsimons further advised that while he had concerns about the administration of the estate, he and Ms. Reid would agree to the accounting based on specific terms, which included a waiver of Respondent's fee.

29. Mr. Fitzsimons wrote to Mr. Boswell and Respondent again on January 19, 2005 advising that Respondent had agreed to the proposal for completion of the administration of the estate.

30. In Mr. Boswell's response dated January 28, 2005, to Mr. Fitzsimons', Boswell stated that while he saw no problems with the final settlement, he would not give final approval until he reviewed the settlement proposal in full.

31. Mr. Fitzsimons wrote to Respondent requesting implementation of the terms of the January 10, 2005 proposal rather than incur the cost of preparing a formal settlement.

32. On July 13, 2006, Mr. Fitzsimons wrote to Mr. Boswell and Respondent stating that the payment to maintain the surety on Respondent's bond was past due and the federal and state tax matters had not been resolved. Mr. Fitzsimons advised that Respondent had been contacted by the insurance company about paying the premium to maintain the bond on March 15th, May 3rd, May 17th and July 7th and that Respondent had failed to do so.

33. Respondent wrote to Mr. Fitzsimons on July 18, 2006 stating that the bond premium had been paid in full and the "bond remained in full force".

34. On August 10, 2007, Mr. Boswell received a faxed copy of correspondence from Margaret Springston of Maheny/Irby Insurance Agency to Respondent notifying him that despite repeatedly sending him statements for bond renewal, they had not received payment and would therefore be asking National Grange Mutual to cancel the bond due to non-payment of premium.

35. Mr. Boswell wrote to Respondent on April 24, 2008 stating he had received a call regarding the fees for preparing the tax returns had not been paid, which Respondent had agreed to pay.

36. Mr. Boswell received a letter dated April 25, 2008 from Susan Norfleet, (the CPA hired to handle the tax issues for the estate) concerning outstanding issues regarding the estate.

37. Mr. Boswell wrote to Respondent on May 5, 2008 and stated, "Why can't you understand that this thing is going to kill you if you don't take care of it?"

38. On May 7, 2008, Mr. Boswell wrote to Respondent about bond renewal premiums. He wrote, "How many times do I have to tell you before I get your attention that your attention needs to be given this estate."

39. On May 28, 2008, Mr. Boswell wrote to Respondent stating he had been contacted about the bond renewal again and would be issuing a show cause.

40. On June 5, 2008, Mr. Boswell wrote to Respondent advising him that he had two weeks to resolve the issues he had raised or he would issue a Rule to Show Cause.

41. Boswell wrote to McCarthy on June 5, 2008. (Attachment 40) "Please be advised that I am issuing a show cause for your appearance before Judge Warren two weeks from today, unless substantial progress has been made in those two weeks." Boswell wrote a second letter to McCarthy also dated June 5, 2008. (Attachment 41) "It is my understanding that all you have to do to conclude the estate is to answer the question posed to you by the accountant as to the disposition of two small checks totaling \$83.00, the payment of your bond, and the payment to the accountant."

42. On June 23, 2008, Mr. Boswell wrote Respondent stating that his two weeks were up and as he had not heard anything from Respondent and he would be issuing a summons.

43. On June 27, 2008, Mr. Boswell sent Respondent a summons to file a complete and final accounting within 30 days.

44. On July 8, 2008, Ms. Springston faxed Mr. Boswell a copy of correspondence to Respondent regarding the unpaid bond premium. Ms. Springston sent Mr. Boswell additional correspondence regarding the non-payment of the bond premium on July 24, 2008.

45. Respondent failed to file the accounting and on July 31, 2008 Boswell asked the court to issue a show cause. A hearing was set for September 2, 2008.

46. On September 2, 2008, the Court continued the matter until October 6, 2008 in order to allow Respondent additional time to resolve the matter of the accountant's fees and the two Internal Revenue Service ("IRS") checks to the estate.

47. On October 3, 2008, Respondent sent the accountant payment of her fees as well as the IRS checks. (Attachment 48) The IRS checks were dated March 27, 2007, and had become void after a year. It was decided that Respondent would have the IRS reissue the checks. At that time, the two checks were the only two remaining issues barring approval of the accounting. Because the two outstanding checks totaled only \$83, substantially less than the premium due on the bond, it had been agreed to cancel the bond, approve and record the final accounting and instruct Respondent to forward the checks upon receipt from the IRS to Ms. Nivens.

48. Mr. Boswell approved the final accounting of the estate on January 29, 2009 and it has been recorded with the court.

49. Mr. Boswell filed a complaint with the Virginia State Bar regarding Respondent's Misconduct with respect to his administration of the Estate.

50. Respondent failed to file a written response to the Complaint despite the Bar's demand that he do so, and failed to file a response to a subpoena duces tecum issued to him on December 10, 2008.

51. Respondent failed to return the investigator's telephone calls to schedule an appointment to be interviewed.

52. The Bar issued a subpoena compelling Respondent to appear for an interview on February 5, 2009. Respondent appeared and produced his file, and requested more time so he could retain counsel.

53. On February 19, 2009, the Bar's investigator wrote to Respondent to advise that another subpoena would be issued based on his refusal to reschedule the meeting. Respondent finally appeared at the office of the Virginia State Bar, without counsel, on March 5, 2009 to be interviewed.

II. NATURE OF MISCONDUCT

Such conduct by Denis Joseph McCarthy constitutes misconduct in violation of the following provisions of the 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 1.3 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.

* * * *

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 1.15 Safekeeping Property

- (a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
 - (1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or
 - (2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is in dispute by the client, in which even the disputed portion shall not be withdrawn until the dispute is finally resolved.
- (c) A lawyer shall:
 - (c) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

* * * *

RULE 4.1 Truthfulness In Statement To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of fact or law.

* * * *

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 admission or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected under Rule 1.6.

* * * *

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (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 lawyer's fitness to practice law

* * * *

VSB Docket No. 09-031-077245

Complainant: Timothy Berry

I. FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed and in good standing to practice law in the Commonwealth of Virginia.

2. Respondent was admitted to the practice of law in the Commonwealth of Virginia on May 18, 1988.

3. Respondent was appointed to represent Timothy Berry on certain criminal charges in the Circuit Court of Amelia County, Record No. CR07000071-00.

4. Mr. Berry was convicted of those charges and requested that Respondent appeal his conviction.

5. Respondent filed a Notice of Appeal on May 27, 2008 with the Virginia Court of Appeals.

6. On September 29, 2008, the Virginia Court of Appeals dismissed the appeal because Respondent failed to file a Petition for Appeal.

7. Respondent took no steps to inform Mr. Berry that his appeal had been dismissed.

8. From December of 2008 through June of 2009, Mr. Berry wrote Respondent for an update but Respondent failed to respond to the inquiries.

II. NATURE OF MISCONDUCT

Such conduct by Denis Joseph McCarthy 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.

(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.

* * * *

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.

* * * *

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.

(d) Upon termination or representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, 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 shall be returned to the client 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. Upon request, the client must also be provided 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); pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared 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.

* * * *

VS B Docket No. 09-031-079279
Complainant: Gregory Hopkins

I. FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed and in good standing to practice law in the Commonwealth of Virginia.
2. Respondent was admitted to the practice of law in the Commonwealth of Virginia on May 18, 1988.
3. Respondent represented Mr. Hopkins in the Circuit Court for Nottaway County on charges of robbery.
4. Mr. Hopkins entered into a plea agreement whereby he would plead guilty in exchange for a dismissal of other charges relating to a bank robbery that carried a potential life sentence.
5. The Circuit Court of Nottaway County accepted the plea and convicted Mr. Hopkins of robbery. However, he was sentenced to a term greater than anticipated, having received ten years imprisonment.
6. Mr. Hopkins was sentenced on October 6, 2008.

7. On October 24, 2008, Mr. Hopkins wrote to Respondent requesting that he file an appeal of his conviction. Respondent never responded.

8. On October 28, 2008, Respondent filed a notice of appeal on behalf of Mr. Hopkins.

9. On October 30, 2008, the Circuit Court of Nottaway County entered an order appointing Respondent to represent Mr. Hopkins on appeal of his conviction.

10. On December 29, 2008, the Nottaway Circuit Court file was forwarded to the Court of Appeals of Virginia.

11. Since Respondent had not answered Mr. Hopkins previous correspondence, on January 26, 2009, Mr. Hopkins again wrote to Respondent. Mr. Hopkins advised Respondent that he wanted to review the Petition for Appeal prior to filing, asked for copies of transcripts, and a copy of the plea agreement. Respondent never responded.

12. On February 18, 2009, Mr. Hopkins wrote to Respondent seeking among other things an update on the status of his appeal. Respondent never responded.

13. On February 20, 2009, the Virginia Court of Appeals dismissed Mr. Hopkins appeal because no Petition for Appeal was filed. Respondent never advised Mr. Hopkins of the dismissal.

14. On May 15, 2009, Mr. Hopkins filed a pro se motion for a delayed appeal.

15. On May 19, 2009, the Clerk's Office of the Virginia Court of Appeals wrote to Mr. Hopkins advising him that before he could receive a delayed appeal, he would need an affidavit from Respondent.

16. On May 29, 2009, Mr. Hopkins wrote to Respondent requesting that he provide the affidavit necessary for a delayed appeal and that he formally move to withdraw as counsel of record. Respondent never responded.

17. On July 16, 2009, the Virginia Court of Appeals denied Mr. Hopkins' delayed appeal because he did not file the required affidavit signed by Respondent.

18. Respondent was interviewed by the Virginia State Bar's investigator on November 19, 2009. At that interview, he asked for an additional thirty days in order to file a delayed appeal on Mr. Hopkins behalf.

19. Respondent never followed up with the Bar's investigator and cancelled several meetings the investigator had scheduled during January of 2010. He finally did attend a

scheduled meeting on January 22, 2010 and advised the Bar that he had done nothing in obtaining a delayed appeal.

II. NATURE OF MISCONDUCT

Such conduct by Denis Joseph McCarthy 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.
- (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.

* * * *

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.

* * * *

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.
- (d) Upon termination or representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, 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 shall be returned to the client 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. Upon request, the

client must also be provided 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); pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared 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.

* * * *

VSB Docket No. 10-031-080381

Complainant: George Wright

I. FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed and in good standing to practice law in the Commonwealth of Virginia.
2. Respondent was admitted to the practice of law in the Commonwealth of Virginia on May 18, 1988.
3. Respondent was appointed to represent Mr. George Wright on the appeal of his conviction of distribution of cocaine in the Circuit Court of Nottoway County to the Virginia Court of Appeals, Case No. 0123-08-2.
4. Respondent filed a Notice of Appeal on January 14, 2008 and a Petition for Appeal on April 1, 2008. Respondent did not provide Mr. Wright with copies of the pleadings.
5. On September 25, 2008, the Court of Appeals denied Mr. Wright's appeal.
6. Respondent did not notify Mr. Wright of the denial of the appeal, nor did he advise Mr. Wright of his options for a further appeal to the Supreme Court of Virginia.
7. In April of 2009, Mr. Wright wrote to the Clerk of the Court of Appeals inquiring about the status of his case. On April 17, 2009, the Clerk of the Court advised that his case had been dismissed.
8. Mr. Wright filed a complaint with the Virginia State Bar which was forwarded to the Respondent for a response.

9. Respondent failed to respond to the Complaint.

10. The Bar's investigator met with Respondent during the course of the investigation and Respondent requested that he be given an additional thirty days to reconvene with the investigator so that he could file a delayed appeal on Mr. Wright's behalf.

11. Respondent never followed up with the Bar's investigator and cancelled several meetings the investigator had scheduled during January of 2010. He finally did attend a scheduled meeting on January 22, 2010 and advised the Bar that he had done nothing in obtaining a delayed appeal.

II. NATURE OF MISCONDUCT

Such conduct by Denis Joseph McCarthy 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.
- (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.

* * * *

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.

* * * *

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.
- (d) Upon termination or representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, 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 shall be returned to the client 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. Upon request, the client must also be provided 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); pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared 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.

* * * *

VSB Docket No. 10-031-081999

Complainant: VSB/Trust Account Overdraft Notice

I. FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed and in good standing to practice law in the Commonwealth of Virginia.
2. Respondent was admitted to the practice of law in the Commonwealth of Virginia on May 18, 1988.
3. On December 1, 2009, Citizens Bank and Trust Company wrote to the Virginia State Bar and advised that items presented against Respondent's Real Estate Trust Account 124769401 were presented for payment that resulted in overdrafts on the account.
4. On November 2, 2009, check number 4902 in the amount of \$91,195.13 was presented for payment.
5. The check was approved for payment on November 3, 2009 which created an overdraft in the amount of \$407.82.

6. On November 12, 2009, check number 4841 in the amount of \$220.00 and check number 4905 in the amount of \$220.00 were presented for payment.

7. Both checks were approved for payment on November 13, 2009 which created an overdraft of \$917.82.

8. At or around the same time that these overdrafts were created, Respondent had already misappropriated client funds from the Real Estate Trust Account, which are the subject of the complaint in VSB Docket No. 10-031-082265, which is a part of this Certification.

9. A review of documents obtained from Respondent in response to a subpoena duces tecum reveals that the checks creating the overdraft in the Real Estate Trust Account were in connection with real estate closings that Respondent was conducting in 2009. One of those transactions, of which the Bar is aware, was the sale of real property by Frankie Williamson to Curtis and Gretchen Gunn, by contract of sale dated September 22, 2009.

10. Check No. 4902 was payable to Bank of America as part of the Williamson/Gunn closing.

11. Respondent provided information regarding check number 4841 showing that it was dated April 24, 2009 and made payable to Central Virginia Title.

12. The check was issued in connection with a real estate closing for Steven Hailey.

13. Respondent provided no information regarding the matter related to check number 4095.

14. At the time that Respondent was conducting these real estate closings in 2009, he was not authorized by law to provide such services.

15. Respondent was not authorized to conduct real estate closing services because his certification pursuant to the Virginia Consumer Real Estate Settlement Protection Act ("CRESPA") was revoked by the Virginia State Bar on February 29, 2008.

16. Respondent's CRESPA certification was revoked because the surety bond he was required to have had been cancelled.

17. At no time since February 29, 2008 has Respondent taken any steps with the Virginia State Bar to reactivate his CRESPA certification.

18. The Bar investigator reviewed files in Respondent's office that were made available to her by Respondent's assistant show that Respondent conduct the following closings without being in compliance with the requirements of CRESPA pursuant to Virginia law:

a. William Spruill closing on March 13, 2008

- b. Brett Watson closing on March 13, 2008
- c. Steven Hailey closing on April 8, 2008
- d. Willard Newby closing on March 4, 2008
- e. Huckabee-Mayfield closing on March 25, 2008
- f. Richard Hudson closing on March 20, 2008
- g. Charles Johnson closing on April 4, 2008
- h. Frankie Williamson closing on April 25, 2008
- i. Doug Fisher closing on April 29, 2008
- j. Phyllis Jones closing on April 30, 2008
- k. Mary Mitchell closing on May 13, 2008
- l. Lawrence Jones closing on June 9, 2008
- m. Ryan Watson closing on June 26, 2008
- n. Gwen Tuck closing on July 24, 2008
- o. Flippen – Allman closing on September 15, 2008
- p. Frankie Williamson closing on August 20, 2008
- q. Mildred Ridley closing on December 4, 2008
- r. Steven Hailey closing on October 6, 2008
- s. Tanner Tools closing on January 20, 2009
- t. Henson Spencer closing on March 13, 2009
- u. Bennie Wyatt closing on March 13, 2009
- v. Ray Sheffield closing on March 17, 2009
- w. Frankie Williamson closing on March 31, 2009

- x. Lonnie Cole closing on May 19, 2009
- y. Frankie Williamson closing on May 19, 2009
- z. Frankie Williamson on May 19, 2009
- aa. Sarah Nicholas closing on July 1, 2009
- bb. Frankie Williamson closing on August 7, 2009
- cc. Donnie Pratt closing on September 28, 2009
- dd. Carol Williamson closing on October 7, 2009
- ee. Brandon Hanson closing on October 23, 2009
- ff. Frankie Williamson closing to Gunn on October 23, 2009
- gg. Steven Hailey closing on April 23, 2009

19. In addition, Respondent was the settlement agent for three closings in 2010 for which he received and deposited funds into his normal client trust account rather than a separate and discrete account for real estate closings as required by CRESPA.

- a. Frankie Williamson closing on January 20, 2010
- b. Harold Kees closing on March 8, 2010
- c. Nichole Cogar closing on April 22, 2010

20. The overdrafts in the Real Estate Trust Account demonstrate that Respondent failed to keep the required records and perform the required accounting procedures of Rule 1.15 (e) and (f) of the Rules of the Supreme Court of Virginia to keep his trust accounts balanced.

21. Respondent also failed to conduct a number of the closings enumerated in this Certification by paying himself the remainder of funds contained in the subsidiary client accounts rather than returning those funds to the lender. On numerous occasions, Respondent failed to conduct the closing in accordance with the HUD-1 which he had prepared.

22. During the investigation of this matter, the Bar's investigator attempted to interview Respondent.

23. Respondent advised that he had set a meeting with potential counsel and needed additional time to be interviewed.

24. Respondent advised the Bar's investigator that he made an appointment with prospective counsel.

25. On January 28, 2010, the Bar's investigator contacted the counsel that Respondent claimed to be retaining. The investigator was informed by that counsel that Respondent had cancelled their meeting and had heard nothing further.

26. On January 28, 2010, the Bar's investigator wrote Respondent advising him that he had until February 5, 2010 to schedule an interview or else she would turn in her report indicating that Respondent had failed to cooperate.

27. Neither the Bar nor its investigator has received any communication from Respondent since February 5, 2010.

28. Respondent failed to call the investigator in an attempt to obstruct the investigation and otherwise conceal the fact that he was misappropriating monies from his Real Estate Trust Account and other client trust accounts.

29. Notwithstanding Respondent's obstruction, his office assistant granted access to certain closing files. Along with financial and other bank records subpoenaed from Respondent's financial institutions, the Bar discovered the following information.

30. The Bar's investigation revealed that over a course of time from at least January of 2008 through April of 2010, Respondent paid himself and others funds from his Real Estate Trust Account, number 124773201 which could not be reconciled. There were not legitimate entries or records justifying the payments. Specifically, the records reveal the following:

- On September 17, 2008, Respondent issued to a Chase McCarthy check number 4776 from his Real Estate Trust Account for \$320 for grass cuttings which he referenced in connection with the Allman closing. Respondent's real estate closing file for the Allman transaction, which took place on September 15, 2008, contains no supporting documentation to justify such a payment.
- On October 2, 2008, Respondent issued himself Check #4780 from his Real Estate Trust Account for \$1,538.88 which in the checkbook ledger referenced legal fees owed from a real estate closing for David McGrady, RE06-068. RE06-068 refers to a closing in which Respondent was the settlement attorney. A review of Respondent's closing file, RE06-68 showed that the closing took place on December 20, 2006. According to the HUD-1 and other documents in his closing file, Respondent received all of the \$350 in attorney's fees to which he was entitled
- On October 3, 2008, Respondent issued himself Check #4781 from his Real Estate Trust Account for \$1,311.04 which in his checkbook ledger referenced legal fees owed from a real estate closing for Jeffrey Prince, RE06-056.

Respondent was not the closing attorney for Prince. The settlement date was 9/28/06. An invoice in the file from McCarthy to First American Title dated 10/3/06 indicates McCarthy was due \$300 for attorney's fees.

- On October 15, 2008, Respondent issued himself Check #4788 from his Real Estate Trust Account for \$710.93. In his checkbook ledger, Respondent noted "282.50 – RE07-018 169.74 - RE06-011 258.89 – McNees". The closing file for RE07-018 and showed that Respondent had already been paid all closing fees to which he was entitled. The Bar's investigator could not locate a file for McNees RE06-011.
- On October 27, 2008, Respondent issued himself Check #4789 from his Real Estate Trust Account for \$5,000. There was no notation on the check or in the checkbook ledger for this payment. When pressed on the nature of this check, Respondent's assistant stated that although she prepared the checks for Respondent's signature, Respondent had prepared this particular one himself and she had no explanation for why Respondent would be entitled to the \$5,000 he had paid himself. Respondent's October 2008 bank statement for his Operating Account, number 594395401 shows a \$2,849.92 deposit on October 6, 2008, a \$710.93 deposit on October 16, 2008 and a \$5,000 deposit on October 27, 2008.
- Check #4801 dated December 2, 2008 for \$300 which in his checkbook ledger referenced McGrady-RE06-068.
- Check #4802 from his Real Estate Trust Account dated 1/12/09 for \$750 which in his checkbook ledger referenced Chris Weston. The only real estate closing file for a Chris Weston that the investigator discovered had in it an invoice August 6, 2009 indicating that Respondent was due \$300.
- A copy of the bank statement for Respondent's Operating Account for January shows that on January 12, 2009 a \$750 deposit was made.
- On February 17, 2009, Respondent issued himself Check #4810 from his Real Estate Trust Account for \$7,575.41. There is no notation on either the check or the check register. A copy of the bank statement from Respondent's Operating Account for February 2009 shows a deposit of \$7,575.41 on March 17, 2009. On March 19, 2009 Respondent made a payment to "US Treasury Tax" for \$7,575.41 from his Operating Account.
- On February 18, 2009, Respondent issued check number 4811 from his Real Estate Trust Account to James Pateras referencing a "Whitt Restitution". The Bar's investigator was not able to reconcile the payment.

31. Upon information and belief, Respondent has converted the funds in the previous paragraph for his own personal use.

II. NATURE OF MISCONDUCT

Such conduct by Denis Joseph McCarthy constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.15 Safekeeping Property

- (c) A lawyer shall
 - (4) promptly pay or deliver to the client or another as requested by such person the funds, securities or other properties in the possession of the lawyer which such person is entitled to receive.
- (e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.
 - (1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:
 - (i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;
 - (ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;
 - (ii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from

whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

- (iv) reconciliations and supporting records required under this Rule;
- (v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:

- (i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;
- (ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under (i), above;
- (iii) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

- (1) Insufficient fund check reporting.
 - (i) Clearly identified escrow accounts required. A lawyer or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identify of such account. Lawyer escrow accounts shall be maintained only in financial institutions approved by the Virginia State Bar, except as otherwise expressly directed in writing by the client for whom the funds are being deposited;

- (ii) Overdraft notification agreement required. A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions.

No escrow account shall be maintained in any financial institution which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

- (iii) Overdraft reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:
 - (a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;
 - (b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby;
 - (c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

- (iv) Financial institution cooperation. In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefore.

A financial institution may charge for the reasonable costs of producing the records required by this Rule.

- (v) Lawyer cooperation. Every lawyer or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule;
- (vi) Definitions. "Lawyer" means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, pro hac vice or otherwise, in the practice of law in Virginia;

"Lawyer escrow account" or "escrow account" means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client;

"Client" includes any individual, firm, or entity for which a lawyer performs any legal service, including acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full-time employee;

"Dishonored" shall refer to instruments which have been dishonored because of insufficient funds as defined above;

"Financial institution" and "bank" include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government;

"Insufficient Funds" refers to an overdraft in the commonly accepted sense of there being an insufficient balance as shown on the bank's accounting records; and does not include funds which at the moment may be on deposit, but uncollected;

"Law firm" includes a partnership of lawyers, a professional or nonprofit corporation of lawyers, and a combination thereof engaged in the practice

of law. In the case of a law firm with offices in this State and in other jurisdictions, these Rules apply to the offices in this State, to escrow accounts in other jurisdictions holding funds of clients who are located in this State, and to escrow accounts in other jurisdictions holding client funds from a transaction arising in this State;

"Notice of Dishonor" refers to the notice which, pursuant to Uniform Commercial Code Section 3-508(2), must be given by a bank before its midnight deadline and by any other person or institution before midnight of the third business day after dishonor or receipt of notice of dishonor. As generally used hereunder, the term notice of dishonor shall refer only to dishonor for the purpose of insufficient funds, or because the drawer of the bank has no account with the depository institution;

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under Uniform Commercial Code Section 4-104, if sufficient funds were available.

- (2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;
- (3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;
- (4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.
 - (i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and
 - (ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.
- (5) Reconciliations.
 - (i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash

disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;

- (ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;
- (iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

- (6) Receipts and disbursements explained. The purpose of all receipts and disbursements of escrow funds reported in the escrow journals and subsidiary ledgers shall be fully explained and supported by adequate records.

* * * *

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 admission or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected under Rule 1.6.
- (d) obstruct a lawful investigation by an admissions or disciplinary authority

* * * *

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (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 lawyer's fitness to practice law

* * * *

I. FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed and in good standing to practice law in the Commonwealth of Virginia.
2. Respondent was admitted to the practice of law in the Commonwealth of Virginia on May 18, 1988.
3. Helen Messenger and others entered into a contract to sell certain real property to Christopher Weston and David Heartwell. Respondent represented the buyers.
4. The property had been offered for sale at auction, and Respondent received a \$27,000.00 deposit to be applied to the purchase price that he was to hold in escrow.
5. Records for Respondent's Real Estate Trust Account show that he made a \$27,000.00 deposit into account number 124773201 on February 21, 2008.
6. Closing was scheduled for February 14, 2008. The closing never took place, and on April 30, 2008 the parties agreed on a settlement of the funds Respondent held in escrow.
7. On February 28, 2008, Respondent's registration with the Virginia State Bar pursuant to the Consumer Real Estate Settlement Protection Act to conduct real estate closing, escrow or related services, was terminated due to the cancellation of his surety bond. Respondent was notified that before he could perform any such services he would have to renew his registration which he has failed to do since February 28, 2010.
8. Mr. Weston was to be paid \$15,000.00 immediately and the remaining \$12,000.00 was to remain in Respondent's Real Estate Trust Account pending sale of the property.
9. On May 15, 2008, Respondent issued check number 4721 from his Real Estate Trust Account, account number 124773201 in the amount of \$15,000.00 payable to Mr. Weston and his attorney, Cal Spencer.
10. Ms. Messenger was unable to sell the property, and on October 30, 2009, the parties reached an agreement that they split equally the funds remaining in Respondent's Real Estate Trust Account.
11. In between May 15, 2008 and October 30, 2009 bank records show that the balance in Respondent's Real Estate Trust Account went below \$12,000.00. The closing balance in the Real Estate Trust Account on the November 2009 statement was negative 917.82.

12. Despite demands for the release of the funds, Respondent refused, and in fact refused to return any phone calls demanding disbursement of the funds.

13. Respondent eventually wrote a check dated December 3, 2009 to Mr. Weston and his attorney Cal Spencer in the amount of \$6,000.00. That check, however, was drawn off of his Client Trust Account, and not his Real Estate Trust Account.

14. On December 17, 2009, Respondent made a deposit into his Client Trust Account of \$6,003.86. Bank records for the deposit reveal that funds came from a check drawn on a Davenport & Co. account in the amount of \$5,003.86 and a check for \$1,000.00 that came from Respondent's operating account.

15. Ms. Messenger, through her counsel, attempted to get the \$6,000.00 Respondent was holding in trust. Respondent did not respond to the numerous requests seeking a return of the escrowed monies.

16. When the Virginia State Bar's Investigator questioned Respondent about the matter, he advised her that he sent Ms. Messenger a check. That statement was false.

17. Ms. Messenger never received her funds and had to take the additional step of suing Respondent in the Powhatan General District Court. Although he had been properly served with process, Respondent failed to appear and the court entered a default judgment against him in favor of Ms. Messenger on February 8, 2010. The judgment was for \$6,875.00 plus interest at 6% from December 10, 2009 until paid and costs of \$55.00.

18. In an effort to collect the funds Respondent owed, Ms. Messenger scheduled an appointment with him on March 19, 2010 under the guise of being a new real estate client.

19. When Ms. Messenger revealed her true identity to Respondent, he became visibly agitated. He left the room and returned with a check for \$3,000.00 drawn on his operating account. He further advised her that he would need to transfer some funds and that he would meet her at his bank later that day to pay her the rest of the funds. Respondent failed to appear and has since refused to accept any of Ms. Messenger's telephone calls.

20. During the course of the investigation in this case, the Bar's investigator spoke to Respondent on January 21, 2010 who acknowledged receipt of Ms. Messenger's complaint, at which time he falsely represented to the Bar that he had paid Ms. Messenger.

21. Respondent further advised the Bar's investigator that he was scheduled to meet with counsel and wished to retain counsel prior to being interviewed.

22. On January 28, 2010, the Bar's investigator contacted the counsel that Respondent claimed to be retaining. The investigator was informed by that counsel that Respondent had cancelled their meeting and had heard nothing further.

23. On January 28, 2010, the Bar's investigator wrote Respondent advising him that he had until February 5, 2010 to schedule an interview or else she would turn in her report indicating that Respondent had failed to cooperate.

24. Neither the Bar nor its investigator has received any communication from Respondent since February 5, 2010.

II. NATURE OF MISCONDUCT

Such conduct by Denis Joseph McCarthy 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.
- (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.

* * * *

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.

RULE 1.15 Safekeeping Property

- (a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
 - (1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or
 - (2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer

or law firm to receive it is in dispute by the client, in which even the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) A lawyer shall:

(c) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

* * * *

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:

(a) knowingly make a false statement of material fact;

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

(d) obstruct a lawful investigation by an admissions or disciplinary authority

* * * *

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(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 lawyer's fitness to practice law

* * * *

III. CERTIFICATION

Accordingly, it is the decision of the subcommittee to certify the above matters to the Virginia State Bar Disciplinary Board.

THIRD DISTRICT SECTION I SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By Joseph P. Rapisarda, Jr.
Joseph P. Rapisarda, Jr.
Chair

CERTIFICATE OF SERVICE

I certify that on this 1st day of July, 2010, I mailed by Certified Mail, Return Receipt Requested, a true and correct copy of the foregoing Subcommittee Determination (Amended Certification) to Denis Joseph McCarthy, Esquire, Respondent, *pro se*, at 930 South Main Street, P.O. Box 610, Blackstone, VA 23824-0610, the Respondent's last address of record with the Virginia State Bar.

Paulo E. Franco, Jr.
Paulo E. Franco, Jr.
Assistant Bar Counsel

Denis Joseph McCarthy, Esquire
930 South Main Street
P.O. Box 610
Blackstone, VA 23824-0610

Certified Article Number

7160 3901 9849 7544 7279

SENDER'S RECORD

7160 3901 9849 7544 7279

TO: Denis Joseph McCarthy, Esquire
930 South Main Street
P.O. Box 610
Blackstone, VA 23824-0610

SENDER: PEF/mj

REFERENCE: McCarthy 076135 et al

PS Form 3800, January 2005

RETURN RECEIPT SERVICE	Postage	
	Certified Fee	2.80
	Return Receipt Fee	2.30
	Restricted Delivery	0.00
	Total Postage & Fees	

7.00

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Virginia State Bar

Eighth and Main Building
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800
Telephone: (804) 775-0500

Facsimile: (804) 775-0597 TDD (804) 775-0502

June 29, 2010

**NOTICE OF ALLEGED VIOLATIONS OF THE
VIRGINIA CONSUMER REAL ESTATE SETTLEMENT PROTECTION ACT [CRESPA]
AND THE VIRGINIA STATE BAR REGULATIONS ISSUED PURSUANT TO CRESPA**

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7160390198497544

Denis Joseph McCarthy, Esquire
930 South Main Street
P.O. Box 610
Blackstone, VA 23824-0610

Re: In the Matter of Denis Joseph McCarthy
VSB Docket No. 10-000-082305

Dear Mr. McCarthy:

Pursuant to the Virginia State Bar Regulations issued pursuant to the Virginia Consumer Real Estate Settlement Protection Act [CRESPA], I am hereby serving you with written notice that you have allegedly violated provisions of CRESPA and the Regulations as set forth below:

1. At all times relevant hereto, the Respondent, Denis Joseph McCarthy, has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. The Respondent acted as settlement agent in the following real estate transactions which were closed on or about the dates shown:
 - a. William Spruill closing on March 13, 2008
 - b. Brett Watson closing on March 13, 2008

VSB
EXHIBIT

2

- c. Steven Hailey closing on April 8, 2008
- d. Willard Newby closing on March 4, 2008
- e. Huckabee-Mayfield closing on March 25, 2008
- f. Richard Hudson closing on March 20, 2008
- g. Charles Johnson closing on April 4, 2008
- h. Frankie Williamson closing on April 25, 2008
- i. Doug Fisher closing on April 29, 2008
- j. Phyllis Jones closing on April 30, 2008
- k. Mary Mitchell closing on May 13, 2008
- l. Lawrence Jones closing on June 9, 2008
- m. Ryan Watson closing on June 26, 2008
- n. Gwen Tuck closing on July 24, 2008
- o. Flippen – Allman closing on September 15, 2008
- p. Frankie Williamson closing on August 20, 2008
- q. Mildred Ridley closing on December 4, 2008
- r. Steven Hailey closing on October 6, 2008
- s. Tanner Tools closing on January 20, 2009
- t. Henson Spencer closing on March 13, 2009
- u. Bennie Wyatt closing on March 13, 2009
- v. Ray Sheffield closing on March 17, 2009
- w. Frankie Williamson closing on March 31, 2009
- x. Lonnie Cole closing on May 19, 2009

- y. Frankie Williamson closing on May 19, 2009
- z. Frankie Williamson on May 19, 2009
- aa. Sarah Nicholas closing on July 1, 2009
- bb. Frankie Williamson closing on August 7, 2009
- cc. Donnie Pratt closing on September 28, 2009
- dd. Carol Williamson closing on October 7, 2009
- ee. Brandon Hanson closing on October 23, 2009
- ff. Frankie Williamson closing to Gunn on October 23, 2009
- gg. Steven Hailey closing on April 23, 2009
- hh. Frankie Williamson closing on January 20, 2010
- ii. Harold Kees closing on March 8, 2010
- jj. Nichole Cogar closing on April 22, 2010

3. The above dates are reflected in the respective settlement statements as the settlement dates for each of the transactions. Each of the settlement statements for the transactions also show the Respondent as the settlement agent.

4. In order to function as the settlement agent in said transactions, the Respondent was required to have been registered as a settlement agent with the Virginia State Bar and have in full force and effect the following:

- a. A lawyer's professional liability insurance policy providing first dollar coverage and limits of at least \$250,000.00 per claim covering the Respondent;
- b. A blanket fidelity bond or employee dishonesty insurance policy providing limits of at least \$100,000.00 covering all other employees of the Respondent; and
- c. A surety bond providing limits of at least \$100,000.00 covering the Respondent.

5. On February 29, 2009, the Virginia State Bar provided you with notice that your CRESPA Certification was revoked because your Hartford Surety Bond #14BSBAJ0072 had been canceled.

6. Since that time, you have failed to take steps to renew your CRESPA Certification with the Virginia State Bar, and have conducted real estate closings during the period in which your Certification was revoked.

7. In 2010, you conducted at least three real estate closings and deposited funds in connection with those closings in an account that was not a separate and distinct fiduciary account maintained for the sole purpose of receiving funds for settlement, escrow or settlement services.

a. Frankie Williamson closing on January 20, 2010

b. Harold Kees closing on March 8, 2010

c. Nichole Cogar closing on April 22, 2010

8. You disbursed funds from your Real Estate Trust Account to yourself without being able to properly account for or reconcile in the following instances.

a. On September 17, 2008, Respondent issued to a Chase McCarthy check number 4776 from his Real Estate Trust Account for \$320 for grass cuttings which he referenced in connection with the "Allman: closing. Respondent's real estate closing file for the Allman transaction, which took place on September 15, 2008 contains no supporting documentation to justify such a payment.

b. On October 2, 2008, Respondent issued himself Check #4780 from his Real Estate Trust Account for \$1,538.88 which in the checkbook ledger referenced legal fees owed from a real estate closing for David McGrady, RE06-068. RE06-068 refers to a closing in which Respondent was the settlement attorney. A review of Respondent's closing file, RE06-68 should that the closing took place on December 20, 2006. According to the HUD-1 and other documents in his closing file, Respondent received all of the \$350 in attorney's fees to which he was entitled

c. On October 3, 2008, Respondent issued himself Check #4781 from his Real Estate Trust Account for \$1,311.04 which in his checkbook ledger referenced legal fees owed from a real estate closing for Jeffrey Prince, RE06-056. Respondent was not the closing attorney for Prince. The settlement date was 9/28/06. An invoice in the file from McCarthy to First American Title dated 10/3/06 indicates McCarthy was due \$300 for attorney's fees.

d. On October 15, 2008, Respondent issued himself Check #4788 from his Real Estate Trust Account for \$710.93. In his checkbook ledger, Respondent noted "282.50 – RE07-018 169.74 - RE06-011 258.89 – McNees". The closing file for RE07-018 and showed that Respondent had already been paid all closing fees to which he was entitled. The Bar's investigator could not locate a file for McNees RE06-011.

e. On October 27, 2008, Respondent issued himself Check #4789 from his Real Estate Trust Account for \$5,000. There was no notation on the check or in the checkbook ledger for this payment. When pressed on the nature of this check, Respondent's assistant stated that although she prepared the checks for Respondent's signature, Respondent had prepared this particular one himself and she had no explanation for why Respondent would be entitled to the \$5,000 he had paid himself. Respondent's October 2008 bank statement for his Operating Account, number 594395401 shows a \$2,849.92 deposit on October 6, 2008, a \$710.93 deposit on October 16, 2008 and a \$5,000 deposit on October 27, 2008.

f. Check #4801 dated December 2, 2008 for \$300 which in his checkbook ledger referenced McGrady-RE06-068.

g. Check #4802 from his Real Estate Trust Account dated 1/12/09 for \$750 which in his checkbook ledger referenced Chris Weston. The only real estate closing file for a Chris Weston that the investigator discovered had in it an invoice August 6, 2009 indicating that Respondent was due \$300.

h. A copy of the bank statement for Respondent's Operating Account for January shows that on January 12, 2009 a \$750 deposit was made.

i. On February 17, 2009, Respondent issued himself Check #4810 from his Real Estate Trust Account for \$7,575.41. There is no notation on either the check or the check register. A copy of the bank statement from Respondent's Operating Account for February 2009 shows a deposit of \$7,575.41 on March 17, 2009. On March 19, 2009 Respondent made a payment to "US Treasury Tax" for \$7,575.41 from his Operating Account.

j. On February 18, 2009, Respondent issued check number 4811 from his Real Estate Trust Account to James Pateras referencing a "Whitt Restitution". The Bar's investigator was not able to reconcile the payment.

Such conduct by the Respondent may constitute violations of the following Virginia Code Sections and Regulations issued by the Virginia State Bar pursuant to CRESPA:

1. Virginia Code § 6.1-2.21.C;
2. Virginia Code § 6.1-2.21.D.3;
3. Virginia Code § 6.1-2.23.A
4. Virginia Code § 6.1-2-23.A.1

5. 15 VAC-80-30
6. 15-VAC-80-50-A
7. 15-VAC-80-50-B

Pursuant to Regulation 15 VAC 5-80-50, Attorney Settlement Agent Compliance, the Respondent has thirty (30) days from the date of this notice to respond to the alleged violations. If, after receipt of the response, the Bar no longer has reasonable cause to believe that one or more violations of CRESPA and/or the Regulations have occurred, the Bar may dismiss the complaint as unfounded.

However, if the Bar believes the alleged violation(s) presents or presented a risk to consumers protected under CRESPA, the Bar may request a hearing and issue an order requiring the Respondent to appear at the hearing, whether or not the Respondent responded to this notice in writing or the thirty day time period has lapsed. The hearing shall be held before the Virginia State Bar Disciplinary Board within sixty (60) days of issuance of the Bar's order to appear.

Very truly yours,



Paulo E. Franco, Jr.
Assistant Bar Counsel

PEFjr

cc: Barbara S. Lanier, Clerk of the Disciplinary System