

**VIRGINIA:**

**BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD**

**IN THE MATTER OF  
JAMES KEVIN CLARKE**

**VSB Docket No. 03-031-1625**

**ORDER**

This matter came before the Virginia State Bar Disciplinary Board upon certification from the Third District Committee, Section I. On May 21, 2004, a proposed Agreed Disposition was presented to a duly convened panel consisting of Chester J. Cahoon, Jr., lay member, Robert E. Eicher, Joseph R. Lassiter, Jr., H. Taylor Williams, IV, and Roscoe B. Stephenson, III, Chair. The Respondent, James Kevin Clarke, was present, and Barbara Ann Williams, Bar Counsel, represented the Virginia State Bar.

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, verified that he had no conflicts.

Having considered the proposed Agreed Disposition and the representations of counsel, the Disciplinary Board accepted the Agreed Disposition and finds by clear and convincing evidence as follows:

**I. Findings of Fact**

1. Mr. Clarke was admitted to the practice of law in the Commonwealth of Virginia on May 3, 1994.
2. At all times pertinent to this proceeding, Mr. Clarke was active and in good standing to practice law in Virginia.
3. On or about November 11, 1999, the complainant engaged Mr. Clarke to represent him in connection with the complainant's claim that Delta Air

Lines wrongfully terminated his employment as a commercial airline pilot.

4. By letter dated December 9, 1999, Mr. Clarke proposed expanding the scope of the representation to include “any claim against any individual or entity, including but not limited to Value Jet, Inc., for any interference with Aaron T. Guess’s pursuit of, attainment of, or continuance in employment with Delta Air Lines.”
5. On or about January 2, 2000, the complainant engaged Mr. Clarke to defend him in a lawsuit American Trans Air (ATA) filed in a North Carolina court to recover \$17,000 of the \$25,000 ATA paid for the complainant to be trained as a commercial airline pilot.
6. The ATA lawsuit was mediated, and on or about November 8, 2000, the ATA lawsuit was dismissed without prejudice by stipulation of the parties.
7. More than two years passed before, on January 9, 2002, Mr. Clarke filed the wrongful discharge action on the complainant’s behalf in federal court in Atlanta against Delta Airlines, Inc., AirTran Airways, Inc., the American Pilots Association, International and several individual defendants (“Delta litigation”).
8. The Delta litigation alleged that the defendants had breached contracts with the complainant, wrongfully discharged and defamed him, and tortiously interfered with his employment, thereby violating various federal laws.
10. On February 27, 2002, the federal district court ordered that if Mr. Clarke did not withdraw from the Delta litigation, his name was to be removed from the docket on March 19, 2002, unless he submitted a *pro hac vice* application as the Clerk’s Office had directed him to do on January 14, 2002.
11. Mr. Clarke subsequently retained an Atlanta law firm to assist him as local counsel in the Delta litigation.
12. The defense moved to dismiss the Delta litigation in late July and early August 2002, because, among other things, Mr. Clarke had allegedly failed to file and serve the lawsuit in a timely manner.
13. By letter dated July 30, 2002, local counsel advised Mr. Clarke that his firm planned to move to withdraw as local counsel due to a breakdown in communications with Mr. Clarke and because the Delta litigation appeared to be time barred.

14. On September 11, 2002, local counsel filed a motion for leave to withdraw.
15. On October 18, 2002, after Mr. Clarke failed to file any response to the motions to dismiss, the court dismissed the complainant's claims against all the defendants in the Delta litigation.
16. Because Mr. Clarke had stopped communicating with his client, the complainant did not learn that the Delta litigation had been dismissed until he contacted the federal court on December 2, 2002.
17. The complainant paid Mr. Clarke \$6,000 in fees for the Delta litigation, plus \$3,000 in fees and a \$1,000 bonus in connection with the ATA lawsuit.
18. Mr. Clarke did not deposit any of the money the complainant paid him in his attorney trust account and did not maintain subsidiary ledgers reflecting any disbursements for fees, costs or expenses.
19. After the Delta litigation concluded, the complainant requested Mr. Clarke to provide him a copy of his file; Mr. Clarke did not honor the complainant's request.

**B. Findings of Misconduct**

The foregoing findings of fact give rise to the following findings of misconduct:

**RULE 1.3 Diligence**

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

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**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 1.15 Safekeeping Property**

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(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;

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**RULE 1.16 Declining Or Terminating Representation**

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- (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.

### **III. Disposition**

The Disciplinary Board, Respondent and Bar Counsel agree that a public reprimand with the following terms is an appropriate disposition of this matter:

1. Mr. Clarke shall comply fully with the terms of his current Rehabilitation/Monitoring Agreement with Lawyers Helping Lawyers, and that agreement shall be extended to December 31, 2006.
2. No later than July 1, 2004, Mr. Clarke will deliver to Bar Counsel an executed copy of the extended Rehabilitation/Monitoring Agreement.
3. Mr. Clarke will execute whatever releases are necessary for Lawyers Helping Lawyers to communicate with the Virginia State Bar on a quarterly basis through December 31, 2006, and for any therapists, counselors or medical providers with whom he consults or by whom he is

treated to, upon request, produce his records and communicate with the Virginia State Bar.

4. No later than July 1, 2004, Mr. Clarke will deliver to Bar Counsel a written certification that he has put in place a trust account record keeping system.
5. Mr. Clarke shall be on disciplinary probation with respect to his conduct as an attorney after December 1, 2002, and before December 31, 2006, and warrants that he has no reason to believe that he will be found to have engaged in any additional misconduct arising during that period.

Upon satisfactory proof that all terms and conditions of the Agreed Disposition have been met, this matter shall be closed. Mr. Clarke's failure to comply with any one or more of the agreed terms and conditions, including a finding that he engaged in attorney misconduct between December 1, 2002 and December 31, 2006, will result in the imposition of the alternate sanction of an eighteen month suspension.

If the Virginia State Bar discovers that Mr. Clarke has failed to comply with any of the agreed terms or conditions, imposition of the alternate sanction shall not require a hearing on the underlying charges of Misconduct. In that event, the Virginia State Bar shall issue and serve upon Mr. Clarke a Notice of Hearing to Show Cause why the alternative sanction should not be imposed. The sole factual issue will be whether Mr. Clarke has violated one or more of the terms of the Public Reprimand without legal justification or excuse. The imposition of the alternative sanction shall be in addition to any other sanction imposed for misconduct during the probationary period.

The court reporter for this hearing on the Agreed Disposition was Tracy Stroh of Chandler and Halasz Court Reporters, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222.

Pursuant to Part Six, Section IV, Paragraph 13.A.8.c.(1) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.

It is **ORDERED** that a copy teste of this Order shall be mailed by certified mail, return receipt requested, to the Respondent, at his last address of record with the Virginia State Bar, 1325 Greycourt Avenue, Richmond, Virginia, 23227, and hand delivered to Barbara Ann Williams, Bar Counsel, at the Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, Virginia 23219.

Enter this Order this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

**VIRGINIA STATE BAR DISCIPLINARY BOARD**

By: \_\_\_\_\_  
Roscoe B. Stephenson, III, Chair