

1987

## Annual Survey of Virginia Law: Professional Responsibility

Michael L. Rigsby

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

Michael L. Rigsby, *Annual Survey of Virginia Law: Professional Responsibility*, 21 U. Rich. L. Rev. 807 (1987).

Available at: <http://scholarship.richmond.edu/lawreview/vol21/iss4/12>

This Article is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# PROFESSIONAL RESPONSIBILITY

*Michael L. Rigsby\**

## I. INTRODUCTION

All lawyers licensed in Virginia must adhere to the Disciplinary Rules (DRs) and principles codified in the Virginia Code of Professional Responsibility.<sup>1</sup> The ethical precepts contained therein constitute the bedrock upon which the notion of professionalism is based. It distinguishes Virginia lawyers as members of a learned profession. Unfortunately, all lawyers do not accept the ethical responsibilities which come with the privilege of licensure. For those instances in which a lawyer strays from his ethical tethering, the Supreme Court of Virginia has devised a procedure for investigating complaints of lawyer misconduct and, where appropriate, imposing discipline.<sup>2</sup>

Disciplinary proceedings are in the nature of a summary inquest into the conduct of a lawyer.<sup>3</sup> Thus, discipline, when imposed, accomplishes three goals: (1) it protects the public from unscrupulous practitioners; (2) it instructs other members of the bar regarding unacceptable conduct; and (3) it punishes the errant lawyer. The following cases discuss the principles which have emerged as the bar has sought to meet these three objectives.

---

\* Bar Counsel, Virginia State Bar; Adjunct Professor of Law, University of Richmond; B.S., 1967, Virginia Polytechnic Institute; J.D., 1969, T.C. Williams School of Law, University of Richmond.

I would be woefully remiss if I failed to recognize and thank my assistant, Gretchen Franz, for her comprehensive assistance in preparing this article.

1. Disciplinary Rule 1-102(A)(1) of the Virginia Code of Professional Responsibility states: "A lawyer shall not [v]iolate a Disciplinary Rule or knowingly aid another to do so." VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1983).

2. For the procedures followed in disciplinary investigations, see VA. SUP. CT. R. pt. 6, § IV, ¶ 13.

3. "A [disciplinary] proceeding . . . is merely civil in nature and not criminal." *Maddy v. Dist. Comm.*, 205 Va. 652, 658, 139 S.E.2d 56, 58 (1964). "[Disciplinary proceedings] are not criminal, but merely civil in nature." *Id.* at 658, 139 S.E.2d at 60. *Seventh Dist. Comm. of the Va. State Bar v. Gunter*, 212 Va. 278, 284, 183 S.E.2d 713, 717 (1971).

## II. COURT DECISIONS

A. *Neglect*

In *Mathews v. Virginia State Bar*,<sup>4</sup> the supreme court considered whether a lawyer's failure to obey a court order constitutes neglect in violation of former DR 6-101(A)(3)<sup>5</sup> of the Code of Professional Responsibility, and whether willful disobedience of a court order may be taken into account when determining a penalty. Lawyer Mathews was employed in the spring of 1979 to represent a client in a personal injury suit. Mathews waited until October 1980 to file a motion for judgment, at a time when the statute of limitations had nearly run. He subsequently failed to answer opposing counsel's interrogatories. In June 1981, he received an order compelling answers to the interrogatories, but still failed to do so until January 1982, some seven months later.

During November 1981, the client complained to the Virginia State Bar that he was unable to contact Mathews concerning the status of his case. After an investigation and hearing, the Virginia State Bar Disciplinary Board found Mathews was neglectful, in violation of DR 6-101(A)(3). The Board ordered the suspension of Mathews' license for a period of two months. Mathews' appeal was based upon the contention that violation of a court order may be grounds for punishment for contempt, but that contempt of court is not sufficient grounds to warrant disbarment. Mathews argued further that since contempt is not grounds for disbarment, the lesser penalty of suspension was not justified.<sup>6</sup>

---

4. 231 Va. 308, 343 S.E.2d 79 (1986).

5. Former DR 6-101(A)(3) of the Virginia Code of Professional Responsibility stated: "A lawyer shall not . . . [n]eglect a legal matter entrusted to him." DR 6-101(A)(3) (appearing at 216 Va. 941 (1976)). The complaint against Mathews was initially filed in November, 1981 when the 1970 Virginia Code of Professional Responsibility was still in effect. The current version was adopted June 1, 1983 and has been in effect since October 1, 1983. DR 6-101(A)(3) was not incorporated into the current Code. The current Code provisions relating to lawyer negligence are found in DR 6-101(B), (C), (D). DR 6-101(B) states that a lawyer "shall attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client." DR 6-101(C) states that a lawyer "shall keep a client reasonably informed about matters in which the lawyer's services are being rendered." DR 6-101(D) states that a lawyer "shall inform his client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter." VA. SUP. CT. R. pt. 6, § II, Canon 6 (1983).

6. *Mathews* relied on *In re Damron*, 131 W. Va. 66, 45 S.E.2d 741 (1947), which held that "an attorney may not be disbarred for contempt of court unless his act or course of conduct amounts to bare and aggravated contempt." *Id.* at 78, 45 S.E.2d at 747.

The Virginia Supreme Court rejected Mathews' argument and affirmed the Disciplinary Board's order. The court agreed with the Board's finding of neglect based upon the facts that Mathews virtually ignored his client's case for one and one half years and the court order compelling answers to the interrogatories. The court held that willful disobedience of a single court order may alone justify disbarment and that the board was entirely justified in taking into account Mathews' admitted violation of the court's order when considering punishment.<sup>7</sup>

In *Pickus v. Virginia State Bar*,<sup>8</sup> lawyer Pickus provided real estate settlement services for a client. As settlement counsel, Pickus was instructed by the lending institutions involved in the transactions to satisfy prior deeds of trust and to obtain mortgagee title insurance policies insuring that the new loans constituted first liens. Pickus obtained title insurance commitments, whereupon the lending institutions delivered substantial funds with which to pay off the prior deeds of trust. Rather than doing so, however, Pickus delivered the funds to his client who told Pickus that he would pay off the liens. However, the client did not pay off the liens. Pickus accepted his client's representation without examining the land records and advised both the title insurance company and the lending institution that the loan was secured by a first deed of trust. The title insurance company then issued a policy certifying that fact.

The Disciplinary Board found Pickus guilty of violating DR 6-101(A)(3)<sup>9</sup> as well as other provisions of the Code of Professional Responsibility. On appeal, the court affirmed the Disciplinary Board's finding that Pickus was neither competent nor prepared to handle real estate matters. On the issue of neglect, Pickus argued that since his client was not injured by his actions, Pickus did not neglect a legal matter entrusted to him by his client. The supreme court rejected this narrow interpretation of DR 6-101(A)(3), concluding instead that its language encompasses the neglect of legal matters entrusted to a lawyer whether entrusted by a client or a

---

7. 231 Va. at 311, 343 S.E.2d at 80. The court relied on *Leimer v. Hulse*, 352 Mo. 451, 178 S.W.2d 335, cert. denied, 323 U.S. 744 (1944), and *In re Daly*, 291 Minn. 488, 189 N.W.2d 176 (1971). In *Leimer*, the court held that conduct punishable as contempt of court may also be considered as evidence that an attorney is unfit to practice law. 352 Mo. at —, 178 S.W.2d at 339. The court in *Daly* held that willful disobedience of a single court order may alone justify disbarment. 291 Minn. at 495, 189 N.W.2d at 181.

8. 232 Va. 5, 348 S.E.2d 202 (1986).

9. See *supra* note 6.

third party.<sup>10</sup> Thus, when the lending institution in a real estate transaction delivered loan proceeds to Pickus and directed that he satisfy prior liens and obtain title insurance policies which insured that the new loans were secured as first liens, Pickus was entrusted with a legal matter. His failure to satisfy the prior liens and his subsequent representation that the liens had been satisfied constituted neglect of a legal matter entrusted to him by a third party and was, therefore, a violation of DR 6-101(A)(3).

### B. *Fraudulent and Deceitful Activity*

In *Gibbs v. Virginia State Bar*,<sup>11</sup> decided the same day as *Pickus v. Virginia State Bar*<sup>12</sup> was decided, the supreme court considered whether scienter is a necessary element of misrepresentation under DR 1-102(A)(4)<sup>13</sup> of the Code of Professional Responsibility.<sup>14</sup> Without deciding the issue, the court concluded that the record in each case was sufficient to establish a knowing misrepresentation.<sup>15</sup>

Gibbs acquired a one-half interest in certain real estate and became a tenant in common with another person. The monthly mortgage payment included an accident and sickness insurance premium, which Gibbs wanted to cancel. The bank refused to accept the monthly mortgage payment from Gibbs without the accident and sickness insurance premium, unless it received a letter from the co-tenant cancelling the insurance policy. Without the knowledge or consent of the co-tenant, Gibbs prepared a letter to the bank over the forged signature of the co-tenant, requesting cancellation of the insurance policy.

Even though cancellation of the policy would have benefitted both Gibbs and his co-tenant, and the co-tenant wanted the policy cancelled, the court found that the bank was prejudiced by Gibbs'

---

10. *Pickus*, 232 Va. at 12, 348 S.E.2d at 207.

11. 232 Va. 39, 348 S.E.2d 209 (1986).

12. 232 Va. 5, 348 S.E.2d 202 (1986).

13. Pickus' violation occurred at a time prior to the revision of the Code in 1983. Former DR 1-102(A)(4) stated: "A lawyer shall not [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Rules of Court, 216 Va. 941, 1066 (1976), *amended at* Rules of Court, 218 Va. 173, 192 (1977). Gibbs' violation occurred after the 1983 revisions came into effect. DR 1-102(A)(4) now reads: "A lawyer shall not [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law."

14. *See Gibbs*, 232 Va. at 41, 348 S.E.2d at 210; *Pickus*, 232 Va. at 9, 348 S.E.2d at 205.

15. *See supra* note 14.

actions.<sup>16</sup> If the co-tenant had died while still liable on the mortgage following the unauthorized cancellation of the insurance, the bank would have been exposed to potential liability to the co-tenant's estate.<sup>17</sup> The court reasoned that since the bank was prejudiced by Gibbs' actions and since Gibbs had been advised by the bank that the co-tenant must authorize in writing the cancellation of the insurance, ample evidence existed to uphold the findings of the Disciplinary Board.<sup>18</sup>

In *Pickus*, the supreme court concluded that scienter was established when Pickus certified in the real estate transactions that prior liens had been satisfied and released of record when he knew neither he nor anyone for whom he was responsible had done so. The court stated that scienter was established by the clear proof required in disciplinary proceedings.<sup>19</sup> The supreme court also held that because Pickus violated DR 1-102(A)(4), it necessarily followed that he also was guilty of violations of DRs 1-102(A)(1)<sup>20</sup> and 1-102(A)(6).<sup>21</sup>

### C. *Preservation and Identity of Funds*

The court announced an extremely important concept in *Pickus v. Virginia State Bar*<sup>22</sup> concerning the responsibility of a settlement attorney to unrepresented parties to the transaction. Pickus was found to have violated DR 9-102.<sup>23</sup> Pickus argued that the rule

---

16. 232 Va. at 42, 348 S.E.2d at 213.

17. *Id.*

18. *Id.*

19. *Pickus*, 232 Va. at 9, 348 S.E.2d at 205. The court cited Seventh District Committee v. Gunter, 212 Va. 278, 183 S.E.2d 713 (1983).

20. DR 1-102(A)(1) of the pre-1983 version of the Code states: "A lawyer shall not [v]iolate a Disciplinary Rule." Rules of Court, 216 Va. 941, 1065 (1976). The 1983 version added, "or knowingly aid another to do so."

21. DR 1-102(A)(6) of the pre-1983 version of the Code states: "A lawyer shall not [e]ngage in any other conduct that adversely reflects on his fitness to practice law." Rules of Court, 216 Va. 941, 1066. That provision was removed from the 1983 version of the Code.

22. 232 Va. 5, 348 S.E.2d 202 (1986).

23. The complaint against Pickus was made prior to the 1983 Code revisions. At that time, DR 9-102 stated:

(A) All funds to clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained 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 reasonable to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed position shall not be withdrawn until the dispute is finally resolved.

did not apply to him because he had no attorney-client relationship with either the lending institutions or the title insurance companies involved. The supreme court rejected this argument and construed DR 9-102 to include third parties.<sup>24</sup> The court held that "[w]hen a lawyer acts as a closing or settlement attorney and no other lawyer is involved, the closing or settlement attorney represents all the parties and, in this limited sense, all parties are his clients."<sup>25</sup> The court further held that "the settlement attorney assumes the duties of a fiduciary and must properly handle and dispose of any funds not his own which he may receive in connection with the settlement."<sup>26</sup>

In the more recent case of *Delk v. Virginia State Bar*,<sup>27</sup> the supreme court upheld the Board's order to suspend lawyer Delk's license for three years for violation of DRs 9-102(A), 102(B)(3) and 102(B)(4).<sup>28</sup> An association which made real estate loans employed

(B) A lawyer shall:

- (1) Promptly notify a client of the receipt of his 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 practical.
- (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 his client regarding them.
- (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.

Rules of Court, 216 Va. at 1130

24. 232 Va. at 14, 348 S.E.2d at 208. The court cited the comment to DR 9-102, which appears in the AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 441 (1979). This comment states: "DR 9-102 sets forth rules to govern the attorney's handling of moneys and other properties on behalf of clients or third parties."

25. 232 Va. at 15, 348 S.E.2d at 209.

26. *Id.*

27. 233 Va. 187, 355 S.E.2d 558 (1987).

28. DR 9-102 states:

- (A) All funds to clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained 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 reasonable to pay bank charges may be deposited therein.
  - (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when 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) A lawyer shall:

...

- (3) Maintain complete records of all funds, securities and other properties of a client

Delk to close a loan made to an individual for the purchase of a house. The association specifically instructed Delk that upon delivery of the loan check, he should close the loan, withhold closing costs and disburse the balance as soon as possible to the association. Delk did not disburse the balance to the association in a timely fashion nor did he maintain adequate funds in his trust account to pay the association. Further investigation by the Bar revealed that between the time of deposit of the loan in Delk's trust account and an audit conducted by the Bar, Delk's trust account was overdrawn twenty-four times, and on 217 business days it had insufficient funds to cover the amount owed to the association.<sup>29</sup>

On appeal, Delk contended that the discipline he received was arbitrary and excessive because no client had filed a complaint against him, no client was injured by his actions and no finding of moral turpitude was made. Delk argued further that the Board should not have suspended his license based upon "a perceived inability on his part to have paid [the Association]."<sup>30</sup> Delk added that his license should not have been suspended since his "poor accounting methods had been corrected months before any allegations of misconduct were made."<sup>31</sup> These arguments were rejected by the court.

The court held that there is nothing in the statutes or rules relating to the discipline of attorneys which requires a client to make a complaint prior to the investigation of alleged misconduct.<sup>32</sup> The court also held that the loss of money by a client is not a prerequisite for suspension of an attorney's license for mishandling funds.<sup>33</sup> Potential injury is sufficient to warrant disbarment.<sup>34</sup> In response

---

coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

- (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.

29. 233 Va. at 190, 355 S.E.2d at 561.

30. *Id.*

31. *Id.*

32. *Id.* The court referred to VA. CODE ANN. § 54-74 (Cum. Supp. 1987), which permits a complaint by "any person" regarding judicial suspension or revocation of a lawyer's license. See *Delk*, 233 Va. at 191, 355 S.E.2d at 561. The court also referred to VA. SUP. CT. R. pt. 6, § IV, ¶ 13(b)(5)(a), which provides that upon receipt of a complaint or evidence that lawyer misconduct has occurred, the appropriate committee shall investigate the matter. See *Delk*, 233 Va. at 191, 355 S.E.2d at 561.

33. See *Delk*, 233 Va. at 191, 355 S.E.2d at 561; *Maddy v. Dist. Comm.*, 205 Va. 652, 658, 139 S.E.2d 56, 61 (1964) (prejudice to client's legal rights not a prerequisite).

34. See *Delk*, 233 Va. at 191-92, 355 S.E.2d at 561 (citing *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* 01:818 (1986)).

to Delk's argument concerning moral turpitude, the court held that it is not necessary to prove moral turpitude before suspending a lawyer's license for mishandling client funds.<sup>35</sup> When a lawyer knows or should have known he was dealing improperly with client funds, there are sufficient grounds to warrant suspension.<sup>36</sup> The court reasoned that Delk should have known he was misusing client funds because the trust account had been overdrawn and had contained insufficient funds an inexcusable number of times between the time the funds were deposited and the time when an audit was made of the trust account.<sup>37</sup>

The theme of preserving clients' funds intact was again addressed in *Wright v. Virginia State Bar*.<sup>38</sup> There, the Disciplinary Board found that lawyer Wright failed to maintain books and records for his trust in the aggregate and for specific clients. He routinely advanced funds from his trust account for clients and failed to withdraw his fees from his trust account when due. He also failed to keep sufficient funds in his trust account to satisfy outstanding claims against it. In reply to Wright's argument that no client had been harmed by his record-keeping deficiencies, the court responded that "neither loss of money by a client nor proof of a lawyer's moral turpitude is a prerequisite to a finding that the lawyer has mismanaged his financial records and clients' funds."<sup>39</sup>

#### D. *Excessive Fees*

In *Hudock v. Virginia State Bar*,<sup>40</sup> the supreme court affirmed the Disciplinary Board's decision to publicly reprimand lawyer Hudock for violating DR 2-105(A) and (B).<sup>41</sup> The Board deter-

35. See *id.*, at 192, 355 S.E.2d at 561.

36. *Id.* The court again referred to the *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* 01:818 (1986).

37. See *Delk*, 233 Va. at 192, 355 S.E.2d at 561.

38. 233 Va. 491, 357 S.E.2d 518 (1987).

39. 233 Va. at 498, 357 S.E.2d at 522.

40. 233 Va. 390, 355 S.E.2d 601 (1987).

41. Hudock's alleged misconduct occurred prior to the 1983 revisions to the Code. At that time, DR 2-105 provided that:

- (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal fee or clearly excessive fee.
- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
  - (3) The fee customarily charged in the locality for similar legal services.

mined that Hudock charged a fee in excess of that allowed by section 65.1-102 of the Virginia Code.<sup>42</sup> Therefore, the fee was illegal and in violation of DR 2-105(A) and (B).

Subsequent to Hudock's representation of a client before the Industrial Commission of Virginia ("Commission") and resulting settlement of that claim, the Commission set Hudock's fee at \$2,500. This amount was entered on a draft order submitted by Hudock to the Commission for entry, along with directions that the remainder of the settlement be paid to Hudock's client. Hudock, however, had also entered into a contingency fee arrangement with his client without notifying the Commission. Thereafter, Hudock collected \$5,000: \$2,500 from the employer pursuant to the Commission's order, and \$2,500 from his client pursuant to the contingency fee agreement. The Disciplinary Board determined that the \$2,500 fee paid to Hudock pursuant to the contingency fee arrangement was illegal and clearly excessive, in light of section 65.1-102. Section 65.1-102 gives the Commission full power to set attorneys' fees in workers' compensation cases.<sup>43</sup> The court explained that since the fee charged by Hudock was in excess of that set by the Commission, it was illegal and violated the provisions of DR 2-105(A). The court also rejected arguments made by Hudock that section 65.1-102 violates the equal protection and due process clauses of the Constitution.

In *Chippenham Hospital, Inc. v. LeGrand*,<sup>44</sup> a circuit court considered whether an attorney's fees were excessive. In this instance, the attorney and client entered into a guaranty agreement wherein the attorney would receive twenty-five percent of the recovery which resulted in a fee of \$10,000 for four hours work. The circuit court rejected the attorney's argument that fee arrangements are between the attorney and client and found that the fee in this instance was unreasonable.<sup>45</sup> Based upon the four hours work done

---

42. VA. CODE ANN. § 65.1-102 (Repl. Vol. 1980) stated: "Fees of attorneys . . . whether employed by employer, employee or insurance carrier under this Act, shall be subject to the approval and award of the Commission . . ." This section has been revised, but the provisions relevant here remain unchanged. See VA. CODE ANN. § 65.1-102 (Interim Supp. 1987).

43. See 233 Va. at 393, 355 S.E.2d at 603.

44. No. LK-1587-4, (Richmond Cir. 1987).

45. The court relied on *Stiers v. Hall*, 170 Va. 569, 197 S.E. 450 (1938), which held that when reviewing attorney fee contract claims it is incumbent on the court to determine reasonableness when the question is raised.

by the attorney and statements made concerning what would be necessary to collect a judgment, the court found the reasonable value of the attorney's services for collecting a judgment of \$40,000 to be \$5,000.<sup>46</sup>

#### E. *Venue*

The District Committee is charged with the responsibility of investigating charges of misconduct when the misconduct occurs in that particular district or where the attorney resides in or maintains an office in that district.<sup>47</sup> In *Stith v. Virginia State Bar*,<sup>48</sup> lawyer Stith asserted that the Board erred in suspending his license for three years for violation of numerous disciplinary rules. Stith argued that the Board erroneously denied his motion to dismiss the proceedings and his petition to rehear because the Fourth District, and not the Fifth District, should have investigated the two complaints made against him.

Relying on *Smolka v. Second District Committee*,<sup>49</sup> the court stated that its rule regarding investigations by the District Committee establishes venue rather than subject matter jurisdiction. "Venue is waived if timely objection is not made."<sup>50</sup> The court reasoned that Stith's failure to object to venue when he appeared before the Fifth District Committee on the first complaint constituted an express waiver.<sup>51</sup> Stith again waived his objection to venue when he failed to object in writing or in person on the second complaint.<sup>52</sup> The Court upheld the suspension of Stith's license, finding that his motion to dismiss and his petition for review and remand were both untimely.<sup>53</sup>

#### F. *Virginia Licensed Attorneys Disciplined in Other Jurisdictions*

The Virginia Rules of Court provide that an attorney disbarred or suspended in another jurisdiction may present evidence showing

---

46. No. LK-1587-4, slip op. at 1 (Richmond Cir. 1987).

47. VA. SUP. CT. R. pt. 6, § IV, ¶ 13(B)(4)(b).

48. 233 Va. 222, 355 S.E.2d 310 (1987).

49. 224 Va. 161, 295 S.E.2d 267 (1982).

50. 233 Va. at 224, 355 S.E.2d at 311-12.

51. *Id.* at 224, 355 S.E.2d at 312.

52. *Id.*

53. *Id.* at 225, 355 S.E.2d at 312.

cause why similar discipline should not be imposed in Virginia.<sup>54</sup> In *Cummings v. Virginia State Bar*,<sup>55</sup> the supreme court considered what extrinsic evidence may be admitted by the attorney disciplined in the foreign jurisdiction to show why a similar sanction should not be imposed in Virginia.

Lawyer Cummings, licensed in Virginia and the District of Columbia, was disbarred "on consent" by the District of Columbia Court of Appeals.<sup>56</sup> Consequently, the Virginia State Bar Disciplinary Board temporarily suspended Cummings' license and directed him to show cause why he should not receive the same discipline imposed by the District of Columbia. In his answer, Cummings al-

---

54. VA. SUP. CT. R. pt. 6, § IV, ¶ 13(F) provides:

Whenever there shall be filed with the Executive Director evidence that an Attorney admitted to practice in this State has been disbarred or suspended from practice in another jurisdiction and that such disciplinary action has become final, the Board shall forthwith enter an order suspending the license of the Attorney and directing the Attorney to show cause why the same sanction that was imposed in the other jurisdiction should not be imposed by the Board. The Board shall forthwith serve upon the Respondent by certified mail (a) a copy of such certificate, (b) a copy of such order, and (c) a notice fixing the time and place of a hearing to determine what action should be taken by the Board. The hearing shall be set not less than twenty-one nor more than thirty days after the date of the order. Within fourteen days of the date of mailing, the Respondent shall file a written response, which shall be confined to allegations that:

- (1) The record of the proceeding in the other jurisdiction would clearly show that such proceeding was so lacking in notice or opportunity to be heard as to constitute a denial of due process; or
- (2) The imposition of the Board of the same sanction upon the same proof would result in a grave injustice; or
- (3) The same conduct would not be ground for disciplinary action or for the same sanction in this State.

The respondent shall have the burden of producing the record upon which he relies to support allegations (1), (2), or (3) above, and he shall be limited at the hearing to reliance upon the allegations of his written response. Except to the extent the allegations of the respondent's written response are established, the findings in the other jurisdiction shall be conclusive of all matters for purposes of the proceeding before the Board. If at the time fixed for hearing the respondent has not filed a written response or shall not appear or if the Board, after hearing, shall determine that the respondent has failed to establish the allegations of his written response, the Board shall impose the same discipline that was imposed in the other jurisdiction. If the Board shall determine that the respondent has established the allegations of his written response, it shall, in its discretion, dismiss the proceeding or impose a lesser sanction than was imposed in the other jurisdiction. A copy of any order imposing sanction shall be served upon the respondent by certified mail. Any such order shall be final and binding subject only to appeal as hereinafter provided."

*Id.*

55. 233 Va. 363, 355 S.E.2d 588 (1987).

56. 233 Va. at 366, 355 S.E.2d at 590. Attorney Cummings was investigated over a three-year period by the District of Columbia Bar, but no formal complaint was ever filed. Cummings filed an affidavit consenting to disbarment based on an alleged misuse of client funds.

leged that discipline should not be imposed in Virginia because he had not misused client funds and because the same conduct which was the basis for his disbarment in the District of Columbia would not result in disbarment in Virginia. After ruling that his answer failed to allege any grounds which would authorize the Board to impose a sanction other than that imposed by the District of Columbia, the Board refused to hear any evidence in support of Cummings' answer. The Board then ordered disbarment.<sup>57</sup>

The supreme court upheld the Board's decision not to allow Cummings to relitigate any issues of fact decided in the District of Columbia,<sup>58</sup> but reversed the Board's decision to refuse to receive extrinsic evidence.<sup>59</sup> The court interpreted the Code as requiring the Board to impose the same discipline as the foreign jurisdiction unless the attorney proves one of the three defenses listed in the Code.<sup>60</sup> Under one defense, the attorney is permitted to show that extenuating circumstances exist which might mitigate the sanctions imposed in Virginia.<sup>61</sup> Thus, the court held that Cummings was entitled to present evidence which might mitigate the sanctions in Virginia. The court concluded that under the rules, the Board should weigh the facts and circumstances of each case rather than mechanically apply the same discipline as imposed in the foreign jurisdiction.<sup>62</sup>

### G. *Discretion of Disciplinary Board When Applying Sanctions*

In a series of cases beginning with *Blue v. Seventh District Committee*<sup>63</sup> and ending with *Tucker v. Virginia State Bar*,<sup>64</sup> the supreme court has defined the scope of review of decisions rendered by the Disciplinary Board. In *Blue*, the appellant argued that the Board's findings of fact were no more than recommendations to the court. The court could therefore redetermine the facts in appellate review.<sup>65</sup> The bar argued, however, that the Board's factual findings were entitled to the same consideration as those made by

---

57. *See id.*

58. *Id.* at 367, 355 S.E.2d at 591.

59. *See id.* at 368, 355 S.E.2d at 591.

60. *See id.* at 367, 355 S.E.2d at 591.

61. *See id.* (imposition of same discipline based on same proof would result in grave injustice).

62. *See id.* at 368, 355 S.E.2d at 591.

63. 220 Va. 1056, 265 S.E.2d 753, *cert. denied*, 448 U.S. 904 (1980).

64. 233 Va. 526, 357 S.E.2d 525 (1987).

65. *See* 220 Va. at 1060, 265 S.E.2d at 757.

a circuit court empanelled pursuant to the Code.<sup>66</sup> The court concluded that it would examine the record independently and treat the Board's findings as prima facie correct. While not given the weight of a jury verdict, those conclusions will be sustained unless it appears they are not justified by a reasonable view of the evidence or are contrary to law.<sup>67</sup>

The court reaffirmed this holding in *Tucker*. In *Tucker*, the court recognized that a number of its members would have imposed a lesser sanction than that imposed by the Board. Nevertheless, explaining that the Board had broad discretion, the majority concluded that upon independent examination of the record, the Board had properly exercised its discretion.<sup>68</sup>

The court also ruled during its June term that the Board may consider prior acts of misconduct when considering the appropriateness of a sanction. In *Wright v. Virginia State Bar*,<sup>69</sup> Wright argued that the Board improperly considered Wright's prior private reprimands. The court concluded, however, that the Board would have been derelict in its duty to the public and the profession if it had not considered Wright's prior acts of misconduct.<sup>70</sup>

### III. CONCLUSION

What can we discern from the recent decisions of the court? One fact is the emergence of the Disciplinary Board as the preeminent arbiter of legal ethics in Virginia. Inbued with broad discretion in the adjudication of ethical matters, the Virginia Supreme Court appears to allow the board's decisions to stand unless clearly wrong.

What principles arise? One is that a trust account violation need not depend upon knowledge of trust irregularities. Ignorance of the trust account requirements will not excuse one from accountability; violation of the trust account requirements may subject one to a substantial sanction. Another is that the profession will not abide among its members duplicity, fraud or neglect of a client's affairs.

---

66. *Id.* (referring to VA. CODE ANN. § 54-74 (Supp. 1980)).

67. *See* 220 Va. at 1061-62, 265 S.E.2d at 756-57.

68. 233 Va. at 534, 357 S.E.2d at 529-30.

69. 233 Va. 491, 357 S.E.2d 518 (1987).

70. 233 Va. at 497, 357 S.E.2d at 521; *see also* *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987).

