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BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF  
ROBERT HENRY SMALLENBERG

VSB Docket Nos.

VIRGINIA STATE BAR DISCIPLINARY BOARD

- 11-060-087166 (Reed)
- 12-060-089755 (Howell)
- 11-060-087953 (Lambert)
- 11-060-085684 (Johnson)
- 11-060-088181 (Winfield)
- 11-060-087698 (Leibel)
- 11-060-088022 (Jones)
- 11-060-088180 (Peyton)
- 12-060-089121 (Oliver)

AFFIDAVIT DECLARING CONSENT TO REVOCATION

Robert Henry Smallenberg, after being duly sworn, states as follows:

- I. *That Robert Henry Smallenberg was licensed to practice law in the Commonwealth of Virginia on October 15, 1993;*
- II. *That Robert Henry Smallenberg submits this Affidavit Declaring Consent to Revocation pursuant to Rule of Court, Part 6, Section IV, Paragraph 13-28.*
- III. *That Robert Henry Smallenberg's consent to revocation is freely and voluntarily rendered, that Robert Henry Smallenberg is not being subjected to coercion or duress, and that Robert Henry Smallenberg is fully aware of the implications of consenting to the revocation of his license to practice law in the Commonwealth of Virginia;*
- IV. *Robert Henry Smallenberg is aware that there is currently pending allegations of misconduct, the docket number(s) for which is set forth above, and the specific nature of which is here set forth:*

I. FACTUAL ALLEGATIONS

- 1. Respondent was licensed to practice law in the Commonwealth of Virginia on October 15, 1993.

The Janice Reed Complaint  
VS B Docket No. 11-060-087166

2. On or about August 10, 2010, Janice Reed retained Respondent to represent her in a dispute with her landlord regarding payment of rent. Ms. Reed had paid her rent for March 2010, but her landlord had not credited her account.
3. On or about August 10, 2010, Janice Reed met with Respondent's assistant, David Nelson, whose license to practice law in Virginia was revoked on or about April 28, 2006. Mr. Nelson disclosed to Ms. Reed that he was a disbarred attorney. He also provided her with a business card identifying him as "Dr. David A.G. Nelson, Intake Coordinator."
4. On or about August 10, 2010, Ms. Reed signed an "Attorney/Client Agreement" to retain Respondent as her lawyer. Respondent's name is listed on the fee agreement as the attorney who would handle her case.
5. Ms. Reed paid a \$500 advanced legal fee on August 10, 2010. Mr. Nelson provided her with a receipt.
6. It is unclear from Respondent's trust account records produced to the bar whether Respondent deposited the \$500 into his trust account.
7. Respondent assigned Ms. Reed's case to Allison Bridges, who was working in his office. Ms. Bridges had completed law school but had not yet passed the bar exam. Ms. Bridges signed her correspondence "Allison L. Bridges, Third Year Practitioner."
8. Ms. Reed was not told that Ms. Bridges was handling her case. Ms. Reed had no knowledge of who was handling her case.
9. On or about August 31, 2010, Ms. Bridges sent a letter to Ms. Reed's landlord demanding \$1,000 to resolve the dispute.
10. During September and October 2010, Ms. Bridges and Robert Seabolt, counsel for Ms. Reed's landlord, exchanged letters and emails about the dispute.
11. On or about October 1, 2010, Mr. Seabolt sent Ms. Bridges an email explaining that Ms. Reed's rental check had been credited to her account and that his client was willing to refund Ms. Reed the \$50 late fee she had paid. \*
12. Ms. Reed was never advised of this conversation or any resolution of her issues with her landlord.

13. Ms. Bridges learned in November 2010 that she passed the bar exam. She left Respondent's employment in December 2010. Ms. Bridges did not take Ms. Reed's case with her.
14. During the course of the representation, Ms. Reed called Respondent's office numerous times without a return call.
15. Ms. Reed spoke with Respondent on one occasion, at which time he said he had no information for her. Ms. Reed's other contact with Respondent's office was with Mr. Nelson. Ms. Reed had no substantive contact with Ms. Bridges about her case.
16. On or about February 19, 2011, Ms. Reed and her daughter, Shanita Griffin, went to Respondent's office and met with Mr. Nelson. At this time, Ms. Reed did not know the status of her case.
17. During this meeting, Mr. Nelson told Ms. Reed that he could not find an attorney to handle her case. He then stated that he would file suit for her by February 22, 2011. Mr. Nelson did not thereafter file suit on Ms. Reed's behalf.
18. On February 22, 2011, Ms. Reed spoke with Mr. Nelson and learned that he did not file suit. She then demanded her file, but Mr. Nelson refused to return her original documents.
19. Ms. Reed filed a bar complaint on March 9, 2011.
20. Respondent filed an answer to the bar complaint on April 6, 2011.
21. Respondent told the bar's investigator that after receiving information from Mr. Seabolt, he concluded that Ms. Reed had no cause of action against her landlord. According to Respondent, he instructed Mr. Nelson to draft a letter to Ms. Reed explaining this. Mr. Nelson did not draft a letter to Ms. Reed or otherwise communicate Respondent's opinion to Ms. Reed.
22. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
23. Respondent did not know that most of the above was happening nor did he know that Mr. Nelson did not write the requested letter to Ms. Reed. However, Respondent concedes that he had a duty to supervise non-attorney personnel and he did not adequately do so in the Reed matter.

24. Respondent's conduct in this case violated Rules 1.4(a), 1.4(b), 1.4(c), 1.15(e)(pre-June 2011 amendments), 1.15(f)(pre-June 2011 amendments), 1.16(e), 5.1(a), 5.1(b), 5.1(c), and 5.3(a), 5.3(b), 5.3(c), 8.1(c), and 8.1(d).

The Alexis Howell Complaint  
VS B Docket No. 12-060-089755

25. On July 11, 2011, Respondent participated in a hearing before a three-judge court sitting in the Circuit Court for Hanover County in Virginia State Bar docket number 09-032-078278, Circuit Court case number CL11000632-00. During the hearing, the three-judge court approved an agreed disposition for a thirty (30) day suspension to begin on August 27, 2011. This was a telephone conference. I was not present in Mr. Hershner's office when he participated in the call nor was I on the line when the telephone call took place. Mr. Hershner did inform me of the results of the conference the same day.
26. On or about July 27, 2011, Alexis Howell met with Steven Kelsey, Respondent's office manager, about a show cause issued by the guardian ad litem in a custody/visitation matter. The show cause summons had been issued on July 1, 2011 and set a hearing for September 1, 2011.
27. According to Ms. Howell, on or about July 27, 2011, Respondent briefly met with Ms. Howell and her mother and said he would "take good care" of Ms. Howell. Respondent denies this allegation and submits that he was in Henrico JDR Court at the time of the alleged meeting.
28. On or about July 29, 2011, Ms. Howell signed an "Attorney/Client Agreement" with Respondent's firm that provided for Respondent to represent her on a show cause regarding her visitation and custody case. The Attorney/Client Agreement did not include any reference to an associate working on the file or to Andrew Chen, Esquire.
29. At no time did Respondent or any member of his firm advise Ms. Howell that Respondent's license to practice law would be suspended for thirty (30) days beginning August 27, 2011.
30. The Attorney/Client Agreement Ms. Howell signed stated, "The total fee for the services set forth in the preceding section is \$1,000. A retainer in the amount of \$500 to be applied against the total fee is hereby due and payable upon return of this Executed Agreement to Law Firm. The balance of the total fee is due as follows: \$500 due before court proceeding."
31. On or about July 27, 2011, Ms. Howell paid Respondent an advanced legal fee of \$500 and received a receipt.

32. It is unclear from the trust account records produced to the bar whether Respondent deposited the \$500 into his trust account.
33. On or about August 1, 2011, Respondent sent a letter to the Clerk of the Henrico County Juvenile and Domestic Relations Court noting his appearance on behalf of Ms. Howell. Respondent falsely stated that he would be out of town on the date of the currently scheduled hearing, which was September 1, 2011. In fact, at the time he wrote this letter, Respondent knew that his license to practice law would be suspended for 30 days beginning August 27, 2011. However, Respondent submits that he actually was scheduled to be out of town from August 28, 2011 to September 5, 2012 inclusive.
34. On or about August 4, 2011 Respondent filed and sent to the guardian ad litem a Continuance Request Form, which falsely stated that the reason for the request for a continuance was that "Mr. Smallenberg will be out of town September 1, 2011." Respondent signed the Continuance Request Form. At the time Respondent filed this Form, Respondent knew that his license to practice law would be suspended for 30 days beginning August 27, 2011. However, Respondent submits that he actually was scheduled to be out of town from August 28, 2011 to September 5, 2012 inclusive.
35. According to Ms. Howell, during the month of August 2011, Ms. Howell called Respondent's office several times to speak with Respondent, but was told that he was unavailable. However, Respondent is aware of such calls nor can he find a single e-mail indicating that Ms. Howell called and left a message.
36. During the third week of August, 2011, Ms. Howell visited Respondent's office expecting to meet with him about her case. Instead, she met with Andrew Chen, an associate attorney employed by Respondent.
37. Mr. Chen told her that he would be handling the upcoming show cause hearing because Respondent was scheduled to be out of town.
38. At no time did Mr. Chen advise Ms. Howell that Respondent's license to practice law would be suspended for thirty (30) days beginning August 27, 2011.
39. According to Ms. Howell, later in August 2011, Ms. Howell returned to Respondent's office to ask for a refund because she was dissatisfied that Mr. Chen would be representing her at the hearing instead of Respondent. During this visit, Ms. Howell spoke with Respondent who reassured her that he was still her attorney and that Mr. Chen was only filling in for Respondent while he was out of town. However, according to Respondent, Ms. Howell's allegation is untrue. She came in on August 30. She did not speak to Respondent, who was in Duck NC.

40. On August 27, 2011, Respondent's license to practice law was suspended for thirty (30) days.
41. According to Ms. Howell, on or about September 1, 2011, Ms. Howell paid Respondent's office another \$250 and received a receipt. According to Respondent, this did not happen as Respondent was not in Virginia on September 1 either.
42. On or about September 1, 2011, Ms. Howell appeared for her show cause hearing and was represented by Mr. Chen. The case was continued to January 2012.
43. Ms. Howell was dissatisfied with Mr. Chen's appearance at the hearing.
44. Following the hearing, Ms. Howell heard nothing from Respondent.
45. According to Ms. Howell, approximately two weeks after the September 1, 2011 hearing, Mr. Chen called Ms. Howell and demanded that she pay the remainder of her balance due of \$250. Later, Mr. Chen advised Ms. Howell that she owed another \$700 to Respondent's firm. Respondent, however, is not sure what this is about. The first Respondent heard of this was in her complaint.
46. On September 13, 2011, the Memorandum Order was entered by the three-judge court in Virginia State Bar docket number 09-032-078278, Hanover Circuit Court case number CL11000632-00 imposing the thirty (30) day suspension effective August 27, 2011. The Order also required, pursuant to Part Six, Section IV, Paragraph 13-29 of the Rules of Court, that Respondent to give written notice of his suspension to all clients, opposing counsel, and presiding judges in pending litigation within 14 days of the date of the effective date of the suspension.
47. On or about October 20, 2011, Mr. Chen sent Ms. Howell a letter stating, among other things, that her "insistence" that "your retainer was a 'flat-fee' is grossly inaccurate."
48. On or about October 24, 2011, Mr. Chen filed a motion for Respondent's law firm to withdraw from representing Ms. Howell. The motion falsely states that Ms. Howell agreed to pay a \$1,000 retainer, when in fact her agreement with the firm states that her total fee would be \$1,000. The motion also states that Respondent's firm "vociferously denies" that it had a flat fee arrangement with Ms. Howell.
49. On or about November 4, 2011, an order was entered allowing Respondent's firm to withdraw from representing Ms. Howell.
50. On or about October 24, 2011, Ms. Howell filed a bar complaint against Respondent.

51. Respondent did not file an answer to the bar complaint. Respondent concedes that he did not respond to a request.
52. Respondent admitted to the bar's investigator that he did not notify Ms. Howell of his suspension as ordered by the three-judge court pursuant to Part Six, Section IV, Paragraph 13-29 of the Rules of Court.
53. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
54. Respondent's conduct in this matter violated Rules 1.4(a), 1.15(c)(amended Rule June 2011), 1.15(d) (amended Rule June 2011), 1.16(a)(1), 3.3(a)(1), 4.1(a), 5.1(a), 5.1(b), 5.1(c), 8.1(c), 8.1(d), 8.4(a), 8.4(b), and 8.4(c). Respondent concedes that under the circumstances, Ms. Howell thought he was her attorney and she should have received a notice of the suspension.

The Leslee Lambert Complaint  
VSB Docket No. 11-060-087953

55. On or about February 17, 2011 Leslee Lambert contacted Respondent's law firm about representation in a custody/visitation matter pending in Hanover Juvenile and Domestic Relations Court.
56. On or about February 19, 2011, Ms. Lambert visited Respondent's law firm and met with Respondent's assistant, David Ashley Grant Nelson, whose Virginia law license was previously revoked. Mr. Nelson quoted her a flat fee of \$1000 to handle the representation and said Respondent would be her attorney. Ms. Lambert then retained Respondent as counsel.
57. On or about February 19, 2011, Ms. Lambert briefly met with Respondent when he came in to introduce himself.
58. On or about February 23, 2011, Ms. Lambert met with Steve Kelsey, Respondent's office manager, and signed an "Attorney/Client Agreement" with Respondent's law firm. Ms. Lambert also made a payment of \$500.
59. It is unclear from the trust account records produced whether Respondent deposited the fee into his trust account.
60. On or about February 24, 2011, Mr. Nelson communicated with the court and had Ms. Lambert's case continued to April 26, 2011.

61. During the course of the representation, Ms. Lambert called and emailed Respondent's law firm without response from Respondent or his staff. It appears she was e-mailing Mr. Nelson. She provided Respondent copies of these e-mails after the fact.
62. Respondent did not meet with or contact opposing counsel during the course of the representation.
63. Respondent did not meet with or contact the guardian *ad litem* during the course of the representation. Respondent believes the guardian *ad litem* was appointed on April 26 which is also the date that Respondent found out Ms. Lambert had terminated representation.
64. On or about March 15, 2011, Respondent and Ms. Lambert met in his office and discussed the case. Ms. Lambert alleges this meeting lasted 10-15 minutes, while Respondent alleges the meeting lasted for over 40 minutes. Respondent submits that this meeting was at 4:00. At the time it concluded, Respondent's 4:30 had already been waiting.
65. Thereafter, Ms. Lambert had no communication with Respondent until after she had terminated the representation.
66. On or about April 20, 2011, Ms. Lambert sent Mr. Nelson an email terminating the representation due to lack of communication. Ms. Lambert demanded a full refund of the \$500 paid. Mr. Nelson did not inform Respondent of this e-mail and went so far as to deny receiving it until Ms. Lambert forwarded a copy to Respondent and Respondent confronted Mr. Nelson with the e-mail.
67. Ms. Lambert hired another lawyer, Shannon Dillon, to represent her.
68. Respondent was unaware that Shannon Dillon had been retained as Ms. Dillon did not communicate with Respondent nor did she file a motion to substitute counsel with the court.
69. On or about April 26, 2011, Ms. Lambert appeared in court for her hearing. Respondent also appeared and was unaware that Ms. Lambert had terminated the representation. The court continued the case. Respondent submits that he found out the morning of the hearing but before he arrived at court. The court informed Respondent that he was still required to appear as no one had filed a motion to substitute counsel and Respondent was listed as attorney of record.
70. On or about May 4, 2011, Mr. Nelson sent Ms. Lambert a refund check of \$57.50. When Mr. Nelson was given the refund check, he was also given the itemized bill. If he did not

give this to Ms. Lambert with the check, Respondent has no earthly idea why he would not have done so.

71. Ms. Lambert requested an accounting of the time spent on her case, but Respondent did not provide her with an accounting.
72. On or about May 19, 2011, Ms. Lambert filed a bar complaint against Respondent.
73. Respondent did not respond to the bar complaint. Respondent concedes he did not respond to a request.
74. Respondent also concedes that he had a duty to supervise Mr. Nelson. Hind-sight being 20-20, Respondent should have fired him after the Reed debacle.
75. On or about June 30, 2011, the bar served Respondent with a subpoena *duces tecum* for copies of the client file and his trust account records relating to Ms. Lambert.
76. On or about August 16, 2011, the bar filed a notice of noncompliance and request for interim suspension based on Respondent's failure to respond to the bar's subpoena.
77. On or about August 29, 2011, Respondent finally responded to the bar's subpoena.
78. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
79. Respondent's conduct in this matter violated Rules 1.1, 1.3(a), 1.4(a), 1.15(b)(3) (as amended June 2011), 1.15(c)(as amended June 2011), 1.15(d)(as amended June 2011), 1.15(c)(3) (pre-June 2011 amendment), 1.15(e)(pre-June 2011 version of the Rule), 1.15(f) (pre-June 2011 version of the Rule), 5.3(a), 5.3(b), 5.3(c), 8.1(c), and 8.1(d) of the Rules of Professional Conduct.

The Mary Johnson Complaint  
VSB Docket No. 11-060-085684

80. On or about September 1, 2010, Mary Johnson retained Respondent to represent her grandson who was charged with assaulting a nurse while in a psychiatric ward. Ms. Johnson wanted an aggressive lawyer to replace the Assistant Public Defender handling the matter.
81. On or about September 1, 2010, Ms. Johnson met with Respondent's assistant, David Nelson, whose license to practice law in Virginia was revoked on or about April 28,

2006. Mr. Nelson provided her with a business card identifying him as "Dr. David A.G. Nelson, Intake Coordinator."

82. On or about September 1, 2010, Ms. Johnson paid Respondent an advanced legal fee of \$2500.
83. It is unclear from the trust account records produced whether Respondent deposited the \$2500 into his trust account.
84. Respondent's own time records submitted to the bar are unclear as to when the money was withdrawn from the trust account. Respondent submits that \$177.50 came out on September 23, and the rest was withdrawn on October 1.
85. On or about September 26, 2010, by letter Ms. Johnson terminated the representation and demanded a full refund.
86. On or about October 18, 2010, Respondent provided Ms. Johnson with an accounting of her case and a refund of \$177.50.
87. On or about October 22, 2010, Ms. Johnson filed a bar complaint against Respondent.
88. Respondent did not respond to the bar complaint. Respondent concedes not responding to a request.
89. On or about January 12, 2011, the bar issued a subpoena *duces tecum* for copies of the client file and his trust account records relating to Ms. Johnson and/or her grandson.
90. On or about July 13, 2011, the bar filed a notice of noncompliance and request for interim suspension based on Respondent's failure to respond to the bar's subpoena.
91. On or about July 28, 2011, Respondent's license to practice law was suspended for failing to respond to a bar subpoena.
92. On or about August 2, 2011, Respondent's law license was reinstated after he complied with the bar subpoena.
93. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.

94. Respondent's conduct in this matter violated Rules 1.15(e) (pre-June 2011 amendments) 1.15(f) (pre-June 2011 amendments), 8.1(c), 8.1(d), 8.4(b), and 8.4(c) of the Rules of Professional Conduct.

The Markis Winfield Complaint  
YSB Docket No. 11-060-088181

95. On or about October 7, 2010, Markis Winfield retained Respondent to represent him on a drug charge.
96. On or about October 7, 2010, Mr. Winfield's parents, Paul and Samantha Wilson, met with David Nelson, Respondent's assistant, at Respondent's office to retain Respondent to represent Markis Winfield.
97. On or about October 7, 2010, Paul and Samantha Wilson signed an "Attorney/Client Agreement" for Respondent to represent Mr. Winfield on drug charges. The agreement called for a "retainer" of \$13,000. The agreement provided that \$1,000 of the fee was non-refundable.
98. Between October and December 2010, the Wilsons paid Respondent a total of \$3740 to represent Mr. Winfield. There are receipts for all payments. The amounts were paid as follows:
- \$180 paid on October 7, 2010
  - \$800 paid on October 7, 2010
  - \$300 paid on October 14, 2010
  - \$300 paid on October 21, 2010
  - \$300 paid on October 28, 2010
  - \$300 paid on November 5, 2010
  - \$300 paid on November 12, 2010
  - \$400 paid on November 26, 2010
  - \$300 paid on December 6, 2010
  - \$260 paid on December 10, 2010
  - \$300 paid on December 10, 2010
99. It is unclear from the trust account records produced whether Respondent deposited any of these payments into his trust account.
100. In addition to these amounts paid, Mr. Wilson agreed to work on Respondent's BMW for a \$1000 credit on the bill. Mr. Wilson performed the work, but Respondent did not credit Mr. Winfield's account any amount.
101. Respondent's trust account subsidiary ledger for Mr. Winfield erroneously records only \$800 received on October 12, 2010 on behalf of Mr. Winfield.

102. According to the complainants in this matter, during the course of the representation, Respondent failed to provide reasonable communication. However, Respondent does not understand this allegation as he recalls speaking with Mr. Winfield and his family numerous times.
103. On or about December 9, 2010, Mr. Winfield and Respondent appeared in court and Mr. Winfield pleaded guilty to several charges.
104. On or about March 10, 2011, Mr. Winfield and Respondent appeared for a sentencing hearing and Mr. Winfield was sentenced.
105. Mr. Winfield asked Respondent to file a motion for a sentence reduction, but Respondent refused to take further action unless he was paid another \$750. Respondent did not receive further payment and did not perform further work. The retainer did not obligate the firm to handle any post-sentencing relief.
106. By letter dated June 7, 2011 to Mr. Winfield, Respondent advised Mr. Winfield that he had received less than \$1000 in payments. At the time, Respondent had received \$3740 in payments and \$1000 worth of work on his BMW. Respondent submits that the parties had a mistaken assumption about how the work on the BMW would be applied to the legal bill. Respondent submits that he was not going to take on new post-sentencing proceedings without being paid.
107. On or about June 8, 2011, Mr. Winfield filed a bar complaint against Respondent.
108. Respondent did not answer the bar complaint. Respondent concedes not responding.
109. On or about July 22, 2011, the bar served on Respondent a subpoena *duces tecum* for Mr. Winfield's client file and trust account records related to Respondent's representation of Mr. Winfield.
110. On or about September 9, 2011, the bar filed a notice of noncompliance and request for suspension based on Respondent's failure to respond to the bar subpoena.
111. On or about September 20, 2011, Respondent's license to practice law was suspended for failure to comply with the bar's subpoena.
112. On or about September 23, 2011, Respondent's license to practice law was reinstated after he complied with the bar's subpoena.
113. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger, which was in itself incomplete.

Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.

114. Respondent's conduct in this case violated the following Rules of Professional Conduct: 1.1, 1.4(a), 1.5(a), 1.5(b), 1.15(e) (pre-June 2011 amendments) 1.15(f) (pre-June 2011 amendments), 1.16 (d), 8.1(c), 8.1(d), and 8.4(c).

The Richard Leibel Complaint  
VSB Docket No. 11-060-087698

115. On or about December 21, 2010, Richard Leibel retained Respondent to represent him in a divorce.
116. On or about December 21, 2010, Mr. Leibel met with David Nelson, Respondent's assistant, about the representation. Mr. Leibel paid an advanced legal fee of \$2000 and signed an "Attorney/Client Agreement" with Respondent.
117. On or about January 14, 2011, Mr. Leibel paid Respondent another advanced legal fee of \$2000.
118. It is unclear from the trust account records produced whether Respondent deposited these amounts into his trust account.
119. Respondent's associate, Allison Bridges, prepared and answer to the complaint seeking divorce and discovery answers.
120. On or about February 23, 2011, counsel for Mr. Leibel's wife, Melanie Friend, sent Respondent a settlement offer, which Respondent sent to Mr. Leibel.
121. Mr. Leibel thereafter sent Respondent his counter to the settlement offer. Respondent submits that he met with Mr. Leibel about the offer on March 15. Pursuant to this meeting, Respondent understood that Mr. Leibel was going to bring him additional documents to look at before the offer was conveyed.
122. Respondent did not respond to Ms. Friend on behalf of Mr. Leibel.
123. Pursuant to discussions about the proposed settlement on March 15, Mr. Leibel dropped off an inch thick packet of materials the afternoon of March 18 (a Friday). Respondent saw these documents for the first time on March 21 (the following Monday). Respondent was also answering voluminous discovery in this matter during this time period.

124. On or about March 15, 2011, Ms. Friend emailed Respondent about a property settlement, but Respondent did not answer.
125. On or about March 28, 2011, Ms. Friend issued witness subpoenas for an April 11, 2011 pendente lite hearing, which was scheduled to begin at 9:00 AM. Ms. Friend mailed Respondent a copy of the subpoenas. Respondent did receive copies of the subpoenas. However, the copies were received after the court date.
126. On or about April 1, 2011, Mr. Leibel emailed Respondent about an April 11, 2011 court date his son had mentioned. Mr. Leibel wanted information about the court date and about responding to the settlement offer. Respondent did not respond to Mr. Leibel's email.
127. Mr. Leibel called Respondent's office several times about the April 11<sup>th</sup> hearing. On or about April 8, 2011, Respondent spoke with Mr. Leibel and told him he was preparing for the hearing. Respondent believes he absolutely mentioned 11:00 albeit that time was incorrect. Respondent does not specifically remember saying the words that he needed to be there. Respondent was told by Mr. Nelson that it was Mr. Leibel who provided the time of 11:00.
128. On or about the morning of April 11, 2011, Respondent called Mr. Leibel to discuss where they were going to meet. During this conversation, Mr. Leibel did say words to the effect that he did not know he had to be there.
129. On or about April 11, 2011, Mr. Leibel appeared in court at approximately 10:45 AM and saw Ms. Friend, who told him the hearing was already over. Mr. Leibel left the courthouse without seeing Respondent. Respondent was there prior to 11:00, but did not see Mr. Leibel.
130. Respondent did not appear for Mr. Leibel at the April 11, 2011 hearing, which went forward at 9:00 AM.
131. At the April 11, 2011 hearing, Mr. Leibel was ordered to pay spousal support.
132. On or about April 14, 2011 Mr. Leibel and Respondent met and discussed the hearing. Shortly thereafter, Mr. Leibel retained another attorney to represent him. New counsel was substituted in on or about June 1, 2011.
133. Mr. Leibel's new counsel filed a motion for reconsideration and obtained a reduction in the amount of support Mr. Leibel was ordered to pay.
134. According to Mr. Leibel, he requested that Respondent provide him with an accounting, but Respondent did not do so. According to Respondent, such a request was never made

though Respondent concedes a final bill should have been sent without a request. Respondent's only contact with Mr. Leibel after April 14, 2011 was two telephone conversations on or about April 22 during which Respondent believes Mr. Leibel attempted to blackmail him.

135. On or about April 25, 2011, Mr. Leibel filed a bar complaint against Respondent.
136. Respondent did not respond to the bar complaint. Respondent conceded responding to a request.
137. On or about June 9, 2011, the bar served on Respondent a subpoena *duces tecum* for Mr. Leibel's client file and trust account records related to Respondent's representation of Mr. Leibel.
138. On or about July 20, 2011, the bar filed a notice of noncompliance and request for suspension based on Respondent's failure to respond to the bar subpoena.
139. On or about August 4, 2011, Respondent's license to practice law was suspended for failure to comply with the bar's subpoena.
140. On or about August 8, 2011, Respondent's license to practice law was reinstated after he complied with the bar's subpoena.
141. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
142. Respondent's conduct in this case violated the following Rules of Professional Conduct: 1.3(a), 1.4(a), 1.15(b)(3) (as amended June 2011), 1.15 (c)(3) (pre-June 2011 amendments), 1.15(e) (pre-June 2011 amendments), 1.15(f) (pre-June 2011 amendments), 8.1(c), and 8.1(d).

The Anthony Jones Complaint  
VS B Docket No. 11-060-088022

143. On or about September 16, 2010, Alzena Mayfield went to Respondent's office with a legal problem unrelated to this matter. During a visit about a week later, she discussed an issue her family was having with the landlord of a commercial property they were renting.
144. On or about October 28, 2010, Ms. Mayfield's son, Anthony Jones, retained Respondent to represent him and his family in the same landlord-tenant matter Ms. Mayfield had

earlier discussed with Respondent's office. Respondent did not previously discuss a landlord-tenant issue.

145. On or about October 28, 2010, Anthony Jones and Ms. Mayfield signed an "Attorney/Client Agreement" with Respondent that called for a \$2,000 advanced legal fee.
146. On or about September 24, 2010, either Ms. Mayfield or Mr. Jones paid Respondent \$1000. On or about March 1, 2011, either Ms. Mayfield or Mr. Jones paid Respondent \$200. It is unclear from the trust account records produced whether Respondent deposited these funds into his trust account, but Respondent submits the money was deposited into escrow.
147. Mr. Jones and Ms. Mayfield advised Respondent that the landlord refused to make repairs to the heating and air conditioning system, but that they wished to work out their differences with the landlord continue renting the commercial property. They also told Respondent that they failed to escrow any of the rent the rent which would be required if a failure or refusal to pay rent was due to a defect in the demised premises.
148. During the course of the representation, Respondent failed to provide Mr. Jones and Ms. Mayfield with adequate communication.
149. Actually, trial on the matter set forth in the retainer was November 3, 2010 in the Petersburg Circuit Court. I appeared and the matter against Mr. Jones was dismissed.
150. On January 13, 2011, Respondent had three telephone conversations with Ms. Mayfield. According to Respondent, among matters discussed was the fact that there was no defense to the unlawful detainer action as Mr. Jones and Ms. Mayfield were several months behind in rent.
151. On or about the morning of January 13, 2011, Respondent and counsel for the landlord worked out a settlement agreement by which Mr. Jones/Ms. Mayfield would pay the landlord \$29,500 in back rent and vacate the premises by February 15, 2011.
152. On the morning of January 13, 2011, Respondent and Ms. Mayfield talked by telephone at least three times – once before and twice after Respondent's telephone conversation with the landlord's attorney. Ms. Mayfield told Respondent that she wanted to work with the landlord on a solution. Respondent did not adequately explain to her the details of the settlement he was negotiating with the landlord's counsel. Respondent believes he was clear that judgment would be entered and they would have 30 days to work out something with the landlord. Respondent told Ms. Mayfield she did not need to go to court that day.

153. Mr. Jones alleges that on or about January 13, 2011, Respondent talked to him and Respondent did not advise Mr. Jones of the settlement he was negotiating with the landlord's counsel. Respondent, however, submits that he did not speak to Mr. Jones. He spoke to Ms. Mayfield three times after calling a number he believed to be Mr. Jones' cellular phone number. Ms. Mayfield stated that she had Mr. Joens' cellular phone and that she was speaking with him.
154. On or about January 13, 2011, Ms. Mayfield and Mr. Jones went to court anyway, and thought they learned that the case had been continued because the lawyers had reached an agreement. According to Respondent, the case was not continued. It is Respondent's understanding that the landlord's attorney appeared and explained the agreement to the judge.
155. Respondent did not send Mr. Jones or Ms. Mayfield a copy of any agreement reached with the landlord's counsel. Respondent submits there was nothing to send, as it was an oral agreement.
156. Mr. Jones and Ms. Mayfield allege that Respondent did not adequately explain to them the terms of the settlement he reached with the landlord's counsel. Respondent submits this is not true. Respondent was crystal clear that a judgment would be entered and that Ms. Mayfield and Mr. Jones would have 30 days to work out something with the landlord or they would have to vacate the premises.
157. On or about February 10, 2011, the court entered an Agreed Order of Judgment that incorporated the agreement between Respondent and the landlord's counsel. The order was entered *nunc pro tunc* to January 13, 2011.
158. Respondent concedes that he may not have sent Ms. Mayfield and Mr. Jones a copy of the order when it was received.
159. On or about March 9, 2011, Mr. Jones received a notice of eviction. He later obtained from the clerk of court a copy of the Agreed Order of Judgment entered February 10, 2011.
160. On or about March 9, 2011, Mr. Jones wrote Respondent a letter complaining about lack of communication and stating that Respondent had not told him about the settlement. Mr. Jones implored Respondent to call him.
161. Respondent did not call Mr. Jones in response to the letter.
162. Mr. Jones later went to Respondent's office unannounced and was able to meet with him. Mr. Jones alleges that Respondent did not offer any solution for Mr. Jones to keep possession of the commercial property. Respondent submits that this is not true. He suggested bankruptcy protection. This route was not viable because the business had

neither a bank account nor any record of what monies were taken in. Apparently the business was being run as a cash to pocket affair. No plan of reorganization would be approved under the circumstances.

163. On or about May 25, 2011, Mr. Jones filed a bar complaint against Respondent.
164. Respondent did not respond to the bar complaint. Respondent concedes he did not respond to a request.
165. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
166. Respondent's conduct in this matter violated the following Rules of Professional Conduct: 1.2(a), 1.4(a), 1.4(b), 1.4(c), 1.15(e) (pre-June 2011 amendments), 1.15(f) (pre-June 2011 amendments) 8.1(c), and 8.1(d).

The Darryl Peyton Complaint  
VSB Docket No. 11-060-088180

167. On or about December 7, 2010, Darryl Peyton met with Respondent's assistant, David Nelson about a legal issue involving litigation to remove the administrator of his father's estate. Mr. Peyton was concerned that the administrator was actively converting assets of the estate.
168. On or about December 8, 2010, Mr. Peyton retained Respondent to represent him with regard to a legal issue involving litigation to remove the administrator of his father's estate.
169. On or about December 8, 2010, Mr. Peyton signed an "Attorney/Client" agreement with Respondent that provided that Respondent would represent him with regard to "Client's representative in the Estate of Thomas Lee Peyton, including but not limited to the review of any inventory and commencement of litigation, and all issues pertaining thereto."
170. Sometime after December 8, 2010, Mr. Peyton asked Respondent to prepare a will for him in addition to representing him with regard to his father's estate. Respondent is not aware of any will for a wife. A will was drafted for Mr. Peyton and he had an appointment to sign it before a notary on 12/22/10.

171. On or about December 8, 2010, Mr. Peyton paid Respondent an advanced legal fee of \$3000. It is unclear from the trust account records produced whether Respondent deposited this payment into his trust account. Respondent submits it was so deposited.
172. Mr. Peyton alleges that during the course of the representation, Respondent failed to provide reasonable communication. However, Respondent submits that Mr. Peyton called at least twice a week and had four scheduled meetings between 12/7/10 to 1/7/11 inclusive and there were two other times that he showed up unannounced. Respondent met with him at least three times.
173. During the course of the Representation, Mr. Peyton called Respondent's office several times, but only was able to speak with David Nelson.
174. According to Respondent's subsidiary ledger for Mr. Peyton, on or about January 6, 2011, Respondent withdrew \$1,000 of the advanced legal fee paid.
175. On or about January 12, 2011, Respondent filed a Motion to Remove Administrator of the Estate in the Circuit Court of Richmond on Mr. Peyton's behalf.
176. Counsel for the administrator told the bar's investigator that he did not receive a copy of the Motion to Remove Administrator of the Estate. Respondent was not aware the administrator had an attorney.
177. Counsel for the administrator told the bar's investigator that he had no communication with Respondent and was not aware that Respondent represented Mr. Peyton.
178. On or about February 2, 2011, Mr. Peyton terminated Respondent's representation.
179. Shortly thereafter, Mr. Peyton retained other counsel who was able to resolve Mr. Peyton's legal issues regarding the estate within two weeks.
180. According to Respondent's subsidiary ledger for Mr. Peyton, on or about February 7, 2011, Respondent withdrew the remaining \$2000 of advanced legal fees Mr. Peyton had paid, leaving a balance of zero.
181. Respondent did not provide Mr. Peyton with any refund of monies paid.
182. Mr. Peyton sued Respondent in Richmond General District Court for a return of unearned fees. The trial was on or about May 18, 2011. Respondent presented evidence of his billing records and prevailed.
183. Prior to the May 18, 2011 trial in Richmond General District Court, Mr. Peyton had not received or seen a billing record or any accounting of time Respondent spent on his case.

184. Respondent's time sheet for Mr. Peyton's legal matter was created in Microsoft Excel. The bar's electronic copy of this document shows that the time sheet was named and last modified on May 12, 2011 by Respondent. Respondent submits that his copy says it was created on December 6, 2011 and modified on May 12, 2011. Respondent submits that obviously, it could not have been modified before it was created.
185. On or about June 2, 2011, Respondent's secretary by mail returned Mr. Peyton's photographs. Respondent did not return to Mr. Peyton the other documents Mr. Peyton had provided to Respondent. Further, Respondent did not provide Mr. Peyton with a copy of his file or the will Mr. Peyton had asked him to draft.
186. On or about June 8, 2011, Mr. Peyton filed a bar complaint against Respondent.
187. Respondent did not respond to the bar complaint. Respondent concedes he did not respond to a request.
188. On or about July 22, 2011, the bar served on Respondent a subpoena *duces tecum* for Mr. Peyton's client file and trust account records related to Respondent's representation of Mr. Peyton.
189. On or about September 9, 2011, the bar filed a notice of noncompliance and request for suspension based on Respondent's failure to respond to the bar subpoena.
190. On or about September 20, 2011, Respondent's license to practice law was suspended for failure to comply with the bar's subpoena.
191. On or about October 3, 2011, Respondent's license to practice law was reinstated after he complied with the bar's subpoena.
192. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
193. Respondent's conduct in this case violated the following Rules of Professional Conduct: 1.1, 1.3(a), 1.4(a), 1.15(e) (pre-June 2011 amendments), 1.15(f) (pre-June 2011 amendments), 1.16(d), 1.16(e), 5.3(a), 5.3(b), 5.3(c), 8.1(c), 8.1(d), and 8.4(c).

The Tanya Oliver Complaint  
VS B Docket No. 12-060-089121

194. On or about March 2, 2011, Tanya Oliver retained Respondent to represent her on a criminal charge.

195. On or about March 2, 2011, Ms. Oliver signed an "Attorney/Client Agreement" with Respondent.
196. On or about March 4, 2011, Ms. Oliver paid Respondent \$1000. Respondent produced no trust account records. It is unknown whether Respondent deposited this amount into his trust account. Respondent submits that he may have overlooked sending the records in when he ultimately sent the file. He is sure that the \$1,000 was deposited into trust.
197. On or about April 11, 2011, Ms. Oliver paid Respondent \$300. Respondent produced no trust account records. It is unknown whether Respondent deposited this amount into his trust account. Respondent submits that this probably would not have gone into trust as he believes it was wholly earned at the time it was paid.
198. During the course of the representation, Ms. Oliver submits that Respondent failed to provide Ms. Oliver with reasonable communication. Respondent submits that Ms. Oliver's telephone was disconnected during a significant portion of this time and Respondent had no alternative number for her.
199. On or about August 8, 2011, Respondent represented Ms. Oliver at trial. She was found guilty. Respondent submits that Ms. Oliver's boyfriend had brought someone to the trial who informed Respondent that he was with the NAACP. This individual told Respondent that he did a great job and that the individual did not understand why Ms. Oliver was convicted given the evidence presented.
200. On or about August 29, 2011, Ms. Oliver filed a bar complaint against Respondent.
201. Respondent did not answer the bar complaint. Respondent conceded not answering a request.
202. On or about September 9, 2011, Andrew Chen, Esquire, represented Ms. Oliver at a bond hearing because Respondent was suspended from the practice of law.
203. On or about September 10, 2011, by letter Respondent notified the court of his suspension.
204. On or about November 15, 2011, the bar issued a subpoena *duces tecum* for Ms. Oliver's client file and trust account records related to Respondent's representation of Ms. Oliver.
205. On or about December 21, 2011, the bar filed a notice of noncompliance and request for suspension based on Respondent's failure to respond to the bar subpoena.
206. On or about January 5, 2012, Respondent's license to practice law was suspended for failure to comply with the bar's subpoena.

207. On or about January 6, 2012, Respondent's license to practice law was reinstated after he complied with the bar's subpoena.
208. Respondent produced Ms. Oliver's client file but failed to produce any trust account records relating to his representation of Ms. Oliver. Therefore, it is unknown whether Respondent complied with proper trust account procedures with regard to this representation.
209. Respondent's conduct in this matter violated the following Rules of Professional Conduct: 1.4(a), 1.15(e)(pre-June 2011 amendments) 1.15(f) (pre-June 2011 amendments), 1.15(c) (June 2011 amendment), 1.15(d) (June 2011 amendment), 8.1(c), and 8.1(d).

## II. NATURE OF MISCONDUCT

Such conduct by Respondent Robert H. Smallenberg violates the following 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 1.2 Scope of Representation**

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

### **RULE 1.3 Diligence**

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

### **RULE 1.4 Communication**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

#### RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

#### RULE 1.15 Safekeeping Property (Pre-June 2011 Amendments)

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(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;

(iii) 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 therefor.

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 1.15 Safekeeping Property (Amended June 2011)

(b) Specific Duties. A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;

(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Cash receipts and disbursements journals for each trust account, including entries for receipts, disbursements, and transfers, and also including, at a minimum: an identification of the client matter; the date of the transaction; the name of the payor or payee; and the manner in which trust funds were received, disbursed, or transferred from an account.

(2) A subsidiary ledger containing a separate entry for each client, other person, or entity from whom money has been received in trust.

The ledger should clearly identify:

(i) the client or matter, including the date of the transaction and the payor or payee and the means or methods by which trust funds were received, disbursed or transferred; and

(ii) any unexpended balance.

(3) In the case of funds or property held by a lawyer as a fiduciary, the required books and records shall include an annual summary of all receipts and disbursements and changes in assets comparable in detail to an accounting that would be required of a court supervised fiduciary in the same or similar capacity; including all source documents sufficient to substantiate the annual summary.

(4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

(d) Required Trust Accounting Procedures. In addition to the requirements set forth in Rule 1.15 (a) through (c), the following minimum trust accounting procedures are applicable to all trust accounts.

(1) Insufficient Fund Reporting. All accounts are subject to the requirements governing insufficient fund check reporting as set forth in the Virginia State Bar Approved Financial Institution Agreement.

(2) Deposits. All trust funds received shall be deposited intact. Mixed trust and non-trust funds shall be deposited intact into the trust fund and the non-trust portion shall be withdrawn upon the clearing of the mixed fund deposit instrument. All such deposits

should include a detailed deposit slip or record that sufficiently identifies each item.

(3) Reconciliations.

(i) At least quarterly a reconciliation shall be made that reflects the trust account balance for each client, person or other entity.

(ii) A monthly reconciliation shall be made of the cash balance that is derived from the cash receipts journal, cash disbursements journal, the trust account checkbook balance and the trust account bank statement balance.

(iii) At least quarterly, a reconciliation shall be made that reconciles the cash balance from (d)(3)(ii) above and the subsidiary ledger balance from (d)(3)(i).

(iv) Reconciliations must be approved by a lawyer in the law firm.

(4) The purpose of all receipts and disbursements of trust funds reported in the trust journals and ledgers shall be fully explained and supported by adequate records.

RULE 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, 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, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel 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. Also upon termination, the client, upon request, must also be provided within a reasonable time 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); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected 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. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

**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;

**RULE 4.1 Truthfulness In Statements To Others**

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

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

**RULE 5.1 Responsibilities Of Partners And Supervisory Lawyers**

(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

- (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**RULE 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**RULE 8.1 Bar Admission And Disciplinary Matters**

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

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

**RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(b) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

V. *Robert Henry Smallenberg acknowledges that the material facts upon which the allegations of misconduct are predicated are true; and*

VI. *Robert Henry Smallenberg 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, he could not successfully defend them.*

Executed and dated on 11/13/12

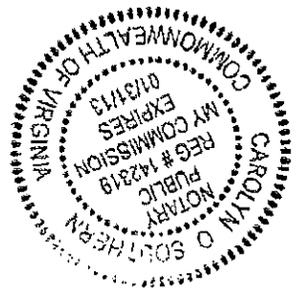
[Signature]  
Robert Henry Smallenberg  
Respondent

COMMONWEALTH OF VIRGINIA  
CITY/COUNTY OF Hanover, to wit:

The foregoing Affidavit Declaring Consent to Revocation was subscribed and sworn to before  
me by Robert Henry Smallenberg on 11-13-2012

[Signature]  
Notary Public

My Commission expires: 1-31-2013



VIRGINIA:

BEFORE THE SIXTH DISTRICT SUBCOMMITTEE  
OF THE VIRGINIA STATE BAR

IN THE MATTER OF

ROBERT HENRY SMALLENBERG

VSB Docket Nos.

11-060-087166 (Reed)

12-060-089755 (Howell)

11-060-087953 (Lambert)

11-060-085684 (Johnson)

11-060-088181 (Winfield)

11-060-087698 (Leibel)

11-060-088022 (Jones)

11-060-088180 (Peyton)

12-060-089121 (Oliver)

RECEIVED

MAY 18 2012

VSB CLERK'S OFFICE

SUBCOMMITTEE DETERMINATION  
(CERTIFICATION)

On February 14, 2012, a meeting in these matters was held before a duly convened Sixth District Subcommittee consisting of Melanie B. Economou, Esquire, Kay V. Forrest, lay member, and Andrew J. Cornick, Esquire, chair presiding.

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

**I. FACTUAL ALLEGATIONS**

1. Respondent was licensed to practice law in the Commonwealth of Virginia on October 15, 1993.

**The Janice Reed Complaint**  
**VSB Docket No. 11-060-087166**

2. On or about August 10, 2010, Janice Reed retained Respondent to represent her in a dispute with her landlord regarding payment of rent. Ms. Reed had paid her rent for March 2010, but her landlord had not credited her account.
3. On or about August 10, 2010, Janice Reed met with Respondent's assistant, David Nelson, whose license to practice law in Virginia was revoked on or about April 28, 2006. Mr. Nelson disclosed to Ms. Reed that he was a disbarred attorney. He also provided her with a business card identifying him as "Dr. David A.G. Nelson, Intake Coordinator."

4. On or about August 10, 2010, Ms. Reed signed an "Attorney/Client Agreement" to retain Respondent as her lawyer. Respondent's name is listed on the fee agreement as the attorney who would handle her case.
5. Ms. Reed paid a \$500 advanced legal fee on August 10, 2010. Mr. Nelson provided her with a receipt.
6. It is unclear from Respondent's trust account records produced to the bar whether Respondent deposited the \$500 into his trust account.
7. Respondent assigned Ms. Reed's case to Allison Bridges, who was working in his office. Ms. Bridges had completed law school but had not yet passed the bar exam. Ms. Bridges signed her correspondence "Allison L. Bridges, Third Year Practitioner."
8. Ms. Reed was not told that Ms. Bridges was handling her case. Ms. Reed had no knowledge of who was handling her case.
9. On or about August 31, 2010, Ms. Bridges sent a letter to Ms. Reed's landlord demanding \$1,000 to resolve the dispute.
10. During September and October 2010, Ms. Bridges and Robert Seabolt, counsel for Ms. Reed's landlord, exchanged letters and emails about the dispute.
11. On or about October 1, 2010, Mr. Seabolt sent Ms. Bridges an email explaining that Ms. Reed's rental check had been credited to her account and that his client was willing to refund Ms. Reed the \$50 late fee she had paid.
12. Ms. Reed was never advised of this conversation or any resolution of her issues with her landlord.
13. Ms. Bridges learned in November 2010 that she passed the bar exam. She left Respondent's employment in December 2010. Ms. Bridges did not take Ms. Reed's case with her.
14. During the course of the representation, Ms. Reed called Respondent's office numerous times without a return call.
15. Ms. Reed spoke with Respondent on one occasion, at which time he said he had no information for her. Ms. Reed's other contact with Respondent's office was with Mr. Nelson. Ms. Reed had no substantive contact with Ms. Bridges about her case.
16. On or about February 19, 2011, Ms. Reed and her daughter, Shanita Griffin, went to Respondent's office and met with Mr. Nelson. At this time, Ms. Reed did not know the status of her case.

17. During this meeting, Mr. Nelson told Ms. Reed that he could not find an attorney to handle her case. He then stated that he would file suit for her by February 22, 2011. Mr. Nelson did not thereafter file suit on Ms. Reed's behalf.
18. On February 22, 2011, Ms. Reed spoke with Mr. Nelson and learned that he did not file suit. She then demanded her file, but Mr. Nelson refused to return her original documents.
19. Ms. Reed filed a bar complaint on March 9, 2011.
20. Respondent filed an answer to the bar complaint on April 6, 2011.
21. Respondent told the bar's investigator that after receiving information from Mr. Seabolt, he concluded that Ms. Reed had no cause of action against her landlord. According to Respondent, he instructed Mr. Nelson to draft a letter to Ms. Reed explaining this. Mr. Nelson did not draft a letter to Ms. Reed or otherwise communicate Respondent's opinion to Ms. Reed.
22. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
23. Respondent's conduct in this case violated Rules 1.4(a), 1.4(b), 1.4(c), 1.15(e)(pre-June 2011 amendments), 1.15(f)(pre-June 2011 amendments), 1.16(e), 5.1(a), 5.1(b), 5.1(c), and 5.3(a), 5.3(b), 5.3(c), 8.1(c), and 8.1(d).

**The Alexis Howell Complaint**  
**VSB Docket No. 12-060-089755**

24. On July 11, 2011, Respondent participated in a hearing before a three-judge court sitting in the Circuit Court for Hanover County in Virginia State Bar docket number 09-032-078278, Circuit Court case number CL11000632-00. During the hearing, the three-judge court approved an agreed disposition for a thirty (30) day suspension to begin on August 27, 2011.
25. On or about July 27, 2011, Alexis Howell met with Steven Kelsey, Respondent's office manager, about a show cause issued by the guardian ad litem in a custody/visitation matter. The show cause summons had been issued on July 1, 2011 and set a hearing for September 1, 2011.
26. On or about July 27, 2011, Respondent briefly met with Ms. Howell and her mother. He said he would "take good care" of Ms. Howell.
27. On or about July 29, 2011, Ms. Howell signed an "Attorney/Client Agreement" with Respondent's firm that provided for Respondent to represent her on a show cause

regarding her visitation and custody case. The Attorney/Client Agreement did not include any reference to an associate working on the file or to Andrew Chen, Esquire.

28. At no time did Respondent or any member of his firm advise Ms. Howell that Respondent's license to practice law would be suspended for thirty (30) days beginning August 27, 2011.
29. The Attorney/Client Agreement Ms. Howell signed stated, "The total fee for the services set forth in the preceding section is \$1,000. A retainer in the amount of \$500 to be applied against the total fee is hereby due and payable upon return of this Executed Agreement to Law Firm. The balance of the total fee is due as follows: \$500 due before court proceeding."
30. On or about July 27, 2011, Ms. Howell paid Respondent an advanced legal fee of \$500 and received a receipt.
31. It is unclear from the trust account records produced to the bar whether Respondent deposited the \$500 into his trust account.
32. On or about August 1, 2011, Respondent sent a letter to the Clerk of the Henrico County Juvenile and Domestic Relations Court noting his appearance on behalf of Ms. Howell. Respondent falsely stated that he would be out of town on the date of the currently scheduled hearing, which was September 1, 2011. In fact, at the time he wrote this letter, Respondent knew that his license to practice law would be suspended for 30 days beginning August 27, 2011.
33. On or about August 4, 2011 Respondent filed and sent to the guardian ad litem a Continuance Request Form, which falsely stated that the reason for the request for a continuance was that "Mr. Smallenberg will be out of town September 1, 2011." Respondent signed the Continuance Request Form. At the time Respondent filed this Form, Respondent knew that his license to practice law would be suspended for 30 days beginning August 27, 2011.
34. During the month of August 2011, Ms. Howell called Respondent's office several times to speak with Respondent, but was told that he was unavailable.
35. During the third week of August, 2011, Ms. Howell visited Respondent's office expecting to meet with him about her case. Instead, she met with Andrew Chen, an associate attorney employed by Respondent.
36. Mr. Chen told her that he would be handling the upcoming show cause hearing because Respondent was scheduled to be out of town.
37. At no time did Mr. Chen advise Ms. Howell that Respondent's license to practice law would be suspended for thirty (30) days beginning August 27, 2011.

38. Later in August 2011, Ms. Howell returned to Respondent's office to ask for a refund because she was dissatisfied that Mr. Chen would be representing her at the hearing instead of Respondent. During this visit, Ms. Howell spoke with Respondent who reassured her that he was still her attorney and that Mr. Chen was only filling in for Respondent while he was out of town.
39. On August 27, 2011, Respondent's license to practice law was suspended for thirty (30) days.
40. On or about September 1, 2011, Ms. Howell paid Respondent another \$250 and received a receipt.
41. On or about September 1, 2011, Ms. Howell appeared for her show cause hearing and was represented by Mr. Chen. The case was continued to January 2012.
42. Ms. Howell was dissatisfied with Mr. Chen's appearance at the hearing.
43. Following the hearing, Ms. Howell heard nothing from Respondent.
44. Approximately two weeks after the September 1, 2011 hearing, Mr. Chen called Ms. Howell and demanded that she pay the remainder of her balance due of \$250. Later, Mr. Chen advised Ms. Howell that she owed another \$700 to Respondent's firm.
45. On September 13, 2011, the Memorandum Order was entered by the three-judge court in Virginia State Bar docket number 09-032-078278, Hanover Circuit Court case number CL11000632-00 imposing the thirty (30) day suspension effective August 27, 2011. The Order also required, pursuant to Part Six, Section IV, Paragraph 13-29 of the Rules of Court, that Respondent to give written notice of his suspension to all clients, opposing counsel, and presiding judges in pending litigation within 14 days of the date of the effective date of the suspension.
46. On or about October 20, 2011, Mr. Chen sent Ms. Howell a letter stating, among other things, that her "insistence" that "your retainer was a 'flat-fee' is grossly inaccurate."
47. On or about October 24, 2011, Mr. Chen filed a motion for Respondent's law firm to withdraw from representing Ms. Howell. The motion falsely states that Ms. Howell agreed to pay a \$1,000 retainer, when in fact her agreement with the firm states that her total fee would be \$1,000. The motion also states that Respondent's firm "vociferously denies" that it had a flat fee arrangement with Ms. Howell.
48. On or about November 4, 2011, an order was entered allowing Respondent's firm to withdraw from representing Ms. Howell.
49. On or about October 24, 2011, Ms. Howell filed a bar complaint against Respondent.
50. Respondent did not file an answer to the bar complaint.

51. Respondent admitted to the bar's investigator that he did not notify Ms. Howell of his suspension as ordered by the three-judge court pursuant to Part Six, Section IV, Paragraph 13-29 of the Rules of Court.
52. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
53. Respondent's conduct in this matter violated Rules 1.4(a), 1.15(c)(amended Rule June 2011), 1.15(d) (amended Rule June 2011), 1.16(a)(1), 3.3(a)(1), 4.1(a), 5.1(a), 5.1(b), 5.1(c), 8.1(c), 8.1(d), 8.4(a), 8.4(b), and 8.4(c).

**The Leslee Lambert Complaint**  
**VSB Docket No. 11-060-087953**

54. On or about February 17, 2011 Leslee Lambert contacted Respondent's law firm about representation in a custody/visitation matter pending in Hanover Juvenile and Domestic Relations Court.
55. On or about February 19, 2011, Ms. Lambert visited Respondent's law firm and met with Respondent's assistant, David Ashley Grant Nelson, whose Virginia law license was previously revoked. Mr. Nelson quoted her a flat fee of \$1000 to handle the representation and said Respondent would be her attorney. Ms. Lambert then retained Respondent as counsel.
56. On or about February 19, 2011, Ms. Lambert briefly met with Respondent when he came in to introduce himself.
57. On or about February 23, 2011, Ms. Lambert met with Steve Kelsey, Respondent's office manager, and signed an "Attorney/Client Agreement" with Respondent's law firm. Ms. Lambert also made a payment of \$500.
58. It is unclear from the trust account records produced whether Respondent deposited the fee into his trust account.
59. On or about February 24, 2011, Mr. Nelson communicated with the court and had Ms. Lambert's case continued to April 26, 2011.
60. During the course of the representation, Ms. Lambert called and emailed Respondent's law firm without response from Respondent or his staff.
61. Respondent did not meet with or contact opposing counsel during the course of the representation.

62. Respondent did not meet with or contact the guardian *ad litem* during the course of the representation.
63. On or about March 15, 2011, Respondent and Ms. Lambert met in his office and discussed the case. Ms. Lambert alleges this meeting lasted 10-15 minutes, while Respondent alleges the meeting lasted for over 40 minutes.
64. Thereafter, Ms. Lambert had no communication with Respondent until after she had terminated the representation.
65. On or about April 20, 2011, Ms. Lambert sent Mr. Nelson an email terminating the representation due to lack of communication. Ms. Lambert demanded a full refund of the \$500 paid.
66. Ms. Lambert hired another lawyer, Shannon Dillon, to represent her.
67. On or about April 26, 2011, Ms. Lambert appeared in court for her hearing. Respondent also appeared and was unaware that Ms. Lambert had terminated the representation. The court continued the case.
68. On or about May 4, 2011, Mr. Nelson sent Ms. Lambert a refund check of \$57.50.
69. Ms. Lambert requested an accounting of the time spent on her case, but Respondent did not provide her with an accounting.
70. On or about May 19, 2011, Ms. Lambert filed a bar complaint against Respondent.
71. Respondent did not respond to the bar complaint.
72. On or about June 30, 2011, the bar served Respondent with a subpoena *duces tecum* for copies of the client file and his trust account records relating to Ms. Lambert.
73. On or about August 16, 2011, the bar filed a notice of noncompliance and request for interim suspension based on Respondent's failure to respond to the bar's subpoena.
74. On or about August 29, 2011, Respondent finally responded to the bar's subpoena.
75. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
76. Respondent's conduct in this matter violated Rules 1.1, 1.3(a), 1.4(a), 1.15(b)(3) (as amended June 2011), 1.15(c)(as amended June 2011), 1.15(d)(as amended June 2011), 1.15(c)(3) (pre-June 2011 amendment), 1.15(e)(pre-June 2011 version of the Rule),

1.15(f) (pre-June 2011 version of the Rule), 5.3(a), 5.3(b), 5.3(c), 8.1(c), and 8.1(d) of the Rules of Professional Conduct.

**The Mary Johnson Complaint**  
**VS B Docket No. 11-060-085684**

77. On or about September 1, 2010, Mary Johnson retained Respondent to represent her grandson who was charged with assaulting a nurse while in a psychiatric ward. Ms. Johnson wanted an aggressive lawyer to replace the Assistant Public Defender handling the matter.
78. On or about September 1, 2010, Ms. Johnson met with Respondent's assistant, David Nelson, whose license to practice law in Virginia was revoked on or about April 28, 2006. Mr. Nelson provided her with a business card identifying him as "Dr. David A.G. Nelson, Intake Coordinator."
79. On or about September 1, 2010, Ms. Johnson paid Respondent an advanced legal fee of \$2500.
80. It is unclear from the trust account records produced whether Respondent deposited the \$2500 into his trust account.
81. According to Respondent's own time records, as of September 2, 2010, he had earned a fee of \$345.00. Nevertheless, according to Respondent's subsidiary ledger, on September 2, 2010, Respondent transferred \$2322.50 to another account and wrote a check for \$177.50 from the funds Ms. Johnson had paid the day before.
82. On or about September 26, 2010, by letter Ms. Johnson terminated the representation and demanded a full refund.
83. On or about October 18, 2010, Respondent provided Ms. Johnson with an accounting of her case and a refund of \$177.50.
84. On or about October 22, 2010, Ms. Johnson filed a bar complaint against Respondent.
85. Respondent did not respond to the bar complaint.
86. On or about January 12, 2011, the bar issued a subpoena *duces tecum* for copies of the client file and his trust account records relating to Ms. Johnson and/or her grandson.
87. On or about July 13, 2011, the bar filed a notice of noncompliance and request for interim suspension based on Respondent's failure to respond to the bar's subpoena.
88. On or about July 28, 2011, Respondent's license to practice law was suspended for failing to respond to a bar subpoena.

89. On or about August 2, 2011, Respondent's law license was reinstated after he complied with the bar subpoena.
90. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
91. Respondent's conduct in this matter violated Rules 1.15(e) (pre-June 2011 amendments) 1.15(f) (pre-June 2011 amendments), 8.1(c), 8.1(d), 8.4(b), and 8.4(c) of the Rules of Professional Conduct.

**The Markis Winfield Complaint**  
**VSB Docket No. 11-060-088181**

92. On or about October 7, 2010, Markis Winfield retained Respondent to represent him on a drug charge.
93. On or about October 7, 2010, Mr. Winfield's parents, Paul and Samantha Wilson, met with David Nelson, Respondent's assistant, at Respondent's office to retain Respondent to represent Markis Winfield.
94. On or about October 7, 2010, Paul and Samantha Wilson signed an "Attorney/Client Agreement" for Respondent to represent Mr. Winfield on drug charges. The agreement called for a "retainer" of \$13,000. The agreement provided that \$1,000 of the fee was non-refundable.
95. Between October and December 2010, the Wilsons paid Respondent a total of \$3740 to represent Mr. Winfield. There are receipts for all payments. The amounts were paid as follows:
  - \$180 paid on October 7, 2010
  - \$800 paid on October 7, 2010
  - \$300 paid on October 14, 2010
  - \$300 paid on October 21, 2010
  - \$300 paid on October 28, 2010
  - \$300 paid on November 5, 2010
  - \$300 paid on November 12, 2010
  - \$400 paid on November 26, 2010
  - \$300 paid on December 6, 2010
  - \$260 paid on December 10, 2010
  - \$300 paid on December 10, 2010
96. It is unclear from the trust account records produced whether Respondent deposited any of these payments into his trust account.

97. In addition to these amounts paid, Mr. Wilson agreed to work on Respondent's BMW for a \$1000 credit on the bill. Mr. Wilson performed the work, but Respondent did not credit Mr. Winfield's account any amount.
98. Respondent's trust account subsidiary ledger for Mr. Winfield erroneously records only \$800 received on October 12, 2010 on behalf of Mr. Winfield.
99. During the course of the representation, Respondent failed to provide reasonable communication.
100. On or about December 9, 2010, Mr. Winfield and Respondent appeared in court and Mr. Winfield pleaded guilty to several charges.
101. On or about March 10, 2011, Mr. Winfield and Respondent appeared for a sentencing hearing and Mr. Winfield was sentenced.
102. Mr. Winfield asked Respondent to file a motion for a sentence reduction, but Respondent refused to take further action unless he was paid another \$750. Respondent did not receive further payment and did not perform further work.
103. By letter dated June 7, 2011 to Mr. Winfield, Respondent falsely advised Mr. Winfield that he had received less than \$1000 in payments. At the time, Respondent had received \$3740 in payments and \$1000 worth of work on his BMW.
104. On or about June 8, 2011, Mr. Winfield filed a bar complaint against Respondent.
105. Respondent did not answer the bar complaint.
106. On or about July 22, 2011, the bar served on Respondent a subpoena *duces tecum* for Mr. Winfield's client file and trust account records related to Respondent's representation of Mr. Winfield.
107. On or about September 9, 2011, the bar filed a notice of noncompliance and request for suspension based on Respondent's failure to respond to the bar subpoena.
108. On or about September 20, 2011, Respondent's license to practice law was suspended for failure to comply with the bar's subpoena.
109. On or about September 23, 2011, Respondent's license to practice law was reinstated after he complied with the bar's subpoena.
110. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger, which was in itself incomplete. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.

111. Respondent's conduct in this case violated the following Rules of Professional Conduct: 1.1, 1.4(a), 1.5(a), 1.5(b), 1.15(e) (pre-June 2011 amendments) 1.15(f) (pre-June 2011 amendments), 1.16 (d), 8.1(c), 8.1(d), and 8.4(c).

**The Richard Leibel Complaint**  
**VSB Docket No. 11-060-087698**

112. On or about December 21, 2010, Richard Leibel retained Respondent to represent him in a divorce.
113. On or about December 21, 2010, Mr. Leibel met with David Nelson, Respondent's assistant, about the representation. Mr. Leibel paid an advanced legal fee of \$2000 and signed an "Attorney/Client Agreement" with Respondent.
114. On or about January 14, 2011, Mr. Leibel paid Respondent another advanced legal fee of \$2000.
115. It is unclear from the trust account records produced whether Respondent deposited these amounts into his trust account.
116. Respondent's associate, Allison Bridges, prepared and answer to the complaint seeking divorce and discovery answers.
117. On or about February 23, 2011, counsel for Mr. Leibel's wife, Melanie Friend, sent Respondent a settlement offer, which Respondent sent to Mr. Leibel.
118. Mr. Leibel thereafter sent Respondent his counter to the settlement offer.
119. Respondent did not respond to Ms. Friend on behalf of Mr. Leibel.
120. On or about March 15, 2011, Ms. Friend emailed Respondent about a property settlement, but Respondent did not answer.
121. On or about March 28, 2011, Ms. Friend issued witness subpoenas for an April 11, 2011 pendente lite hearing, which was scheduled to begin at 9:00 AM. Ms. Friend mailed Respondent a copy of the subpoenas.
122. On or about April 1, 2011, Mr. Leibel emailed Respondent about an April 11, 2011 court date his son had mentioned. Mr. Leibel wanted information about the court date and about responding to the settlement offer. Respondent did not respond to Mr. Leibel's email.
123. Mr. Leibel called Respondent's office several times about the April 11<sup>th</sup> hearing. On or about April 8, 2011, Respondent spoke with Mr. Leibel and told him he was preparing for the hearing. He did not tell Mr. Leibel the time of the hearing or that he had to be there.

124. On or about the morning of April 11, 2011, Respondent called Mr. Leibel and told him to appear at the hearing at 11:00 AM.
125. On or about April 11, 2011, Mr. Leibel appeared in court at approximately 10:45 AM and saw Ms. Friend, who told him the hearing was already over. Mr. Leibel left the courthouse without seeing Respondent.
126. Respondent did not appear for Mr. Leibel at the April 11, 2011 hearing, which went forward at 9:00 AM.
127. At the April 11, 2011 hearing, Mr. Leibel was ordered to pay spousal support.
128. On or about April 14, 2011 Mr. Leibel and Respondent met and discussed the hearing. Shortly thereafter, Mr. Leibel retained another attorney to represent him. New counsel was substituted in on or about June 1, 2011.
129. Mr. Leibel's new counsel filed a motion for reconsideration and obtained a reduction in the amount of support Mr. Leibel was ordered to pay.
130. Mr. Leibel requested that Respondent provide him with an accounting, but Respondent did not do so.
131. On or about April 25, 2011, Mr. Leibel filed a bar complaint against Respondent.
132. Respondent did not respond to the bar complaint.
133. On or about June 9, 2011, the bar served on Respondent a subpoena *duces tecum* for Mr. Leibel's client file and trust account records related to Respondent's representation of Mr. Leibel.
134. On or about July 20, 2011, the bar filed a notice of noncompliance and request for suspension based on Respondent's failure to respond to the bar subpoena.
135. On or about August 4, 2011, Respondent's license to practice law was suspended for failure to comply with the bar's subpoena.
136. On or about August 8, 2011, Respondent's license to practice law was reinstated after he complied with the bar's subpoena.
137. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.

138. Respondent's conduct in this case violated the following Rules of Professional Conduct: 1.3(a), 1.4(a), 1.15(b)(3) (as amended June 2011), 1.15 (c)(3) (pre-June 2011 amendments), 1.15(e) (pre-June 2011 amendments), 1.15(f) (pre-June 2011 amendments), 8.1(c), and 8.1(d).

**The Anthony Jones Complaint**  
**VSB Docket No. 11-060-088022**

139. On or about September 16, 2010, Alzena Mayfield went to Respondent's office with a legal problem unrelated to this matter. During this visit, she discussed an issue her family was having with the landlord of a commercial property they were renting.
140. On or about October 28, 2010, Ms. Mayfield's son, Anthony Jones, retained Respondent to represent him and his family in the same landlord-tenant matter Ms. Mayfield had earlier discussed with Respondent's office.
141. On or about October 28, 2010, Anthony Jones and Ms. Mayfield signed an "Attorney/Client Agreement" with Respondent that called for a \$2,000 advanced legal fee.
142. On or about September 24, 2010, either Ms. Mayfield or Mr. Jones paid Respondent \$1000. On or about March 1, 2011, either Ms. Mayfield or Mr. Jones paid Respondent \$200. It is unclear from the trust account records produced whether Respondent deposited these funds into his trust account.
143. Mr. Jones and Ms. Mayfield advised Respondent that the landlord refused to make repairs to the heating and air conditioning system, but that they wished to work out their differences with the landlord continue renting the commercial property.
144. During the course of the representation, Respondent failed to provide Mr. Jones and Ms. Mayfield with adequate communication.
145. Trial was set for January 13, 2011.
146. On or about the morning of January 13, 2011, Respondent and counsel for the landlord worked out a settlement agreement by which Mr. Jones/Ms. Mayfield would pay the landlord \$29,500 in back rent and vacate the premises by February 15, 2011.
147. On the morning of January 13, 2011, Respondent and Ms. Mayfield talked by telephone. Ms. Mayfield told Respondent that she wanted to work with the landlord on a solution. Respondent did not adequately explain to her the details of the settlement he was negotiating with the landlord's counsel. Respondent told Ms. Mayfield she did not need to go to court that day.
148. On or about January 13, 2011, Respondent talked to Mr. Jones. Respondent did not advise Mr. Jones of the settlement he was negotiating with the landlord's counsel. Respondent told Mr. Jones that he did not need to go to court that day.

149. On or about January 13, 2011, Ms. Mayfield and Mr. Jones went to court anyway, and learned that the case had been continued because the lawyers had reached an agreement.
150. Respondent did not send Mr. Jones or Ms. Mayfield a copy of any agreement reached with the landlord's counsel.
151. Respondent did not adequately explain to Mr. Jones or Ms. Mayfield the terms of the settlement he reached with the landlord's counsel.
152. On or about February 10, 2011, the court entered an Agreed Order of Judgment that incorporated the agreement between Respondent and the landlord's counsel. The order was entered *nunc pro tunc* to January 13, 2011.
153. Respondent did advise Mr. Jones or Ms. Mayfield of the Order and did not send either of them a copy.
154. On or about March 9, 2011, Mr. Jones received a notice of eviction. He later obtained from the clerk of court a copy of the Agreed Order of Judgment entered February 10, 2011.
155. On or about March 9, 2011, Mr. Jones wrote Respondent a letter complaining about lack of communication and stating that Respondent had not told him about the settlement. Mr. Jones implored Respondent to call him.
156. Respondent did not call Mr. Jones in response to the letter.
157. Mr. Jones later went to Respondent's office unannounced and was able to meet with him. Respondent did not offer any solution for Mr. Jones to keep possession of the commercial property.
158. On or about May 25, 2011, Mr. Jones filed a bar complaint against Respondent.
159. Respondent did not respond to the bar complaint.
160. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.
161. Respondent's conduct in this matter violated the following Rules of Professional Conduct: 1.2(a), 1.4(a), 1.4(b), 1.4(c), 1.15(e) (pre-June 2011 amendments), 1.15(f) (pre-June 2011 amendments) 8.1(c), and 8.1(d).

**The Darryl Peyton Complaint**  
**VS B Docket No. 11-060-088180**

162. On or about December 7, 2010, Darryl Peyton met with Respondent's assistant, David Nelson about a legal issue involving litigation to remove the administrator of his father's estate. Mr. Peyton was concerned that the administrator was actively converting assets of the estate.
163. On or about December 8, 2010, Mr. Peyton retained Respondent to represent him with regard to a legal issue involving litigation to remove the administrator of his father's estate.
164. On or about December 8, 2010, Mr. Peyton signed an "Attorney/Client" agreement with Respondent that provided that Respondent would represent him with regard to "Client's representative in the Estate of Thomas Lee Peyton, including but not limited to the review of any inventory and commencement of litigation, and all issues pertaining thereto."
165. Sometime after December 8, 2010, Mr. Peyton asked Respondent to prepare a will for him and his wife, in addition to representing him with regard to his father's estate.
166. On or about December 8, 2010, Mr. Peyton paid Respondent an advanced legal fee of \$3000. It is unclear from the trust account records produced whether Respondent deposited this payment into his trust account.
167. During the course of the representation, Respondent failed to provide reasonable communication to Mr. Peyton.
168. During the course of the Representation, Mr. Peyton called Respondent's office several times, but only was able to speak with David Nelson.
169. According to Respondent's subsidiary ledger for Mr. Peyton, on or about January 6, 2011, Respondent withdrew \$1,000 of the advanced legal fee paid.
170. On or about January 12, 2011, Respondent filed a Motion to Remove Administrator of the Estate in the Circuit Court of Richmond on Mr. Peyton's behalf.
171. Counsel for the administrator told the bar's investigator that he did not receive a copy of the Motion to Remove Administrator of the Estate.
172. Counsel for the administrator told the bar's investigator that he had no communication with Respondent and was not aware that Respondent represented Mr. Peyton.
173. On or about February 2, 2011, Mr. Peyton terminated Respondent's representation.
174. Shortly thereafter, Mr. Peyton retained other counsel who was able to resolve Mr. Peyton's legal issues regarding the estate within two weeks.

175. According to Respondent's subsidiary ledger for Mr. Peyton, on or about February 7, 2011, Respondent withdrew the remaining \$2000 of advanced legal fees Mr. Peyton had paid, leaving a balance of zero.
176. Respondent did not provide Mr. Peyton with any refund of monies paid.
177. Mr. Peyton sued Respondent in Richmond General District Court for a return of unearned fees. The trial was on or about May 18, 2011. Respondent presented evidence of his billing records and prevailed.
178. Prior to the May 18, 2011 trial in Richmond General District Court, Mr. Peyton had not received or seen a billing record or any accounting of time Respondent spent on his case.
179. Respondent's time sheet for Mr. Peyton's legal matter was created in Microsoft Excel. The time sheet was named and last modified on May 12, 2011 by Respondent.
180. On or about June 2, 2011, Respondent's secretary by mail returned Mr. Peyton's photographs. Respondent did not return to Mr. Peyton the other documents Mr. Peyton had provided to Respondent. Further, Respondent did not provide Mr. Peyton with a copy of his file or the will Mr. Peyton had asked him to draft.
181. On or about June 8, 2011, Mr. Peyton filed a bar complaint against Respondent.
182. Respondent did not respond to the bar complaint.
183. On or about July 22, 2011, the bar served on Respondent a subpoena *duces tecum* for Mr. Peyton's client file and trust account records related to Respondent's representation of Mr. Peyton.
184. On or about September 9, 2011, the bar filed a notice of noncompliance and request for suspension based on Respondent's failure to respond to the bar subpoena.
185. On or about September 20, 2011, Respondent's license to practice law was suspended for failure to comply with the bar's subpoena.
186. On or about October 3, 2011, Respondent's license to practice law was reinstated after he complied with the bar's subpoena.
187. Respondent's response to the bar's subpoena for trust account records was incomplete. Respondent produced only a subsidiary ledger. Respondent failed to produce any other records that could confirm whether Respondent complied with proper trust account procedures with regard to this representation.

188. Respondent's conduct in this case violated the following Rules of Professional Conduct: 1.1, 1.3(a), 1.4(a), 1.15(e) (pre-June 2011 amendments), 1.15(f) (pre-June 2011 amendments), 1.16(d), 1.16(e), 5.3(a), 5.3(b), 5.3(c), 8.1(c), 8.1(d), and 8.4(c).

**The Tanya Oliver Complaint**  
**VSB Docket No. 12-060-089121**

189. On or about March 2, 2011, Tanya Oliver retained Respondent to represent her on a criminal charge.
190. On or about March 2, 2011, Ms. Oliver signed an "Attorney/Client Agreement" with Respondent.
191. On or about March 4, 2011, Ms. Oliver paid Respondent \$1000. Respondent produced no trust account records. It is unknown whether Respondent deposited this amount into his trust account.
192. On or about April 11, 2011, Ms. Oliver paid Respondent \$300. Respondent produced no trust account records. It is unknown whether Respondent deposited this amount into his trust account.
193. During the course of the representation, Respondent failed to provide Ms. Oliver with reasonable communication.
194. On or about August 8, 2011, Respondent represented Ms. Oliver at trial. She was found guilty.
195. On or about August 29, 2011, Ms. Oliver filed a bar complaint against Respondent.
196. Respondent did not answer the bar complaint.
197. On or about September 9, 2011, Andrew Chen, Esquire, represented Ms. Oliver at a bond hearing because Respondent was suspended from the practice of law.
198. On or about September 10, 2011, by letter Respondent notified the court of his suspension.
199. On or about November 15, 2011, the bar issued a subpoena *duces tecum* for Ms. Oliver's client file and trust account records related to Respondent's representation of Ms. Oliver.
200. On or about December 21, 2011, the bar filed a notice of noncompliance and request for suspension based on Respondent's failure to respond to the bar subpoena.
201. On or about January 5, 2012, Respondent's license to practice law was suspended for failure to comply with the bar's subpoena.

202. On or about January 6, 2012, Respondent's license to practice law was reinstated after he complied with the bar's subpoena.
203. Respondent produced Ms. Oliver's client file but failed to produce any trust account records relating to his representation of Ms. Oliver. Therefore, it is unknown whether Respondent complied with proper trust account procedures with regard to this representation.
204. Respondent's conduct in this matter violated the following Rules of Professional Conduct: 1.4(a), 1.15(e)(pre-June 2011 amendments) 1.15(f) (pre-June 2011 amendments), 1.15(c) (June 2011 amendment), 1.15(d) (June 2011 amendment), 8.1(c), and 8.1(d).

## II. NATURE OF MISCONDUCT

Such conduct by Respondent Robert H. Smallenberg violates the following 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 1.2     Scope of Representation**

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

### **RULE 1.3     Diligence**

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

### **RULE 1.4     Communication**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

#### **RULE 1.5 Fees**

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  - (3) the fee customarily charged in the locality for similar legal services;
  - (4) the amount involved and the results obtained;
  - (5) the time limitations imposed by the client or by the circumstances;
  - (6) the nature and length of the professional relationship with the client;
  - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
  - (8) whether the fee is fixed or contingent.
- (b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

#### **RULE 1.15 Safekeeping Property (Pre-June 2011 Amendments)**

(c) A lawyer shall:

- (3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(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;

(iii) 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 therefor.

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 1.15 Safekeeping Property (Amended June 2011)**

(b) Specific Duties. A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;

(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Cash receipts and disbursements journals for each trust account, including entries for receipts, disbursements, and transfers, and also including, at a minimum: an

identification of the client matter; the date of the transaction; the name of the payor or payee; and the manner in which trust funds were received, disbursed, or transferred from an account.

(2) A subsidiary ledger containing a separate entry for each client, other person, or entity from whom money has been received in trust.

The ledger should clearly identify:

(i) the client or matter, including the date of the transaction and the payor or payee and the means or methods by which trust funds were received, disbursed or transferred; and

(ii) any unexpended balance.

(3) In the case of funds or property held by a lawyer as a fiduciary, the required books and records shall include an annual summary of all receipts and disbursements and changes in assets comparable in detail to an accounting that would be required of a court supervised fiduciary in the same or similar capacity; including all source documents sufficient to substantiate the annual summary.

(4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

(d) Required Trust Accounting Procedures. In addition to the requirements set forth in Rule 1.15 (a) through (c), the following minimum trust accounting procedures are applicable to all trust accounts.

(1) Insufficient Fund Reporting. All accounts are subject to the requirements governing insufficient fund check reporting as set forth in the Virginia State Bar Approved Financial Institution Agreement.

(2) Deposits. All trust funds received shall be deposited intact. Mixed trust and non-trust funds shall be deposited intact into the trust fund and the non-trust portion shall be withdrawn upon the clearing of the mixed fund deposit instrument. All such deposits should include a detailed deposit slip or record that sufficiently identifies each item.

(3) Reconciliations.

(i) At least quarterly a reconciliation shall be made that reflects the trust account balance for each client, person or other entity.

(ii) A monthly reconciliation shall be made of the cash balance that is derived from the cash receipts journal, cash disbursements journal, the trust account checkbook balance and the trust account bank statement balance.

(iii) At least quarterly, a reconciliation shall be made that reconciles the cash balance from (d)(3)(ii) above and the subsidiary ledger balance from (d)(3)(i).

(iv) Reconciliations must be approved by a lawyer in the law firm.

(4) The purpose of all receipts and disbursements of trust funds reported in the trust journals and ledgers shall be fully explained and supported by adequate records.

### **RULE 1.16 Declining Or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, 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, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel 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. Also upon termination, the client, upon request, must also be provided within a reasonable time 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); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected 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. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

### **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;

**RULE 4.1 Truthfulness In Statements To Others**

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

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

**RULE 5.1 Responsibilities Of Partners And Supervisory Lawyers**

(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

- (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**RULE 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**RULE 8.1 Bar Admission And Disciplinary Matters**

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

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

**RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(b) 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.

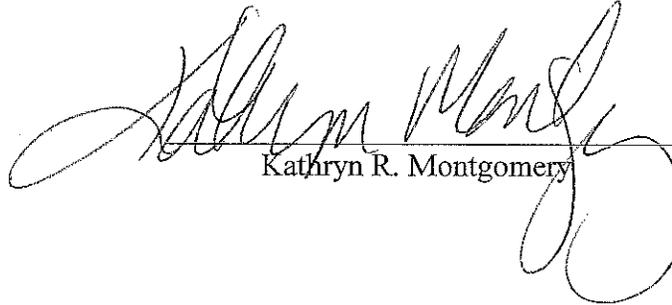
SIXTH DISTRICT SUBCOMMITTEE  
OF THE VIRGINIA STATE BAR

By \_\_\_\_\_

Andrew J. Cornick  
Subcommittee Chair

**CERTIFICATE OF SERVICE**

I certify that on May 16, 2012 I mailed by certified mail a true and correct copy of the foregoing Subcommittee Determination (Certification) to Robert Henry Smallemberg, Esquire, Respondent, *pro se*, at Suite 204, 10035 Sliding Hill Road, Ashland, VA 23005, the Respondent's last address of record with the Virginia State Bar.

  
Kathryn R. Montgomery