VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF WAYNE RICHARD HARTKE

VSB DOCKET NUMBERS 08-053-070206, 09-053-078491, 09-053-079792 AND 10-053-081287

ORDER OF PUBLIC REPRIMAND WITH TERMS

This matter came on August 26, 2011, to be heard before a duly convened panel of the Virginia State Bar Disciplinary Board consisting of Thomas R. Scott, Chair, Nancy C. Dickenson, Whitney G. Saunders, Tyler E. Williams, III, and Robert W. Carter, lay member.

The Virginia State Bar (the "Bar") was represented by Seth Mark Guggenheim, Assistant Bar Counsel. Wayne Richard Hartke (the "Respondent") appeared in person, pro se. Tracy J. Stroh, a registered professional reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn reported the hearing and transcribed the proceedings.

The Chair opened the proceedings and polled the members of the Board as to whether any of them had any personal or financial interest, which would impair, or reasonably could be perceived to impair, his ability to be impartial. Each member of the Board, including the Chair, responded in the negative.

This matter came before the Board on the four Subcommittee Determinations for Certification by the Fifth District Subcommittee of the Bar. The Certifications were sent to Respondent on October 28, 2010 (VSB Docket No. 08-053-07026) and November 1, 2010 (VSB Docket Nos. 09-053-078491, 09-053-079792 and 10-053-081287.)

At the commencement of the hearing, Bar Exhibit 1, "Stipulations of Fact and Regarding Evidence" was admitted, without objection by the Respondent.

The Bar called David G. Fennessey, State Bar investigator as a witness. At the conclusion of his testimony, the Bar rested. The Respondent, Wayne Richard Hartke offered a letter from the probation department as Exhibit 1, a Proffer letter from the U.S. Attorney's Office as Exhibit 2, and a letter and court order as Exhibit 3. The Respondent, Wayne Richard Hartke testified in his behalf. Thereafter, the Chair closed the presentation of evidence.

I. FINDINGS OF FACT

Based on the "Stipulations of Fact and Regarding Evidence" entered into by the Virginia State Bar and Wayne Richard Hartke, the Board makes the following findings of fact on the basis of clear and convincing evidence:

1. At all times relevant to the facts set forth herein, Wayne Richard Hartke ("Respondent") was an attorney licensed to practice law in the Commonwealth of Virginia.

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2. On August 16, November 22, and December 3, 2006, Gibran Sehbai was charged in Fairfax County, Virginia, with misdemeanor and felony charges arising from alleged traffic and drug offenses. Kimberly J. Phillips (Complainant #1), a member of the Virginia State Bar, was appointed by the Fairfax County General District Court on successive occasions to represent Mr. Sehbai.

3. By motion filed in the aforesaid court on January 10, 2007, Ms. Phillips successfully moved to have Mr. Sehbai's multiple preliminary hearing dates for thirteen cases consolidated for hearing on March 5, 2007.

4. A former client of the Respondent, who was also a friend of Mr. Sehbai, contacted Mr. Sehbai's mother, Ms. Sara Sehbai (Complainant #2), and recommended that the Respondent be retained to represent Mr. Sehbai because it would be better for her son to have the Respondent as his attorney than a court-appointed lawyer.

5. Ms. Sehbai contacted the Respondent by telephone. According to the Respondent, he informed Ms. Sehbai that he would represent her son for "an initial non-refundable $10,000 fee." In an e-mail which the Respondent sent to Ms. Sehbai on February 16, 2007, he informed her that he had "asked for a $10,000.00 retainer fee to represent [her son]. The actual ultimate cost may be more, but I cannot tell you at this time."

6. On February 23, 2007, Ms. Sehbai caused a wire transfer of the legal fee (in the net amount of $9,960.00) to be deposited in the Respondent's attorney operating account at United Bank, which was the bank account designated by the Respondent in his e-mail to Ms. Sehbai of February 16, 2007. As of the dates of the e-mail and of the wire transfer, the Respondent had not earned $9,960.00 in legal fees. The funds so wired were not deposited in an attorney escrow account.

7. At no time following his receipt of the wired funds did the Respondent enter his appearance as counsel of record for Mr. Sehbai with regard to any or all of the charges pending against Mr. Sehbai. Respondent contends that he presented a Substitution of Counsel form to Ms. Phillips' office, but she was not present and it was never entered.

8. The Respondent failed to appear on the scheduled preliminary hearing date of March 5, 2007. Ms. Phillips, who had been advised that the Respondent would be appearing in court on that date, and who remained counsel of record in the cases, waited approximately two

hours in court for the Respondent to appear, at the conclusion of which time, with no telephone or other notice from the Respondent having been received by Ms. Phillips, the court, or the prosecutor concerning the Respondent's absence, the court continued the preliminary hearing to March 12, 2007.

9. On March 5, 2007, Ms. Phillips and the assistant commonwealth's attorney assigned to Mr. Sehbai's cases were able to agree on a plea offer to dispose of the charges against Mr. Sehbai. Even prior to March 5, 2007, Ms. Phillips and the assistant commonwealth's attorney had discussed a potential plea agreement. Ms. Phillips advised Mr. Sehbai that his cases were continued, that a plea offer was outstanding, and that she would need to discuss it with him in detail.

10. After March 5, 2007, Ms. Phillips reached the Respondent by telephone. He advised her that he had discussed the plea offer with the prosecutor, and that he would need to review the guidelines to determine if the offer were acceptable.

11. The Respondent visited Mr. Sehbai in the detention center on March 8, 2007, but did not take with him to exhibit to, and discuss with, Mr. Sehbai the sentencing guidelines and the worksheet which is used to determine the sentencing guideline range. (The Respondent, however, contends that he did orally review the guideline ranges for the offenses in question with Mr. Sehbai on prior occasions.) Mr. Sehbai informed the Respondent that he did not want the Respondent to serve as his attorney.

12. Ms. Phillips met with Mr. Sehbai on March 9, 2007, and on successive occasions thereafter. As court-appointed counsel for Mr. Sehbai, she successfully concluded the charges pending against him consistent with a plea agreement reached as of March 12, 2007, with the assistant commonwealth's attorney.

13. On or about March 7, 2007, Ms. Sehbai sent the Respondent a letter, requesting a refund of fees paid to him. On March 23, 2007, an attorney engaged by Ms. Sehbai and her son sent a letter via facsimile and regular mail to the Respondent, stating that Ms. Sehbai had previously requested a refund of fees, and that such request had not been honored. The attorney's letter stated, *inter alia*, as follows:

In an attempt to resolve this matter amicably, they are seeking a refund of an amount of no less than $8,500.00. This will taken [*sic*] into account the bank fees of $40.00 for the wire transfer and any attorney's fees that you think you may be entitled to for the limited time spent on this matter, if any. In sending your refund, if the amount you send is less then [*sic*] the $8,500.00, we also request that you provide a detailed accounting of time spent.

14. The Sehbais' attorney received a telephone call from the Respondent, who stated that he was not going to make a refund as requested in the letter. The Respondent claimed during the phone call that he had done all of the work in Mr. Sehbai's case and that he had earned the fee charged. The Respondent at no time thereafter provided to the Sehbais or their attorney any accounting of the application of fees paid to legal services rendered, and he at no

time refunded all, or any portion, of the $9,960.00 wired to his attorney operating account, as aforesaid.

15. The Respondent answered the bar complaint filed in this matter, claiming to have performed "extensive" services for Mr. Sehbai, and referring to calls made, meetings had, and documents reviewed in connection with the matter. The Respondent made references in his answer in several instances that information being provided was in accordance with his "notes." The Respondent stated, *inter alia*, in his answer that

*** I had met with the defendant in jail on 4 occasions and met with his mother; I was committed to resolving this very difficult case. My car is destroyed, but my plea agreement is intact. I did my job, and I'm certainly entitled to not only the initial $10,000 fee, but to much more that I am sure I will never recover from Sara Sehbai in Pakistan. ***

16. The Virginia State Bar issued a subpoena *duces tecum* to the Respondent on February 3, 2010, requiring production of this client file in this matter, and other documents, on or before February 24, 2010. The Respondent advised the investigator that he was not able to locate his client file, and he confirmed that contention in writing on or about April 14, 2010.

17. The Bar's investigation of this matter revealed that the assistant commonwealth's attorney responsible for prosecuting the charges against Mr. Sehbai had no notes to indicate that he had any discussions with the Respondent regarding a plea offer or that the Respondent was going to be substituted as counsel for Mr. Sehbai. While conceding that it was possible that he spoke to the Respondent by telephone concerning the matters, he had no recollection of doing so or notes to support the fact that any conversations occurred.

18. The Bar's investigation further revealed that the Respondent visited Mr. Sehbai at the detention center on February 8, 2007, for 45 minutes; on February 28, 2007, for 19 minutes; on March 8, 2007, for 8 minutes; and on March 11, 2007, for 3 minutes. The Respondent contends to the Virginia State Bar, however, that he did have telephone conversations with Mr. Sehbai in addition to the aforementioned visits.

As to VSB Docket No. 09-053-078491

19. On or about September 3, 2007, Ms. Sherry Mosley, the mother of Mr. Jeremy P. Mosley ("Complainant"), executed an "Engagement Agreement" presented to her by the Respondent requiring payment of an hourly rate of $320, with "an initial non-refundable payment of $10,000" to represent the Complainant in a criminal matter then pending in the United States District Court for the Eastern District of Virginia, Alexandria Division. The Respondent presented an identical "Engagement Agreement" to the Complainant, which the Complainant executed on or about September 26, 2007.

20. A check dated September 4, 2007, in the sum of $10,000.00 was thereafter presented to the Respondent, which he deposited to his attorney operating account at United Bank on September 12, 2007. As of September 12, 2007, the Respondent had not earned the

sum of $10,000.00 for legal services performed on behalf of the Complainant. The funds were not deposited to an attorney escrow account.

21. The Respondent was substituted as counsel of record for the Complainant on September 21, 2007. The Complainant had theretofore been represented by an assistant federal public defender.

22. The Respondent made two court appearances on behalf of the Complainant. The first appearance was on September 21, 2007, regarding his substitution as Complainant's counsel and argument of a bond motion, which motion was denied. The second appearance was on November 9, 2007, at which time he was removed by the Court as Complainant's counsel following the Complainant's request for new counsel made directly to the Court.

23. Ms. Mosley and the Complainant thereafter requested that the Respondent provide a refund of fees paid, which the Respondent refused to do. The Complainant filed a bar complaint when attempts to secure a refund proved unsuccessful.

24. The Respondent informed a Virginia State Bar investigator that the $10,000.00 paid to him was a flat fee to handle the Complainant's case through trial. He stated that because he had charged a flat fee he kept no billing statements, time sheets, or records to document how the fee was earned or the total number of hours expended in the matter. The Respondent contends to the Virginia State Bar that outside of the court appearances, he performed substantial services by way of investigation and consultation with witnesses, including officers in Warrenton, Virginia, and that he met with the Assistant United States Attorney and conducted negotiations.

25. The Respondent admitted to the investigator that he did not send the Complainant or Ms. Mosley an accounting of the hours he devoted to the Complainant's legal matter.

As to VSB Docket No. 09-053-079792

26. On May 5, 2009, the Respondent appeared in Courtroom 2-K of the Fairfax County General District Court. The Respondent entered and exited the courtroom during the docket call, during which time two deputy sheriffs with courtroom duty observed behavior which suggested that the Respondent had consumed alcohol prior to his appearance in court.

27. The two deputy sheriffs smelled the odor of alcohol on the Respondent's breath. Following an initial refusal to submit to a breath test, the Respondent had a colloquy with the presiding judge, and thereafter submitted to a breath test via an alcosensor device.

28. A blood alcohol content reading of .04 was reported by the alcosensor device. The Respondent denied consuming alcohol that morning, claiming that the odor must have been from mouthwash. Upon questioning, the Respondent stated that he had "a few drinks while watching the basketball game" the previous evening.

29. The Respondent acknowledged to the presiding judge that two other judges of the Fairfax County General District Court had talked to the Respondent about an alchol problem. The presiding judge concluded that the Respondent's conduct constituted "misbehavior of an officer of the court in his official character," and was therefore contemptuous, in violation of Section 18.2-456 of the 1950 Code of Virginia, as amended. The Respondent was convicted under the said statutory provision and fined the sum of $250.00.

30. On June 16, 2009, at approximately 2:20 p.m., the Respondent was present with his client for a hearing before the Fairfax County General District Court. A Fairfax County detective and another attorney detected the odor of alcohol on the Respondent's breath. A deputy sheriff was notified, who, in turn, informed the presiding judge.

31. The judge called the Respondent to the podium in the courtroom and asked the Respondent if he had been consuming alcohol that day. The Respondent replied that he had not consumed any alcoholic beverages that day.

32. The Respondent agreed to submit to a breath analysis. A breathalyzer test was administered, and the blood alcohol content reading was .127. The presiding judge thereupon found the Respondent in contempt of court, and immediately imposed a sentence of incarceration for a period of 10 days.

33. When interviewed by a Virginia State Bar investigator on April 14, 2010, in the presence of his counsel, concerning the events of June 16, 2009, the Respondent informed the investigator that he had consumed alcoholic beverages during lunch prior to the court hearing on that date.

34. The Respondent informed the investigator that when questioned by the judge regarding his consumption of alcohol that day, he informed the judge that he had not consumed any alcoholic beverages. The Respondent admitted to the Virginia State Bar investigator that he had been untruthful with the judge, hoping that the judge would drop the issue.

35. The Respondent was substituted as counsel of record in the Arlington County General District Court for Samuel Abdullah Posey, who was facing criminal charges arising from alleged possession with intent to distribute cocaine.

36. During the Respondent's court appearance on behalf of his client, Assistant Commonwealth's Attorney Molly Newton, the prosecutor in the matter, smelled the strong odor of alcohol on the Respondent's breath, found his speech to be incoherent, and observed that he was unsteady when walking.

37. On other occasions when she spoke to the Respondent on the telephone concerning Mr. Posey's case, Ms. Newton found the Respondent incoherent, repeating himself, and desiring to cover matters concerning his client's case which had been previously discussed with her. The Respondent contends to the Virginia State Bar that his repetition of matters dealt with his client's accommodation defense.

38. Following several continuances, a plea of guilty to possession with intent to distribute cocaine was entered by Mr. Posey in the Arlington County Circuit Court on September 24, 2009, with the Respondent present.

As to VSB Docket No. 10-053-081287

39. On January 3, 2009, Jonathan T. Howe, a resident of Pennsylvania, was charged with grand larceny in Fairfax County, Virginia. Mr. Howe appeared in the Fairfax County General District Court with his father, Steven Lee Howe ("Complainant") on February 11, 2009, at which time it was determined that Jonathan T. Howe qualified for court-appointed counsel.

40. The Complainant and his son encountered the Respondent in the courthouse. After speaking with Jonathan T. Howe, the Respondent offered to represent him for a fee of $1,500.00, which Jonathan T. Howe accepted, and agreed with the Respondent would be paid in installments. No written fee agreement was ever executed. Following payments to him totaling $800.00, the Respondent sent a letter to Mr. Jonathan Howe on or about May 25, 2009, stating that a balance remained due of $1,700.00.

41. When the Complainant brought to the Respondent's attention in an e-mail that the agreed fee was $1,500.00, and not $2,500.00, the Respondent replied by e-mail that "If that is what I agreed to, then I will live with it. My records show differently, but we may discuss that. If I agreed to the lesser fee, which is not reflected in my notes, then I will agree with that."

42. When interviewed by a Virginia State Bar investigator concerning this matter, the Respondent stated that he received two payments from the Complainant that totaled $800.00, the first of which was "probably" received on February 25, 2009, in the form of a check or money order in the sum of $400.00. The Respondent stated that he had no notes to indicate the date he received the first payment and that he had no record of how he handled or negotiated the check or money order. The Respondent stated that he did not deposit the payments received in his attorney escrow account because the funds had been earned. The Howe case resulted in the reduction of the felony charge to a misdemeanor.

NATURE OF MISCONDUCT

The Virginia State Bar and the Respondent stipulated that the Respondent has violated the following Virginia Rules of Professional Conduct:

RULE 1.3 Diligence

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

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.

RULE 1.5 Fees

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

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(2)funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

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:

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client[.]

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

RULE 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

make a false statement of fact or law to a tribunal[.]

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a . . . deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law[.]

DISPOSITION

Upon review of the foregoing Stipulations of Facts, upon evidence from witnesses presented on behalf of the Bar and upon evidence presented by Respondent in the form of exhibits and his own testimony, and at the conclusion of the evidence regarding misconduct, the Board recessed to deliberate. After due deliberation the Board reconvened and stated its findings as follows:

1. Based on the Stipulations Regarding Violations of Rules of Professional Conduct entered into by the parties, the Board determined that the Bar did prove by clear and convincing evidence that the Respondent was in violation of Rule 1.3 (Diligence), Rule 1.4 (Communication), Rule 1.15 (Fees), Rule 1.15 (Safekeeping Property), Rule 1.16 (Declining or Terminating Representation) Rule 3.3 (Candor Toward the Tribunal), and Rule 8.4 (Misconduct) of the Rules of Professional Conduct.

Thereafter, the Board received further evidence of aggravation and mitigation from the Bar and Respondent, including testimony from the Respondent, Respondent's wife, financial information regarding Respondent's current status, testimony regarding Respondent's treatment for alcohol addiction, his successful completion of an eighteen month contract with Lawyers Helping Lawyers and Respondent's prior disciplinary record (See Bar Exhibit 2). As part of its Stipulation, the Virginia State Bar did not oppose Respondent's request that he receive a Public Reprimand with Terms.

The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent.

After due deliberation, the Board reconvened to announce the sanction imposed, which was a Public Reprimand with Terms.

Accordingly, it is ORDERED that the Respondent, Wayne Richard Hartke, receive, and the Board hereby imposes upon him effective August 26, 2011, a PUBLIC REPRIMAND WITH TERMS. The terms and conditions of such discipline are as follows:

1. The Respondent Wayne Richard Hartke shall forthwith enter into a contract with Lawyers Helping Lawyers for a period of two years, or less if deemed appropriate by the Director of Lawyers Helping Lawyers.

2. The Respondent Wayne Richard Hartke shall employ a Law Office Management consultant as approved by the Virginia State Bar.

3. The Respondent Wayne Richard Hartke shall not violate Rules 1.5, 1.15, 8.4 (b), or 8.4(c).

In the event the terms and conditions set out above are violated by the Respondent, an alternate sanction of a suspension of his license to practice law in Virginia for a period of five years shall be imposed.

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 by certified mail, return receipt requested, to Respondent at his address of11890 Sunrise Valley Drive, Reston, Va., 20191, and to Seth Guggenheim, Senior Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 7th day of October, 2011

VIRGINIA STATE BAR DISCIPLINARY BOARD

Thomas R. Scott

Thomas R. Scott, Chair