

VIRGINIA:

**BEFORE THE DISCIPLINARY BOARD
OF THE VIRGINIA STATE BAR**

**IN THE MATTERS OF
DWAYNE BERNARD STROTHERS**

VS. Docket Nos. 05-010-1033, 05-010-1540 and 05-010-3013

MEMORANDUM ORDER

These matters came to be heard on April 27, 2006, by the Disciplinary Board of the Virginia State Bar (the Board) by teleconference upon an Agreed Disposition between the parties, which was presented to a panel of the Board consisting of V. Max Beard, lay member, Nancy C. Dickenson, Esq., Rhysa Griffith South, Esq., Joseph R. Lassiter, Jr., Esq., and Peter A. Dingman, Esq., Chair presiding (the Panel). The Virginia State Bar appeared through its Assistant Bar Counsel, Richard E. Slaney (the Bar), and the Respondent, Dwayne Bernard Strothers (Mr. Strothers), appeared *pro se*.

Pursuant to the Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13(B)(5)(c), the Bar and Mr. Strothers entered into a written proposed Agreed Disposition and presented same to the Panel.

The Chair swore the Court Reporter and polled the members of the Panel to determine whether any member had a personal or financial interest that might affect or reasonably be perceived to affect his ability to be impartial in these matters. Each member, including the Chair, verified they had no such interests.

The Panel heard argument from counsel as well as Mr. Strothers' prior disciplinary record with the Bar and thereafter retired to deliberate on the Agreed Disposition. A majority of the Panel

accepted the Agreed Disposition with the caveat, agreed by the Bar and Mr. Strothers, that Mr. Strothers not accept any new clients or new legal business prior to the effective date of the suspension imposed by this order. The forty-five (45) day delay in the effective date of the suspension imposed by this order is for the prompt and orderly winding up of Mr. Strothers' law practice, and not an opportunity to take on new clients or new legal work. It should be noted that panel member V. Max Beard voted against accepting the Agreed Disposition and had strong reservations about its terms.

I. FINDINGS OF FACT

1. At all times material to this Certification, the Respondent, Dwayne Bernard Strothers (Strothers) was an attorney licensed to practice law in the Commonwealth of Virginia.

The Davis Discrimination Suit 05-010-1033

2. On or about December 1, 2003, one Robert Davis (Davis) hired Strothers to pursue a discrimination claim and paid Strothers \$5,000.

3. None of the \$5,000 paid by Davis was deposited into a trust account.

4. Strothers wrote to Davis on December 11, 2003, stating in part that one-half of the \$5,000 paid would be deemed earned upon the filing of a federal lawsuit. In fact, Strothers had already filed a Complaint on Davis's behalf in the U.S. District Court for the Eastern District of Virginia (the District Court) on December 5, 2003. The suit was styled *Davis v. City of Newport News*, Civil Action No. 4:03cv165 (the Davis Suit).

5. On January 14, 2004, the District Court entered a typical Rule 26(f) Pretrial Order, and on February 5, 2004, the District Court entered a typical Rule 16(b) Scheduling Order in the Davis Suit.

6. The defendant in the Davis Suit, the City of Newport News (Newport News), filed a Motion for Summary Judgment on June 3, 2004.

7. On June 28, 2004, the District Court entered an order granting summary judgment in favor of Newport News (the Judgment Order). In footnote one of the Judgment Order, the District Court noted that pursuant to Local Civil Rule 56(B) Newport News submitted an outline of material facts it claimed was not in dispute, but Strothers failed to timely file a response.

Further, in footnote three the District Court stated:

Plaintiff's counsel repeatedly failed to meet timing deadlines in this matter. The Plaintiff failed to file a timely Response to Defendant's Motion for Summary Judgment. The Plaintiff did send a responsive pleading by facsimile, received by the Court on June 20, 2004, six days after the filing deadline; however, the Plaintiff never filed a motion to extend the filing deadline or the original copy of his untimely response. The Plaintiff also failed to deliver the pretrial disclosure of exhibits and witnesses required by Rule 26(a)(3) to Defendant's counsel by June 18, 2004, as required by the Rule 16(b) Scheduling Order. (Document No. 5, ¶ 5). Even if the Court were to deny Defendant's Motion for Summary Judgment, this matter would not be in a posture to try on July 14, 2004 because of Plaintiff's counsel's failure to comply with disclosure requirements and this Court's pretrial orders. Finally, Plaintiff's counsel was forty minutes late to the final pretrial conference, advising that he was caught in tunnel traffic.

In the body of the Judgment Order, the Court stated:

The Plaintiff failed to timely file a responsive pleading opposing the Defendant's Motion for Summary Judgment. The Plaintiff's failure to file a responsive pleading and noncompliance with the requirements set forth in Local Civil Rule 56(B) triggers the consequences set forth in that rule-the facts identified by the Defendant as material facts to which there is no genuine issue in its initial memorandum are admitted. [citations omitted]

In accordance with Local Civil Rule 56(B), the Court's findings of fact will be those set forth in pages 2-17 of Defendant's Memorandum of Law in Support of its Motion for Summary Judgment.

Judgment Order, pp. 2-3. As such, the District Court declined to consider Strothers' untimely response and deemed the facts as alleged by Newport News to be admitted and undisputed,

essentially making judgment for Newport News and against Davis a foregone conclusion.

8. On July 6, 2004, Strothers wrote Davis, indicating he was in a lengthy jury trial but suggesting he had not yet received any ruling on the Motion for Summary Judgment. Strothers would testify the Judgment Order had been misplaced either by his office staff or misdelivered to an adjacent business owner and he did not see it until shortly before his letter to Davis of August 6, 2004, referenced below.

9. On July 12, 2004, Strothers again wrote Davis, enclosing a copy of the response to the Motion for Summary Judgment. This letter said nothing about the fact the District Court had already ruled against Davis or the reasons for that ruling.

10. Finally, on August 6, 2004, Strothers wrote Davis and enclosed the Judgment Order, without further elaboration.

11. On August 25, 2004, Strothers again wrote Davis. Strothers failed to address any of the procedural problems mentioned in the Judgment Order and instead suggested Davis's claim was weakened by the fact Newport News prevailed in an administrative proceeding. Strothers did offer Davis a refund of \$2,500.

12. Eventually, Strothers refunded to Davis the entire \$5,000 paid.

[Rules applicable: 1.3(a); 1.4(a); 1.5(a); 1.15(a); 3.4(d); and 3.4(g)]

The Eure Appeal 05-010-1540

13. On March 16, 2004, one Lonnell Eure (Eure) pled guilty to possessing a firearm after a felony conviction and was sentenced. Thereafter, Eure's mother, Lillie Barnes (Barnes), hired Strothers to represent Eure on appeal. Barnes paid Strothers \$1,000 as a down payment on a

\$5,000 fee quoted by Strothers. None of the \$1,000 paid was placed in any trust account.

Strothers would testify he earned the \$1,000 shortly after it was paid, at the time the Notice of Appeal was filed.

14. In mid April, Strothers filed a Notice of Appeal stating he was retained and, in paragraph 6, that “Transcripts of the criminal proceedings will be ordered.” Rule 5A:6, however, requires that the Notice of Appeal certify “that in the event a transcript is to be filed a copy of the transcript has been ordered from the court reporter who reported the case.”

15. As Eure was sentenced by order dated March 30, 2004, Rule 5A:8 required that the transcripts be filed on or before May 31, 2004 (within 60 days).

16. No transcripts were filed.

17. On June 2, 2004, Strothers wrote to Eure, stating in part that “To provide adequate appellate representation, I must review the transcripts. Therefore, I make demand for payment of attorney fee [sic] of \$4,000. Failure to pay these fees will seriously compromise my representation.”

18. On June 24, 2004, the Court of Appeals of Virginia (the Court of Appeals) entered an order requiring Eure to show cause why the appeal should not be dismissed for failure to file the transcript. That order also required Eure, on or before July 10, 2004, to state any questions properly presented and preserved for appeal which could be considered without resort to a transcript, further describing why the transcript was unnecessary to those questions.

19. In response, on July 12, 2004 Strothers filed a Reply which stated:

1. The appealable issues of merit are contained within the domestic and foreign convictions orders admitted.

2. The meritorious issues may be decided without reference to a transcript of statement of facts.

20. On July 16, 2004 the Chief Deputy Clerk of the Court of Appeals wrote Strothers, indicating the Reply did not comply with that Court's rules because there was no certificate of service on opposing counsel and the requisite number of copies were not provided. That letter instructed Strothers to respond within seven days and provide the date on which he mailed the Reply to opposing counsel as well as an original certificate of service and three copies, each attached to a copy of the Reply.

21. Strothers filed nothing in response to the Chief Deputy Clerk's letter of July 16.

22. On August 3, 2004, the Chief Deputy Clerk of the Court of Appeals sent a second letter to Strothers, essentially giving him an additional seven days to provide the required filings.

23. Strothers filed nothing in response to the Chief Deputy Clerk's letter of August 3.

24. On August 18, 2004, the Court of Appeals entered an order dismissing Eure's appeal for failure to file a Petition for Appeal.

25. During the Bar's investigation of this matter, Strothers stated he assumed that, after the filing of the Reply, the appeal was dismissed. He acknowledged he never told Eure of the dismissal of his appeal, but may have told Barnes. He also acknowledged he never advised anyone of the possibility of seeking a delayed appeal. Strothers would testify his office staff (no longer employed by Strothers) failed to make him aware of the two letters from the Chief Deputy Clerk until it was too late to respond.

[Rules applicable: 1.1; 1.3(a) and 1.4(a)]

The Bernice Duncan Divorce 05-010-3013

26. In May of 2003, Bernice Duncan (Duncan) hired Strothers to defend her in a divorce action brought by her husband. At that time, she paid him \$1,500. On information and belief, none of the \$1,500 was deposited into a trust account. Strothers would testify the \$1,500 was for an uncontested divorce only, and that he did not charge any further fee even though the divorce became contested.

27. Strothers had the matter transferred from Norfolk to Suffolk and filed an Answer and Cross-Bill. Strothers did not, however, seek any relief *pendente lite*.

28. In the Summer of 2004, Duncan learned her husband wanted to sell the marital home, where she lived, and had taken a draw against their home equity line of credit. Strothers didn't respond to Duncan's attempts to communicate with him until September, when Duncan received an angry telephone call from her husband, who wanted to know why she hadn't signed a real estate listing agreement his attorney sent to Strothers in June.

29. Subsequently, Strothers and Duncan met in September of 2004, and Strothers acknowledged he had received the listing agreement in June but had not told her about it because he didn't want her to sign it. At this time, the husband was late on mortgage payments and although Duncan expressed concern Strothers told her not to worry about it. Strothers would testify he did not tell Duncan about the listing agreement as it did not fit with her previously expressed desire for a guarantee of a certain amount from the sale of the marital home.

30. In December of 2004 and January of 2005, Duncan received numerous late notices from the mortgage company and became increasingly worried. Strothers failed to respond to her attempts to contact him.

31. In early February of 2005, Duncan fired Strothers and requested her file. Strothers never provided the file to Duncan or her new attorney, G. Daniel Forbes (Forbes). Despite requests from Forbes, Strothers never endorsed any order of substitution.

32. Forbes promptly sought and obtained *pendente lite* relief for Duncan, including spousal support, health insurance, an orderly procedure for selling the marital home and exclusive use and possession of it until any sale was complete.

[Rules applicable: 1.1; 1.3(a); 1.4(a); 1.15(a) and 1.16(c), (d) and (e)]

II. NATURE OF MISCONDUCT

The Board finds that such conduct of Mr. Strothers constitutes a violation of the following Disciplinary Rules:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.3 Diligence

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

RULE 1.4 Communication

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

RULE 1.5 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.

RULE 1.15 Safekeeping Property

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

RULE 1.16 Declining Or Terminating Representation

- (c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable rules of court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.
- (d) Upon termination 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 shall be returned to the client upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Upon request, the client must also be provided copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer/client relationship.

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

- (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.
- (g) Intentionally or habitually violate any established rule or procedure or of evidence, where such conduct is disruptive of the proceedings.

III. IMPOSITION OF SANCTION

The Board, having considered all the evidence before it, determined to accept the Agreed

Disposition. Having determined to accept the Agreed Disposition, the Board **ORDERS** that

Pursuant to Part 6, Section IV, Paragraph 13(I)(2)(f)(2)(c) of the Rules of the Supreme Court of Virginia, the license of the Respondent, Dwayne Bernard Strothers, to practice law in the Commonwealth of Virginia be, and the same is, hereby **SUSPENDED** for a period of two (2) years, effective June 12, 2006. Further, pursuant to the agreement of the parties, the Board **ORDERS** Mr. Strothers shall not take on any new clients or new legal business during the period of time between the date of the hearing in this matter on the Agreed Disposition (April 27, 2006) and the date the Suspension is made effective by the terms of this order. The Board's intention is that this suspension run consecutively with any other previously imposed discipline, including, without limitation, the prior ninety (90) day suspension imposed by a three-judge panel of the Circuit Court of the City of Suffolk, currently stayed and on appeal to the Supreme Court of Virginia.

It is further **ORDERED** that costs shall be assessed by the Clerk of the Disciplinary System pursuant to the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13(B)(8)(c).

It is further **ORDERED** that the Clerk of the Disciplinary System shall send a certified copy of this order to the Respondent, Dwayne Bernard Strothers, Esq., at 130 Commerce Street, Suffolk, Virginia 23434, his last address of record with the Virginia State Bar.

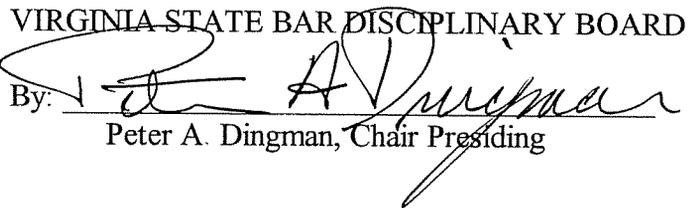
It is further **ORDERED** that the Respondent shall comply with the requirements of Part 6, Section IV, Paragraph 13 (M) of the Rules of the Supreme Court of Virginia. The time for compliance with said requirements runs from June 12, 2006, the effective date of the suspension

in these matters. Issues concerning the adequacy of the notice and arrangements required shall be determined by the Board, which may impose a sanction of revocation or further suspension for failure to comply with the requirements of this paragraph.

Teresa L. McLean, Chandler and Halasz, Inc. Court Reporters, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, was the reporter for the hearing and transcribed the proceedings.

Entered this the 3rd day of May, 2006.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 

Peter A. Dingman, Chair Presiding