VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF JAY LAWRENCE PICKUS	)))	VSB Docket No. 09-033-076639

AMENDED
ORDER OF SUSPENSION

This matter came on to be heard on February 19, 2010, before a panel of the Virginia State Bar Disciplinary Board consisting of Sandra L. Havrilak, Acting Chair; John S. Barr; Pleasant S. Brodnax, III; David R. Schultz and Stephen A. Wannall, lay member [the "Board"].

The Virginia State Bar [the "Bar"] was represented by Edward L. Davis, Bar Counsel. Jay Lawrence Pickus [the "Respondent"], appeared in person and was represented by counsel, Christopher J. Collins and Matthew Geary. Tracy J. Johnson, 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 or her ability to be impartial. Each member of the Board responded in the negative.

The matter came before the Board on the District Committee Determination for Certification by the Third District Committee of the Bar. The Certification was sent to Respondent on October 7, 2009.

At the commencement of the hearing, Bar Exhibits 1 through 10 were admitted without objection. Respondent Exhibits 1 through 25 were also admitted without objection. The parties entered into two separate stipulations regarding the expected testimony of Shelly Ottenbrite and

Barbara Grasso. Their expected testimonies were admitted as one exhibit, VSB Exhibit 11, without objection. The Respondent also testified.

This Amended Order of Suspension is to correct the record reflecting that neither Mr. Geary nor the Bar Investigator testified during any part of this hearing.

The Board conducted the evidentiary hearing with respect to the alleged misconduct. Following the evidentiary hearing, the Board recessed to consider whether the Bar had presented evidence demonstrating that Respondent committed the charged ethical misconduct. The Board made the following findings of fact on the basis of clear and convincing evidence:

I. EVIDENTIARY HEARING

Findings of Facts:

1. At all times relevant hereto, Respondent has been an attorney licensed to practice law in the Commonwealth of Virginia. The Respondent received proper notice of this proceeding as required by Part Six, § IV, ¶ 13(C) and 13(A) of the Rules of Virginia Supreme Court.

2. During October 2004, Shelly Ottenbrite hired Respondent to defend her against a lawsuit filed by Barbara Grasso in the United States District Court, Richmond Division, on September 14, 2004.

3. Ms. Ottenbrite paid Respondent a flat fee of four thousand dollars ($4,000.00) cash to cover the first twenty (20) hours of work.

4. Respondent explained that his plan was to "get the case going," answer the complaint, negotiate with Grasso and conduct research.

5. Respondent admitted that he did not deposit any of the fees into an attorney escrow account.

6. According to Respondent, he told Ms. Ottenbrite that he would not accept her case without a non-refundable fee (VSB Exhibit 10). He testified that it was a mistake to state that it was non refundable and claims he misspoke and never stated that, despite his letter to Mr. Davis acknowledging the statement.

7. On November 23, 2004, Ms. Grasso filed a motion for partial summary

judgment against Ms. Ottenbrite seeking possession of the dog that was the subject of the lawsuit. Ms. Grasso certified that she hand-delivered a copy of the motion to Respondent, who had eleven (11) days to respond under Local Civil Rule 7(F) (1) of the United States District Court.

8. Respondent did not file a response to the motion, feeling that his client had no defense. Respondent did not advise his client in advance about this decision or obtain her consent not to file a responsive pleading.

9. Respondent explained to the Virginia State Bar that his client had not provided him with pertinent information, that she had left the area, and that he could not reach her. Ms. Ottenbrite, on the other hand, is adamant that she assisted Respondent in the case and that the only time during which he could not contact her was a brief period when she was out of the country, a time during which Respondent took care of Ms. Ottenbrite's puppy.

10. During December 2004, Respondent informed Ms. Ottenbrite that he required an additional two thousand five hundred dollars ($2,500.00) to continue representing her, which Ms. Ottenbrite paid to Respondent in cash.

11. Respondent admitted that he did not deposit any of these funds into an attorney escrow account.

12. No response having been filed to the motion for partial summary judgment, on February 18, 2005, the court entered an order granting partial summary judgment and awarding possession of the dog and puppies to Ms. Grasso. (VSB Exhibit 4) The court preserved the issue of damages for trial, and specifically noted that:

> *The defendant has completely and without excuse failed to offer any defense or set forth any facts that create a genuine issue for trial on the issue of the material breach of the contract. Therefore, summary judgment is appropriate in favor of the plaintiff.*

13. As a result of this development, Ms. Ottenbrite terminated Respondent, and on March 1, 2005, the court granted a motion allowing Respondent to withdraw.

14. Also on February 25, 2005, Ms. Ottenbrite filed for bankruptcy protection and hired successor counsel, Deborah Corcoran.

15. On March 23, 2005, Ms. Corcoran filed a motion to set aside the order of partial summary judgment and proceeded to defend Ms. Ottenbrite in the matter. Eventually,

on October 2, 2007, the court dismissed Ms. Grasso's case for failure of the parties to prosecute in a timely manner.

16. On October 26, 2007, Ms. Ottenbrite filed a malpractice action against Respondent in the Circuit Court for the City of Richmond. (VSB Exhibit 7)

17. In a request for production of documents, Ms. Ottenbrite's counsel asked Respondent to provide any and all ledgers showing any and all sums paid or advanced to him by or on behalf of Ms. Ottenbrite. (VSB Exhibit 8)

18. In response, Respondent stated that no such records were available, and that Ms. Ottenbrite paid him four thousand dollars ($4,000.00) to represent her for the first twenty (20) hours and later paid him an additional two thousand five hundred dollars ($2,500.00). (VSB Exhibit 8)

19. Request for Production Number 3 requested a copy of all trust account statements showing any money that was held in trust for the benefit of Ms. Ottenbrite. (VSB Exhibit 8)

20. Respondent answered that none were available (he subsequently acknowledged to the Bar that he did not place the funds in trust). (VSB Exhibit 10)

21. Request for Production Number 6 requested detailed time sheets for services provided to Ms. Ottenbrite.

22. Respondent answered that none were available.

23. Respondent explained to the Bar he was certain that he had earned the money at the time that he received it from Ms. Ottenbrite, that he kept a record of money received and time spent on all of his cases, and that he maintained these records in the file jackets of his cases.

24. Respondent explained further that he turned this case file over to Ms. Ottenbrite's successor counsel, Ms. Corcoran, so he did not have a record of when he received the cash payments from Ms. Ottenbrite or the amount of time that he devoted to her case.

25. On February 24, 2009, the Virginia State Bar issued Respondent a subpoena *duces tecum* for:

> *Copies of all trust account records for the period July 2004 through June 2005, including cancelled checks, cash receipts journals, cash disbursements journals, subsidiary ledgers, bank statements, deposit*

tickets and evidence of reconciliations, in your possession, custody or control, and including any records related to disposition of funds paid to you by Shelley A. Ottenbrite. (VSB Exhibit 9)

26. Respondent asked for an extension of the deadline to March 31, 2009, in order to obtain records from his bank.

27. Unable to provide any records by March 31, 2009, the Bar allowed Respondent a second extension to April 10, 2009.

28. Respondent still did not provide any records and by letter, dated April 27, 2009, the Bar demanded production of the records by May 7, 2009.

29. Respondent answered the request on May 8, 2009, by providing copies of his attorney escrow account bank statements and cancelled checks for the time period requested. Respondent explained that he had to obtain the records from his bank because he had not maintained them himself. He furnished the Bar with his original cancelled checks. (VSB Exhibit 10)

30. Respondent had no other escrow account records of any nature to furnish to the Bar in response to the subpoena duces tecum, although less than five (5) years had elapsed since the time period in question. Respondent claimed he did not know that he was required to keep the records for five (5) years.

31. Respondent explained that his "prior trust account reconciliations consisted of using the bank's statements and concomitant reconciliation form." He provided no other information concerning periodic trial balances, reconciliations, or client ledgers, or any other maintenance of his attorney trust account, and had no reconciliations to furnish to the Bar.

32. Other than copies of the bank statements and cancelled checks, Respondent had no other trust account records required under Rule 1.15 of the Rules of Professional Conduct to furnish to the Virginia State Bar. Specifically, he had no cash receipts journals, cash disbursements journals, client subsidiary ledgers, or reconciliations and supporting records, all required under Rule 1.15 of the Rules of Professional Conduct.

33. Respondent furnished the Bar with eighty-nine (89) cancelled checks from his attorney escrow account. (VSB Exhibit 10)

34. Of those, fourteen (14) bore annotations indicating the purpose of the checks or the case to which they related.[1] None of the other seventy-five (75) checks bore any annotations as to the cases to which they related or the purpose.

35. Sixty-two (62) of the cancelled escrow account checks were made payable to Respondent with no annotations indicating the purpose.

36. Eleven (11) of the cancelled checks were made payable to "cash" and endorsed by persons other than Respondent. Four (4) of those checks made to "cash," in amounts ranging from one hundred fifty dollars ($150.00) to three hundred dollars ($300.00), bore the endorsement of Broad Street Seafood Company, as did a fifth check, number 1750, in the amount of two hundred fifty dollars ($250.00), made payable to Awful Arthur's.

37. On April 15, 2005, the bank issued a check to Comcast Cable Communications in the amount of one hundred fifty dollars ($150.00), drawn on Respondent's escrow account, at the direction of Respondent.

38. Respondent's escrow account bank statements also reflect two (2) automated debits to HSBC MRTG SRVCS (HSBC Mortgage Services), each in the amount of one thousand one hundred forty-nine dollars and 97/100 ($1,149.97), on March 17, 2005 and April 19, 2005.

39. Respondent had no escrow account records reflecting the purpose of any of these checks and debits or the cases, if any, to which they related.

40. Respondent explained to the Virginia State Bar investigator (1) that the checks made payable to him were fees earned, (2) that the checks made out to cash, including those made to Awful Arthur's or negotiated by Broad Street Seafood, were fees earned, (3) that the check to Comcast cable was his personal expense, paid with fees earned, (4) and that the two (2) mortgage payments were his personal expenses.

41. On May 10, 2005, Respondent's escrow account became overdrawn in the amount of two hundred eight dollars and 15/100 ($208.15) and remained overdrawn until

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[1] Specifically, check numbers 1737, 1738 and 1814 were made payable to named persons and bore the annotation, "P.I. Settlement." Check numbers 1736, 1740, 1741, 1743, 1751 and 1761 were made payable to Mr. Pickus with annotations stating that they were for attorney fees relating to those three personal injury clients. Check numbers 1739, 1745, 1765 and 1772 were made payable to Mr. Pickus with annotations stating that they were for attorneys fees. Check number 1753 in the amount of $2.50 indicates that it was for an incident report. (VSB Exhibit 10)

June 6, 2005 when he deposited sixty thousand dollars ($60,000.00) from one of his personal injury cases.

II. NATURE OF MISCONDUCT

The Certification alleged that Respondent engaged in the following acts of misconduct and the Board finds as more specifically set forth below:

RULE 1.3 Diligence

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

The panel finds that the Bar proved by clear and convincing evidence a violation of Rule 1.3(a).

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.
>
> (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

The panel finds that the Bar proved by clear and convincing evidence violations of Rules 1.4(a)(b) and (c).

RULE 1.5 Fees

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

The panel finds that the Bar failed to proved by clear and convincing evidence violations of Rules 1.5(a)1-8

(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.

The panel finds that the Bar proved by clear and convincing evidence violation of Rule 1.5(b).

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:
(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

The panel finds that the Bar failed to prove by clear and convincing evidence a violation of Rule 1.15(a)(1).

(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.

The panel finds that the Bar proved by clear and convincing evidence a violation of Rule 1.15(a)(2).

(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.

The panel finds that the Bar proved by clear and convincing evidence a violation of Rule 1.15(c)(3).

(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.

The panel finds that the Bar failed to prove by clear and convincing evidence a violation of Rule 1.15(c)(4).

(e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c).

Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

(i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;

(ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;

(iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained.

The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

(iv) reconciliations and supporting records required under this Rule;

(v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

The panel finds that the Bar proved by clear and convincing evidence violations of Rule 1.15(e)(1)(i)(ii)(iii)(iv)(v).

> **(f) Required Escrow Accounting Procedures.** The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.
>
> (2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;
>
> (3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;
> (4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.
>
> (i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and
>
> (ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.
>
> (5) Reconciliations.
>
> (i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;
>
> (ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;
>
> (iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.
>
> (6) Receipts and disbursements explained. The purpose of all receipts and disbursements of escrow funds reported in the escrow journals and subsidiary ledgers shall be fully explained and supported by adequate records.

The panel finds that the Bar proved by clear and convincing evidence violations of Rules 1.15(f)(2)(3)(4)(i)(ii)(5)(i)(ii)(iii)(6).

III. SANCTIONS HEARING

After considering the written testimony of the witnesses (Joint Exhibit 11), the testimony of the Respondent, and after reviewing all exhibits introduced by the Bar and the Respondent, and having heard argument, the Board recessed to deliberate. After due deliberation the Board reconvened and stated its findings as set forth above.

Following the hearing on the disciplinary matter, the Board received further evidence of aggravation and mitigation from the Bar and Respondent, including Respondent's prior disciplinary record.

The Board received Respondent's prior disciplinary record that included the following:

1) Third District Committee Letter of Private Reprimand in VSB Docket No. 80-032-0544; effective February 4, 1981.

2) Disciplinary Board one (1) year suspension in VSB Docket Nos. 81-031-0608 and 82-31-0192; effective November 1, 1986.

3) Third District Committee, Section II, Dismissal with Terms in VSB Docket No. 91-032-1100; effective October 13, 1992. Complied with terms on April 8, 1993.

4) Circuit Court for Chesterfield County, Public Reprimand in VSB Docket No. 94-031-0925; effective October 23, 1997.

5) Third District, Section III, Subcommittee Public Reprimand in VSB Docket No. 02-033-0698; effective November 20, 2002.

6) Third District, Section III, Subcommittee Public Reprimand with Terms in VSB Docket No. 02-033-3001; effective November 20, 2002. Complied with terms on February 24, 2003.

(VSB Exhibit 12)

The 2002 Public Reprimand with terms specifically found the Respondent violated Rule 1.15(e)(VI)(v), *inter alia*, that requires an attorney to preserve bank records for

at least five (5) full calendar years following the termination of the fiduciary relationship. Therefore, Respondent's testimony in this case is simply not truthful.

The Respondent offered the testimony of Gerald Strong, who is his tax preparer. Mr. Strong testified that he is familiar with the Virginia State Bar's escrow rules and counseled Respondent on them. He told Respondent that it is a mistake to write any personal checks from his escrow account. He acknowledged that he does not do an audit of Respondent's account, but merely inputs the data in the tax return as provided to him by Respondent.

The Respondent testified that he has been practicing law for thirty-three (33) years, since 1981. He acknowledged that he should not have written third party checks out of his escrow account and apologized for it. He also testified that in January 2005 he had four to five (4-5) checks written out of his operating account that were not authorized and he claimed he was the victim of identity theft. Nevertheless, he did not close his operating account and instead used his escrow accounts to write personal checks. The Board found Respondent's testimony to be incredible. The Board also found the testimony provided by the Respondent throughout the case to be less than truthful.

IV. IMPOSITION OF SANCTIONS

The Board heard argument on what sanction should be imposed. The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent. After due deliberation taking into consideration the evidence and testimony presented, Respondent's lack of credibility, lack of contrition or apology and the fact that the Respondent did not appear to adequately or accurately comprehend the seriousness or gravamen of his behavior and misrepresentation of his client. The Board reconvened and the

Chair announced the sanction to be imposed as a four (4) year suspension of Respondent's license to practice law, effective February 19, 2010.

Accordingly, it is ORDERED that the Respondent, Jay Lawrence Pickus, be suspended from the practice of law for a period of four (4) years, effective February 19, 2010.

It is further ORDERED that, as directed in the Board's February 19, 2010, Summary Order in this matter, 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 Respondent's license to practice law in the Commonwealth of Virginia, to all clients for whom Respondent 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 Respondent's care in conformity with the wishes of Respondent's client. Respondent shall give such notice within fourteen (14) days of the effective date of this order, and make such arrangements as are required herein within forty-five (45) days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty (60) days of the effective day of this order that such notices have been timely given and such arrangements made for the disposition of matters.

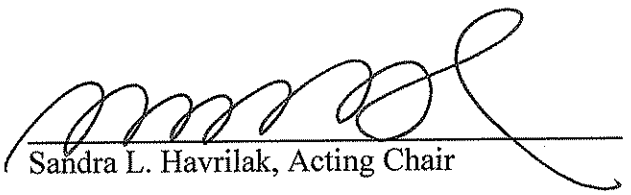
It is further ORDERED that if the Respondent is not handling any client matters on the effective date of this order, Respondent shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9E 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 Jay Lawrence Pickus, at his address of record with the Virginia State Bar, by certified mail, return receipt requested. The Clerk of the Disciplinary System shall also mail an attested copy of this order, by regular mail, to Christopher Collins, 304 East Main Street, Richmond, Virginia 23219-3820, Matthew P. Geary, Chucker & Reibach, 1 ½ North Robinson Street, Richmond, Virginia 23220 and Edward L. Davis, Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 19 day of April, 2010.

VIRGINIA STATE BAR DISCIPLINARY BOARD



Sandra L. Havrilak, Acting Chair