VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
CURTIS TYRONE BROWN, ESQUIRE

VSB DOCKET NO.
00-010-2346

ORDER OF SUSPENSION

THIS MATTER was certified to the Virginia State Bar Disciplinary Board by a Subcommittee of the First District Committee on September 30, 2003, and was heard on October 22, 2004, by a duly convened panel of the Disciplinary Board consisting of Karen A. Gould, Chair, James L. Banks, Jr., Robert E. Eicher, Dr. Theodore Smith, Lay Member, and William H. Monroe, Jr. The Respondent, Curtis Tyrone Brown and his counsel, Henry L. Marsh, III made a special appearance for purposes of challenging the jurisdiction of the Disciplinary Board to hear this matter and to reassert Respondent's previous request to have this matter heard before a three-judge panel pursuant to Virginia Code § 54.1-3935. Edward L. Davis, Assistant Bar Counsel, appeared as counsel for the Virginia State Bar (hereafter "VSB"). The proceedings were transcribed by Ms. Tracy J. Stroh, a Registered Professional Reporter of Chandler & Halasz, P.O. Box 9349, Richmond, Virginia, 23227, (804)730-1222.

All required notices were properly sent by the Clerk of the Disciplinary System.

The Chair polled the panel members to determine whether any member had a personal or financial interest in this matter that might affect or reasonably be perceived to affect his or her ability to be impartial in this proceeding. Each member, including the Chair, responded in the negative.

Jurisdiction of the Disciplinary Board

Counsel for Respondent challenged the jurisdiction of the Disciplinary Board to hear this matter. In his argument, Respondent's counsel asserted the following:

1. That on September 30, 2003, a certification letter was mailed to the Respondent from John W. Jelich, III, Subcommittee Chair of the First District Committee wherein Respondent was advised of the Subcommittee Determination (Certification) of VSB No. 00-010-2346. In the certification letter Respondent was informed that "Pursuant to Section Six, Part IV, Paragraph 13.I.1.a of the Rules of the Virginia Supreme Court, you have 21 days from the date of certification of service on the enclosed Subcommittee Determination to either 1) file an answer or 2) demand that further proceedings be conducted before a three-judge panel in accordance with Virginia Code Section 54.1-3935. Your failure to file an answer or demand within 21 days will be deemed to be consent to the jurisdiction of the Disciplinary Board."

2. That on October 21, 2003, exactly 21 days after the certification of service on September 30, 2003, the Respondent demanded, by certified mail, a three-judge panel.

3. That the demand for a three-judge panel was timely made and therefore the Disciplinary Board lacked jurisdiction to hear the matter.

For its response, the VSB agreed that the demand for a three-judge panel was mailed via certified mail by the Respondent and postmarked on October 21, 2003. However, the demand for a three-judge panel was not received by the VSB until October 23, 2003. Accordingly, the request for a three-judge panel was not deemed filed until after the expiration of the twenty-one day period. Respondent argued that Part One of the Rules of the Supreme Court of Virginia, including Rule 1:7, allow for the addition of three days to the time prescribed to take certain action when a document is served by mail.

The VSB argued that that the rules of service under Part One of the Rules of the Supreme Court of Virginia, including Rule 1:7, are inapplicable here. Part Six of the Rules of the Supreme Court of Virginia provide that a matter is filed when received by the Clerk of the Disciplinary System, not when postmarked. Furthermore, the Board cannot waive the twenty-one day filing requirement and surrender jurisdiction to a three-judge panel because the Rules do not allow the Board to waive jurisdiction. The VSB maintains that in the absence of a timely filed answer or demand to the certification letter from the First District Subcommittee, the Respondent is deemed to have consented to the jurisdiction of the Disciplinary Board pursuant to Section Six, Part IV, Paragraph 13.I.1.a of the Rules of the Virginia Supreme Court. The VSB also cites as controlling authority the case of *Fails v. Virginia State Bar, 265 Va. 3, 574 S.E.2d 530 (2003).*

Having heard the argument of counsel and having considered the history of this matter, including the telephone conference of August 6, 2004 (a transcript of which was received into evidence and marked as VSB Exhibit 2), the Board found that no new argument had been presented that had not already been considered by the Board in the telephone conference of August 6, 2004. For this reason, the Board chose not to reconsider the Order previously entered by the past Disciplinary Board Chairman, Roscoe B. Stephenson, III, on August 30, 2004, Accordingly, Respondent's Motion to Challenge Jurisdiction of the Virginia State Bar Disciplinary Board was overruled.

Respondent's Motion for a Continuance

Respondent's counsel next moved to continue this matter. In support of his Motion for a Continuance, Respondent's counsel argued that he had not been consulted regarding the setting of the pre-hearing conference date of October 12, 2004, or the hearing date of October 22, 2004. Respondent's counsel further argued that the VSB would not reasonably consider the alternative dates provided by him in November and December, 2004. As additional grounds for the continuance, Respondent's counsel asserted that the Respondent had a matter which was being

considered before the Supreme Court of the United States and the resolution of that matter may have a direct impact upon this disciplinary hearing.

For the VSB's response, it was noted that Respondent and Respondent's counsel each received notice of the pre-hearing conference date of October 12, 2004 via correspondence from the VSB dated September 21, 2004. Receipt of this notice by Respondent and Respondent's counsel was not disputed. Respondent and Respondent's counsel were also provided with a copy of the Order of August 16, 2004 from the Board setting this matter for hearing on October 22, 2004. Although the initial Order was evidently not received by Respondent's counsel upon its first mailing, another copy of the Order setting this matter for hearing was received by Respondent's counsel via correspondence from the VSB dated August 31, 2004. Respondent's receipt of the Order setting this matter for hearing on October 22, 2004 was also not disputed. The VSB argued that the alternative dates supplied by Respondent's counsel for purposes of setting the pre-hearing conference were unacceptable inasmuch as each of these dates would occur after the established hearing date of October 22, 2004.

The VSB also argued that Respondent's counsel was furnished with a questionnaire by the Board providing Respondent's Counsel with the opportunity to raise any issue he may have wished to raise before the Board at the pre-hearing conference in the event of his absence. No questionnaire was returned. On the day of the pre-hearing conference a call was placed by the VSB to the office of Respondent's counsel but attempts to reach him were was unsuccessful.

In further support of the VSB's position, the VSB called as a witness, Ms. Bonnie Waldeck, Assistant Clerk of the Virginia State Bar Disciplinary System. In response to Bar Counsel's direct examination, Ms. Waldeck testified that she made several attempts to work with Respondent's counsel to obtain a mutually agreeable date for the pre-hearing conference. Specifically, Ms. Waldeck testified that a call was made to Respondent's counsel's office on September15, 2004 wherein a representative of the office staff was advised of the VSB's request to set a pre-hearing conference date. The representative advised Ms. Waldeck that the message would be given to Respondent's counsel and the VSB should expect a return call later that day. Hearing no response from Respondent's counsel, another call was made by the VSB on September 16, 2004. During this call, a representative of the office staff of Respondent's counsel was advised by the VSB that in the absence of a return call from Respondent's counsel, a pre-hearing conference date of October 12, 2004, would be set. No return call was received from Respondent's counsel or any authorized office staff representative. Accordingly, the date for the pre-hearing conference was set for October 12, 2004 at 9:00am. Ms. Waldeck further testified that on September 23, 2004 the order setting the hearing for October 12, 2004, was sent to Respondent's counsel's office. Another copy of the order was sent again to a representative of the office staff of Respondent's Counsel's office on September 24, 2004.

Respondent's counsel had no questions for Ms. Waldeck.

Having heard the arguments of counsel, the testimony of Ms. Bonnie Waldeck and having reviewed the history of this matter including correspondence and notice letters preceding the pre-hearing conference, the Board finds 1) that this matter arose from events going back to January, 2000; 2) that the hearing of this matter had previously been continued for good cause

shown; 3) that reasonable efforts were made by the VSB to accommodate Respondent's counsel in setting a mutually agreeable date and time to conduct the pre-hearing conference; and 4) that the alternative dates for the pre-hearing conference suggested by Respondent's counsel were unreasonable in that none of the suggested dates would have occurred prior to the previously established hearing date of October 22, 2004. Accordingly, the Motion for a Continuance filed by the Respondent was denied[1] and the hearing of this matter was ordered to proceed.

Upon hearing the decision of the panel to deny Respondent's Motion for a Continuance, Respondent's counsel informed the Chair that they were not ready to participate in the hearing before the Board. Whereupon, Respondent and Respondent's counsel withdrew from the hearing choosing not to participate further.

By direction of the Chair, the VSB was asked to proceed with its case. The VSB then moved into evidence a binder containing fourteen pre-numbered exhibits and the entire binder of exhibits was admitted collectively as VSB Exhibit 1. The transcript of the telephone conference held on August 6, 2004, between Respondent's Counsel, Bar Counsel and the Acting Chairman of the Disciplinary Board was admitted into evidence and marked as VSB Exhibit 2.

I. FINDINGS OF FACT

Having considered the VSB Exhibits entered into evidence by Bar Counsel and having heard the testimony of the witnesses called to testify, the Board unanimously found by clear and convincing evidence as follows:

1. During all times relevant hereto, the Respondent, Curtis Tyrone Brown (hereinafter Respondent or Mr. Brown) was an attorney licensed to practice law in the Commonwealth of Virginia.

2. On November 3, 1999, a grand jury sitting in the Circuit Court for the City of Norfolk indicted Germaine S. Doss for the capital murder for hire of James M. Webb on March 23, 1998, and related offenses. The alleged murderer for hire was Nathaniel McGee.

3. Mr. Doss had previously been arrested and indicted for the same crime in May 1998; however, the charges were nolle prossed.

4. For a brief time in April 1998, Joseph C. Lindsey, Esquire, represented Mr. McGee, and withdrew as counsel. Thereafter, attorney Jerrauld C. Jones was appointed by the court to represent McGee, and he did so until November 1998.

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[1] Respondent's counsel was specifically asked by the Chair to explain the potential impact of any currently pending matter before The Supreme Court of the United States and/or the Supreme Court of Virginia. Despite this request, no specific argument was advanced by Respondent's counsel that served to either identify the proceeding or its potential effect upon the instant matter. Additionally, it should be noted that the arguments presented in support of Respondent's Motion for a Continuance had been previously considered and ruled upon as set forth in the October 12, 2004, Order of Board Chair, Karen A. Gould.

5. In December 1999, Mr. Doss hired the respondent, Curtis Tyrone Brown to represent him in the matter. Trial was scheduled to take place in February 2000 in the Norfolk Circuit Court.

6. On January 24, 2000, in the Norfolk Circuit Court, Mr. Brown endorsed and filed the following motion in the case of *Commonwealth of Virginia v. Jermaine S. Doss*:

> MOTION TO SUBPOENA
> COUNSEL OF CO-DEFENDANT, NATHANIEL MCGEE
>
> COMES NOW the Defendant, Jermaine S. Doss, by counsel, and moves this Honorable Court for permission to subpoena Joseph Lindsey, Esquire, and Jerrauld Jones, Esquire to testify:
>
> 1) That Norman Thomas Esquire contacted them for help in fabricating a case against the Defendant; and
>
> 2) That these conversations were made prior to the Defendant ever being indicated on charges relating to the murder of James Webb.
>
> NOTICE
>
> PLEASE TAKE NOTICE that on February 3, 2000, at 10:00 a.m., or as soon thereafter as counsel may be heard, the Defendant, by counsel, will move this Honorable Court in accordance with the foregoing Motion.

7. Norman Thomas, Chief Deputy Commonwealth's Attorney for the City of Norfolk, was the prosecutor.

8. On January 31, 2000, Mr. Thomas filed a response to the motion, and a motion for sanctions, alleging that the grounds stated in the motion were groundless and false, that Mr. Brown had not talked to Mr. Lindsey until after he filed the motion, and that Mr. Lindsey had told Mr. Brown that he could not testify in support of the allegations.

9. On February 24, 2000, following an eight-day trial, a jury found Mr. Doss guilty of First Degree Murder, use of a firearm in the commission of a felony, statutory burglary, and conspiracy. It recommended a sentence of life plus 38 years.

10. On May 23, 2000, following a presentence report, the court imposed the sentence recommended by the jury.

11. On May 19, 2000, the court held an evidentiary hearing on Mr. Thomas' motion for sanctions against Mr. Brown.

12. Mr. Lindsey testified that Mr. Brown never communicated with him about the case prior to filing the motion, and that Mr. Thomas never asked him about fabricating a case against Mr. Doss. He testified further that Mr. Brown did speak to him after filing the motion, and told him to disregard a subpoena if he received one because his testimony was not necessary. Mr. Lindsey testified further that Mr. Brown told him words to the effect that he filed the motion to "either get Norman Thomas off balance or get under Norman Thomas' skin during the course of the prosecution of the case that was going on with Mr. Doss."

13. Likewise, Mr. Jones testified in the May 19, 2000, evidentiary hearing and in the hearing before the Board that Mr. Brown never communicated with him about the case prior to filing the motion, and that Mr. Thomas never asked him about fabricating a case against Mr. Doss.

14. The court made the specific finding that, before filing the motion, Mr. Brown did not speak to either Mr. Lindsey or Mr. Jones, that had Mr. Brown spoken to them he would have learned that Mr. Thomas never asked either of them to assist him in presenting false evidence in this case, that Mr. Brown did not care about the truth or falsity of his allegation, and that Mr. Lindsey's testimony established that Mr. Brown filed the motion to harass Mr. Thomas.

15. The court found further that the filing of the motion falsely accused Mr. Thomas of solicitation of perjury or attempting to suborn perjury, that it falsely accused Mr. Lindsey and Mr. Jones of violations of Rules 3.3d and 8.3a of the Rules of Professional Conduct and misprision of felony, and that such conduct by a member of the bar was outrageous and intolerable.

16. The court also held that Mr. Brown's defense, that the word "fabricate" meant to "build," was disingenuous. It held that the court's conclusion that Mr. Brown's use of the word "fabricate" meant to create a falsehood was strengthened by excerpts from Mr. Brown's closing arguments to the jury in the underlying case, in which he accused police detectives of manufacturing a case against his client.

17. The court concluded by finding that Mr. Brown violated Code of Virginia Section 8.01-271.1 by filing the motion, and that his conduct warranted a sanction that both punished him and compensated the Commonwealth's Attorney's office. It imposed a $4,000 sanction against Mr. Brown, payable at the rate of $1,000 per month. The order provided further that if Mr. Brown appealed the decision, and the sanction was affirmed on appeal, that the first payment became due on the first business day of the first month after the decision became final and unappealable.

18. Mr. Brown appealed the court's decision to the Court of Appeals of Virginia, petitioned for a rehearing and petitioned for review en banc, all of which was denied. He then petitioned for appeal to the Supreme Court of Virginia, and petitioned for a rehearing, both of which were denied. He then filed for a writ of certiorari to the Supreme Court of the United States, which was denied on April 29, 2002.

19. On October 16, 2002, having found that Mr. Brown had not paid any of the sanction as previously ordered, the court issued a rule to show cause against Mr. Brown, ordering him to appear on November 15, 2002. Subsequently, Mr Brown paid the sanction.

20. The imposition of a sanction by the Circuit Court does not serve to negate the potential penalties associated with the violation of the Virginia Professional Rules of Conduct. *Joseph D. Morrissey v. Virginia State Bar, Ex Rel. Third District Committee*, 260 Va. 472, 538 S.E.2d 677 (2000).

II. MISCONDUCT

Following closing argument at the conclusion of the evidence regarding misconduct, the Board recessed to deliberate. The Board reviewed the foregoing findings of fact, the exhibit presented by Bar Counsel on behalf of the VSB as Exhibit1 (tabbed documents 1 – 14) and the testimony of each witness called to testify at the hearing. After due deliberation the Board reconvened and stated its findings as follows:

The Board determined that the VSB failed to prove by clear and convincing evidence that the Respondent violated Rule 3.4 (d) of the Virginia Rules of Professional Conduct. Rule 3.4 (d) states:

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.

There was no evidence that the Respondent knowingly disobeyed or disregarded the ruling of the circuit court judge. Although there appeared to be some delay on the part of the Respondent in paying the monetary sanction imposed against him, the sanction was ultimately paid by the Respondent.

The Board determined that the VSB had proved by clear and convincing evidence that the Respondent violated each of the following Virginia Rules of Professional Conduct:

1. 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;

In choosing to file his *Motion to Subpoena Counsel of Co-Defendant, Nathaniel McGee,* the Respondent clearly made false statements to the Court. Specifically, the Respondent filed his Motion stating, in pertinent part:

> COMES NOW the Defendant, Jermaine S. Doss, by counsel, and moves this Honorable Court for permission to subpoena Joseph Lindsey, Esquire, and Jerrauld Jones, Esquire to testify:

1) That Norman Thomas Esquire contacted them for help in fabricating a case against the Defendant of misconduct on the part of the Prosecutor.

In testimony at the evidentiary hearing of May 19, 2000, and/or at the hearing of this matter, Attorneys Lindsey and Jones each stated that the Respondent never spoke to them prior to filing his Motion. Moreover, had the respondent chosen to do so, he would have been informed that the Prosecutor was not guilty of the conduct alleged in the Respondent's Motion. (VSB Exhibit 1, tab 12, pp. 16 and 17.)

2. RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(i) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

The evidence presented by the VSB clearly shows that the conduct of the Respondent was done with an intent to harass or maliciously injure the reputation of the Prosecutor before the Court. Specifically, the testimony offered by attorney Lindsey to the Court in the evidentiary hearing of May 19, 2000, provided the following:

Q. Was there a conversation with Mr. Brown with reference to the Motion later on?
A. *At some point after that Motion was obviously filed, I ran into Mr. Brown in the Norfolk Juvenile Court lobby and he advised me that in the event I received a subpoena to come and testify in the Jeramine Doss case, to disregard it because my testimony wasn't necessary. [ ] He said he had filed a motion with the Circuit Court as a tactical means and that it was either --- and I don't remember his exact words, but the tenor of it was either to get Norman Thomas off balance or get under Norman Thomas's skin during the course of the prosecution of the case that was going on with Mr. Doss.* (VSB Exhibit 1, tab 12, pp. 16 and 17).

3. 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;

In the testimony offered by the Respondent, Mr. Brown, at the evidentiary hearing of May 19, 2000, the Respondent admitted that he had not spoken with Mr. Lindsey prior to filing his Motion. (VSB Exhibit 1, tab 12, p.115, lines 11-16). Likewise, there was no conversation with Mr. Jones prior to filing the Motion. (VSB Exhibit 1, tab 12, p.116, lines 13-24).

4. **RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;

In addition to the Respondent's complete failure to speak with counsel in an effort to properly investigate the allegations made against the Prosecutor in his Motion, the Respondent chose to dismiss his use of the word "fabricate" as a term simply meaning to build a case. This attempt on the part of the Respondent to dismiss his intentional use of such a term is particularly troubling. The Board agrees with the finding of the Circuit Court wherein the Court stated:

> *Fabricate certainly has two meanings. If we were to have furniture manufactures and someone talking about fabricating, he's talking about building furniture. In the legal context, both Mr. Thomas and Mr. Jones testified and I think the clear meaning of that word in the legal proceedings is to make something up, to falsify. I think Mr. Brown's testimony that he intended it to mean build is disingenuous at best.* (VSB Exhibit 1, Tab 12, p.162, lines 17-25).

III. DISPOSITION

Thereafter, the Board received evidence of aggravation from Bar Counsel, i.e., Respondent's prior disciplinary record. The Board recessed to deliberate what sanction to impose upon its finding of misconduct by Respondent. After due deliberation, the Board reconvened to announce the sanction imposed. The Board recognizes that the zealous representation of a client is not only proper, it is required. However, when counsel in the course of representing their clients step across the line of zealousness and chose to make misrepresentations and false and uninvestigated allegations that have the effect of maligning and tarnishing the reputations of fellow members of the bar, this conduct is nothing less than outrageous and intolerable. The Chair announced the sanction as being a one (1) year license suspension.

Accordingly, it is ORDERED that the license of the Respondent, Curtis Tyrone Brown, to practice law in the Commonwealth of Virginia, be, and the same hereby is, suspended, effective November 22, 2004, for a period of one (1) year.

It is further ORDERED that, as directed in the Board's October 22, 2004, Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13(M) of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the

wishes of his client. Respondent shall give such notice within 14 days of the effective date of the suspension, and make such arrangements for the disposition of matters.

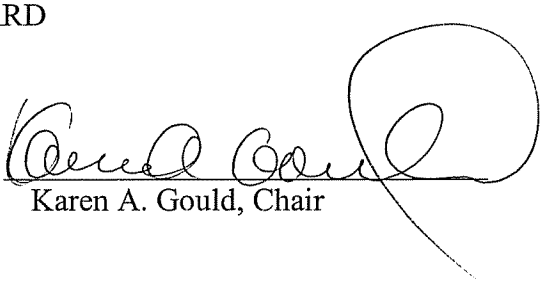
It is further ORDERED that if the Respondent is not handling any client matters on the effective date of suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13 (M) shall be determined by the Virginia State Bar Disciplinary Board, unless the respondent makes a timely request for hearing before a three-judge court.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13.B.8.c. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to respondent at his address of record with the Virginia State Bar, being 555 Fenchurch Street, Suite 306, Norfolk, Virginia 23510, by certified mail, return receipts requested, and by regular mail to Henry L. Marsh, III, Respondent's Counsel, Suite 201, 600 East Broad Street, Richmond, Virginia 23219, and to Edward L. Davis, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 24th day of November, 2004.

VIRGINIA STATE BAR DISCIPLINARY BOARD

BY: 

Karen A. Gould, Chair