

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF
MARCUS NOAH PERDUE, III**

VSB DOCKET NOS: 09-080-077375

**MEMORANDUM ORDER
(PUBLIC REPRIMAND WITH TERMS)**

THIS MATTER came to be heard before a panel of the Virginia State Bar Disciplinary Board on Thursday, October 22, 2009. The Panel convened at the Lewis F. Powell, Jr., U.S. Courthouse, Tenth and Main Street, Richmond, Virginia 23219. The Panel was comprised of Thomas R. Scott, Jr., Chair, Stephen A. Wannall, Lay Member, Nancy C. Dickenson, Randall G. Johnson, Jr., and Michael S. Mulkey. Jennifer L. Hairfield, court reporter, with Chandler & Halasz, PO Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings. Kathryn R. Montgomery appeared as counsel for the Virginia State Bar; Marcus Noah Perdue, III, appeared pro se.

This matter came before the Board on the District Committee Determination for Certification by a duly convened Subcommittee of the Eighth District Committee of the Virginia State Bar on March 31, 2009.

A motion to admit agreed upon Exhibits from the Bar was granted. Respondent did not file an Exhibit List. A motion to admit the Bar's Witness List was admitted. Respondent did not file a Witness List.

Witnesses

1. Marcus Noah Perdue, III, Respondent
2. Albert E. Rhodenizer, Bar Investigator

3. William A. Parks, Jr., Esquire, Complainant

At the conclusion of the Bar's case, Respondent made a Motion to Strike challenging the sufficiency of the evidence. The Board recessed the proceedings to deliberate. After deliberation the Board ruled that a prima facie case had been made out by the Bar and the Respondent's Motion to Strike was denied.

Following evidence from the witnesses, questions from the Board and argument of counsel, the Board made the following Findings of Fact:

I. FINDINGS OF FACT

1. At all relevant times Respondent has been an attorney duly licensed to practice law in the Commonwealth of Virginia and his address of record with the Bar is 233 West Locust Street, Covington, Virginia 24426. Respondent has been licensed to practice law since April 16, 1998.

2. Respondent was properly served with notice of these proceedings in accordance with Part 6, § ¶13 E. and I.1.a. of the Rules of Professional Conduct.

THE PULLEN MATTER – VSB DOCKET NO. 09-080-077375

1. Melissa Pullen was divorced from her husband by an order dated November 11, 2003. The final decree of divorce provided that Ms. Pullen would hold her husband harmless for a marital debt. Respondent did not represent Ms. Pullen in the divorce.

2. Melissa Pullen filed bankruptcy in the United States Bankruptcy Court for the Western District of Virginia on or about June 13, 2005. Respondent represented Ms. Pullen in bankruptcy. She was granted a discharge on or about September 27, 2005.

3. In 2005, Mr. Pullen initiated a contempt action in the Circuit Court of Alleghany County based on Ms. Pullen's alleged failure to hold him harmless for the marital debt. Mr.

Pullen was represented by complainant, William A. Parks, Jr., Esquire. Ms. Pullen was represented by Respondent.

4. On December 14, 2007, the Circuit Court of Alleghany County entered an order in the contempt case. In it, the Court said:

Having heard arguments concerning the filing of bankruptcy of Melissa Rimmer Pullen, this Court, over the objection of Ms. Pullen, finds that it has jurisdiction to resolve the complaint of nonpayment of marital debt against Ms. Pullen.

5. On January 28, 2008, Respondent filed a Motion to Reopen Melissa Pullen's bankruptcy case in the United States Bankruptcy Court for the Western District of Virginia (hereinafter "the Motion to Reopen"). The Motion to Reopen alleged that Mr. Pullen's actions to collect a debt were in contempt of the 2005 bankruptcy order that discharged Ms. Pullen's debts.

6. The Motion to Reopen failed to disclose that the Circuit Court of Alleghany County had found that it had jurisdiction over the issue of nonpayment of marital debt.

7. Based on the Motion to Reopen, the Bankruptcy Court reopened Melissa Pullen's bankruptcy case.

8. In March, 2008, Mr. Pullen, by counsel, complainant William A. Parks, Jr., Esquire, filed in the Bankruptcy Court a motion for sanctions against Melissa Pullen and Respondent.

9. On September 8, 2008, U.S. Bankruptcy Judge Ross W. Krumm dismissed Melissa Pullen's bankruptcy case, denied the motion for sanctions, and ordered Respondent to appear on October 22, 2008 and show cause why he had not violated the Federal Rules of Bankruptcy Procedure 9011(b)(2) and (b)(3). The Bankruptcy Court's order stated in pertinent part:

In moving to reopen Mrs. Pullen's case on January 28, 2008, Mrs. Pullen's counsel failed to disclose that there was a separate ruling in the Circuit Court of Alleghany County that clearly showed that the parties had fully litigated the issue of jurisdiction to determine the effect of Mrs. Pullen's discharge on her hold harmless obligation and that the Circuit Court ruled in favor of Mr. Pullen on that issue. Had Mrs. Pullen's counsel

revealed these facts in Mrs. Pullen's motion to reopen her bankruptcy case would not have been reopened.

10. Respondent appeared at the show cause hearing on October 22, 2008. By Order dated October 24, 2008, Judge Krumm found that Respondent violated Federal Rules of Bankruptcy Procedure 9011(b)(2) and (b)(3) by filing the Motion to Reopen. Respondent was ordered to complete the Virginia Continuing Legal Education seminar entitled "Ethics 101: How to Avoid Disbarment, Poverty, and Shame."

The Boone Matter

1. Pamela Boone was divorced from her husband by an order dated December 9, 2005. The final decree of divorce provided that Ms. Boone would hold her husband harmless for a marital debt. Respondent did not represent Ms. Boone in the divorce.

2. Pamela Boone filed bankruptcy on or about April 29, 2005, and was granted a discharge on or about July 26, 2005. Respondent represented Ms. Boone in the bankruptcy.

3. On or about April 30, 2007, Mr. Boone, by counsel, complainant William A. Parks, Jr., Esquire, initiated a contempt action in the Circuit Court of Alleghany County based on Ms. Boone's alleged failure to hold him harmless for the marital debt. Respondent represented Ms. Boone in this matter.

4. Thereafter Respondent, on behalf of Ms. Boone, filed the first motion to reopen the bankruptcy case in the United States Bankruptcy Court for the Western District of Virginia.

5. By order dated October 30, 2007, the Bankruptcy Court denied the motion to reopen. In so doing, the Bankruptcy Court said:

State courts have concurrent jurisdiction pursuant to U.S.C. § 1334(b) to entertain any issue regarding dischargeability of an omitted debt. In re Bowen, 102 B.R. 752, 754 (B.A.P. 9th Cir. 1989).

6. On January 14, 2008, the Circuit Court for Alleghany County issued an order holding that “Ms. Boone’s debt to Mr. Boone occurred subsequent to her bankruptcy; therefore, such debt could not be and was not discharged in bankruptcy.”

7. On January 28, 2008, Respondent filed a second Motion to Reopen Pamela Boone’s bankruptcy case in the United States Bankruptcy Court for Western District of Virginia (hereinafter “the Second Boone Motion to Reopen”). The Second Boone Motion to Reopen alleged that Mr. Boone’s actions to collect a debt were in contempt of the bankruptcy order that discharged Ms. Boone’s debts.

8. The Second Boone Motion to Reopen failed to disclose that the Circuit Court of Alleghany County had decided the issue of the marital debt in its January 14, 2008, order. It also failed to disclose that the first motion to reopen filed in October, 2007, had been denied by the Bankruptcy Court.

9. Based on the Second Motion to Reopen, the Bankruptcy Court reopened Ms. Boone’s bankruptcy case on January 29, 2008.

10. Thereafter, Mr. Boone, by counsel, William A. Parks, Jr., Esquire, filed in the Bankruptcy Court a Motion for Sanctions against Pamela Boone and Respondent.

11. On September 10, 2008, U.S. Bankruptcy Judge Ross W. Krumm dismissed Pamela Boone’s bankruptcy case, denied the motion for sanctions, and ordered Respondent to appear on October 22, 2008 and show why he had not violated the Federal Rules of Bankruptcy Procedure 9011(b)(2) and (b)(3). The Order stated in pertinent part:

The court finds that the second motion to reopen filed by debtor’s counsel appears to violate Federal Rule of Bankruptcy Procedure 9011 (b)(1), (b)(2), and (b)(3) because its purpose was to obtain a ruling from this court that the debt to Mr. Boone had been discharged when it was clearly known that the Circuit Court Alleghany County held to the contrary and issued a final judgment order with respect to the issue. Further, the claimed legal contentions contained in the pleading were not warranted by existing law

or by non-frivolous argument for the extension, modification, or reversal of existing law, or the establishment of new law. Had the debtor, by counsel, exposed all of the facts surrounding the second motion to reopen, including the status of the litigation in the Circuit Court of Allegheny County, the second motion to reopen would not have been granted. Full disclosure would have permitted this court to recognize that the pleading filed by counsel for the debtor on October 23, 2007, and advocating reopening of the case contained similar facts and circumstances set forth in the motion to reopen dated January 28, 2008. Further, the allegations or other factual contentions in the debtor's pleading dated January 28, 2008, did not have evidentiary support in view of the omissions pertaining to the disposition of the debtor's state court action in the Circuit Court of Allegheny County subsequent to the initial denial of the motion to reopen dated October 30, 2007.

II. MISCONDUCT

The Certification charged violations of the following provisions of the Virginia Rules of Professional Conduct.

RULE 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for a defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless defend the proceeding as to require that every element of the case be established.

RULE 3.3 Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal;
 - (2) fail to disclose a fact to a tribunal when disclosure is necessary to assisting a criminal or fraudulent act by the client, subject to Rule 1.6;
 - (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonest, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

III. DISPOSITION

Upon review of the foregoing findings of fact, upon review of exhibits presented by Bar Counsel on behalf of the Virginia State Bar and the admitted stipulation of facts, upon evidence from witnesses presented on behalf of the Bar and upon evidence presented by Respondent in the form of his own testimony at the conclusion of the evidence regarding misconduct, the Board recessed to deliberate. After due deliberation the Board reconvened and announced its findings as follows:

1. On the Pullen matter and the Boone matter, VSB Docket No. 09-080-0777375, the Board determined that the Bar failed to prove by clear and convincing evidence any violation of Rule 3.1 of the Rules of Professional Conduct and failed to prove by clear and convincing evidence any violation of Rule 8.4(c).

2. The Board determined that the Bar proved by clear and convincing evidence that Respondent violated Rule 3.3(a); Rule 3.3(a)(1); Rule 3.3(a)(2); and Rule 3.3(a)(3) of the Rules of Professional Conduct.

Thereafter, the Board received further evidence of aggravation and mitigation from the Bar and Respondent, including Respondent's prior disciplinary record. The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent. After due deliberation the Board reconvened to announce the sanction imposed. The Chair announced the sanction as a Public Reprimand with terms effective November 2, 2009. The terms and conditions with which Respondent must comply are as follows:

1. Respondent shall complete six (6) hours of ethics which shall not be credited toward Respondent's compliance with his annual mandatory CLE requirement. Respondent shall, on or before the completion of the sixty (60) day suspension in VSB Docket Nos. 09-080-076688 and 09-080-078894 that begins on November 2, 2009, certify in writing completion of this requirement to Kathryn R. Montgomery, Assistant Bar Counsel.

Because Respondent was sanctioned with a Public Reprimand with terms for which no alternative sanction was provided, a show cause will be issued for Respondent to appear before the Board to show cause, if any he can, as to why he should not be further sanctioned should he fail to comply with the foregoing terms.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against Respondent.

It is further ORDERED that an attested copy of this Order be mailed to Respondent, Marcus Noah Perdue, III, by certified mail, return receipt requested, to his Virginia State Bar address of record, 233 West Locust Street, Covington, Virginia 24426, and by hand delivery to Kathryn R. Montgomery, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia.

ENTERED THIS 15th DAY OF DECEMBER, 2009

VIRGINIA STATE BAR DISCIPLINARY BOARD



Thomas R. Scott, Jr., 2nd Vice Chair