

**RECEIVED**

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA NOV 25 2008

VIRGINIA STATE BAR ex rel )  
FOURTH DISTRICT COMMITTEE SECTION II, )  
Complainant, )  
v. )  
JOHN W. TOOTHMAN, )  
Respondent. )

**VSB CLERK'S OFFICE**

Case No. CL06002481

**FINAL ORDER**

On October 14 and 15, 2008, proceedings continued before the three-judge panel in the Circuit Court of the City of Alexandria, Virginia, in accordance with the August 22, 2007, and September 11, 2007, Orders of the Supreme Court of Virginia. By designation of the Chief Justice of the Supreme Court of Virginia, dated October 2, 2008, and pursuant to Virginia Code Section 54.1-3935, the three-judge panel consisted of the Honorable Beverly W. Snukals, Judge of the Thirteenth Judicial Circuit and Chief Judge of this panel, the Honorable James E. Kulp, Retired Judge of the Fourteenth Judicial Circuit of Virginia, and the Honorable Charles E. Poston, Judge of the Fourth Judicial Circuit.

Yvonne DeBruyn Weight, Special Assistant Bar Counsel, appeared on behalf of the Virginia State Bar, and the Respondent, John W. Toothman, appeared pro se.

Upon the conclusion of the Complainant's evidence, Respondent moved to strike the Bar's evidence as to all allegations of misconduct pursuant to Virginia Supreme Court Rule, Part 6, § IV, ¶ 13.I.2.d. Based upon the entire record herein, the panel unanimously sustained the

motion to strike, finding that the Bar failed to introduce sufficient evidence that would under any set of circumstances support the conclusion that the Respondent engaged in misconduct.

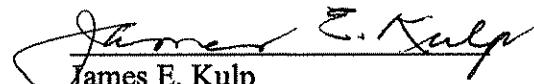
WHEREFORE it is ORDERED that all allegations of misconduct against Respondent John W. Toothman are hereby DISMISSED WITH PREJUDICE.

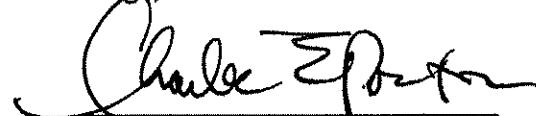
It is further ORDERED that a copy teste of this Order shall be mailed by certified mail to the Respondent.

AND THIS ORDER IS FINAL.

ENTERED this 6<sup>th</sup> day of November, 2008.

  
Beverly W. Snukals  
Chief Judge of the three-judge panel

  
James E. Kulp  
Judge, Retired

  
Charles E. Poston  
Judge

A COPY TESTE:  
EDWARD SEMONIAN, CLERK  
BY , DEPUTY CLERK  
CERTIFIED THIS 12<sup>th</sup> DAY OF Nov, 2008

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on Wednesday the 22nd day of August, 2007.*

John W. Toothman,

Appellant,

against Record No. 062630  
Circuit Court No. CL06002481

Virginia State Bar, ex rel.  
Fourth District Committee,

Appellee.

Upon an appeal of right  
from a judgment rendered by the  
Circuit Court of the City of  
Alexandria.

Upon consideration of the record and the briefs filed by the appellant, pro se, and counsel for the appellee, the Court is of the opinion that there is error in the judgment appealed from.

On September 19, 2006, a panel of three judges presiding in the Circuit Court of the City of Alexandria entered an order holding that appellant John Williams Toothman violated Rules 3.1 and 3.4(j) of the Virginia Rules of Professional Conduct. As a sanction for these violations, the court ordered that a public reprimand be imposed.

On appeal, Toothman asserts eight assignments of error to the court's judgment. This Court holds that the first two assignments of error warrant reversal of the judgment and, accordingly, the remaining six assignments of error will not be addressed.

Assignments of error numbered 1 and 2 state as follows:

"1. The three judge court erred in barring Toothman from offering evidence and testimony to challenge the charges brought against him by the Virginia State Bar, including

evidence that was unavailable at the time the circuit court sanctioned Toothman."

"2. The three judge court erred in barring Toothman in the sanctions portion of the hearing from offering evidence and testimony relevant to the conduct which the court had found to have violated Rules 3.1 and 3.4(j) of the Rules of Professional Conduct."

The charges that are the subject of this appeal arose out of an anonymous complaint regarding Toothman's conduct during litigation in the Circuit Court of Fairfax County. The trial court in that litigation held that Toothman violated Code § 8.01-271.1 by filing pleadings that were not well grounded in fact and were interposed for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. After stating its findings on the record at a hearing held on November 12, 2003, the court assessed monetary sanctions against Toothman in the amount of \$15,000.00. Toothman's petition for appeal of the sanctions order to this Court was refused on June 22, 2004. John W. Toothman v. James D. Turner, Record No. 040393.

Toothman's hearing before the three-judge court commenced on August 24, 2006. The Bar based its case principally on the transcript of the sanctions hearing held in the Circuit Court of Fairfax County on November 12, 2003, and on a news article that appeared in the Virginia Lawyers' Weekly newspaper. Toothman sought to adduce evidence purporting to explain his actions during the course of the litigation in Fairfax County Circuit Court, but was barred by the three-judge court from doing so. The court stated, "the court [is of the opinion] that Mr. Toothman cannot collaterally challenge the findings of [the trial court]." Later,

the court stated that "we are going to stand on our ruling that you are precluded from going into the underlying facts of that case."

On appeal, the Bar concedes that the three-judge court's evidentiary ruling was erroneous, because it prevented Toothman from contesting the charges brought against him by the Bar.

Toothman explained his intention as follows: "I'm asking to please have the opportunity to show that I did not do anything that violated any ethics rules, and I think one way to do that is to explain what I did and why." As stated by the Bar in its brief: "Toothman was, in effect, prevented from presenting evidence to show that his underlying conduct, despite the sanctions ruling, was not violative of the Rules of Professional Conduct." We agree with the Bar's position on this issue.

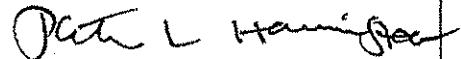
The Bar further concedes that the three-judge court erred in barring Toothman from presenting mitigation evidence during the sanctions portion of the hearing. The Rules of this Court provide a respondent with an opportunity to "cross-examine the Bar's witnesses and to challenge any evidence introduced on behalf of the Bar" and to "present witnesses and other evidence on [his own] behalf." Pt. 6, SIV, ¶¶ 13(H)(2)(f) and (I)(2)(c). Toothman sought to explain his reasons for taking the actions that he did in the litigation in the Fairfax County Circuit Court, so that his explanation could be considered as evidence in mitigation of the sanction to be imposed. He was prohibited from doing so. The three-judge court thus erred in barring Toothman from presenting such relevant mitigation evidence during the sanctions portion of the hearing. See Green v. Virginia State Bar, 272 Va. 612, 636 S.E.2d 412 (2006).

For the reasons stated, the judgment of the Circuit Court of the City of Alexandria holding that Toothman violated Rules 3.1 and 3.4(j) of the Rules of Professional Conduct is reversed, the sanction imposed by the court is vacated, and this case is remanded for further proceedings consistent with this order.

This order shall be certified to the said circuit court.

A Copy,

Teste:



Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

VIRGINIA STATE BAR *EX REL*  
FOURTH DISTRICT COMMITTEE SECTION II,

Complainant,

v.

Case No. CL06002481

JOHN WILLIAM TOOTHMAN, ESQUIRE,

Respondent.

**MEMORANDUM ORDER**

On the 24<sup>th</sup> and 25<sup>th</sup> days of August, 2006, this came before the Three-Judge Court empanelled on July 27, 2006, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to §54.1-3935 of the 1950 Code of Virginia, as amended, consisting of the Honorable Beverly W. Snukals, Judge of the Thirteenth Judicial Circuit and Chief Judge of this Three-Judge Court, the Honorable Joseph E. Spruill, Jr., Retired Judge of the Fifteenth Judicial Circuit and the Honorable James E. Kulp, Retired Judge of the Fourteenth Judicial Circuit of Virginia.

Marian L. Beckett, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar, and the Respondent, John William Toothman, Esquire, appeared *pro se*.

WHEREUPON, a hearing was conducted upon the Rule to Show Cause issued against the Respondent, which directed him to appear and to show cause why his license to practice law in the Commonwealth of Virginia shall not be suspended, revoked or otherwise sanctioned in accordance with the Rules of the Supreme Court of Virginia, Part Six, § IV, ¶ 13.

THEREAFTER, the Bar presented its evidence regarding misconduct in the matter, followed by the Respondent's presentation of his evidence as to misconduct. At the conclusion of the presentation of evidence, the Court heard argument, retired to deliberate, and returned to issue its rulings and findings in open court.

The Court unanimously found by clear and convincing evidence as follows:

1. At all times relevant hereto the Respondent, John William Toothman, Esq. (hereinafter the Respondent), has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On November 12, 2003, the Respondent was sanctioned by Judge Stanley P. Klein of the Circuit Court for Fairfax County in the amount of Fifteen Thousand Dollars (\$15,000).

3. Judge Klein ruled that by filing certain pleadings in ongoing litigation, the Respondent had violated Virginia Code § 8.01-271.1, which states in pertinent part:

The signature of an attorney ... constitutes a certificate by him that (i) he has read the pleading, motion or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact ... and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

4. Judge Klein found that the Respondent failed to make a reasonable inquiry as to whether the pleadings were well grounded in fact, filed pleadings that were not well grounded in fact, and that by doing so, acted with an improper purpose, thereby violating both sections (ii) and (iii) of Virginia Code § 8.01-271.1 above "in letter and in spirit".

5. The Respondent filed an appeal with the Supreme Court of Virginia. It was the

Supreme Court's opinion that there was no reversible error in the judgment complained of, and the petition for appeal was refused.

The Court finds that the Virginia State Bar has proved by clear and convincing evidence that the Respondent's conduct constitutes misconduct in violation of the following Rules of Professional Conduct:

**RULE 3.1 Meritorious Claims And Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

**RULE 3.4 Fairness To Opposing Party And Counsel**

A lawyer shall not:

- (j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

In announcing its findings the Court noted in particular that the Respondent brought proceedings for which he had no factual basis and were frivolous. In addition, the Court found that the Respondent filed pleadings when he knew, or when it was obvious that such an action would merely serve to harass.

Following the Court's announcement of its findings of fact and misconduct, the Court received evidence as to the Respondent's prior disciplinary record and as to the *ABA Standards for Imposing Lawyer Discipline*, and heard argument from both the Bar and the Respondent as to the appropriate sanction to be imposed. After due deliberation, upon consideration of the

Respondent's absence of a prior record and the nature of misconduct proved, the Court by majority decision

ORDERED that the sanction of a Public Reprimand be imposed, the dissenting judge being of the opinion that a thirty day suspension was warranted on the grounds that the Respondent's behavior far exceeded the bounds of ethical behavior and the fact that the Respondent holds himself out as an authority on legal ethics;

AND IT IS FURTHER ORDERED that the terms and provisions of the Summary Order entered by this Court pursuant to Part Six, § IV, ¶ 13 I(2)(h) of the Rules of the Supreme Court of Virginia and § 54.1-3935 of the Code of Virginia, 1950 as amended, following the hearing conducted on August 24 and 25, 2006, be, and the same hereby are, merged herein;

AND IT IS FURTHER ORDERED that pursuant to Part Six, § IV, ¶ 13(B)(8)(c) of the *Rules of the Virginia Supreme Court*, the Clerk of the Disciplinary System shall assess costs against the Respondent;

AND IT IS FURTHER ORDERED that compliance with Rule 1:13 of the *Rules of the Virginia Supreme Court* shall be dispensed with by this Court as allowed by Rule 1:13 in this Court's discretion;

AND IT IS FURTHER ORDERED that four (4) copies of this Order be certified by the Clerk of Circuit Court of the City of Alexandria, and be thereafter mailed by said Clerk to the Clerk of the Disciplinary System of the Virginia State Bar at 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, for further service upon the Respondent and Bar Counsel consistent with the rules and procedures governing the Virginia State Bar Disciplinary System.

AND THIS ORDER IS FINAL.

ENTERED this 19<sup>th</sup> day of September, 2006.

Beverly W. Snukals

BEVERLY W. SNUKALS

Chief Judge of the Three-Judge Court

Joseph E. Spruill, Jr.

JOSEPH E. SPRUILL, JR.

Judge, Retired

James E. Kulp

JAMES E. KULP

Judge, Retired

Copy to:  
Edward Semonian, Clerk

By Chp Bld, Deputy Clerk

Certified this 28<sup>th</sup> day of September 2006