

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF  
BRIAN WESLEY BARGER, JR.

VSB DOCKET NO. 22-000-123539

**MEMORANDUM ORDER OF SUSPENSION**

**THIS MATTER** came to be heard on November 19, 2021, before a panel of the Disciplinary Board consisting of Carolyn V. Grady, Chair; Reba H. Davis, lay member; Stephanie Cox; Kamala Lannetti; and Alexander Simon. The Chair polled the members of the Panel as to whether any were conscious of any personal or financial interest or bias which would preclude them from fairly hearing this matter and serving on the panel, to which inquiry each member, including the Chair, responded in the negative.

The Virginia State Bar (the “Bar”) was represented by Laura Anne Booberg, Assistant Bar Counsel. Respondent Brian Wesley Barger, Jr. (the “Respondent”) was present and represented by Paul D. Georgiadis. Lisa Wright, court reporter, P.O. Box 9349, Richmond, Virginia 23227, telephone number 804-730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

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

The matter came before the Board on the Bar’s Notice of Show Cause Hearing for Failure to Comply with Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia, and the Petition for Rule to Show Cause and the Rule to Show Cause issued on September 24, 2021. The Board took judicial notice of the Notice of Hearing and the Petition for Rule of Show Cause and received those documents into evidence as Board Exhibit 1.

## **I. RESPONDENT'S MOTION TO QUASH**

Respondent, by counsel, made an oral motion to quash the Petition for Rule to Show Cause on the grounds that the petition for rule to show cause filed by the Bar was not verified and sworn to under oath. Respondent's counsel submitted 9 pages of documents in support of his motion just prior to the commencement of the hearing, which documents were presented to the Board and the Bar via email. Respondent's counsel did not raise this issue at the time of the pre-hearing conference call on November 10, 2021 or thereafter until the commencement of the hearing. Respondent cited Virginia Code Section 8.01-274.1 requiring that a petition for rule to show cause be sworn to or accompanied by an affidavit for violation of court orders in civil actions in courts of record, except as otherwise required by law. The Respondent argued that hearings before the Disciplinary Board are "civil matters," that there is a record of the disciplinary Board's proceedings, and that the Board's orders are equivalent to those of a court of record.

The Bar argued that lawyer disciplinary proceedings are not controlled by Virginia Code Section 8.01-274.1 but rather Part 6, Section IV, Paragraph 13 of the Rules of Supreme Court of Virginia; that those rules expressly set forth when a pleading must be verified; and that a verified petition is not required in the present matter. The Bar also objected to the motion to quash on the grounds that, if section 8.01-274.1 did apply to Respondent's current proceedings, then so would the time limits for filing an objection set out in Rule 1:10 of the Rules of Supreme Court of Virginia and, therefore, Respondent's motion to quash has been waived as not timely filed.

Following argument of counsel, the Board retired to deliberate on Respondent's motion to quash the petition. The Board then returned and reported that the oral motion was taken under advisement until the conclusion of the evidence in the violations phase of the proceeding. The Board invited the Respondent and the Bar to provide any additional authority they wish to be considered at that time. Later in the hearing, the Bar submitted a written response to the oral motion for the Board to consider.

After considering the arguments of counsel and the written materials, the Board finds as follows:

1. The Petition for a Rule to Show Cause against the Respondent was filed September 24, 2021.

2. A prehearing conference with the Chair, bar counsel and Respondent's counsel present was held on November 10, 2021. The Respondent did not raise an objection to the sufficiency of the pleadings. Only at the commencement of the show cause hearing on November 19, 2021 did the Respondent move the Board to Quash the Petition on the basis that the petition was not verified and sworn to under oath pursuant to Virginia Code Section 8.01-274.1.

3. The matter before the Board is brought pursuant to Part Six, § IV, ¶ 13-29 of the Rules. Section 8.01-274.1 applies to certain civil actions "except as otherwise provided by law." Paragraph 13 of the Rules controls procedures for disciplining, suspending and disbaring attorneys, including Respondent's matter, and was enacted pursuant to the authority granted to the Supreme Court of Virginia in Code Section 54.1-3909. Nothing in Paragraph 13 requires that the Bar's petition in this matter be sworn to under oath when filed.

4. Virginia Code Section 8.01-274.1 applies to requests for a rule to show cause for a violation of a court order in any civil action in a court of record. The order at issue in this matter is the Agreed Disposition Memorandum Order entered May 14, 2021 from the Disciplinary Board. The Agreed Disposition Memorandum Order is not a "court order." The Disciplinary Board is not a "court of record" under the plain language of 8.01-274.1.

5. In addition, the Board finds that, should Virginia Code Section 8.01-274.1 apply, Respondent waived his objection by failing to file it timely pursuant to Rule 1:10 of the Rules of the Supreme Court of Virginia.

The Respondent's motion to quash the Petition for a Rule to Show Cause is denied.

At the onset of the hearing, the Board admitted the Bar's exhibits 1 through 13 and Respondent's exhibits 1 through 8 without objection. A motion to exclude witnesses was granted. The Board then heard testimony from the Respondent. The Board admitted VSB exhibit 14 in rebuttal without objection. The Bar then called witnesses Jacklyn Brown and Sophia Flanagan,

after being sworn under oath. The Board admitted VSB Exhibits 15 and 16 in rebuttal without objection. The Respondent then testified in rebuttal. At the close of the evidence the Board denied Respondent's motion to strike. The Board considered the exhibits; heard argument of counsel; and met in private to consider its decision.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Board made the following findings of fact based on clear and convincing evidence:

1. At all times relevant hereto, the Respondent has been an attorney licensed to practice law in the Commonwealth of Virginia and his address of record with the Bar has been 2920 W. Broad Street, Suite 102, Richmond, Virginia 23230. The Respondent received proper notice of this proceeding as required by Part Six, § IV, ¶¶ 13-12 and 13-18.A of the Rules.
2. On May 14, 2021, the Virginia State Bar Disciplinary Board entered an Agreed Disposition Memorandum Order imposing a 90-day suspension of Respondent's license to practice law in the commonwealth of Virginia under Docket No. 22-000-123539. The 90-day suspension lasted through August 12, 2021. (VSB Exhibit No. 4)
3. As a result of the suspension, Respondent was to comply with the notice requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia, including that he provide notice of his suspension by certified mail to his clients, opposing counsel, and presiding judges within 14 days of the effective date of his suspension, that is by May 28, 2021. Respondent was also required to "make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client" within 45 days, that is by June 28, 2021. (VSB Exhibit No. 4)
4. On April 22, 2021, prior to the suspension of Respondent's license to practice law, an Order for Substitution of Counsel was entered by the Circuit Court of Henrico County, Virginia in the matter of Brian Wesley Barger, Jr., BWB Construction, LLC, D/B/A Restoration Builders, Turnkey Historic Properties, LLC, and Restoration Builders, LLC v. Jacklyn Brown, and Peter Plunkett, Case no. CL19-6717-00. Respondent was one of four plaintiffs

in this action. The other three plaintiffs are single member LLCs owned by Respondent and his wife. The defendants were acting *pro se*. This Order substituted the Respondent in as counsel for all four plaintiffs, that is Respondent individually and for the three corporate entities, replacing former counsel, Jarrell Williams, and was endorsed by Respondent and Mr. Williams. (VSB Exhibit No. 14, Respondent's Exhibit No. 5, bates No. 0016)

5. Respondent did not at any time notify the Circuit Court of Henrico County that his license to practice law had been suspended.
6. Respondent did not notify by certified mail the *pro se* defendants Jacklyn Brown and Peter Plunkett of the suspension of his law license. Ms. Brown testified that she was aware of the suspension when it occurred.
7. On June 14, 2021, Respondent filed a sworn affidavit with the Clerk of the Disciplinary System incorrectly stating that as of May 14, 2021 he did not have any clients for whom he was currently handling matters and he was in compliance with the notice requirements of Part Six, § IV, ¶ 13-29. (VSB Exhibit 6). Respondent testified that he did not know that the Order for substitution of Counsel that he endorsed and filed in the Henrico County Circuit Court suit was entered on April 22, 2021 when he filed his June 14, 2021 affidavit. Respondent testified in the hearing that he did little to check whether he had been substituted in as counsel on that case and only learned of the entry of the order after the Bar's petition in September. Respondent's testimony is contrary to the Henrico County Circuit Court record showing that a copy of the Order was sent to him on April 28, 2021. (VSB Exhibit 14). Respondent's testimony is also inconsistent with his admission that he was preparing and subsequently filing pleadings in the Henrico County case in August of 2021 as counsel for the plaintiffs.
8. Respondent did not furnish proof to the Virginia State Bar within 60 days of the effective date of his suspension, that is on or before July 13, 2021, that he had given notices of his suspension as required under Part Six, § IV, ¶ 13-29.

9. While under suspension, Respondent continued to practice law as counsel of record for himself and for the plaintiff corporations as outlined below.
10. On August 10, 2021, during his period of suspension, Respondent propounded Requests for Admissions to *pro se* defendant Jacklyn Brown, under the caption of the Henrico County Circuit Court lawsuit. (VSB Exhibit 8). On the date before he propounded the Requests, on August 9, 2021, Respondent sent a copy of the Request for Admissions to Ms. Brown as an attachment via email. (VSB Exhibit 15). The Board does not find it convincing the Respondent's suggestion that others with access to his email account could have sent this email.
11. On August 10, 2021, during his period of suspension, Respondent also filed a Notice of Withdrawal of Counts on behalf of the Plaintiffs, under the caption of the Henrico County Circuit Court lawsuit. (VSB Exhibit 9). Although the Requests for Admission do not state whether they are filed *pro se* on behalf of the Respondent individually, the Notice of Withdrawal of Counts read "Plaintiffs, hereby respectfully file this Notice of Withdrawal of Counts." The Panel does not find it credible that Respondent could have forgotten that he was acting as an Attorney, and not as a *pro se* litigant for the three LLC Plaintiffs, the reason he gave for his failure to notify the Court and litigants of his suspension and filing an incorrect Statement with the Bar that he had no clients.
12. On August 10, 2021, during the period of his suspension, and under the caption of the Henrico County Circuit Court lawsuit, Respondent signed an Attorney Issued Subpoena Duces Tecum summoning Sophia Flanagan to produce records in the Henrico suit, which subpoena was served on her on August 11, 2021, according to her testimony. On August 9, 2021, Respondent sent an email to the process server, with a blind copy to Ms. Flanagan, with the Subpoena Duces Tecum attached and service instructions. (VSB Exhibits 7 and 16). The Board does not find credible Respondent's suggestion that others with access to his email account could have sent this email.
13. The Board does not find credible Respondent's uncorroborated testimony that his new

office assistant, who had been working for him for only two or three weeks, filed these pleadings on his behalf, using his electronic signature, without his knowledge or expressed directions.

Following deliberation, the Board determined that the Respondent has not proved by clear and convincing evidence that he has complied with Part Six, § IV, ¶ 13-29 of the Rules and the terms of his suspension order entered May 14, 2021.

### **III. IMPOSITION OF SANCTION**

Thereafter, the Board received further evidence and argument in aggravation and mitigation from the Respondent and the Bar. The Bar's evidence included Respondent's prior disciplinary record, which reflected he had received no prior public or private discipline except for a 90-day suspension in VSB Docket No. 19-032-114806. The Bar also presented the testimony of Jacklyn Brown, and VSB exhibits 17, 18, 19, and 20, without objection. Respondent's evidence included testimony of the Respondent, and witnesses Paul Mack, Sean Thornton, Major Lee Offen (Ret) and Kathleen McLaughlin, regarding Respondent's good character and reputation for honesty. The Board recessed to deliberate what sanction to impose upon its findings of noncompliance by Respondent.

The Board finds that Respondent knowingly violated his duty to the legal profession, the legal system and the public. There was no actual injury to a client or individual caused by his violation of the requirements of Part Six, § IV, ¶ 13-29, however there is injury to the legal profession and the legal system by Respondent's failure to abide by the terms of his suspension and maintain the integrity of the profession. Based on the evidence the Panel concludes that the Respondent knowingly violated the sanctions imposed by the State Bar's prior order of May 14, 2021.

The Board found the evidence in mitigation to be Respondent's good character and reputation for honesty and diligence. The evidence in aggravation included Respondent's prior recent disciplinary record, selfish motive in continuing to practice law in a suit where he was also one of the plaintiffs, and his refusal to acknowledge the wrongful nature of his conduct.

The Board finds that Respondent has failed to prove by clear and convincing evidence that his license to practice law in the Commonwealth of Virginia should not be further suspended or revoked and, accordingly, it is ORDERED that the Respondent, Brian Wesley Barger, Jr., is suspended from the practice of law for eight months, effective November 20, 2021.

It is further ORDERED that, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 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 immediately, and in no event later than 14 days of the effective date of the suspension, and make such arrangements as are required herein as soon as is practicable and in no event later than 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Clerk of the VSB within 60 days of the effective date 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 suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within 60 days of the effective date of the suspension. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

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 order to Respondent at his address of record with the Virginia State Bar, at Brian



Wesley Barger, Jr., 2920 W. Broad Street, Suite 102, Richmond, Virginia 23230, by electronic mail, first class mail and certified mail, return receipt requested; by electronic mail to Paul D. Georgiadis, Esquire; and by electronic mail to Laura Ann Booberg, Assistant Bar Counsel.

ENTERED this 7<sup>th</sup> day of December 2021.

VIRGINIA STATE BAR DISCIPLINARY BOARD

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Carolyn V. Grady  
Chair