

VIRGINIA:
BEFORE THE THIRD DISTRICT, SECTION THREE, SUBCOMMITTEE
OF THE
VIRGINIA STATE BAR

IN THE MATTERS OF
JOHN FREDRICK MCGARVEY

VSB DOCKET NOS. 04-033-2735 [VSB/ANONYMOUS]
 04-033-2736 [BROOKS]
 05-033-2297 [VSB/VA CT APP]
 05-033-3134 [VSB/ANONYMOUS]

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On March 4, 2005, a meeting in these matters was held before a duly convened Third District, Section Two, Subcommittee consisting of Coral C. Gills, Lay Member; Cullen D. Seltzer, Esq.; and John D. Sharer, Esq., Vice Chair, presiding.

Pursuant to Part 6, Section IV, Paragraph 13.G.1.c.(3) of the Rules of the Supreme Court, the Third District, Section Three, Subcommittee of the Virginia State Bar hereby serves upon the Respondent the following Public Reprimand with Terms:

1. At all times relevant hereto the Respondent, John Fredrick McGarvey [McGarvey] has been an attorney licensed to practice law in the Commonwealth of Virginia.

VSB Docket No. 04-033-2735 [VSB/Anonymous]:

I. FINDINGS OF FACT:

2. McGarvey was retained to represent Allen and Lloyd on the appeals of criminal cases to the Supreme Court of Virginia [the Court]. McGarvey was court-appointed to represent Leigh and Patton on the appeals of criminal cases to the Court.

3. By orders entered on the dates set forth herein the Court dismissed the Allen, Lloyd, Leigh and Patton appeals because the petitions for appeal did not contain assignments of error as required by Rule 5:17(c). The dates of entry of the dismissal orders were as follows:

Leigh	January 9, 2004
Patton	January 12, 2004
Allen	February 10, 2004
Lloyd	February 11, 2004

4. McGarvey prepared and filed for Allen, Leigh and Lloyd petitions for writ of habeas corpus based solely on his failure to include assignments of error in each respective petition for appeal.

5. On the dates set forth herein, McGarvey sent Allen, Leigh and Lloyd each a letter in which, inter alia, McGarvey enclosed the Court's respective dismissal order and offered to file "for a delayed appeal and get it back in front of the Court." The dates of the letters were as follows:

Leigh	January 23, 2004
Allen	February 25, 2004
Lloyd	February 27, 2004

6. Leigh sent McGarvey a letter dated February 3, 2004 in which, inter alia, Leigh asked whether McGarvey was familiar with Va. Code Section 8.01-654, and if the delayed appeal was unsuccessful, his chances for filing an additional habeas corpus to challenge his conviction would be destroyed by filing a petition for writ of habeas corpus based solely on McGarvey's failure to include assignments of error in his petition for appeal.

7. On the dates set forth herein, McGarvey sent Allen, Leigh and Lloyd, respectively, a letter enclosing a petition for writ of habeas corpus for signature. In each letter, McGarvey discussed the import of Va. Code Section 8.01-654 and his conclusion that he could assist each respective client in seeking a writ of habeas corpus if the client did not choose to add grounds in addition to the failure to include assignments of error in each client's petition for appeal. In the letter, McGarvey also discussed the question whether such a limited filing would eliminate the ability of each client to file another petition for a writ of habeas corpus on different grounds, noting that most lawyers believed it did; but McGarvey thought there was an argument to be made for additional filings of petitions for writs of habeas corpus in each respective client's case once the instant petitions had been filed. The dates of the letters were as follows:

Allen	April 14, 2004
Lloyd	April 14, 2004
Leigh	April 15, 2004

8. Allen, Leigh and Lloyd, respectively, signed the petitions for writ of habeas corpus which McGarvey had prepared and sent to them. On the dates set forth herein, McGarvey filed each petition with the Court. In each petition, McGarvey showed himself as counsel for the petitioner. The dates of the filings were as follows:

Allen	May 14, 2004
Leigh	May 14, 2004
Lloyd	May 14, 2004

9. McGarvey admitted that with respect to the failure to include assignments of error in the petitions for appeal, he failed to take note that his secretary had not included in the petitions for appeal to the Court all of his handwritten notations on the respective Court of Appeals petitions. McGarvey failed properly to supervise his nonlawyer assistant(s).

10. McGarvey did not represent Allen, Lloyd, Leigh and Patton with reasonable diligence and competence in their appeals to the Court.

11. By representing Allen, Leigh and Lloyd in the pursuit of writs of habeas corpus based solely on McGarvey's failure to include assignments of error in their respective petitions for appeal to the Court, McGarvey engaged in a conflict of interest and a lack of competence.

II. Nature of Misconduct:

Such conduct constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.1 Competence

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

RULE 1.3 Diligence

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

RULE 1.7 Conflict of Interest: General Rule

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

I. Findings of Facts:

12. McGarvey was court-appointed to represent Steven Lamont Brooks [Brooks] on his appeal of a criminal case to the Supreme Court of Virginia [the Court].

13. By order entered February 10, 2004, the Court dismissed Brooks' appeal because the petition for appeal did not contain assignments of error as required by Rule 5:17(c).

14. McGarvey prepared and filed for Brooks a petition for writ of habeas corpus based solely on his failure to include assignments of error in the petition for appeal.

15. On February 27, 2004, McGarvey sent Brooks a letter in which, inter alia, McGarvey enclosed the Court's dismissal order and offered to file "for a delayed appeal and get it back in front of the Court."

16. On April 13, 2004, McGarvey sent Brooks a letter enclosing a petition for writ of habeas corpus for signature. In the letter, McGarvey discussed the import of Va. Code Section 8.01-654 and his conclusion that he could assist Brooks in seeking a writ of habeas corpus if Brooks did not choose to add grounds in addition to the failure to include assignments of error in Brooks' petition for appeal. In the letter McGarvey also discussed the question whether such a limited filing would eliminate the ability of Brooks to file another petition for a writ of habeas corpus on different grounds, noting that most lawyers believed it did; but McGarvey thought there was an argument to be made for additional filings of petitions for writs of habeas corpus in Brooks' case once the instant petition had been filed.

17. Brooks signed the petition for writ of habeas corpus which McGarvey had prepared and sent to him. On May 14, 2004, McGarvey filed the petition with the Court. In the petition McGarvey showed himself as counsel for Brooks.

18. On September 2, 2004, Brooks filed a letter dated August 11, 2004 with the Court addressed to, "To Whom It May Concern" asking for termination of the habeas corpus proceeding filed by McGarvey, his "former counsel," and stating, inter alia, that Brooks had spoken with another attorney and learned that "a habeas corpus should only be filed one time, and it needs to contain all issues being raised by the appellant."

19. The Clerk of the Court responded to Brooks' letter on September 3, 2004.

20. On October 1, 2004, McGarvey filed a motion to withdraw as counsel.

21. On October 19, 2004, the Court entered an order granting the withdrawal motion in the habeas corpus case.

22. McGarvey admitted that with respect to the failure to include assignments of error in the petition for appeal, he failed to take note that his secretary had not included in the petition for appeal to the Court all of his handwritten notations on the Brooks Court of Appeals petition. McGarvey failed properly to supervise his nonlawyer assistant(s).

23. McGarvey did not represent Brooks with reasonable diligence and competence in the appeal to the Court.

24. By representing Brooks in the pursuit of a writ of habeas corpus based solely on McGarvey's failure to include assignments of error in Brooks' petition for appeal to the Court, McGarvey engaged in a conflict of interest and a lack of competence.

II. Nature of Misconduct:

Such conduct constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

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RULE 1.3 Diligence

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

RULE 1.7 Conflict of Interest: General Rule

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
- (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation

shall include explanation of the implications of the common representation and the advantages and risks involved.

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

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- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

VSB Docket No. 05-033-2297 [VSB/VaCtApp]:

I. Findings of Facts:

25. McGarvey was court-appointed to represent Jackson on an appeal of a criminal conviction to the Court of Appeals.

26. Final judgment in Jackson's case was entered in the trial court on October 1, 2002. The transcript of the trial was due to be filed by December 1, 2002, in the office of the clerk of the trial court. The transcript was not filed by December 1, 2002. The Court of Appeals dismissed the appeal on June 12, 2003, upon the failure of McGarvey to file the transcript timely.

27. McGarvey then filed a Motion to Reconsider the Dismissal on June 20, 2003 which the Court of Appeals denied on August 1, 2003.

28. Upon notification from McGarvey of the dismissal and that Jackson could file a petition for writ of habeas corpus seeking a delayed appeal, Jackson requested that McGarvey do so.

29. On November 4, 2003, McGarvey filed a motion to allow Jackson to remain on bond pending a habeas corpus petition and subsequent appeal. The motion was granted. Before McGarvey filed a petition for habeas corpus, Jackson signed a statement stating that he wished to withdraw his appeal in the Court of Appeals.

30. McGarvey filed a motion to withdraw the appeal in the Circuit Court of the City of Richmond. The motion was granted on February 9, 2004.

31. McGarvey did not represent Jackson with reasonable diligence and competence in his appeal to the Court of Appeals.

II. Nature of Misconduct:

Such conduct constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.1 Competence

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

RULE 1.3 Diligence

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

VSB Docket No. 05-033-3134 [VSB/Anonymous]:

I. Findings of Facts:

32. McGarvey was retained to represent McCullough in an appeal of a March 9 2004, final judgment in a criminal case.

33. The Court of Appeals denied the petition for appeal on October 18, 2004, and upon a demand for reconsideration, denied the petition again on December 13, 2004.

34. McGarvey filed a notice of appeal to the Court on December 20, 2004.

35. McGarvey failed to file a timely petition for appeal in the Court. According to McGarvey, he assumed that a prepared petition had been mailed when it had not; his tickler systems reflected that the appeal had been filed.

36. McGarvey represented McCullough in the preparation, filing and pursuit of a petition for writ of habeas corpus seeking a delayed appeal on the basis of McGarvey's failure to file a petition for appeal in the Supreme Court of Virginia.

37. McGarvey did not represent McCullough with reasonable diligence and competence in his appeal to the Court.

38. By representing McCullough in the pursuit of a writ of habeas corpus based solely on McGarvey's failure to file a petition for appeal in the Court timely, McGarvey engaged in a conflict of interest and a lack of competence.

II. Nature of Misconduct:

Such conduct constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.1 Competence

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

RULE 1.3 Diligence

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

RULE 1.7 Conflict of Interest: General Rule

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
- (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation

shall include explanation of the implications of the common representation and the advantages and risks involved.

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

II. NATURE OF MISCONDUCT:

Such conduct on the part of the Respondent constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.15 Safekeeping Property

- (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

- (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.
- (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;

RULE 1.16 Declining Or Terminating Representation

- (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).
- (e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and shall be returned to the client upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Upon request, the client must also be provided copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer/client relationship.

RULE 5.5 Unauthorized Practice Of Law

- (a) A lawyer shall not:
 - (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not:

- (c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

III. PUBLIC REPRIMAND WITH TERMS:

Accordingly, it is the decision of the subcommittee to offer the Respondent an opportunity to comply with certain terms and conditions, compliance with which will be a predicate for the disposition of a Public Reprimand With Terms of these complaints. The terms and conditions shall be met by the dates indicated below. The terms with which the Respondent must comply are as follows:

1. **Immediately**, with the consent of McCullough and without causing any harm to McCullough's delayed appeal, the Respondent shall withdraw from representing McCullough and arrange, with the consent of McCullough, for another competent attorney to represent McCullough on his delayed appeal at the Respondent's cost. Any unearned funds paid by or on behalf of McCullough for the appeal shall be returned to McCullough unless McCullough consents to the use of said funds for the services of the attorney taking over his appeal.
2. By **March 15, 2005**, Respondent shall certify in writing to Deputy Bar Counsel that he has accomplished the requirements of Term 1.

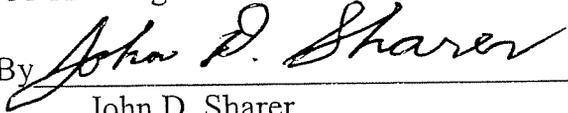
3. By **June 1, 2005**, the Respondent shall attend six (6) hours of continuing legal education on the subject of the appeal of criminal cases in Virginia. The Respondent shall not receive any mandatory continuing legal education credit for said hours.

4. By **June 8, 2005**, the Respondent shall certify in writing to Deputy Bar Counsel that he has attended said continuing legal education hours.

Upon satisfactory proof that such terms and conditions have been met, these matters shall be closed. If, however, the terms and conditions are not met as stated herein, the Third District Committee, Section Three, shall impose a Certification for Sanction Determination.

The Clerk of the Disciplinary System shall assess costs pursuant to Rules of Court, Part Six, Section IV, Paragraph 13.

Third District, Section Three, Subcommittee
Of The Virginia State Bar

By 
John D. Sharer
Vice Chair

CERTIFICATE OF SERVICE

I certify that I have this 17th day of March, 2005, caused to be mailed by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a true and correct copy of the Subcommittee Determination (Public Reprimand with Terms) to John Frederick McGarvey, Esq., 320 West Broad Street, Richmond, VA 23220-4257, his last address of record with the Virginia State Bar.

