V I R G I N I A:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

In the matter of:
WALTER FRANKLIN GREEN, IV

VSB DOCKET NUMBERS: 05-070-4678
06-070-0739
06-070-2089
06-070-2259

ORDER OF SUSPENSION

These matters came to be heard before panels of the Virginia State Bar Disciplinary Board on June 27, 2008 and August 22, 2008. Both Panels convened at the State Corporation Commission, Courtroom A, Tyler Building, 1300 East Main Street, Richmond Virginia 23219. The Panel at the June 27, 2008 hearing was comprised of James L. Banks, Jr., Chair; W. Jefferson O'Flaherty, Lay Member; John W. Richardson; Bruce T. Clark and Gordon P. Peyton. The Panel at the August 22, 2008 hearing was comprised of James L. Banks, Jr., Chair; Stephen A. Wannall, Lay Member; Gordon P. Peyton, Sandra L. Havrilak and Timothy A. Coyle. On June 27, 2008, Teresa L. McLean, a certified court reporter, Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn, reported the hearings and transcribed the proceedings. On August 22, 2008, Tracy Stroh, a certified court reporter, Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

On both days, the Chair inquired of the respective Panel members whether any member had any personal or financial interest or bias which would preclude any of them from fairly hearing the matters and serving on the Panel, to which inquiry each member, including the Chair, answered in the negative. Alfred L. Carr appeared as counsel for the Virginia State Bar; Janipher W. Robinson of Robinson and Green appeared on behalf of the Respondent. The Respondent

waived an explanation of the hearing process.

The matters came before the Board on the District Committee Determination for Certification by the Subcommittee of the Seventh District Committee of the Virginia State Bar. On May 18, 2006, the Subcommittee of the Seventh District Committee held a meeting and certified multiple Charges of Misconduct against the Respondent to the Virginia State Bar Disciplinary Board. The Certification of these charges was sent to Respondent on May 31, 2007.

The Bar's Exhibits 1-52 and Respondent's Exhibits Slusher 1-26, Kester 1-9, Henley 1-20, and Beavers/Eavey 1-3, were all offered and received into evidence without objection.

Bar Counsel called the following witnesses, each of whom testified on June 27, 2008: Stewart Slusher; Kenneth Henley, Walter F. Green, IV, (Respondent); Gene Rhodenizer, VSB Investigator; and Michael Eavey. Ms. Beavers was excused as she was too ill to testify. Respondent Green also testified on his own behalf.

The second day of the hearing was held on August 22, 2008. Bar Counsel called the Respondent and Mr. Rhodenizer to testify and then rested his case.

Prior to the hearing on August 22nd, each member of the Panel who was not present on June 27, 2008 was provided with a transcript of the proceedings of June 27th, along with a copy of the entire record, which included the Certification of charges and copies of all Exhibits previously admitted into evidence.

At the conclusion of the Bar's case, Respondent made a Motion to Strike all charges in all four cases, objecting to the change in composition of the Panel, challenging the jurisdiction of the Board and contending that none of the charges had been proven by clear and convincing evidence.

With respect to the Motion to Strike because the members of the Panel on August 22nd were not identical to the Panel on June 27th, Bar Counsel argued that **Part** 6 § IV ¶ 13 I.2.i.(2) of the Rules expressly permits a change in composition of the Panel in hearings that last more than one day provided the substituted member is provided with a transcript of the prior proceedings in the matter. Finding that the requirements of Part 6, § IV ¶ 13 I.2.i.(2) of the Rules had been met, the Motion to Strike on these grounds was overruled by the Chair.

In support of the Motion to Strike for lack of jurisdiction, Respondent argued that the delay from May 18, 2006 until May 31, 2007 to send the Respondent the Certification of the charges from the Seventh District Committee was violative of ¶ 13 G. 4. of the Rules in that the Certification was not "promptly" mailed. Respondent also contended that a delay of more than one year in sending the Certification to him did not constitute "substantial compliance" with ¶ 13 G. 4. as required by ¶ 13 E. 1. of the Rules. Respondent further argued that such delay prejudiced his ability to defend against the charges and in support referred the Panel to the testimony of Mr. Slusher at the hearing on June 27, 2008. No other prejudice was suggested by the Respondent. Bar Counsel argued that the Supreme Court of Virginia rejected the same or similar argument by Respondent in Green v. Virginia State Bar, 274 Va 775, 635 S.E.2d 118 (2007).

The Board recessed the proceedings to deliberate. After due deliberation, the Board reconvened and by majority vote overruled the Motion to Strike for lack of jurisdiction finding that no prejudice was shown by Respondent based on the time delay (See Motley v. Virginia State Bar, 260 Va 251, 536 S.E.2d 101 (2000), holding that an eleven month delay in notifying the Respondent of the certified charges was not enough to deny the Board of jurisdiction absent a showing of prejudice by the Respondent). Respondent's argument of prejudice in the Slusher

case was not persuasive since all charges in that case were dismissed for failure of the Bar to meet its burden of proof and, in any event, the inability of Mr. Slusher to remember details involving the case handled for him by Respondent did not prejudice the Respondent in the Henley, Kestner or Beavers/Eavey matters. Two members of the Panel would have dismissed all charges for lack of jurisdiction for the reasons set forth in the Dissent appended at the end of this Order.

The Respondent also moved to strike all charges in all four cases arguing that the Bar had failed to prove by clear and convincing evidence any of the Rules' violations identified in the Certification. In response, Bar Counsel agreed that the following charges of misconduct should be dismissed since the evidentiary burden of the Bar had not been met:

In the Slusher matter: Rules 1.15(c) (1) and (2); Rules 1.15(d)(1) (i), (ii), (iii) and (iv), Rules 1.15(d) (2) (i), (ii) and (iii); and Rules 1.15(e) (2) (i), (ii) and (iii);

In the Henley matter: Rules 1.15(c) (1) and (2); Rules 1.15(d) (1) (i), (ii), (iii) and (iv); Rules 1.15(d) (2) (i), (ii) and (iii); and Rules 1.15(e) (2) (i), (ii) and (iii);

In the Kestner matter: Rules 1.15(c) (1) and (2); Rules 1.15(d) (1) (i), (ii), (iii); Rules 1.15(d) (2) (i), (ii) and (iii); and Rules 1.15(e) (2) (i), (ii) (iii) and (iv); and

In the Beavers/Eavey matter: Rules 1.15(c) (1) and (2); Rules 1.15(d) (1) (i), (ii), (iii) and (iv); Rules 1.15(d) (2) (i), (ii) and (iii) and Rules 1.15(e) (2) (i), (ii) and (iii).

Bar Counsel argued that the Motion to Strike ought to be overruled as to all other charges of misconduct set forth in the Certification since they had been proven by clear and convincing evidence.

Following argument of counsel, the Chair dismissed each of the aforesaid charges of misconduct which Bar Counsel agreed should be dismissed; granted the Motion to Strike with

regard to Beavers/Eavey Rule 1.15(e)(1)(iii); and, overruled the Motion to Strike as to all other charges of misconduct.

I. FINDINGS OF FACT

1. At all relevant times Respondent has been an attorney duly licensed to practice law in the Commonwealth of Virginia and his address of record with the Bar is 77 Liberty Street, Harrisonburg, Virginia 22802. (VSB Exhibit1) The Respondent has been licensed to practice law since 1981.

2. The Respondent was properly served with notice of these proceeding in accordance with Part 6,§ IV ¶ 13 E. and I.1.a. of the Rules of Professional Conduct.

A. The Slusher Matter (VSB Docket No. 05-070-4678)

1. Mr. Slusher stated that he is 77 years old. Mr. Slusher signed a retainer agreement with the Respondent for divorce and property proceedings on January 5, 2004. (VSB 4, Resp. Slusher 1) At the time he signed the retainer, Mr. Slusher gave Respondent a check for $6,000.00. (Resp. Slusher 2) This was classified on the retainer agreement as a "Flat fee." (VSB 4) Mr. Slusher could not define what a "Flat fee" meant or remember if the Respondent had explained the term to him.

2. Mr. Slusher retained Respondent as his wife had recently filed for divorce and Mr. Slusher believed that she wanted more spousal support from him. (Resp. Slusher 5)

3. Mr. Slusher was very unclear on the timeline of events and stated that he occasionally forgets names and dates. He had no recollection of seeing documents filed on his behalf and admitted he might have trouble remembering events that happened in 2004.

4. Mr. Slusher testified that he spoke to Respondent and his office staff on the

telephone or in person multiple times and he also had regular meetings with Respondent.

5. During 2004-2005, Respondent filed an Answer to the wife's Complaint (VSB 8, Resp. Slusher 7), issued discovery (VSB 9, Resp. Slusher 8), attended court to set dates, and met with Mr. Slusher multiple times. Mrs. Slusher non-suited her divorce action in early 2004. (Resp. Slusher 14) On September 17, 2004, Respondent filed a Complaint for Divorce on Mr. Slusher's behalf. (VSB 10, Resp. Slusher 15) The trial date in that matter was set for December 20, 2005. (Resp. Slusher 16)

6. Mr. Slusher wrote a letter to Respondent dated June 20, 2005 inquiring about the status of his case. (VSB 12, Resp. Slusher 20) On August 1, 2005, Mr. Slusher wrote another letter asking that Respondent non-suit the pending divorce action and requesting a return of his retainer. (VSB 16, Resp. Slusher 23)

7. Respondent filed a Motion to Non-Suit Mr. Slusher's divorce action on September 5, 2005. (VSB 18, Resp. Slusher 10)

8. At the time of the June 27, 2008 hearing, Mr. and Mrs. Slusher were still married.

9. Respondent's Client Ledger (VSB 6) shows the $6,000.00 credit to Mr. Slusher's account as a "Flat Fee." It also lists the subsequent work performed on the case with no charge to Mr. Slusher. Respondent's Account Ledger shows the deposit of the $6,000.00 on January 5, 2004 and the withdrawal of that amount on the same day. (VSB 5, Resp. Slusher 3) Subsequent work performed on Mr. Slusher's case such as client meetings and court filings are charged at $0.00 on this ledger.

10. Respondent denied that the ledger represented a fee in and fee out statement and insisted it merely showed the hours he worked on the case and that, in fact, he earned the entire $6,000.00 over time.

11. The Bar did not introduce any bank statements or other documents or present testimony to dispute Respondent's testimony.

B. <u>The Henley Matter (VSB Docket No.06-070-0739)</u>

1. Mr. Henley was arrested for three felonies and was expecting to be charged with a parole violation when he retained the Respondent in December 2003. At that time, Mr. Henley paid a $7,500.00 "Flat Fee" retainer to Respondent. (VSB 20)

2. Mr. Henley entered a plea agreement in March 2005 for the felonies of Driving After Being a Habitual Offender, two counts of Child Neglect, a misdemeanor charge of driving under the influence, the probation violation and another felony charge of Driving After Being an Habitual Offender. (Resp. 11) Mr. Henley received a sentence of one year and two months.

3. Between December 2003 and March 2005, Respondent attended numerous hearings on behalf of Mr. Henley. (VSB 20)

4. Mr. Henley testified that he would call Respondent's office and his calls were never returned. Mr. Henley never asked Respondent for a refund of any money paid.

5. Respondent testified that he could not remember if Mr. Henley's $7,500.00 was deposited in his trust account. Respondent does have an escrow account but this account does not pay his client any interest for fees held in trust.

6. Respondent testified that he charged a "Flat Fee" as his clients did not want to pay an hourly fee over the initial deposit. Respondent's client ledger for Mr. Henley noted that the $7,500.00 was a "Flat Fee." (VSB 20)

7. Respondent had represented Mr. Henley since 1999 and he believed that he had discussed his "Flat Fee" method of billing with Mr. Henley on prior occasions. Respondent

testified that a Retainer Agreement should have been signed with Mr. Henley although none was introduced.

8. Respondent never discussed with Mr. Henley as to whether the "Flat Fee" was non-refundable. Respondent testified that the retainer is earned when paid.

9. Respondent also acknowledged that he could not fully explain the Client Ledger that was used to track the activity performed on Mr. Henley's case or when the $7,500.00 paid by Mr. Henley was removed from the trust account. (VSB 20)

10. Respondent also testified that a portion of the $7,500.00 retainer paid in December 2003 helped defray expenses Respondent had already incurred for previously representing Mr. Henley. (Resp. Henley 20) This previous debt was not noted on the Client Ledger. (VSB 20) nor did Respondent testify to the amount owed.

C. <u>The Kestner Matter (VSB Docket No. 06-070-2089)</u>

1. Mr. Kestner was incarcerated at the time of the hearing and did not appear before the Board.

2. Respondent testified that Mr. Kestner paid him $3,000.00 on June 15, 2005. Mr. Kestner then subsequently paid more money to Respondent for a total fee of $5,500.00. (VSB 25)

3. Mr. Kestner had originally retained Respondent after he was charged with three felonies and Respondent represented him in those matters at a bench trial in November 2005. (VSB 29, Resp. Kestner 2) Respondent also represented Mr. Kestner in an appeal on some misdemeanor convictions for which Mr. Kestner had already served the majority of his sentence. (Resp. Kestner 9)

4. Respondent testified that he was not sure if the funds went into his general

account or his trust account. He stated there was no fee agreement in this case, and that he had not instructed his employees as to where to deposit credit card receipts.

5. Respondent estimated he had spent between 50 - 60 hours on Mr. Kestner's behalf.

6. Respondent's Client Ledger in this matter records payment on Mr. Kestner's account of $800.00 at the initial conference on May 16, 2005; another payment of $800.00 on May 20, 2005, payment of $900.00 on May 26, 2005 and a final payment of $3000.00 on June 15, 2005. This ledger also lists the activity on Mr. Kestner's matter with no charge or subtraction for the work performed. (VSB 25)

D. Beavers/Eavey Matter (VSB Docket No. 06-070-2259)

1. Michael Eavey and Kristen Beavers were cohabitating at the time Respondent was retained.

2. Mr. Eavey testified that Respondent was retained to represent him and Ms. Beavers in an insurance claim on a car that was vandalized. Prior to hiring Respondent, Mr. Eavey was being investigated by the Harrisonburg City Police Department for fraud involving the vehicle. Mr. Eavey at one point testified that the car was stolen and at another point that it was vandalized.

3. Mr. Eavey testified that his mother-in-law, Bonnie Todd, paid Respondent $2,500.00 in August 2000 to proceed against Allstate Insurance Company for the damaged car. (VSB 32) Respondent put that money in his operating account.

4. Respondent's Client Ledger records a payment on August 23, 2000 of $2,500.00 from Bonnie Todd, a charge of $500.00 on August 29, 2000; a payment of $1000.00 on September 6, 2000 again from Bonnie Todd; a charge of $2,000.00 on October 26, 2000, a

charge of $500.00 on October 30, 2000, a fee of $250.00 on December 1, 2000 and a final charge of $250.00 on December 8, 2000. (VSB 33)

5. Mr. Eavey testified that his grandmother paid another $2,000.00 on September 6, 2000 to Respondent to represent Mr. Eavey on two assault and battery charges. According to Mr. Eavey's testimony, these cases were not prosecuted and Respondent did not represent him in court on those matters.

6. Mr. Eavey testified that Respondent never notified him and Ms. Beavers that a Warrant in Debt was filed on behalf of Ms. Beavers against Allstate. Further, he was never notified that there was a court date in the insurance matter, that discovery had been propounded against them or that depositions had been scheduled in the matter. Mr. Eavey also testified that he did not supply the answers that were filed in response to Allstate's Interrogatories (VSB 39) nor did he have any settlement discussions with Respondent with regard to their claim against Allstate. He eventually did attend a deposition in the insurance matter with Respondent and Ms. Beavers. He also testified that he attended three client meetings with Respondent.

7. On November 14, 2000, Respondent filed a Warrant in Debt against Allstate in the General District Court, which was removed on Allstate's motion to the Circuit Court of Rockingham County. Subsequently, according to letters written by Allstate's counsel, Mr. Eavey and Ms. Beavers were arrested for stealing the car. (VSB 41, 42). However, Mr. Eavey denied ever being arrested for this matter.

8. In August of 2002, the Circuit Court issued an Order for the Complainants and for Respondent to appear on November 20, 2002 to set a trial date. (VSB 47) On December 23, 2002, the Circuit Court dismissed the case because no one appeared on behalf of the Complainants. (VSB 48)

9. The evidence suggested that Respondent advised Eavey and Beavers that due to the threat of criminal prosecution for what Allstate claimed was a fraudulent claim, everyone agreed the best course of action was to do nothing in the civil action brought against Allstate.

10. On November 4, 2003, almost a year after the case against Allstate had been dismissed, Respondent wrote to counsel for Allstate offering to "settle" the matter for $2,500.00. (VSB 49) Respondent testified that this was only an attempt to recoup the Complainants' retainer. In response to the settlement offer, counsel for Allstate, William Tyler Shands, Esquire, wrote to Respondent several days later advising him of the dismissal of the case due to his failure to appear. (VSB 50)

11. On December 5, 2005, Complainants wrote to Respondent and demanded a return of their $2,500.00 and an accounting. (VSB 51) At that point in time, five years had lapsed since the case against Allstate had been brought, three years since the case had been dismissed and two years since the Respondent had attempted to "settle" the case. Respondent did not keep his clients reasonably informed about the status of their case.

12. Ms. Beavers did not testify at either day of the hearing. She was too ill to testify on June 27, 2008 and did not attend the August 22, 2008 hearing.

II MISCONDUCT

In the Slusher Matter (VSB Docket No. 05-070-4678), the Certification charged the Respondent with violations of the following Rules of Professional Conduct: Rule 1.3 (a) Diligence; Rule 1.4 (a) Communication; Rule 1.15 (a) through (e) Safekeeping Property; and, Rule 1.16 (d) Declining or Terminating Representation, arising from Respondent's representation of Mr. Slusher in his divorce case.

In the Henley matter (VSB Docket No. 06-070-0739), the Certification charged the

Respondent with violations of the following Rules of Professional Conduct: Rule 1.15 (a) through (e) Safekeeping Property, arising from Respondent's representation of Mr. Henley in criminal matters.

In the Kestner matter (VSB Docket No. 06-070-2089), the Certification charged the Respondent with violations of the following Rules of Professional Conduct: Rule 1.15 (a) through (e) Safekeeping Property and Rule 1.16 (d) Declining or Terminating Representation, arising from Respondent's representation of Mr. Kestner in criminal matters.

In the Beavers/Eavey matter (VSB Docket No. 06-070-2259), the Certification charged the Respondent with violations of the following Rules of Professional Conduct: Rule 1.1; Rule 1.3 (a) Diligence; Rule 1.4 (a) through (c) Communication; Rule 1.15 (a) through (e) Safekeeping Property; Rule 1.16 (d) Declining or Terminating Representation; and Rule 8.4 (a) through (c) Misconduct, arising from Respondent's representation of Beavers/Eavey with regard to an insurance claim that had criminal charges implicated and other criminal charges.

The Respondent's Motion to Strike was granted with respect to the following charges of misconduct set forth in the Certification: In the Slusher matter, violation of Rules 1.15 (c) (1) and (2); 1.15 (d) (1) (i), (ii), (iii) and (iv) and (2) (i), (ii) and (iii); 1.15 (e) (2) (i), (ii) and (iii); In the Henley matter, violation of Rules 1.15 (c) (1) and (2); 1.15 (d) (1) (i), (ii), (iii) and (iv) and (2) (i), (ii) and (iii); 1.15 (e) (2) (i), (ii) and (iii); In the Kestner matter, violation of Rules 1.15 (c) (1) and (2); 1.15 (d) (1) (i), (ii), (iii) and (2) (i), (ii) and (iii); and 1.15 (e) (2) (i), (ii) and (iii); In the Beavers/Eavey matter, violation of Rules 1.15 (c) (1) and (2); 1.15 (d) (1) (i), (ii), (iii) and (iv); 1.15 (d) (2) (i), (ii) and (iii) and 1.15 (e) (2) (i), (ii) and (iii).

After granting, in part, the Motion to Strike, the following charged violations of the Rules of Professional Conduct remained to be considered by the Board:

In Slusher: Rules 1.3 (a); 1.4 (a); 1.15 (a) (1) and (2); 1.15 (b); 1.15 (c) (3) and (4); 1.15 (e), (e) (1) (i), (ii), (iii), (iv) and (v); and 1.16 (d);

In Henley: Rules 1.15 (a) (1) and (2); 1.15 (b); 1.15 (c) (3) and (4); and 1.15 (e), (e) (1) (i), (ii), (iii), (iv) and (v);

In Kestner: Rules 1.15 (a) (1) and (2); 1.15 (b); 1.15 (c) (3) and (4); 1.15 (e), (e) (1) (i), (ii), (iii), (iv) and (v); and 1.16 (d); and

In Beavers/Eavey: Rules 1.1; 1.3 (a); 1.4 (a) (b) and (c); 1.15 (a) (1) and (2); 1.15 (b); 1.15 (c) (3) and (4); 1.15 (e), (e) (1) (i), (ii), (iv) and (v); 1.16 (d); and 8.4 (a), (b) and (c).

The text of the charged violations of the Rules that remained to be considered by the Board follows:

RULE 1.1 Competence [Charged in theBeavers/Eavey matter]

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 [Charged in the Slusher and Beavers/Eavey matters]

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

RULE 1.4 Communication [Charged in the Slusher and Beavers/Eavey matters]

(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 [Charged in the Slusher, Henley, Kestner and Beavers/Eavey matters]

(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.

(b) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(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.

(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;

(iv) reconciliations and supporting records required under this Rule;

(v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

RULE 1.16 Declining Or Terminating Representation [Charged in the Slusher, Kestner and Beavers/Eavey matters]

(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).

RULE 8.4 Misconduct [Charged in the Beavers/Eavey matter]

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

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

III DISPOSITION

After considering the Exhibits admitted into evidence on behalf of the Bar and the Respondent, the testimony of witnesses presented on behalf of the Bar and upon evidence presented by Respondent in the form of his own testimony, and the argument of counsel, the Board recessed to deliberate. After due deliberation the Board reconvened and stated its findings as follows:

In the Slusher matter (VSB Docket No. 05-070-4678): Although the Board was concerned about the retainer agreement and the way Respondent maintained his ledger, the Bar failed to prove, by clear and convincing evidence, any violation as alleged in the aforesaid charges of misconduct and, accordingly all charges of misconduct were dismissed.

In the Henley matter (VSB Docket No.06-070-0739), the Bar proved by clear and convincing evidence that Respondent received $7,500.00 on December 23, 2003 and immediately withdrew the money as having been earned based on the flat fee charged when in fact the entire fee had not then been earned. Accordingly, the Board determined that Respondent violated Rule 1.15 (a) (2) pertaining to the handling of trust funds. The Bar failed to prove by clear and convincing evidence any other charges of misconduct and all other charges of misconduct were dismissed.

In the Kestner matter (VSB Docket No. 06-070-2089), it was difficult for the Board to evaluate the situation given the Bar's failure to introduce any bank statements or other financial

documents or offer clear and convincing testimony to support its position on Respondent's alleged violations of the Rules. While the Board does not endorse the manner in which Respondent handled these cases or funds, all charges of misconduct in the Kestner matter were dismissed based on the Bar's failure to prove any violation the Rules by clear and convincing evidence.

In the Beavers/Eavey matter (VSB Docket No. 06-070-2259), the Bar proved by clear and convincing evidence that Respondent violated Rule 1.4 (a), (b) and (c) in his failure to communicate with his clients and keep them reasonably informed concerning most, if not all, aspects of their case against Allstate. The Bar also proved by clear and convincing evidence that Respondent violated Rule 1.16 (d), dealing with duties owed to a client upon termination of representation. The Bar failed to prove any of the other alleged violations by clear and convincing evidence and, accordingly, all other charges of misconduct in this matter were dismissed.

The Board received evidence of aggravation and mitigation from the Bar and Respondent, including the Respondent's prior disciplinary record. The Board recessed to deliberate what sanction to impose upon its findings of misconduct. After due deliberation, the Board reconvened and the Chair announced the sanction to be imposed as suspension of the Respondent's license to practice law in the Commonwealth of Virginia for a period of 18 months effective August 22, 2008.

It is therefore ORDERED that the license of the Respondent, Walter Franklin Green, IV, to practice law in the Commonwealth of Virginia be and the same hereby is suspended for a period of eighteen (18) months, effective August 22, 2008.

It is further ORDERED that, as directed in the Board's August 22, 2008 Summary Order in this matter, Respondent must comply with the requirements of Part 6, § 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 as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 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 6, § 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 Walter Franklin Green, IV at 77 North Liberty Street, Harrisonburg, Virginia 22802 by certified

mail, return receipt requested, and by regular mail to Janipher W. Robinson, Esquire, Suite 205, 2809 North Avenue, Richmond, Virginia 23222-3647 and to Alfred L. Carr, Assistant Bar Counsel, Virginia State Bar, 100 North Pitt Street, Suite 310, Alexandria, Virginia 22314.

ENTERED this 12 day of November, 2008.

JAMES L. BANKS, JR., Chair

DISSENT:

Respondent's Motion to Strike on jurisdictional grounds should have been granted because of the Bar's failure to promptly notify Respondent of the charges certified. The Bar did not "substantially comply" with the Rules of Professional Conduct as evidenced by the fact that the certification hearing was held on May 18, 2006 but a full year and two weeks elapsed before the Certification was mailed to Respondent.

Paragraph 13. G. 4. of the Rules provides: "If a Subcommittee elects to certify a Complaint to the Board, the subcommittee Chair shall promptly mail a copy of the certification to the Clerk of the Disciplinary System, Bar Counsel, and the Respondent and the Complainant."

While we recognize the Supreme Court requires Respondent to prove prejudice in order to successfully argue for a dismissal, in this case we believe that a one year and two week delay in notifying the Respondent of the charges that arose as early as 2000, in one of these cases, can be nothing but prejudicial and, furthermore, as revealed by the testimony of Mr. Slusher, not only was Respondent prejudiced but the public was prejudiced by the failure of the Bar to substantially comply with the Rules. Mr. Slusher's memory was severely lacking and Mr. Eavey

also testified that, "Done forgot now. This has been so long ago." (Tr. at 261) The Bar did not promptly mail the Certification to Respondent and a delay of more than one year in mailing the Certification to Respondent does not constitute substantial compliance with the Rule requiring action to be taken promptly. Accordingly, we respectfully DISSENT from the Board's refusal to grant the Motion to Strike for lack of jurisdiction.

Sandra L. Havrilak
Gordon P. Peyton