

Prior to the commencement of the hearing, Bar Counsel and the Respondent submitted a Stipulation of Facts and Rule Violations, which the Board accepted as Joint Exhibit 1, and agreed that the Misconduct referenced below as set forth in the Stipulated Facts constitutes violations of the Rules of Professional Conduct as referenced below and for the reasons set forth:

I. STIPULATIONS OF FACTS

1. In 2002, Respondent was licensed to practice law, and she has been in good standing at all times relevant.

VS B Docket No. 23-033-128231

Elvin Rafael Gervacio

2. By order entered December 21, 2020, the Circuit Court of Nottoway County appointed Respondent as counsel for Elvin Rafael Gervacio. Gervacio was charged with two counts of possession of a Schedule I/II controlled substance and one count of prisoner in possession of marijuana/Schedule III Drug in violation of Va. Code Sections 81.2-250 and 53.1-203(6).
3. On March 15, 2021, Gervacio was convicted of all three counts.
4. On June 21, 2021, Gervacio was sentenced to ten years with eight years suspended on each offense, for a total of two years to serve, with the sentences running concurrently.
5. On July 20, 2021, Respondent, on Gervacio's behalf, filed a notice of appeal of Gervacio's convictions and sentence in the Court of Appeals of Virginia.
6. By e-mail dated November 17, 2021, the Court of Appeals of Virginia notified Respondent that the record of the proceedings in the trial court was received by the Court of Appeals of Virginia on November 17, 2021, and that, in appeals by petition, the petition for appeal was due no later than 40 days after the date on which the record was received. The e-mail also specified the deadlines for appeals of right. Gervacio's petition was then an appeal by petition and not an appeal of right.
7. On December 27, 2021, Respondent filed a petition for appeal on behalf of Gervacio with the Court of Appeals of Virginia.
8. On January 1, 2022, Va. Code Section 17.1-407 was amended providing Gervacio an appeal of right to the Court of Appeals of Virginia.
9. By order entered January 18, 2022, the Court of Appeals of Virginia referenced the statutory amendment allowing an appeal of right to the Court of Appeals of Virginia and provided a briefing schedule before the Court of Appeals of Virginia by which

the filing deadlines for the assignments of error and the opening brief were February 2 and 27, 2022 respectively, pursuant to Rules 5A:25(d) and 5A:19(b), also cited in the order.

10. Respondent did not timely file the opening brief.
11. By order entered March 18, 2022, the Court of Appeals of Virginia dismissed Gervacio's appeal because Respondent did not timely file the opening brief.
12. On April 18, 2022, Respondent filed a motion to reopen the appeal because Respondent asserted that she was unaware of the conversion of Gervacio's appeal to an appeal of right. Respondent requested that Gervacio be allowed to submit an opening brief in the Court of Appeals of Virginia.
13. By email dated April 19, 2022, the Court of Appeals of Virginia notified Respondent that the time to appeal to the Supreme Court of Virginia concluded April 17, 2022, and the Court of Appeals of Virginia no longer had jurisdiction and could not act on Respondent's motion.
14. Also, by the same email dated April 19, 2022, the Court of Appeals of Virginia referenced Va. Code Section 19.2-321.1, which permits filing the Court of Appeals motions for delayed appeals criminal cases that have been dismissed for failure to adhere to time limits in the perfection of an appeal, and stated, "if Code § 19.2-321.1 is applicable, you may want to consider filing a motion for a delayed appeal. I have provided you with a link to that Code Section."
15. Respondent did not file a motion for delayed appeal.
16. Respondent did not notify Gervacio of the dismissal of Gervacio's appeal, the reason his appeal was dismissed, or Gervacio's option of filing a motion for delayed appeal or petition for writ of habeas corpus or the deadlines by which to do so.

Sameer Abraham Ismael

17. By order entered August 17, 2022, the Circuit Court of Dinwiddie County appointed Respondent to represent Ismael in his appeal of convictions for misdemeanor failure to appear and contempt, misdemeanor destruction of property with intent to steal, and felony issuance of bad checks. By order entered July 20, 2022, Ismael was sentenced to 10 days on the failure to appear charge; 12 months with nine months suspended on the destruction of property with intent to steal charge; and five years with four years and nine months suspended on the felony issuance of bad checks charge, all sentences to run concurrently.
18. On September 16, 2022, Respondent, on Ismael's behalf, filed a notice of appeal from the order entered July 20, 2022.

19. By order entered October 21, 2022, the Court of Appeals of Virginia dismissed Ismael's appeal because Respondent did not timely file the notice of appeal with the clerk of the trial court.
20. On October 28, 2022, Respondent filed an assignment of error with the Court of Appeals of Virginia. Respondent asserted that the trial court erred in finding that the Commonwealth established that the trial court had jurisdiction over the matter adjudicated.
21. On November 21, 2022, Respondent filed a "motion to reopen/reconsider" with the Court of Appeals of Virginia stating that appellant timely electronically filed his appeal with the Court of Appeals of Virginia.
22. On November 22, 2022, Respondent filed a motion for extension of time with the Court of Appeals of Virginia stating that she never received notice that the Court of Appeals of Virginia received the record, nor did she receive a copy of the electronically filed record.
23. On November 29, 2022, Respondent filed her opening brief and an amended opening brief.
24. By order entered December 9, 2022, the Court of Appeals of Virginia dismissed as untimely the "Motion to Reopen/Reconsider," which the Court treated as a petition to set aside the judgment rendered October 21, 2022, and for rehearing.
25. In an email of December 9, 2022, to Respondent, the Court of Appeals of Virginia stated in bold: "**Counsel may want to consider filing a motion for a delayed appeal pursuant to Va. Code section § 19.2-321.1.**"
26. Respondent took no further action, including filing a motion for delayed appeal.
27. Respondent did not advise Ismael of the dismissal of Ismael's appeal, the reason Ismael's appeal was dismissed, or Ismael's option to file a motion for delayed appeal or petition for writ of habeas corpus or the deadlines by which to do so.

VSB Docket No. 24-033-130230

Jimmy Lee Merhout

1. On August 30, 2022, the Circuit Court of Petersburg entered final judgment against Jimmy Lee Merhout. Merhout was convicted of murder, use of a firearm in the commission of murder, perjury, and ten counts of attempted unlawful wounding in the commission of a felony. Merhout was sentenced to life plus a term of years.

2. On September 26, 2022, trial counsel timely noted an appeal on Merhout's behalf.
3. By order entered September 27, 2022, the Circuit Court of Petersburg, on trial counsel's request, ordered the court reporter to prepare and file the trial transcript.
4. By order of substitution entered October 24, 2022, the Circuit Court of Petersburg substituted Respondent as Merhout's counsel on the appeal.
5. Respondent was required to file a transcript or statement of facts no later than October 31, 2022.
6. Respondent did not timely file the transcript nor did she file a statement of facts.
7. Respondent had until November 28, 2022 to file a motion seeking an extension of the filing deadline.
8. Respondent did not seek an extension of the filing deadline.
9. Respondent filed the trial transcript on November 28, 2022, 28 days late.
10. Respondent filed the opening brief and an amended opening brief on January 10 and 11, 2023.
11. By email dated August 1, 2023, the Court of Appeals of Virginia asked Respondent and the Assistant Attorney General ("AAG") representing the Commonwealth to submit a supplemental brief addressing whether the transcripts were timely filed and if not whether either party waived reliance on the time requirement.
12. By email dated August 7, 2023, "Subject: Response Required: Jimmy Lee Merhout v. Commonwealth of Virginia; Record No. 1484-22-2-Supplemental Brief," Importance: High, the Court of Appeals of Virginia asked Respondent and the AAG to acknowledge receipt of the email within five days. The AAG responded by email August 7.
13. By email dated August 11, 2023, the CAV asked Respondent to "**[p]lease acknowledge receipt of this notice by return e-mail as soon as possible.**"
14. By email dated August 21, 2023, "Subject: 3rd Attempt: RESPONSE REQUIRED: Jimmy Lee Merhout v. Commonwealth of Virginia; Record No. 1484-22-2-Supplemental Brief" the Court asked Respondent again to please acknowledge receipt of the email and referenced that it was a follow-up to the emails sent August 1 and 11.
15. On August 22, 2023, the assistant attorney general filed a supplemental brief arguing that the parties could not waive the strictly enforced timeliness requirement for the filing of the trial transcript and that Merhout was not without the remedy of a motion for delayed appeal pursuant to Va. Code Section 19.2-321.1 or a petition for writ of habeas corpus.

16. By email dated August 24, 2023, Respondent acknowledged receipt of the emails and stated that she would file a supplemental brief shortly.
17. By email dated September 7, 2023, the Court of Appeals of Virginia advised Respondent that it had not received a supplemental brief from her and asked her to acknowledge receipt.
18. Respondent did not file a supplemental brief.
19. By order entered October 12, 2023, the Court of Appeals of Virginia affirmed Merhout's convictions of murder, use of a firearm in the commission of murder, perjury, and ten counts of attempted unlawful wounding in the commission of a felony because Respondent failed to timely file a transcript or written statement of facts in lieu of a transcript. The Court of Appeals noted, "Because the transcripts are indispensable to the issues raised, we cannot reach his assignments of error and we must affirm his convictions."
20. By the same order, the Court of Appeals of Virginia did not approve payment to Respondent because "the representation provided appellant by his court-appointed counsel fell significantly below the standard expected of counsel who serve on a court-appointed basis..."
21. Respondent never met or talked with Merhout. Merhout states that he wrote to her without response and that three people also attempted, in vain, to contact her. Respondent states that she did notify Merhout, through his sister-in-law, that she noted the appeal, and it was a lengthy process and that the Court of Appeals of Virginia would not accept witness testimony.
22. Respondent did not tell Merhout that his appeal was dismissed, why his appeal was dismissed, or of any of his options, including a motion for delayed appeal or petition for writ of habeas corpus. Merhout only learned of the dismissal of his appeal during his December 4, 2023, interview with the bar investigator.
23. In her January 8, 2024, interview with the bar investigator, Respondent admitted that she did not tell Merhout of the dismissal of his appeal, or of his options because "she was hoping to find out whether she could get the delayed appeal first."
24. Also, during her interview with the bar investigator, Respondent told the bar investigator that she gets anxious when hearing from the Court of Appeals of Virginia and does not want any to handle any more appeals.
25. As of February 14, 2024, Respondent has not filed a motion for delayed appeal on Merhout's behalf. The deadline to file a delayed appeal for Merhout is "within six months after the appeal has been dismissed, the conviction has been affirmed, or the circuit court judgment sought to be appealed has become final, whichever is later." Va. Code Section 19.2-321.1.A.

II. STIPULATED RULE VIOLATIONS

The Stipulated Facts constitute violations of the following Rules of Professional Conduct by clear and convincing evidence:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

By failing to (1) timely file an opening brief for Gervacio, (2) take any steps to correct her failure to timely file the opening brief while the Court of Appeals of Virginia retained jurisdiction over Gervacio's appeal, (3) timely note Ismael's appeal with the trial court, (4) timely petition to set aside the judgment against Ismael and request a rehearing, (5) timely file the transcript or a written statement of facts in lieu of the transcript for Merhout, or file a motion seeking an extension of time to file the transcripts, (6) communicate to any of the clients referenced herein that their appeals were dismissed, the reasons the appeals were dismissed, and the clients' options after their appeals were dismissed, including the possibility of motions for delayed appeal or petitions for writ of habeas corpus, even after being reminded of the options by the Court of Appeals of Virginia, and (7) pursue motions for delayed appeals on behalf of any of the clients, Respondent violated Rule 1.1.

RULE 1.3 Diligence

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

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services but may withdraw as permitted under Rule 1.16.

By failing to (1) timely file an opening brief for Gervacio, (2) take any steps to correct her failure to timely file the opening brief while the Court of Appeals of Virginia retained jurisdiction over Gervacio's appeal, (3) timely note Ismael's appeal with the trial court, (4) timely petition to set aside the

judgment against Ismael and request a rehearing, (5) timely file the transcript or a written statement of facts in lieu of the transcript for Merhout, or file a motion seeking an extension of time to file the transcripts, (6) communicate to any of the clients referenced herein that their appeals were dismissed, the reasons the appeals were dismissed, and the clients' options after their appeals were dismissed, including the possibility of motions for delayed appeal or petitions for writ of habeas corpus, even after being reminded of the options by the Court of Appeals of Virginia, and (7) pursue motions for delayed appeals on behalf of any of the clients, Respondent also violated Rules 1.3(a), and 1.3(b).

RULE 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.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

By failing to communicate to any of the clients referenced in this Order that (1) their appeals were dismissed, (2) the reasons the appeals were dismissed, and (3) the clients' options after their appeals were dismissed, including the possibility of motions for delayed appeal or petitions for writ of habeas corpus, even after being reminded of the options by the Court of Appeals of Virginia, Respondent violated Rules 1.4(a) and 1.4(b).

RULE 1.16 Declining or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the representation will result in violation of the Rules of Professional Conduct or other law.

By failing to withdraw as counsel for Merhout when her anxiety prevented her from adequately representing him, and by failing to withdraw when she procedurally defaulted Gervacio and Ismael's appeals, Respondent violated Rule 1.16(a)(1).

III. SANCTION

After the Board found by clear and convincing evidence that the Respondent had violated the Rules of Professional Conduct identified in the Stipulations of Facts and Rule Violations (see above), the Board received further evidence and argument as to the appropriate sanction to be imposed, including aggravating and mitigating factors.

The Board heard testimony from Jimmy Lee Merhout, who appeared via the Microsoft Teams platform from the Buckingham Correctional Institution. Merhout was convicted in August of 2022 of murder and several other felonies. He is serving life plus twenty-five years and is currently incarcerated at the Buckingham Correctional Institution. He wished to appeal his convictions, but he has had no contact with Respondent whom the trial court appointed to pursue his appeal. Merhout stated that Respondent has never met with him, has never written to him, and has never sent him any paperwork whatsoever. He has attempted to contact Respondent by writing her two letters and has had his ex-wife, mother, and niece call her. His family reported that Respondent said she was going to send him something in the mail, but she never has. Respondent has stopped returning the phone calls of Merhout's family members. Merhout learned that his appeal had been dismissed from Bar Investigator Mike Powell. Merhout stated that he is still attempting to get an affidavit from Respondent and that there is currently no motion for a delayed appeal pending nor is there a petition for a writ of habeas corpus.

The Board also received a certification of Respondent's disciplinary record in Virginia, which reported that Respondent had no prior public or private disciplinary record. *VSB Ex. 2*

The Board heard testimony from Respondent Marlene Alice Harris. Ms. Harris testified briefly that she had contacted The Virginia Judges and Lawyers Assistance Program ("JLAP"), but she has not completed the process. She also stated that during this time she was suffering from personal and emotional problems. She stated that COVID was especially hard on her, and she apologized for the damage she had caused to her clients by her inaction.

IV. DISPOSITION

After considering the exhibits, testimony, and arguments, the Board was guided by Standard 4.42 of the Annotated Standards for Imposing Lawyer Sanctions (ABA 2015), which provides that a suspension is generally appropriate when the lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client or engages in a pattern of neglect and causes injury or potential injury to a client.

The Board considered as mitigating factors (1) that the Respondent did not have a prior disciplinary record, and (2) Respondent was suffering from personal or emotional problems but indicated that she “was not looking to use that as an excuse or a crutch,” and (3) Respondent expressed remorse at the hearing.

The Board considered as aggravating factors (1) a pattern of misconduct, and (2) the existence of multiple offenses, and (3) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with Rules or orders of the disciplinary agency, and (4) vulnerability of the victims, and (5) substantial experience in the practice of law, and (6) deceptive practices during the disciplinary process.

After due deliberation, the Board reconvened and announced its decision as follows:

It is **ORDERED** that Respondent’s license to practice law in the Commonwealth of Virginia be **SUSPENDED** for a period of **ONE YEAR**, effective immediately.

The suspension carries with it the following terms:

1. No later than 10 days after entry of the summary order in this matter, Respondent will contact the Virginia Judges and Lawyers Assistance Program (“JLAP”) to schedule an evaluation to be conducted by JLAP. Thereafter, Respondent will fully participate in the evaluation conducted by JLAP and will implement all of JLAP’s recommendations. Respondent will enter into a written contract with JLAP for a minimum period of 60 months and will comply with the

terms of such contract, including meeting with JLAP and its professionals as directed. Respondent will authorize JLAP to provide monthly reports to Bar Counsel stating whether Respondent is in compliance with JLAP's contract with Respondent.

Pursuant to Paragraph 13-18.0, Bar Counsel will monitor Respondent's compliance with the JLAP contract. If a JLAP representative and Bar Counsel determine Respondent is not in substantial compliance with her contract, Bar Counsel will serve notice requiring Respondent to show cause why the ultimate disposition should not be imposed.

2. On or before June 20, 2025, Respondent will complete six hours of continuing legal education credits by attending courses approved by the Bar in the subject matter of criminal appeals. Additionally, during the pendency of the JLAP contract, Respondent shall also take two hours of CLE credits in the area of lawyer wellness. Respondent's continuing legal education attendance obligations set forth herein will not be applied toward her mandatory continuing legal education requirement in Virginia or any other jurisdiction in which she may be licensed to practice law. Respondent will certify her compliance with the terms set forth in this paragraph by delivering a fully and properly executed Virginia MCLE Board Certification of Attendance form to Bar Counsel promptly following her attendance of such CLE programs.

The alternative sanction in the event of non-compliance will be revocation.

It is further **ORDERED** that Respondent must comply with the requirements of Part Six, Section IV, Paragraph 13-29 of the *Rules* and notice all clients that she is currently representing, judges, and opposing counsel.

It is further **ORDERED** that pursuant to Part Six, Section IV, Paragraph 13-9 E. of the *Rules*, the Clerk shall assess all costs against the Respondent.

The Chair concluded the hearing by noting that the Board struggled with the appropriate sanction in this matter given the egregiousness of the Respondent's misconduct and the

vulnerability of her clients. The Board's decision not to revoke Respondent's license was ultimately governed by a desire to assist Respondent in gaining access to resources that would help her obtain the help that she needs to successfully return to the practice of law. The Chair also informed the Respondent that the Board's decision was an opportunity for her and that if she should fail to accept the opportunities afforded by the imposed terms, the Board would impose the alternate sanction of revocation if necessary.

It is further **ORDERED** that the Clerk shall mail an attested copy of this Memorandum Order of Suspension to Respondent, Marlene Alice Harris, by certified mail, return receipt requested to PO Box 4279, Midlothian, Virginia 23112, Respondent's last address of record with the Bar, and at attyharris@gmail.com; and a copy by electronic mail to Renu M. Brennan, Bar Counsel.

ENTERED this 10th day of September, 2024

VIRGINIA STATE BAR DISCIPLINARY BOARD



Jennifer D. Royer, First Vice-Chair