VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
BRIAN CHARLES SHEVLIN **VSB DOCKET NO. 04-041-2338**

ORDER OF PUBLIC ADMONITION

This matter came on to be heard on November 18, 2005, before a panel of the Virginia State Bar Disciplinary Board (the "Board") composed of Peter A. Dingman, Chair, William E. Glover, Glenn M. Hodge, Robert E. Eicher, and W. Jefferson O'Flaherty, lay member.

The Virginia State Bar ("VSB") was represented by Seth M. Guggenheim, Assistant Bar Counsel. Brian Charles Shevlin (the "Respondent") appeared and was represented by Michael L. Rigsby. Jennifer L. Hairfield, 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 Fourth District Committee – Section I of the VSB and upon the Respondent's answer thereto.

At the outset, counsel for the Respondent renewed for the record his previously overruled objection to the Board hearing the matter, which the Chair again overruled. On motion, the

Chair excluded all persons who would testify, and they withdrew from the hearing room to the hall.

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

VSB Exhibits 1 through 24 were admitted without objection. Respondent's Exhibits 1 through 17 and 19 through 27 were admitted without objection. The Chair had previously overruled the Bar's objection to Respondent's Exhibit 18, and that Exhibit was admitted subject to such ruling. Stipulations of Fact between Bar Counsel and counsel for the Respondent were received. The Chair overruled Bar Counsel's pre-hearing motion in limine with respect to the Respondent's witnesses.

Bar Counsel called Daniel L. Winand to testify. Counsel for the Respondent conducted cross-examination, and Bar Counsel conducted re-direct examination. Bar Counsel called Earl C. Walts to testify. Counsel for the Respondent had no cross-examination. Bar Counsel called the Respondent to testify, and counsel for the Respondent conducted cross-examination.

During the course of the cross-examination of Daniel L. Winand, he testified that he had looked at his notes to refresh his memory of a conversation with the Respondent. Counsel for the Respondent moved that those notes be produced to him for his review. The Chair instructed Mr. Winand to retrieve those notes, and he subsequently did. Counsel for the Respondent reviewed the notes and had no further questions for Mr. Winand.

Members of the Board addressed questions to Mr. Winand and to the Respondent following their examination by counsel.

Bar Counsel rested following the testimony of Messrs. Winand, Walts, and the Respondent. Counsel for the Respondent moved to strike the Bar's evidence. The Chair overruled the motion.

Counsel for the Respondent called Edward J. Sullivan to testify, and Bar Counsel conducted cross-examination. Counsel for the Respondent called Constance S. Bennie to testify; Bar Counsel did not conduct cross-examination. Counsel for the Respondent called the Respondent to testify, and Bar counsel conducted cross-examination. Members of the Board addressed questions to the Respondent.

Counsel for the Respondent called Robert T. Hall to testify and Bar Counsel conducted cross-examination. Members of the Board addressed questions to Mr. Hall.

Counsel for the Respondent called Bernard J. DiMuro to testify. Counsel for the Bar had no cross-examination. Counsel for the Respondent then rested, and Bar Counsel re-called Daniel L. Winand in rebuttal.

VSB Exhibits 25 and 26 were admitted without objection. Respondent's Exhibit 28 was admitted without objection.

Bar Counsel rested. Bar counsel and counsel for the Respondent presented closing argument.

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 since 1970, and his address of record with the Virginia State Bar has been Suite 610, 1655 North Fort Myer Avenue, Arlington, Virginia 22209, but

currently the address of his law practice is 4084 University Drive, Suite 102, Fairfax, Virginia 22030.

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 Respondent represented Edward J. Sullivan, administrator of the estate of his wife, Donna J. Sullivan, in a wrongful death action in the Circuit Court of Fairfax County, Virginia (Case No. 196237) against Carl T. Brown, M.D., et al., arising from alleged medical malpractice committed by Dr. Brown in surgery he performed on Donna J. Sullivan in August of 1999.

4. Following the surgery forming the alleged medial malpractice, Donna J. Sullivan received care and treatment from J.W. Carlson, D.O., a board-certified gynecological oncologist at Walter Reed Army Medical Center ("WRAMC") in Washington, D.C. The care and treatment of Mrs. Sullivan at WRAMC related to medical conditions resulting from the alleged medical malpractice.

5. Donna J. Sullivan husband, Edward J. Sullivan, was a military retiree, which made her eligible for care and treatment at WRAMC without expense to them except for a nominal per diem charge.

6. Mrs. Sullivan died in January of 2002 under the care of Dr. Carlson at WRAMC, allegedly in consequence of Dr. Brown's medical malpractice in his surgery on Mrs. Sullivan.

7. By letter dated April 18, 2001, to WRAMC, the Respondent sent Mrs. Sullivan's medical authorization and requested release of medical bills for care at WRAMC.

8. By letter dated January 22, 2002, to WRAMC, the Respondent sent Mrs. Sullivan's medical authorization and requested copies of her medical records for care at WRAMC.

9. By letter dated March 1, 2002, to the Respondent, the Recovery Attorney for the Department of the Army at WRAMC acknowledged receipt of the Respondent's requests for medical treatment and/or billing records for Donna J. Sullivan and advised that, under the Federal Medical Care Recovery Act, the United States had the right to recover the reasonable cost of medical care provided to her at government expense. The Recovery Attorney also advised that (a) the government had an independent cause of action but preferred to coordinate with the patient's attorney to permit him to present WRAMC's bills as an item of special damages and to access WRAMC physicians to provide expert testimony, (b) any communication to WRAMC physicians must be channeled through the Recovery Attorney, and (c) the government's investigation of the events leading to the request for records was in its early stages. The Recovery Attorney enclosed a Statement of Incident form to be completed and returned.

10. The Respondent returned the completed Statement of Incident form to WRAMC's Recovery Attorney by letter dated March 20, 2002.

11. On May 14, 2002, the Respondent had a telephone conversation with Daniel L. Winand, a civilian lawyer with the Department of the Army's claims division at WRAMC who reported to the WRAMC Recovery Attorney. According to Mr. Winand, he explained to the Respondent that WRAMC had its own cause of action for the expense of the care provided to Mrs. Sullivan, that WRAMC did not send bills to patients and had to arrive at bills for the charges for care provided, and that, unlike private hospitals, there was not a central repository of medical records, which were kept in different locations.

12. Mr. Winand's testimony was that, in his telephone conversation with the Respondent on May 14, 2002, the Respondent did not advise him of a timetable for the case or the trial date, and merely stated that the Respondent was under a "tight time frame." Mr. Winand's testimony was that he asked the Respondent to send a copy of the scheduling order in the case, and that he never received it from the Respondent.

13. At the time of the telephone conversation between Mr. Winand and the Respondent, a trial date of July 22, 2002, previously had been set.

14. The Respondent's letter of May 14, 2002, to Mr. Winand stated that it was "further to our telephone conversation earlier today" and did not contain any deadlines in the case except to say that there was "some urgency" in the Respondent speaking with Dr. Carlson, whom he intended to use as an expert witness. The Respondent's letter confirmed that he "would be happy to represent the interests of the United States...."

15. On May 17, 2002, the Respondent's secretary sent medical records of Mrs. Sullivan and deposition transcripts of witnesses to Mr. Winand's legal assistant. On May 21, 2002, the Respondent's secretary sent Mr. Winand's legal assistant Mrs. Sullivan's in-patient medical records and a copy of the pleadings.

16. Since Dr. Carlson was a WRAMC doctor, Mr. Winand was responsible for his preparation to testify as an expert. However, on June 21, 2002, the Respondent wrote Dr. Carlson alerting him "to the issues" presented by the three experts for the defense.

17. On June 21, 2002, the Respondent signed an Attorney Representation Agreement in which, inter alia, he agreed to represent the United States Government under the Federal Medical Care Recovery Act in a recovery of the reasonable value of care and treatment that Mrs. Sullivan had received at WRAMC, and the United States Government agreed to provide medical

records and medical billing and to cooperate in reasonable efforts to provide access to government witnesses and make them available for testimony. The Agreement provided that either party could terminate it for failure to abide by its terms.

18. Dr. Carlson's deposition was taken by defendant's counsel on June 28, 2002. Mr. Winand arranged for Dr. Carlson to arrive an hour and a half early so that the Respondent could work with him. The Respondent arrived approximately 45 minutes late because of traffic delays.

19. The Respondent testified that Dr. Carlson's testimony at his deposition was harmful to the wrongful death case because Mr. Winand had prepared Dr. Carlson to express opinions, and he did, on the standard of care and causation when, armed with other experts, the Respondent needed Dr. Carlson to testify only as a fact witness on care provided and damages. The Respondent's Designation of Expert Witnesses, dated April 23, 2002, states, however, that Dr. Carlson will testify on the issue of causation.

20. On the occasion of, but before, Dr. Carlson's deposition on June 28, 2002, the Respondent asked Mr. Winand about WRAMC's medical bill, and Mr. Winand said he did not yet have it and could not have it the following week when the Respondent said there would be a mediation in the case. According to Mr. Winand, he had checked with the WRAMC Casualty Section clerks who handle billing and told the Respondent that the bill would be "really big, six figures." According to the Respondent, Mr. Winand told him that $75,000 was a ballpark estimate of the amount of the bill. With respect to the conflict in testimony, the Board notes the Respondent's letter to Mr. Winand, dated July 26, 2002, in which the Respondent said that he estimated the WRAMC cost of care at approximately $75,000. The Respondent did not write that $75,000 was an estimate given him by Mr. Winand.

21. On July 23, 2002, Mr. Winand faxed to the Respondent WRAMC's final bill for care provided Mrs. Sullivan in the amount of $187,119.30 and requested the Respondent to let him know "where we stand on a settlement of this case." Mr. Winand testified that he did not learn until the Respondent's letter to him of July 26, 2002, that the Respondent already had settled the case in mediation before the trial date of July 22, 2002. The Respondent testified, however, that he called Mr. Winand on July 12, 2002, and reported that the Respondent had settled Mr. Sullivan's case, and that the United States Government was on its own.

22. The Respondent did not have the WRAMC bill when he entered into a monetary settlement. The Respondent testified that he represented Mr. Sullivan but not the United States Government at the mediation resulting in the settlement. The Respondent had not theretofore notified Mr. Winand that the Respondent had terminated or withdrawn from his representation of the United States Government with respect to its claim for the value of the care provided Mrs. Sullivan at WRAMC, nor had the Respondent given notice of his termination of the Attorney Representation Agreement.

23. The settlement of the case was presented to Fairfax County Circuit Court in the Respondent's Confidential Memorandum of Settlement for review in camera, dated July 12, 2002, which recites $150,000 to the U.S. Government in satisfaction of its lien ("to be held in escrow").

24. A Joint Petition for approval of the settlement was filed in Fairfax County Circuit Court on July 12, 2002. The Joint Petition stated that the statutory beneficiary had agreed, inter alia, to a distribution to the United States Government in the amount specified in the Respondent's Confidential Memorandum of Settlement, which was $150,000, and petitioned the Court, inter alia, to "approve the payment of the United States Government lien."

25. On July 19, 2002, the Fairfax County Circuit Court entered a Final Order Approving Compromise Settlement in which it directed the plaintiff, through counsel, to distribute the proceeds "to the Plaintiff's attorney, the beneficiary, and to the United States Government for its lien in the amounts set forth in Plaintiff's Memorandum of Settlement."

26. According to the Respondent's testimony, he represented to the Court at the hearing on the Joint Petition on July 17, 2002, that the United States Government had a claim, not then determined, that might be asserted against Mr. Sullivan, that the Respondent had doubled his estimated $75,000 for the claim, and that he would hold the $150,000 in escrow and work it out with the United States Government. The Court's Final Order is unqualified, however, in its direction of distribution to the United States Government in accordance with the Confidential Memorandum of Settlement, *i.e.*, $150,000 (to be held in escrow).

27. On August 1, 2002, Mr. Sullivan signed a Settlement Statement agreeing to a deduction from the settlement proceeds of $150,000 "To Be Held In Escrow For The U.S. Government Lien." The $150,000 was received by the Respondent and placed in his escrow account. Mr. Winand testified that the Respondent never mentioned to him that the Respondent was holding $150,000, or that the Court had ordered the distribution thereof.

28. By letter to Mr. Winand, dated July 26, 2002, the Respondent challenged WRAMC's bill for $187,119.30 and concluded that because of the Government's failure of cooperation, "we do not agree to be bound by your claim."

29. On October 9, 2002, the Respondent wrote to Mr. Sullivan regarding the "$150,000 in escrow pending resolution of the lien issue" and presented three alternatives: (1) attempt to negotiate the lien with the United States Government, (2) continue to hold the

$150,000 in escrow and write letters threatening to release the money to Mr. Sullivan if Mr. Winand did not respond, or (3) contest the lien in its entirety in litigation.

30. On November 7, 2002, the Respondent wrote to Mr. Winand regarding the lack of response to the Respondent's letter of July 26, 2002, and stated that he would disburse the escrowed funds to Mr. Sullivan unless the matter was resolved within 30 days. Mr. Winand testified that he called the Respondent once or twice but did not reach him, and that the Respondent did not call back.

31. In December of 2002, Mr. Winand, a reserves Army officer, was mobilized to active duty and left WRAMC. His legal assistant was left with pending claims.

32. By letter dated December 12, 2002, the Respondent enclosed a $150,000 check drawn on his escrow account payable to Mr. Sullivan, stating that the Government had asserted a lien but not responded to his letters regarding its amount. The Respondent confirmed Mr. Sullivan's agreement to indemnify the law firm for whatever costs might be incurred if the Government asserted its lien holder rights against the law firm. Mr. Sullivan testified that he invested the $150,000, and that it is available to him.

33. Throughout correspondence and in the settlement documents, the Respondent referred to the United States Government's "lien" for care provided Mrs. Sullivan at WRAMC. In point of fact, there was no lien, as Mr. Winand testified. Moreover, paragraph C of Section I of the Attorney Representation letter states that the claim of the United States Government is an independent cause of action against a tortfeasor rather than a lien on any settlement or judgment obtained by the injured party. See McCotter v. Smithfield Packing Co., Inc., 868 F.Supp. 160 (E.D. Va. 1994).

34. The Respondent established an attorney-client relationship with the United States on May 14, 2002, when he wrote Mr. Winand to "confirm the fact that I would be happy to represent the interests of the United States Government in collecting its costs" for care provided Mrs. Sullivan. The Attorney Representation Agreement, signed by the Respondent on June 21, 2002, memorialized the attorney-client relationship. That attorney-client relationship between the Respondent and the United States Government continued to exist when the Respondent struck a settlement of the case in mediation.

35. The Bar Investigator, Earl W. Walts interviewed the Respondent on October 1, 2004, and asked the Respondent why he had not gone back to the Court regarding the $150,000 in escrow. The Respondent answered that he did not consider it.

36. The delays in response to the Respondent's requests for documentation from Mr. Winand disrupted the Respondent's orderly preparation of his case. Even so, a lawyer's professional obligations to clients uniformly apply whether the client is cooperative or not. The Respondent's remedy was a timely withdrawal from representation of the United States Government, and this the Respondent failed to do.

37. The lack of response to the Respondent's letters regarding the WRAMC bill and the escrowed money was exasperating for the Respondent. Even so, the Respondent had escrowed the $150,000 because he apparently believed the United States Government had a lien, or, in any event, might have a claim in an amount not then determined. The Respondent's remedy was to reinstate the case on the docket and request judicial instruction, or to file an interpleader paying the $150,000 into Court and joining the United States Government and Mr. Sullivan for an adjudication of their interests. This the Respondent failed to do.

II. Misconduct

The certification of the Fourth District – Section I Committee of the Virginia State Bar charges that the Respondent engaged in misconduct in violation of the following Rules of Professional conduct, to wit:

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 1.15

> (c) A lawyer shall:
>
> (4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

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.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

> (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.

(c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation[.]

III. Disposition

Upon consideration of the foregoing, following deliberation in closed session, the Board reconvened in open session, and the Chair announced that (1) the VSB had failed to prove by clear and convincing evidence a violation of Rule 1.1 and Rule 8.4(b) and (c) of the Rules of Professional Conduct, and (2) the VSB had proved by clear and convincing evidence a violation of Rule 1.3(a), Rule 1.15(c)(4),and Rule 3.4(d) of the 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 VSB's certification that the Respondent had no disciplinary record.

Counsel for the Respondent presented testimony from Robert T. Hall, a prominent lawyer in medical malpractice and products liability; Bernard J. Dimuro, a former president of the Virginia State Bar; and the Respondent, and presented letters from Stephen L. Altman, Gary W. Brown, John M. Fitzpatrick, Gary A. Godard, and Brian H. Rhatigan – all being Virginia lawyers. Bar Counsel and counsel for the Respondent presented argument.

Following deliberation in closed session, the Board reconvened in open session. The Chair announced the Board's decision that the Respondent should be given a **PUBLIC ADMONITION**, and it is ORDERED that a **PUBLIC ADMONITION** be and hereby is issued to the Respondent effective November 18, 2005, the Board finding that misconduct was established but that no substantial harm was done the complainant or the public and that no further disciplinary action is necessary.

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

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to the Respondent at his address of record with the Virginia State Bar, Suite 102, 4084 University Drive, Fairfax, Virginia 22030, by certified mail, return receipt requested, and to Michael L. Rigsby, 7275 Glen Forest Drive, Forest Plaza II, Suite 309, Richmond, Virginia 23226, and by regular mail to Seth M. Guggenheim, Assistant Bar Counsel, Virginia State Bar, 100 North Pitt Street, Suite 310, Alexandria, Virginia 22314-3133.

Enter this Order this 15th day of December, 2005.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: _____
Peter A. Dingman, 1st Vice Chair

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