

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF
NICHOLAS ASTOR PAPPAS**

VSB DOCKET NO. 03-060-2734

ORDER

This matter came on to be heard on April 22, 2005, before a panel of the Virginia State Bar Disciplinary Board (the "Board") composed of Peter A. Dingman, chair, David R. Schultz, Nancy C. Dickenson, Robert E. Eicher, and Theodore Smith, lay member.

The Virginia State Bar ("VSB") was represented by Barbara A. Williams, Bar Counsel. Nicholas Astor Pappas (the "Respondent") appeared and was represented by Michael L. Rigsby. Tracy J. Stroh, Registered Professional Reporter, of Chandler & Halasz, P. O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, having been duly sworn by the Chair, reported the hearing and transcribed the proceedings.

The Chair inquired of the members of the panel whether any of them had any personal or financial interest or any bias which would preclude, or could be perceived to preclude, their hearing the matter fairly and impartially. Each member of the panel and the Chair answered the inquiry in the negative.

The matter came before the Board on a Subcommittee Determination (Certification) of the Sixth District Committee of the VSB and upon the Respondent's answer thereto.

Bar Counsel and counsel for the Respondent stated that they were prepared to proceed. Counsel for the Respondent waived an explanation of the hearing procedure. Bar Counsel and counsel for the Respondent waived opening statements.

Bar Counsel offered VSB Exhibits 1 through 20, and they were admitted without objection. Bar Counsel called John W. Hartel to testify as a witness for the VSB, and counsel for the Respondent conducted cross-examination. Bar Counsel rested the VSB's case-in-chief.

The Respondent then testified on his own behalf, and Bar Counsel conducted cross-examination. VSB Exhibit 21 was admitted over objection by counsel for Respondent.

Bar Counsel's cross-examination elicited that the Respondent's client, Rochelle McCarl, had signed a retainer agreement with the Respondent which the Respondent had not produced in response to Bar Counsel's discovery. The Respondent testified that he had given his file to his former attorney, David Ross Rosenfeld. Bar Counsel represented that Mr. Rosenfeld had not produced the retainer agreement.

Bar Counsel moved for a continuance of the hearing in order to obtain the retainer agreement since the date signed is a material fact. Counsel for the Respondent objected to a continuance.

The Board retired to a closed session to deliberate. The Board reconvened in open session, and the Chair announced that the Board granted Bar Counsel's motion for continuance and thereupon continued the hearing to July 22, 2005, at 9:00 o'clock a.m. in Courtroom A at the State Corporation Commission.

This matter came on to be again heard on July 22, 2005, before the same panel of the Virginia State Bar Disciplinary Board. The chair of the panel stated that the court reporter had been sworn at the original hearing, and that she remained under oath.

The chair noted that at the original hearing, he and the other panel members had answered that they did not have any personal or financial interest or any bias which would preclude, or could be perceived to preclude, their hearing the matter fairly and impartially. The

chair inquired whether their answer remained the same, and the chair and each member of the panel affirmed the answer given on April 22, 2005.

Bar Counsel offered two sets of stipulations of fact as VSB Exhibits 22 and 23, which were admitted without objection.

Bar Counsel noted that Randy Poe testified at his deposition on July 19, 2005, that he had not authorized the Respondent to enter a guilty plea for him at the hearing on June 22, 2005, on the charge of driving under the influence of alcohol. Bar Counsel then moved to amend paragraph 5 of the certification from the subcommittee of the Sixth District Committee in VSB Docket No. 03-060-2734 to insert the word “allegedly,” so that paragraph 5 would read: “Mr. Poe had moved to Tennessee and did not appear for the DUI hearing, but Mr. Pappas appeared and, allegedly with Mr. Poe’s consent, entered a guilty plea on his client’s behalf.” Counsel for the Respondent objected to such amendment of the certification; his objection was overruled; and Bar Counsel was granted leave to amend.

Bar Counsel offered the transcript of the deposition testimony of Randy Poe as VSB Exhibit 24. Counsel for the Respondent objected to the admission into evidence of Randy Poe’s testimony appearing in the transcript on page 16, line 23, through line 25 on page 18. The objection was overruled, and VSB Exhibit 24 was admitted in its entirety.

Counsel for the Respondent offered the deposition testimony of Rochelle J. McCarl as Respondent Exhibit 1, and the transcript thereof was admitted without objection.

Bar Counsel resumed the cross-examination of the Respondent. Bar Counsel offered VSB Exhibits 25, 26, 27, 28, 29, 30, 31, and 32, which were admitted without objection. Bar Counsel also offered VSB Exhibit 33, and counsel for the Respondent objected. The objection was overruled, and VSB Exhibit 33 was admitted. Board Exhibit 1 was admitted without

objection. Bar Counsel's cross-examination concluded, and counsel for the Respondent did not conduct re-direct examination of the Respondent.

Counsel for the Respondent rested following the Respondent's testimony. Bar Counsel did not present rebuttal evidence. Thereupon, Bar Counsel and Counsel for the Respondent presented closing argument. Bar Counsel represented that the VSB withdrew the certification of a violation of Rule 4.3(b).

I. Findings of Fact

Upon consideration of the foregoing, the Board finds that the following facts have been proved by clear and convincing evidence, to wit:

1. At all relevant times, the Respondent has been a lawyer duly licensed to practice law in the Commonwealth of Virginia, and his address of record with the Virginia State Bar has been 411 Chatham Square Office Park, Fredericksburg, Virginia 22405.
2. The Respondent was properly served with notice of this proceeding as required by Part Six, § IV, ¶ 13 (E) and (I) (a) of the Rules of the Supreme Court of Virginia.
3. The complainant in this proceeding was John W. Hartel.
4. On December 7, 1999, Rochelle McCarl signed an engagement letter hiring the Respondent to represent her in a personal injury claim against Keith Atkins. Ms. McCarl was injured on August 15, 1999, when the automobile in which she was a passenger overturned and ejected her. Mr. Atkins was the operator of the automobile. Among the injuries for which Ms. McCarl sought compensation were allegedly severe facial injuries.
5. The Respondent sent a letter to Omni Insurance Company, dated April 19, 2000, requesting any recorded statements given by Ms. McCarl in connection with Mr. Atkins' automobile accident.

6. The Respondent sent a demand letter, dated July 14, 2000, to Mr. Atkins' liability carrier.

7. By letter dated August 25, 2000, Ms. McCarl authorized the Respondent to accept Mr. Atkins' liability policy limit of \$25,000 in settlement of her personal injury claim against Mr. Atkins.

8. The Respondent represented Kenneth R. Poe on a summons for driving under the influence ("DUI") as a result of Mr. Poe's automobile accident on February 25, 2000. Ms. McCarl, who was living with Mr. Poe, was a passenger in the automobile and sustained facial injuries when it overturned and ejected her.

9. Mr. Poe's summons for DUI had a return day of March 14, 2000, in the General District Court of the City of Fredericksburg, Virginia.

10. Ms. McCarl referred Mr. Poe to the Respondent, who was then representing Ms. McCarl in her personal injury claim against Keith Atkins. Mr. Poe and Ms. McCarl met with the Respondent in early March of 2000 before the return day of March 14, 2000, on the summons for DUI. Mr. Poe had no money at the time, and the Respondent said they would talk about a fee at their next meeting.

11. At the initial meeting among the Respondent, Mr. Poe, and Ms. McCarl, a laceration Ms. McCarl suffered to her forehead in Mr. Poe's automobile accident was visible. The Respondent suggested that photographs should be taken of her injury.

12. Mr. Poe took photographs of Ms. McCarl's laceration on her forehead, and he and Ms. McCarl met with the Respondent and delivered the photographs to him some time during the third or fourth week of March 2000. At that meeting, the subject of the Respondent's fee for representing Mr. Poe came up. The Respondent said that if a suit was filed with Mr. Poe's

insurance company, he could take his fee from the amount recovered, and that Mr. Poe would owe nothing personally. Also at the meeting with Mr. Poe and Ms. McCarl, the Respondent discussed filing a claim for Ms. McCarl's personal injuries, telling Mr. Poe and Ms. McCarl that, because of their personal relationship, he would "go after the insurance company" but not Mr. Poe. Mr. Poe did not understand from the Respondent that he would be the named defendant. Mr. Poe understood from the Respondent that if the Respondent sued Allstate, his carrier, the Respondent would have him named as a policy holder but that nothing would become of him because everything would be going through Allstate. The Respondent did not mention punitive damages to Mr. Poe.

13. Trial of Mr. Poe's summons for DUI was continued on the March 14, 2000, return date to June 22, 2000.

14. Mr. Poe and the Respondent discussed a plea to the summons for DUI. Mr. Poe said that he was going to plead not guilty unless the Commonwealth could prove that he was the driver of the automobile. There was no discussion of the effect of a guilty plea on a suit brought by Ms. McCarl against Mr. Poe for personal injuries.

15. Mr. Poe and Ms. McCarl moved from Virginia to New Jersey in late April-early May 2000 and from New Jersey to Tennessee in August or September 2000 where they continued to live together. Mr. Poe never spoke with the Respondent after moving from Virginia, did not know the DUI was set for trial on June 22, 2000, and therefore did not appear, did not instruct Mr. Pappas to enter a guilty plea, and did not learn he had been convicted on a guilty plea entered by the Respondent until 2005 when Mr. Poe sought to get a Tennessee operator's license. Ms. McCarl was in contact with the Respondent after she and Mr. Poe moved from Virginia.

16. In a letter dated June 26, 2000, addressed to Randy Poe, P. O. Box 283, Franklinville, NJ 08322, the Respondent stated that he had entered a plea of guilty to the DUI charges “pursuant to your instructions” and explained the court’s disposition. Mr. Poe did not have a post office box address and did not see the letter until the day before his deposition in this matter on July 18, 2005.

17. Ms. McCarl signed an agreement on September 26, 2000, calling for the Respondent to represent her in “Personal Injury McCarl v. Poe.”

18. In a letter dated July 7, 2000, from the Respondent to the Virginia Department of State Police, the Respondent stated “I represent Rochelle McCarl who was involved in [the Poe accident,] and requested any photographs of the scene.

19. In a letter dated July 7, 2000, from the Respondent to the Virginia State Police, the Respondent stated “I represent Rochelle McCarl in an action for personal injuries sustained [in the Poe accident].”

20. On December 9, 2001, Ms. McCarl, then residing in Tennessee, sent an e-mail message to Althea, who was Althea Burnett, an employee in the Respondent’s office, stating “I was talking to Nick [the Respondent] about another case and decided to have him look into the Allstate deal [Poe’s carrier], he made initial contact to let them know he was handling my case and shortly after, I moved. . . .” The e-mail also states that “we had numerous contacts through e-mail.” The Respondent did not produce any e-mail messages from Ms. McCarl except for the one on December 9, 2001.

21. Ms. McCarl’s testimony in the deposition transcript exhibited with the Respondent’s Motion for Reconsideration in the Circuit Court of Fredericksburg, Virginia, was that after Mr. Poe’s accident on February 28, 2000, she first met with Mr. Pappas about her

injuries a month or two after the accident, but that she was not entirely sure about the timeframe. In her affidavit of March 5, 2003, exhibited with the Respondent's Motion for Reconsideration in the Circuit Court of the City of Fredericksburg, Virginia, Ms. McCarl stated that she contacted the Respondent in August of 2000 to discuss her case against Mr. Poe. Ms. McCarl's affidavit was prepared by the Respondent with assistance from his counsel at the time. In McCarl's deposition in this matter on July 14, 2005, she testified that she did not recall whether she had any conversation with the Respondent about the contents of the affidavit before signing it. She was asked whether it was her testimony that she had no conversations with the Respondent about her injuries in the Poe accident on February 28, 2000 until August 15, 2000. She answered that was not her testimony because she did not recall.

22. On or about September 5, 2000, the Respondent sent a draft of a Waiver for Mr. Poe to his counsel, David Ross Rosenfeld, for review and changes. The Waiver was for Mr. Poe to sign waiving any conflict arising from the Respondent's representation of Ms. McCarl against Mr. Poe. Mr. Rosenfeld consulted with the Respondent and re-drafted the Waiver, based on information the Respondent provided him. The Respondent approved Mr. Rosenfeld's re-draft. Mr. Rosenfeld understood from the Respondent that the attorney-client relationship between the Respondent and Mr. Poe had ended and that the Respondent had not consulted with or advised Ms. McCarl regarding a possible claim against Mr. Poe prior to the termination of the Respondent's attorney-client relationship with Mr. Poe.

23. The Respondent mailed the Waiver to Mr. Poe's address in Tennessee where he and Ms. McCarl lived. She got the mail there. Mr. Poe confirmed his signature and his filled in date of September 27, 2000, opposite his signature. Mr. Poe did not recall reading or signing the Waiver, explaining that at the time he was going through a divorce and signing papers related to

it. Though the waiver is notarized, Mr. Poe did not appear before a Notary. Mr. Poe did not mail the Waiver to the Respondent; Ms. McCarl did the mailing.

24. The Respondent did not have any conversation with Mr. Poe about the Waiver before or after it was signed.

25. The Waiver does not mention a claim for punitive damages against Mr. Poe. Nor does it mention a suit against him in excess of his liability policy limits on coverage.

26. On February 27, 2002, the Respondent filed a motion for judgment on behalf of Ms. McCarl against Mr. Poe in the Circuit Court of the City of Fredericksburg, Virginia, alleging Mr. Poe's negligence and intoxication in the automobile accident and claiming compensatory damages of \$250,000, which exceeded Mr. Poe's policy limits, and punitive damages of \$250,000.

27. Mr. Poe's liability carrier appointed John W. Hartel to defend Mr. Poe in the suit brought on behalf of Ms. McCarl.

28. On March 4, 2003, following a hearing, the Circuit Court of the City of Fredericksburg, Virginia, entered an order recusing the Respondent from the representation of Ms. McCarl against Mr. Poe. On March 31, 2003, following a hearing, the court denied the Respondent's motion for reconsideration.

29. There were conflicts between the testimony of the Respondent and Ms. McCarl, on the one hand, and Mr. Poe, on the other hand, in material respects. The deposition testimony of Mr. Poe is credible. Ms. McCarl's deposition testimony was marked by uncertainty and speculation. The Respondent's testimony *ore tenus*, if not evasive in material respects, was marked by inconsistency and vagueness.

30. A current or former client's consent to a conflict of interest in an adverse representation is required to be consent after consultation. Consultation is defined in the Rules of Professional Conduct as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Without consultation, a client's consent to a conflict of interest is not an informed consent and thus is no consent at all.

31. Loyalty is an essential element in the lawyer's relationship with a client.

32. Lawyers have superior knowledge and experience in addressing conflicts of interest with clients, current or former, and such clients justifiably may rely on their lawyer to be honest, candid, and thorough in eliciting consent to an adverse representation of another client.

33. A client's consent to a representation adverse to the client's interests, whether in litigation or otherwise, is required to be elicited before the adverse representation commences.

II. Misconduct

The remaining charge in the Certification is a violation of Rule 8.4 of the Rules of Professional Conduct, as follows:

It is professional misconduct for a lawyer to:

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

III. Disposition

Upon consideration of the foregoing, following deliberation in closed session, the Board reconvened in open session and the Chair announced the Board's determination that the VSB had proved by clear and convincing evidence the Respondent's violation of Rule 8.4(c) of the Virginia Rules of Professional Conduct, as charged in the Certification.

IV. Sanction

The Board called for evidence in aggravation or in mitigation of the misconduct found. Bar Counsel presented the Respondent's prior disciplinary record as VSB Exhibit 34, consisting of a Dismissal with Terms on May 19, 1997, and May 6, 1999, respectively, and a Private Reprimand with Terms on May 16, 1999, and November 9, 1999, respectively.

Counsel for the Respondent presented the testimony of David Lee Coman, the Director of Social Services for King George County, Virginia. The Respondent testified on his own behalf. Bar Counsel and Counsel for the Respondent then presented argument.

Following deliberation in closed session, the Board reconvened in open session, and the Chair announced the Board's decision that the Respondent's license to practice law in the Commonwealth of Virginia should be SUSPENDED for a period of six (6) months effective July 22, 2005.

Accordingly, it is ORDERED that the license of the Respondent, Nicholas Astor Pappas, to practice law in the Commonwealth of Virginia be and hereby is SUSPENDED for a period of six (6) months, effective July 22, 2005.

It is further ORDERED that Respondent, as directed in the Board's summary order in this matter, dated July 22, 2005, 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 fourteen days of the effective date

of the suspension, and make such arrangements as are required herein within forty-five days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

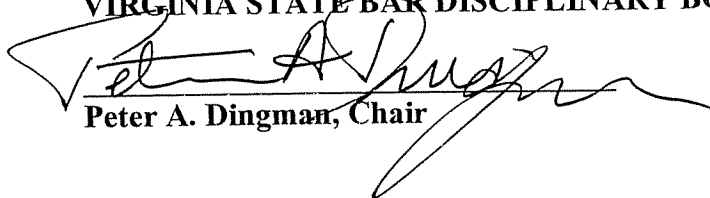
It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required 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 deliver an attested copy of this order to the Respondent at his address of record with the Virginia State Bar, 411 Chatham Square Office Park, Fredericksburg, Virginia 22405, by certified mail, return receipt requested, by first class mail to Respondent's counsel, Michael L. Rigsby, Esquire, Carrell Rice & Rigsby, Forest Plaza II, Suite 309, 7275 Glen Forest Drive, Richmond, Virginia 23226, and by hand to Barbara Ann Williams, Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Enter this Order this 10th day of August, 2005.

VIRGINIA STATE BAR DISCIPLINARY BOARD


Peter A. Dingman, Chair