VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF KATINA C. WHITFIELD
VSB DOCKET NO. 11-031-085051

ORDER OF PUBLIC REPRIMAND WITH TERMS

THIS MATTER came on to be heard on April 1, 2011, before a panel of the Disciplinary Board consisting of William E. Glover, Chair, John S. Barr, Bruce T. Clark, Tyler E. Williams, III and Robert W. Carter, Lay member. The Virginia State Bar was represented by Kathryn R. Montgomery. The Respondent, Katina C. Whitfield, appeared in person and represented herself. The Chair polled the members of the Board Panel whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. Valarie L.S. May, RPR, Chandler and Halasz, Inc., PO Box 9349, Richmond, VA 23227, 804-730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

The matter came before the Board Pursuant to Part 6, Section IV, Paragraph 13-18.D. of the Rules of the Supreme Court of Virginia, on the petition of Assistant Bar Counsel Kathryn R. Montgomery to the Virginia State Bar Disciplinary Board ("Board") for an order requiring Respondent to appear before the Board for a hearing. The Board on March 3, 2011 issued its order that the Respondent appear before the Board on April 1, 2011.

I. FINDINGS OF FACT

VSB Exhibits 1-23 were admitted without objection. Respondent testified and provided important and candid testimony to explain circumstances surrounding the misconduct charges asserted against her and steps she had taken to insure compliance with applicable Rules of Professional Conduct. The Bar and Respondent stipulated to the facts sets forth below in

paragraphs 1-17, and the Board, based on the testimony of Respondent, finds by clear and convincing evidence the facts set forth below in paragraph 18.

1. At all times relevant hereto, Respondent has been licensed to practice law in the Commonwealth of Virginia. Respondent was licensed on or about October 9, 1998.

2. According to Respondent, most of her work is court-appointed criminal work. Respondent does, however, handle some civil matters for which she is retained.

3. On or about March 20, 2007, Respondent entered into a legal services agreement with a client to handle a divorce. Respondent's agreement provided for a rate of $175 per hour and required a "non-refundable deposit of $1500."

4. On or about September 7, 2007, Respondent entered into a legal services agreement with a client to handle a divorce. Respondent's agreement provided for a rate of $275 per hour and required a "non-refundable deposit of $1500."

5. On or about March 8, 2010, Respondent was retained by a client to handle an employment discrimination matter. The client paid Respondent an advanced legal fee of $3500 and agreed to a rate of $275 per hour. On or about March 8, 2010, Respondent deposited the entire $3500 fee into her operating account. She admitted to the bar's investigator that at the time of deposit, she had not earned the entire fee.

6. On or about April 22, 2010, Respondent entered into a legal services contract to represent a client regarding "misconduct allegation at [redacted] regarding activities related to any [redacted] and general horseplay. To include criminal charges if filed." Respondent received $3500 from the client and on or about April 23, 2010 deposited the entire $3500 into her operating account. Respondent admitted to the bar's investigator that at the time of deposit, she had not earned the entire fee.

7. On or about May 17, 2010, Respondent entered into a legal services contract to represent a client regarding "probate of a will/estate of [redacted]" for $275 per hour, with a deposit of $1500. Respondent told the bar's investigator that she received $1500 from the client and deposited it into her operating account.

8. On or about May 20, 2010, Respondent entered into a legal services contract to represent a client on "any and all legal services related to business law, contract disputes/negotiations, and personal legal matters (will prep, deed prep, power of attorney, etc.)." On or about May 29, 2010, Respondent received a check of $200 from this client, and on or about June 16, 2010, she received a check for $100 from this client. Respondent did not deposit these checks into her trust account. Respondent's invoice to the client indicates that she did not perform legal services until June 21, 2010.

9. On or about July 12, 2010, Respondent entered into a legal services agreement with a client to handle a fault-based divorce. Respondent's agreement provided for a rate of $275 per hour and required a "non-refundable deposit of $3500." On or about July 12, 2010, the client paid Respondent $500. Respondent did not deposit the $500 into her trust account.

10. On or about July 15, 2010, Respondent entered into a legal services agreement with a client to handle a contested divorce. Respondent's agreement provided for a rate of $275 per hour and required a "non-refundable deposit of $500." On or about July 15, 2010, the client paid Respondent $500. Respondent did not deposit the $500 into her trust account. Respondent told the bar's investigator that she had earned the fees.

11. On or about August 19, 2010, Respondent overdrew her trust account by $4.13 when she used a debit card drawn on the trust account to buy fast food for $5.25.

12. By letter dated October 8, 2010, Respondent admitted to the bar that shortly before she overdrew her trust account, she had deposited into her trust account $120.00 in fees earned from court-appointed work she had performed in Colonial Heights.

13. On or about September 21, 2010, the bar issued a subpoena duces tecum to Respondent for copies of all trust account records from January 1, 2010 to the present.

14. On or about October 12, 2010 Respondent responded to the subpoena by providing copies of bank statements for her trust account for January 2010 through September 2010. Respondent admitted to the bar's investigator that she does not keep a cash receipts journal, a deposit journal, or subsidiary ledgers.

15. Respondent also admitted to the bar's investigator that she does not reconcile her trust account and that she does not have a method for tracking checks that have been written.

16. Respondent's trust account bank statements from January 1, 2010 to September 30, 2010 show that Respondent has regularly used a debit card to make various personal purchases using trust account funds.

17. Respondent admitted to the bar's investigator that she transfers money between her trust account and operating account without regard to whether the funds are client funds, earned fees, or money from another source.

18. Ninety five percent of Respondent's practice is court appointed representations. None of the alleged misconduct involved any representation of a court appointed client and nothing in the record suggest that any alleged Rule violation involved Respondent's court appointed practice. No private client suffered any financial loss, and it was clear that while Respondent did not handle client retainers in accordance with applicable Rules, Respondent did not misuse any client funds in her possession. Respondent has engaged a professional

bookkeeper to maintain her accounts in full compliance with the Rules of Professional Conduct and Respondent has revised her form retainer or engagement agreements to remove any language that retainers are "non-refundable".

II. MISCONDUCT

The Petition charged violations of the following provisions of the Virginia Rules of Professional Conduct:

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.

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

(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.

(b) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(c) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(2) identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(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

(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.

(d) Funds, securities or other properties held by a lawyer or law firm as a fiduciary shall be maintained in separate fiduciary accounts, and the lawyer or law firm shall not commingle the assets of such fiduciary accounts in a common account (including a book entry custody account), except in the following cases:

(1) funds may be maintained in a common escrow account subject to the provisions of Rule 1.15(a) and (c) in the following cases:

(i) funds that will likely be disbursed or distributed within thirty (30) days of deposit or receipt;

(ii) funds of $5,000.00 or less with respect to each trust or other fiduciary relationship;

(iii) funds held temporarily for the purposes of paying insurance premiums or held for appropriate administration of trusts otherwise funded solely by life insurance policies; or

(iv) trusts established pursuant to deeds of trust to which the provisions of Code of Virginia Section 55 58 through 55 67 are applicable;

(2) funds, securities, or other properties may be maintained in a common account:

(i) where a common account is authorized by a will or trust instrument;

(ii) where authorized by applicable state or federal laws or regulations or by order of a supervising court of competent jurisdiction; or

(iii) where (a) a computerized or manual accounting system is established with record keeping, accounting, clerical and administrative procedures to compute and credit or charge to each fiduciary interest its pro rata share of common account income, expenses, receipts and disbursements and investment activities (requiring monthly balancing and reconciliation of such common accounts), (b) the fiduciary at all times shows upon its records the interests of each separate fiduciary interest in each fund, security or other property held in the common account, the totals of which assets reconcile with the totals of the common account, (c) all the assets comprising the common account are titled or held in the name of the common account, and (d) no funds or property of the lawyer or law firm or funds or property held by the lawyer or the law firm other than as a fiduciary are held in the common account.

For purposes of this Rule, the term "fiduciary" includes only personal representative, trustee, receiver, guardian, committee, custodian and attorney in fact.

(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.

(2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:

(i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;

(ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under (i), above;

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

(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.

(1) Insufficient fund check reporting.

(i) Clearly identified escrow accounts required. A lawyer or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identify of such account. Lawyer escrow accounts shall be maintained only in financial

institutions approved by the Virginia State Bar, except as otherwise expressly directed in writing by the client for whom the funds are being deposited;

ii) Overdraft notification agreement required. A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions.

No escrow account shall be maintained in any financial institution which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

(iii) Overdraft reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby;

(c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

(iv) Financial institution cooperation. In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefore.

A financial institution may charge for the reasonable costs of producing the records required by this Rule.

(v) Lawyer cooperation. Every lawyer or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule;

(vii) Definitions. "Lawyer" means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, pro hac vice or otherwise, in the practice of law in Virginia;

"Lawyer escrow account" or "escrow account" means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client;

"Client" includes any individual, firm, or entity for which a lawyer performs any legal service, including acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full time employee;

"Dishonored" shall refer to instruments which have been dishonored because of insufficient funds as defined above;

"Financial institution" and "bank" include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government;

"Insufficient Funds" refers to an overdraft in the commonly accepted sense of there being an insufficient balance as shown on the bank's accounting records; and does not include funds which at the moment may be on deposit, but uncollected;

"Law firm" incudes a partnership of lawyers, a professional or nonprofit corporation of lawyers, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, these Rules apply to the offices in this State, to escrow accounts in other jurisdictions holding funds of clients who are located in this State, and to escrow accounts in other jurisdictions holding client funds from a transaction arising in this State;

"Notice of Dishonor" refers to the notice which, pursuant to Uniform Commercial Code Section 3 508(2), must be given by a bank before its midnight deadline and by any other person or institution before midnight of the third business day after dishonor or receipt of notice of dishonor. As generally used hereunder, the term notice of dishonor shall refer only to dishonor for the purpose of insufficient funds, or because the drawer of the bank has no account with the depository institution;

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under Uniform Commercial Code Section 4 104, if sufficient funds were available.

(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.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

III. DISPOSITION

Upon review of Exhibits 1-23 presented by Bar Counsel on behalf of the VSB, the stipulation of facts, the testimony of the Respondent, and the argument of Bar Counsel and the Respondent, the Board recessed to deliberate. After due deliberation the Board reconvened and stated its findings as follows:

1. The Bar failed to prove by clear and convincing evidence any violation of Rule 1.15 (a)(1) and (b), Rule 1.5 (c)(1, 2 & 4), Rule 1.15 (d)(1)(ii-iv) and (2), Rule 1.15(f) and Rule 8.4.
2. The Bar proved by clear and convincing evidence that the Respondent violated Rule 1.5 (a) (1-8), Rule 1.15 (a)(2), Rule 1.15 (c)(3), Rule1.15 (d)(1)(i), Rule 1.15 (e)(1)(i-iv) and (2)(i-iii).

Thereafter, the Board received further evidence from the Bar and Respondent, including Respondent's prior disciplinary record. The Board recessed to deliberate what sanction to impose upon its findings of Respondent's misconduct. After due deliberation the Board reconvened and the Chair announced the Board's decision to impose a sanction of a public reprimand with the following terms:.

(1) Respondent shall read in its entirety *Lawyers and Other People's Money* and Legal Ethics Opinion 1606 and shall certify compliance with this term in writing to Kathryn R.

Montgomery, Assistant Bar Counsel, not later than 60 days following the date of the entry of this order.

(2) For a period of one year following the entry of this order, the Respondent shall authorize a VSB investigator to conduct unannounced inspections of her trust account(s), books, records bank accounts and other financial records associated with her law practice to ensure her compliance with the provisions of Rule 1.15 and the Rules of Professional Conduct, and she shall fully cooperate with the VSB investigator in the performance of such inspections.

(3) In the event Respondent's engagement with her bookkeeper is terminated for any reason, Respondent shall, within 10 days of such termination, notify Kathryn R. Montgomery, Assistant Bar Counsel, that the engagement has been terminated.

(4) Respondent shall provide to Kathryn R. Montgomery, Assistant Bar Counsel, notice in writing once a month, for a period of 12 months from the date of this Order, a signed certification that any trust account associated with Respondent's law practice has been reconciled, as required by the Rules of Professional Conduct.

Accordingly, it is ORDERED that the Respondent, Katina C. Whitfield, is publicly reprimanded with terms as set forth herein effective April 1, 2011.

It is further ORDERED that pursuant to Part Six, § IV, 13.B.8.c. 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 her address of record with the Virginia State Bar, being Katina C. Whitfield, PO Box 3576, Petersburg, VA 23805, by certified mail, and by regular mail

to Kathryn R. Montgomery, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219,

ENTERED this 9th day of May, 2011

VIRGINIA STATE BAR DISCIPLINARY BOARD

WE

William E. Glover, Chair