



Writing Sample Solicitation

Thank you for your interest in serving as a member of the Virginia State Bar Disciplinary Board. As a member or former member of a District Committee you understand the importance of the Bar's function to protect the public and regulate the profession.

Members of the Disciplinary Board hear the most serious cases of lawyer misconduct. The twenty-member board, appointed by the Supreme Court of Virginia, is composed of sixteen attorneys and four lay members. When vacancies arise, the Supreme Court solicits input from the Bar regarding individuals' qualifications to serve as members of the Board.

A key responsibility of all lawyer board members is to write the Orders that the Board issues applying findings-of-fact to the appropriate Rules of Professional Conduct. Appeals are made directly to the Supreme Court of Virginia. If you are appointed to the Board, you will not be assigned Order-writing responsibilities in your first matter; however, you will be expected to assist in revising Orders to ensure they conform to the testimony, evidence, and Board's findings. Later during your tenure, you will be expected to draft well-written, cogent and reasoned Orders that will serve as the principal fact-finding foundation for subsequent review. Accordingly, the Order-writing process is critical to Board membership.

To ensure that qualified applicants are presented to the Supreme Court, the Bar asks all applicants to complete the attached writing sample.

Scenario

- a) Today is October 1, 2019. On September 10, 2019, you participated in a Disciplinary Board hearing as a member of a five-person panel. The Respondent appeared and was represented by counsel—Clarence Darrow. The Bar was represented by Assistant Bar Counsel—Marcia Clark.
- b) The allegations in the Certification provided were proven at the hearing with the exception of those allegations in *italicized* text. If an allegation is *italicized*, there was inconclusive or contradictory evidence presented at the hearing, and the fact that formulates the allegation was not found by the Board.

Instructions

1. Review and analyze the following hypothetical District Subcommittee Certification and draft an Order applying the proven facts of the Certification to the applicable Rule of Professional Conduct utilizing the appropriate burden of proof.
2. Limit your Order to six pages, inclusive of the text provided in the template, double spaced, twelve-point Times New Roman font, with 1" margins all around.
3. You may only use the Certification and the Rules of the Supreme Court of Virginia in drafting your Order.
4. You may not consult with any other person in drafting your Order.
5. You may impose whatever disciplinary sanction you feel is appropriate.
6. You may use the attached template to format your Order.

July 2019

VIRGINIA:
**BEFORE THE TWELFTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR**

**IN THE MATTER OF VSB DOCKET NO. 19-012-1927
HERMAN ROOTHE**

**SUBCOMMITTEE DETERMINATION
(CERTIFICATION)**

On July 1, 2019, a meeting in this matter was held before a duly convened Twelfth District Subcommittee panel consisting of Marc Koenig, Chair; Earl Coombs, Member; and Luisa Gehrig, Lay Member.

Pursuant to Part 6, § IV, ¶ 13-15(B)(3) of the Rules of the Supreme Court of Virginia, the Twelfth District Subcommittee of the Virginia State Bar hereby serves upon the Respondent the following,

Certification:

I. ALLEGATIONS OF FACT

1. Unless otherwise noted, at all times relevant hereto, Herman Roothe (“Respondent”) was an attorney licensed to practice law in the Commonwealth of Virginia.
2. By order dated October 16, 2017, the Broncks County Circuit Court appointed Respondent to represent Red Ruffing in a felony possession of marijuana case brought by the Commonwealth’s Attorney for Broncks County.
3. Respondent did not have an appellate criminal law practice. Before he was licensed, however, Respondent was convicted of felony assault and battery with a deadly weapon (a baseball bat) and successfully appealed his own case to the Supreme Court of Virginia to gain a reversal of his conviction. Respondent’s *pro se* experience with the criminal law *gained him a degree of notoriety* in rural Broncks County. As such, when the public defender’s office had a conflict, Respondent was sought to represent criminal defendants.
4. When Respondent first met Ms. Ruffing at the Broncks County jail on October 20, 2017, he advised her that she could face up to 5 years in prison for the charged offense if convicted at trial. On the other hand, he explained that pleading guilty could lead to a term of a few months imprisonment, or perhaps even the possibility of house arrest. He balanced that assessment with his legal analysis that the police had made serious errors in the search that led to the recovery of the marijuana from Ms. Ruffing’s home. Faced with conflicting information, Ms. Ruffing requested time to contemplate her options and *asked Respondent to return to visit her the following week.*

5. Respondent did not return to see Ms. Ruffing again until two days before Thanksgiving, Tuesday, November 21st. At that meeting, Ms. Ruffing explained her frustration that Respondent had not come to see her sooner and inquired as to the likelihood that the Broncks County Assistant Commonwealth's Attorney ("ACA") would seek home detention if she pled guilty. Ms. Ruffing was the mother of three children and wanted to avoid imprisonment at all costs. Respondent advised his client that he would speak with the ACA to get a sense of her willingness to agree to home detention.
6. As the year ended, Respondent was concerned about making collections for his firm. In addition to the holidays that kept him from Ms. Ruffing's case, he spent considerable time attempting to settle an automobile collision matter in which he represented an injured plaintiff with the prospect for a substantial recovery. Respondent thus failed to contact the ACA until after the new year when he returned to his office on January 3, 2018. At that point, the ACA stated that she would consider home detention for Ms. Ruffing given her clean record, but she needed to prepare for Ms. Ruffing's trial, including subpoenaing an expert from Richmond, so she required an answer from Ms. Ruffing by January 9, 2018 as to whether she would plead guilty.
7. Respondent did not return to see Ms. Ruffing at Broncks County jail until January 8th. When Respondent met with Ms. Ruffing, she had decided to plead guilty. She conveyed this information to Respondent, and he stated he would advise the ACA so a plea could be arranged. Nevertheless, Respondent did not convey his client's intent to the ACA until over a month later on February 15, 2018. By that time the ACA advised Respondent that Ms. Ruffing could still plead guilty, but she would no longer recommend home detention. Respondent explained to Ms. Ruffing that the ACA had taken home detention off the table. Ms. Ruffing was very disappointed and decided to take her chances at trial.
8. Ms. Ruffing was tried and convicted on March 6, 2018, and sentenced to three and a half years imprisonment on June 30, 2018. Following the entry of the court's sentencing order on July 14, 2018, Respondent noted an appeal on behalf of Ms. Ruffing on July 28, 2018.
9. Even though the Respondent noted the appeal, however, he failed to draft, much less file, a petition for appeal. Consequently, on January 20, 2019, the Court of Appeals of Virginia ("CAV") issued its order dismissing the appeal for failure to file a petition.
10. Ms. Ruffing made several attempts to communicate with Respondent after her sentencing and during the pendency of her appeal. These futile efforts to communicate with Respondent *began as early as August 22, 2018*, when Ms. Ruffing wrote to Respondent requesting a copy of her case file, discovery, trial transcripts and the appellate brief. Respondent's response, *nearly two months later, in a letter dated October 16, 2018*, included only the trial transcripts. Respondent failed to convey the

requested appellate documents or *to advise Ms. Ruffing that he had noted the appeal but had not filed a petition.*

11. Never receiving the entirety of the requested appellate documents, approximately two and a half months later, on or about January 2, 2019, Ms. Ruffing wrote to the Clerk of the CAV requesting information on the status of her appeal. This same day, family members of Ms. Ruffing communicated with the Virginia State Bar (the “Bar”) and advised that Ms. Ruffing had not heard from her attorney, *knew that her appeal should have been filed*, and inquired if the Bar could verify the status of her appeal.
12. A few days later, on January 5, 2019, the Intake Office of the Bar forwarded to Respondent the complaint from Ms. Ruffing about her appeal and Respondent’s failure to respond to her inquiries. The Bar directed Respondent to advise Ms. Ruffing of the status of her case within five days of the letter. The Bar advised Respondent of his duty to comply with the demand, citing Rule of Professional Conduct (“RPC”) 8.1(c), *and advising him that his failure to comply could result in the imposition of disciplinary sanctions.* Notwithstanding the demand, Respondent failed to communicate with Ms. Ruffing within the time prescribed.
13. On February 20, 2019, a month after the CAV dismissed the appeal for failure to file a petition, Respondent finally communicated with Ms. Ruffing in a two-sentence letter to her stating, “Your appeal was dismissed. I will be filing a Motion for Delayed Appeal.”
14. After not hearing from the Respondent for nearly two months, Ms. Ruffing communicated again with the Bar on April 15, 2019. On April 27, 2019, the Bar mailed the Respondent a copy of Ms. Ruffing’s formal complaint and demanded a written answer within 21 days of the date of the letter. The Bar again cited RPC 8.1(c) for his duty to comply and cautioned him that a failure to do so could result in the imposition of disciplinary sanctions.
15. Respondent failed to timely respond to the 21-day letter. After being further prompted by a subsequent Bar letter, Respondent finally responded to the Bar on June 14, 2019, with a *terse, two-sentence letter reply.* In it, Respondent failed to address allegations of failure to communicate, did not provide copies of the documents he allegedly sent to Ms. Ruffing, and did not respond regarding the filing of the delayed appeal. In fact, Respondent advised the Bar that *he had already destroyed the file* because he expected the CAV to deny his delayed appeal.
16. Finally, having exhausted efforts to communicate with Respondent in writing and by telephone, the Bar sent an investigator to interview Respondent in Broncks County about his efforts to communicate with Ms. Ruffing and the status of her file. During that interview, Respondent refused to answer questions citing his Fifth Amendment privilege against self-incrimination. Even though the Bar investigator advised Respondent that the investigator was not a law enforcement officer, Respondent

refused to answer. The investigator reminded Respondent of his duty to comply with disciplinary authorities regarding the lawful demand for information pursuant to RPC 8.1(c) and (d), to which the Respondent said, "You can take my license, but you'll never take my freedom."

II. NATURE OF MISCONDUCT

Such conduct by Herman Roothe constitutes misconduct in violation of the following provisions of the RPC:

RPC 1.3 Diligence

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

RPC 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

RPC 1.16 Declining or Terminating Representation

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. . . .

RPC 8.1 Bar Admission and Disciplinary Matters

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

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6;

(d) obstruct a lawful investigation by an admissions or disciplinary authority.

III. CERTIFICATION

Accordingly, it is the decision of the Twelfth District Subcommittee to certify the charges of misconduct to the Virginia State Bar Disciplinary Board.

TWELFTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By: Homer Wagner

Homer Wagner
Subcommittee Chair

TEMPLATE

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
[Respondent's first and last name]

VSB Docket No. [case number]

ORDER OF [discipline imposed, e.g., revocation, suspension, etc.]

THIS MATTER came to be heard on September 10, 2019, on the District Committee Determination for Certification by the [number of district subcommittee] District Committee, before a panel of the Virginia State Bar Disciplinary Board (“Board”) consisting of [name], Chair, [name], [name], [name], Lay Member, and [name]. The Virginia State Bar (the “VSB”) was represented by Marcia Clark (“Bar Counsel”). The Respondent [Respondent's name] (hereinafter “the Respondent”) was present and was represented by Clarence Darrow. Court reporter Huey Dewey of Dewey, Cheatham & Howe Court Reporting, P.O. Box 99999, Richmond, Virginia 23227, (804) 555-1212, after being duly sworn, reported the hearing and transcribed the proceedings.

At the outset of the hearing, the Chair polled the members of the panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System (“Clerk”) in the manner prescribed by the Rules of Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-18 of the Rules of Court.

Prior to the proceedings and at the final Prehearing Conference, VSB Exhibits 1-10 were admitted into evidence by the Chair, without objection from the Respondent. By agreement between the VSB and the Respondent, the Stipulations of Fact was received as Exhibit 10. All of the factual findings made by the Board were found to have been proven by [burden of proof].

TEMPLATE

MISCONDUCT

Rule [applicable rule]

The Board finds by [burden of proof] that the Respondent. . . .

Rule [applicable rule]

The Board finds by [burden of proof] that the Respondent. . . .

...

THE BOARD'S FINDINGS

...

SANCTION PHASE OF HEARING

...

DISPOSITION

...

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. 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 Opinion and Order to [Respondent] at his address of record with the Virginia State Bar, [Respondent's address], by certified mail, return receipt requested; by regular mail to Respondent's Counsel, Clarence Darrow, Thurgood Frankfurter Way, Douglass, VA 22222; and by hand delivery to Marcia Clark, Assistant Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

This Order is final.

TEMPLATE

ENTERED this [] day of [], 20 [].

VIRGINIA STATE BAR DISCIPLINARY BOARD

[your bar ID number here: *no name*], Chair