

VIRGINIA:

Before the Virginia State Bar Disciplinary Board

In the Matter of

MARC JAMES SMALL

Attorney at Law

On February 22, 2008, came Marc James Small and presented to the Board an Affidavit Declaring Consent to Revocation of his license to practice law in the courts of this Commonwealth. By tendering his resignation at a time when disciplinary charges are pending, he admits that the charges in the attached Certification and Affidavit Declaring Consent to Revocation are true.

The Board having considered the said Affidavit Declaring Consent to Revocation accepts his resignation. Accordingly, it is ordered that the license to practice law in the courts of this Commonwealth heretofore issued to the said Marc James Small be and the same hereby is revoked, and that the name of the said Marc James Small be stricken from the Roll of Attorneys of this Commonwealth.

Enter this Order this 22nd day of February, 2008

For the Virginia State Bar Disciplinary Board

By Barbara S. Lanier
Barbara S. Lanier
Clerk of the Disciplinary System

VIRGINIA:

BEFORE THE DISCIPLINARY BOARD
OF THE VIRGINIA STATE BAR

IN THE MATTER OF

MARC JAMES SMALL

VSB Docket Nos: 06-080-2725
07-080-0656

AFFIDAVIT DECLARING CONSENT TO REVOCATION

Marc James Small, after being duly sworn, states as follows:

1. I am over the age of twenty-one and competent to make the statements contained herein.

2. I was licensed to practice law in the Commonwealth of Virginia in 1981.

VSB Docket No. 06-080-2725
Complainant: Robert E.L. Shell

3. For over two years beginning in June 2003, I represented Robert Shell on murder charges. During the course of my representation, I failed to explain my fee adequately to Mr. Shell.

4. Prior to trial, Mr. Shell hired new counsel. Thereafter, Mr. Shell and I had a dispute over my fee, which remains unresolved.

5. I admit that my failure to explain my fee to Mr. Shell may constitute a violation of Rule 1.5(b) of the Rules of Professional Conduct, which requires lawyers to adequately explain fees to clients.

VSB Docket No. 07-080-0656
Complainant: Ryland T. Acree, II

6. I represented Ryland Acree in a civil matter. In the summer of 2006, I closed my law office and moved from Roanoke to Richmond, Virginia. I failed to inform Mr. Acree directly of my plans, but instead copied him on an e-mail to another lawyer requesting that he take over Mr. Acree's case. I had no other communication with Mr. Acree.

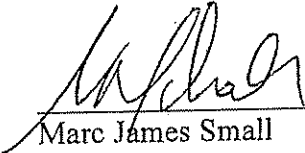
7. I admit that my omission may constitute a violation of Rule 1.16(d) of the Rules of Professional Conduct, which requires lawyers to take steps to the extent reasonably practicable to protect a client's interests upon termination of a representation.

8. Pursuant to Part Six, § IV, ¶ 13.L. of the Rules of the Supreme Court of Virginia, I state that:

- a. My consent to revocation is freely and voluntarily rendered, that I am not being subjected to coercion or duress, and that I am fully aware of the implications of consenting to a revocation of my license to practice law in the Commonwealth of Virginia;
- b. I am aware that there is currently pending investigations into complaints involving allegations of Misconduct, the docket numbers of which are set forth above, and the specific nature of which is set forth above;
- c. I acknowledge that the material facts upon which the allegations of Misconduct set forth above are true; and
- d. I submit this Affidavit and consent to the Revocation of my license to practice law in the Commonwealth of Virginia because I know that if the disciplinary proceedings based on the said alleged Misconduct were prosecuted to a conclusion, I could not successfully defend them.

9. Pursuant to Part Six, § IV, ¶ 13.L, I understand the foregoing admissions may not be deemed an admission in any proceeding except one relating to my status as a member of the Virginia State Bar.

Executed this 5th day of February, 2008



Marc James Small

STATE OF VIRGINIA
AT LARGE, to wit:

I, Chantel Dean Taylor, a Notary Public in the state aforesaid, do hereby certify that Marc James Small appeared in person before me in the City/County of Appomattox, Virginia, on this 5th day of February 2008, ~~2007~~, and was by me duly sworn and thereupon executed in my presence and acknowledged to me the truth of the contents and the voluntariness of execution of the foregoing Affidavit.

GIVEN under my hand this 5th day of February, 2008

Chantel Dean Taylor

Notary Public Reg. # 7154025

My Commission expires: 2-28-2011.

BEFORE THE EIGHTH DISTRICT
SUBCOMMITTEE OF THE VIRGINIA STATE BAR

IN THE MATTER OF
MARC JAMES SMALL

VS B Docket No.: 06-080-2725

**EIGHTH DISTRICT SUBCOMMITTEE DETERMINATION
(DIRECT CERTIFICATION)**

On September 20, 2007, a meeting in this matter was held before a duly convened Eighth District Subcommittee of the Virginia State Bar consisting of Ronnie Lee Clay, Esquire, Anderson W. Douthat, IV, lay member, and Wilson F. Vellines, Jr., Esquire, Chair presiding.

Pursuant to Part Six, Section IV, Paragraph 13.G.1.c of the Rules of the Supreme Court of Virginia, the Eighth Subcommittee of the Virginia State Bar hereby serves upon the respondent, Marc James Small ("Respondent"), the following Certification:

I. FACTUAL ALLEGATIONS

A. Introduction

1. At all times relevant hereto, Respondent was admitted to practice law in the Commonwealth of Virginia.
2. From approximately June 2003 to January 2005, Respondent represented the complainant, Robert E. L. Shell ("Complainant") in the Circuit Court for the City of Radford on charges related to the June 3, 2003 death of Marion Franklin, a nineteen-year-old model who died following a photo shoot in which Complainant was the photographer. The case garnered local media attention, and Complainant was indicted on several charges, including felony homicide, forcible sodomy, and possession and distribution of a schedule I drug. Complainant had no serious prior criminal record.

3. Complainant became unhappy with Respondent and fired him in January 2005 and retained other counsel. The case was tried before a jury beginning August 20, 2007. Following a two-week trial, Complainant was found guilty of involuntary manslaughter and seven other charges related to the death of Marion Franklin.

B. Case Facts

4. On or about June 7, 2003, Complainant was arrested on charges related to the death of Marion Franklin. A lawyer was court-appointed to represent Complainant.

5. While in jail, Complainant met with attorney Gil Davis. Complainant wished to retain Mr. Davis, but did not because he could not afford Mr. Davis's fee.

6. Shortly thereafter, Respondent contacted Complainant in jail and offered to represent him. According to Complainant, Respondent offered to represent Complainant *pro bono* to repay him for free advice he had given him over the years regarding cameras and photography. Complainant believed Respondent would not charge him a legal fee and accepted. There was no written fee agreement between Complainant and Respondent.

7. In July 2003, Complainant was released from jail on bond. Shortly thereafter, Complainant had an idea to start a defense fund to pay for non-legal fee expenses, such as filing fees, private investigator fees, and expert witness fees that Respondent had told him would likely be substantial. Complainant shared his idea with Respondent, who agreed to manage the fund and solicit donations. The Bob Shell Defense Fund ("Defense Fund") was therefore started. Respondent subsequently solicited donations from internet subscription lists of camera and photography enthusiasts.

8. On of about July 4, 2003, Complainant received a check for \$23,000, representing a partial distribution of his mother's estate. He signed the check over to Respondent to be deposited into the Defense Fund.

9. On July 8, 2003, Respondent deposited the \$23,000 check into his trust account. Prior to this deposit, Respondent had less than \$600.00 in his trust account.

10. On July 8, 2003, Respondent made a \$5,000 cash withdrawal from his trust account. A few days later, Respondent paid himself fees of \$4,000 and \$3,500 from his trust account for Complainant's case.

11. At the time Respondent withdrew this money from his trust account, he had not performed sufficient work on Complainant's case to have earned the fees.

12. Later in July 2003, pursuant to his request, Respondent paid Complainant \$4,400 from the Defense Fund.

13. From July 2003 to July 2004, excluding the \$23,000 check from Complainant, Respondent received several individual donations to the Defense Fund totaling approximately \$2000 or less. Respondent did not notify Complainant of the receipt or amount of these donations.

14. Respondent failed to deposit into his trust account several of the individual donations to the Defense Fund. In September 2005, he sent several donation checks that had not been negotiated to Complainant. It is unknown how many of the individual donations to the Defense Fund Respondent failed to deposit into his trust account.

15. In September 2003, Complainant was indicted on additional charges related to the death of Marion Franklin. Complainant was arrested for the second time and taken to jail. Later that month he was again released on bond.

16. Between September 2003 and December 2003, Respondent paid out approximately \$4500 to third parties in connection with the defense of Complainant's case. As of December 31, 2003, Respondent had a balance of \$10.01 in his trust account.

17. For most of 2004, Respondent had a balance of less than \$850 in his trust account. In December 2004, Respondent deposited \$2,000 into his trust account, and later that month paid an expert \$2,000 with a trust account check to perform an examination of Complainant in connection with his defense.

18. In January 2005, Complainant fired Respondent due to concerns about his tardiness to hearings and his use of alcohol. Complainant had smelled alcohol on Respondent during court hearings and believed Respondent may have been intoxicated during some hearings.

19. At no time during the representation did Respondent present Complainant with a bill for services.

20. At no time during the representation did Respondent provide Complainant with an accounting of the monies he had collected on behalf of the Defense Fund or the expenditures of the Defense Fund.

21. At no time did Respondent tell Complainant that in July 2003, he had withdrawn \$5,000 in cash from his trust account and paid himself fees totaling \$7500.

22. Complainant subsequently retained attorney Gil Davis to represent him and signed a fee agreement. The representation was not *pro bono*.

23. On April 21, 2005, Respondent sent Complainant an e-mail stating that he was "clearly entitled to an accounting for the funds [he had] collected on behalf of the Shell Defense Fund." Respondent said he would soon send Complainant an accounting and an itemized bill for his services.

24. On May 17, 2005, Respondent e-mailed Complainant and said he never agreed to represent him *pro bono*, that his hourly fee was \$150, and that his fee for Complainant's case, on a "quantum meruit basis" was between \$12,000 and \$15,000.

25. On July 31, 2005, Respondent sent Complainant an e-mail stating that the Defense Fund had collected a total of \$24,998.20, that he had deducted \$10,900.00 to date, and that the balance was \$14,098.20. He further said he had not yet figured out his bill but would do so that week.

26. In September 2005, Respondent sent Complainant an e-mail stating that the balance of the Defense Fund was \$12,098.20. Respondent also said he would charge his time spent on the case at a reduced rate of \$100 per hour and that he worked 113 hours on the case, for a total fee of \$11,300. Finally, he said he still owed private investigator Paul Holt \$1,000.

27. On February 17, 2006, Complainant filed a bar complaint against Respondent for failing to remit the Defense Fund to him.

28. On March 31, 2006, the Virginia State Bar received Respondent's answer to the bar complaint. In it, Respondent said his rate was \$125 per hour and that Complainant owed him \$16,250 plus mileage of 2000 miles. Respondent also said the current balance of the Defense Fund was \$14,098.20 and that he still owed private investigator Paul Holt \$3,000.

29. In the spring and summer of 2006, Respondent closed his law office and moved to the Richmond, Virginia area.

30. On July 21, 2006, in this case and in connection with another bar complaint, the Virginia State Bar issued two subpoenas *duces tecum* to Respondent demanding production of client files and trust account records. Respondent subsequently failed to respond to the

subpoenas and on August 31, 2006, his license to practice law was suspended by the Virginia State Bar Disciplinary Board. Respondent's license to practice law remains suspended.

31. In June 2007, at Respondent's request, private investigator Paul Holt contacted Complainant. Mr. Holt asked Complainant if he would drop the bar complaint if Respondent remitted to him the funds remaining in the Defense Fund. Complainant agreed and said he estimated Respondent owed him \$18,000. Through Mr. Holt, Respondent replied that by his calculations, the funds due were closer to \$14,000 and that he would make arrangements to get the money to Complainant. Complainant thereafter heard nothing further from Respondent or Mr. Holt.

32. Other than the initial payments totaling \$4,400 to Complainant in July 2003, Respondent has not remitted to Complainant any funds from the Defense Fund.

33. Attorney Gil Davis eventually withdrew from his representation of Complainant. Complainant could not afford another attorney to defend him, and the court appointed counsel.

34. Complainant was represented by a court-appointed attorney at his August 20, 2007 trial. Following a two-week trial, Complainant was found guilty of involuntary manslaughter and seven other charges related to the death of Marion Franklin.

C. Application of Rules

35. Respondent violated Rule 1.5(b) by failing to explain his fee adequately to Complainant.

36. Respondent violated Rule 8.4(b) and 8.4(c) when, in July 2003, he withdrew \$5,000 in cash from his trust account and paid himself fees totaling \$7500 even though he had not yet performed sufficient work on the case to earn these fees.

37. Respondent violated Rules 8.4(b) and 8.4(c) when, whether through improper payments to himself or to other clients or to third parties unrelated to Complainant's case, he expended Defense Fund monies for purposes unrelated to Complainant's case.

38. Respondent violated Rule 1.15(c) when he failed to notify Complainant of the receipt of donations to the Defense Fund.

39. Respondent violated Rule 1.15(c) when he failed to maintain complete records of funds coming into the Defense Fund and failed to render appropriate accountings to Complainant.

40. Respondent violated Rule 1.15(a) when he failed to deposit into his trust account several donations to the Defense Fund.

41. Respondent violated Rule 8.4(c) when he told Complainant in a July 31, 2005 e-mail that the Defense Fund had a balance of \$14,098.20 when in fact the Defense Fund had very little, if any, funds remaining.

42. Respondent violated Rule 8.4(c) when he told Complainant in a September 8, 2005 e-mail that the Defense Fund had a balance of \$12,098.20 when in fact the Defense Fund had very little, if any, funds remaining.

43. Respondent violated Rules 8.4(c) and 8.1(a) when he told the Virginia State Bar in his response to the bar complaint that the Defense Fund had a balance of \$14,098.20 when in fact the Defense Fund had very little, if any, funds remaining.

44. Respondent violated Rules 8.4(c) and 8.1(a) when he told the Virginia State Bar in his March 2006 response to the bar complaint that his fee was \$125 per hour and that his total fee was at least \$16,250 after he had told Complainant in a September 8, 2005 e-mail that his fee was \$100 per hour and that his total fee was \$11,300.

45. Respondent violated Rule 1.15(c) when he failed to remit funds from the Defense Fund Complainant had requested and was entitled to receive.

46. Respondent violated Rules 8.1(d) and 8.4(b) when, though Paul Holt, he suggested to Complainant that he drop the bar complaint in exchange for Respondent paying him the balance of the Defense Fund.

II. CHARGES OF MISCONDUCT

The above facts, if proven, constitute violations of the following Rules of Professional Conduct:

RULE 1.5 Fees

- (b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

RULE 1.15 Safekeeping Property

- (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.

RULE 1.15 Safekeeping Property

- (c) A lawyer shall:
- (1) promptly notify a client of the receipt of the client's funds, securities, or other properties;
 - (2) identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
 - (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.

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer already admitted to the bar, in connection with a bar admission application, any certification required to be filed as a condition of maintaining or renewing a license to practice law, or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact;
- (d) obstruct a lawful investigation by an admissions or disciplinary authority.

RULE 8.4 Misconduct

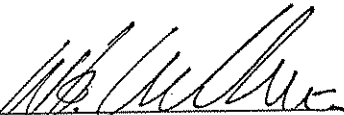
It is professional misconduct for a lawyer to:

- (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyers fitness to practice law;

III. CERTIFICATION

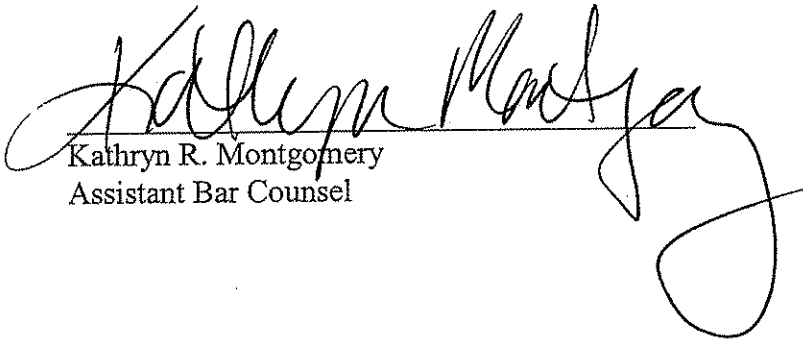
The Subcommittee, on behalf of the Eighth District Committee, hereby certifies these Charges of Misconduct to the Virginia State Bar Disciplinary Board.

EIGHTH DISTRICT SUBCOMMITTEE OF
THE VIRGINIA STATE BAR

By: 
Wilson F. Vellines, Esquire
Subcommittee Chair

CERTIFICATE OF SERVICE

I certify that I have this 1st day of October, 2007 mailed by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a true and correct copy of the Subcommittee Determination (Direct Certification) to Respondent Marc James Small at 2700 Anglewood Drive, Chester, Virginia 2383, his address of record with the Virginia State Bar.


Kathryn R. Montgomery
Assistant Bar Counsel