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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ARLINGTON

VIRGINIA STATE BAR *EX REL.* :
FOURTH DISTRICT—SECTION I COMMITTEE, :

Complainant, :

v. :

MICHAEL PATRICK WEATHERBEE, ESQUIRE :

Respondent. :

Case No. 08-1465

MEMORANDUM ORDER

ON THE 29th day of January, 2009, this matter came before the Three-Judge Court designated on the 9th day of January, 2009, by Order of the Chief Justice of the Supreme Court of Virginia, pursuant to §54.1-3935 of the Code of Virginia (1950 *as amended*), consisting of the Honorable William H. Ledbetter, Jr., Retired Judge of the Fifteenth Judicial Circuit, the Honorable Arthur B. Viereggs, Retired Judge of the Nineteenth Judicial Circuit, and the Honorable Thomas D. Horne, Judge of the Twentieth Judicial Circuit and Chief Judge of the Three-Judge Court.

Kathleen M. Uston, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar, and the Respondent, Michael Patrick Weatherbee appeared represented by counsel, John A. Keats, Esquire.

THEREAFTER, the 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 should not be suspended or revoked or why he should not be otherwise sanctioned in accordance with Rules of Court, Part Six, Section IV, Paragraph 13;

FOLLOWING presentation of the Bar's evidence, which included the testimony of four (4) witnesses and ten (10) documentary exhibits, which were received by the Court on motion of the Bar, without objection, and following presentation of the Respondent's evidence, which included the testimony of four (4) witnesses and seventeen (17) documentary exhibits, which were received by the Court on motion of the Respondent without objection, and upon argument of counsel, the Three-Judge Court retired to deliberate and thereafter returned and announced that it had found, by clear and convincing evidence, the following:

1. At all times relevant hereto, Michael Patrick Weatherbee, Esquire ("the Respondent"), has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. In August of 2004, the Respondent filed suit on behalf of Dianna Broyles, *Broyles v. Backer, et al.*, L04000217, in the Circuit Court of Warren County, alleging medical malpractice against the Complainant, Ward P. Vaughan, M.D. and various other defendants including Joel E. Backer, M.D. and Warren Memorial Hospital in Warren County, Virginia.
3. Dr. Vaughan, however, was not involved in the medical care underlying the suit filed by the Respondent on his client's behalf, was not in the operating theater and, in fact, knew nothing of the events giving rise to the suit filed against him. Further, at the time of the surgery giving rise to Ms. Broyles' claims, Dr. Vaughan did not have privileges at Warren Memorial Hospital.
4. When asked by Virginia State Bar Investigator David W. Jackson how he had arrived at the conclusion that Dr. Vaughan should be named as a defendant in Ms. Broyles's suit, the Respondent informed Mr. Jackson of the following:
 - a. On page one of the operative report from Ms. Broyles's surgery, "Bob Vaughan" is listed as assistant to Joel Evan Backer, M.D., the doctor who actually performed the surgery;
 - b. The Respondent learned from a website maintained by the Virginia Board of Medicine that fifteen (15) medical doctors with the last name "Vaughan" were licensed to practice in Virginia, three (3) of whom specialized in obstetrics and gynecology. Of these three, two (2) were women and located out of state. That left only the Complainant, Ward P. Vaughan, M.D., as an obstetrics and gynecology specialist with a practice in Winchester, Virginia;
 - c. Fred Ornitz, Esquire, Ms. Broyles former attorney, had interviewed Anthony Toth, M.D., the head of obstetrics and gynecology at Warren Memorial Hospital. Mr. Ornitz claimed that Dr. Toth informed him that Dr. Vaughan had privileges at Warren Memorial Hospital.

d. The Respondent's wife, Janet Weatherbee, a licensed registered nurse with twenty (20) years experience reading medical records, assisted the Respondent in his investigation. She pointed out to him that the operative record indicated that "Bob Vaughan" assisted Dr. Backer in the surgery but did not indicate "Bob Vaughan's" professional title. Mrs. Weatherbee pointed out that this was not inconsistent with these types of reports that sometimes listed operating room personnel without indicating the titles of all present, and therefore "Bob Vaughan" very well may have been a doctor. Mrs. Weatherbee testified that, as a result of her investigation, she was certain "Bob Vaughan" was a medical doctor and so informed her husband.

e. Ms. Broyles was employed as a security guard at Warren Memorial Hospital. She claimed to know that Dr. Backer was referred to as "Backer the Hacker" by other hospital staff and personnel, and was told by other staff that Dr. Backer was required by the hospital to have a surgeon assist him during surgery. Ms. Broyles and hospital personnel repeated this to Mr. Weatherbee. However, the evidence was that Dr. Backer performed Ms. Broyle's surgery without any such supervision and without an assisting surgeon.

From this collected information, the Respondent concluded that the "Bob Vaughan" listed on the operative report as assisting Dr. Backer was a medical doctor and therefore must have been Ward P. Vaughan, M.D.

5. The Respondent admitted during his testimony that at no time did he request copies of any medial records Dr. Vaughan may have had pertaining to his client, Dianna Broyles. The Respondent further admitted that at no time did he contact Dr. Vaughan in any way to confirm whether or not Dianna Broyles was his patient or that he, Dr. Vaughan, participated in the surgery that formed the basis of the suit.

6. Both Janet Weatherbee and Fred Ornitz testified that they contacted Warren Memorial Hospital attempting to ascertain the identity of "Bob Vaughan". However after identifying themselves as either working for an attorney or being an attorney, hospital personnel refused to provide information as to either Ward P. Vaughan, M.D. or Bob Vaughan. Mr. Steven M. Frei, an expert witness called on behalf of the Virginia State Bar, confirmed that, in the usual course of business, hospital personnel generally refuse to give out this information. Virginia State Bar Investigator, David W. Jackson, testified, however, that he was able to obtain this information when he telephoned Warren Memorial Hospital. Investigator Jackson could not recall if he identified himself as a Virginia State Bar Investigator at the outset of this call but stated that his was his usual practice.

7. Diana Broyles had been a patient of one of Dr. Vaughan's practice group colleagues some years prior to the matters giving rise to the underlying suit, and had seen Dr. Vaughan during an office visit in 2002 when Dr. Vaughan was covering for Ms. Broyle's regular doctor. The Respondent testified that he transmitted to Ms. Broyles drafts of the Motion for Judgment and she reviewed those drafts, providing a correction as to the ownership of the hospital. She made no further corrections to the Motion for Judgment, and did not suggest to Mr. Weatherbee nor object to the naming of Dr. Vaughan as a defendant, although she had informed Mr.

Weatherbee that she had no idea who was in the operating theater due to having been unconscious at the time. The Respondent testified that Ms. Broyles informed him that Dr. Vaughan was listed on the Warren Memorial Hospital directory and thus should be served at that address. This information was wrong, however, and Dr. Vaughan was not so listed since he had not had privileges at Warren for many years. The Respondent took no steps to independently verify this information from his client, whom he had previously characterized as a "poor historian."

8. The Respondent further admitted, and the evidence and testimony established, that he had four (4) months prior to the expiration of the applicable statute of limitations to either seek to obtain Dr. Vaughan's medical records voluntarily, or to file suit and seek discovery from other defendants, to both confirm whether or not Dr. Vaughan participated in the surgery and the identity of the "Bob Vaughan" listed as an assistant in the operative report prior to naming Dr. Vaughan as a defendant in the case.

9. An expert witness called by the Virginia State Bar, Steven M. Frei, Esquire, a medical malpractice attorney with substantial experience in the field, testified that the Respondent's failure to obtain all potentially relevant medical records prior to filing suit failed to meet the standard of care required of reasonably competent medical malpractice attorneys.

10. Mr. Frei also testified that the investigation conducted by the Respondent to confirm the identity of "Bob Vaughan" was inadequate and failed to meet the standard of care.

11. Mr. Frei further testified that, in light of the fact that the Respondent had ample time within which to do so, the Respondent's failure to either seek to obtain Dr. Vaughan's medical records prior to filing suit, or to file suit and then seek discovery from other defendants to confirm the identity of the "Bob Vaughan" listed as an assistant in the operative report prior to naming Dr. Vaughan as a defendant in the case, fell below the standard of care.

12. By letter dated September 15, 2004, Richard L. Nagle, Esquire, Dr. Vaughan's attorney through his medical malpractice insurance carrier, explained in detail to the Respondent why Dr. Vaughan should never been named as a defendant in the suit that the Respondent brought on behalf of Ms. Broyles. By Order entered September 29, 2004, Dr. Vaughan was dismissed from Ms. Broyles's lawsuit. The Respondent later withdrew as counsel to Ms. Broyles, and successor counsel thereafter successfully settled the case against Dr. Backer.

THE THREE-JUDGE COURT thereupon stated its unanimous finding that the Virginia State Bar had failed to prove, by clear and convincing evidence, that the Respondent had violated the following provisions of the 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.

THE THREE-JUDGE COURT thereupon stated its further finding by majority that the Virginia State Bar had proven, by clear and convincing evidence, that the Respondent had violated the following provision of the 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.

THEREAFTER, the Bar and the Respondent presented argument regarding the sanction to be imposed upon the Respondent for the ethical misconduct found by the Three-Judge Court. The members of the Three-Judge Court deliberated and announced the decision that Respondent should receive a Public Reprimand.

AT THE CONCLUSION of the proceedings on the 29th day of January, 2009, the Three-Judge Court entered a Summary Order imposing a Public Reprimand upon the Respondent, effective that date; accordingly, it is, therefore

ORDERED, that Respondent shall be and hereby is Publicly Reprimanded on the basis of the violation of the Rule of Professional Conduct set forth above; and it is further

ORDERED, that pursuant to Part Six, Section IV, Paragraph 13.B.8.c of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against the Respondent; and it is further

ORDERED that four (4) copies of this Order be certified by the Clerk of the Circuit Court of Arlington County, Virginia, 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.

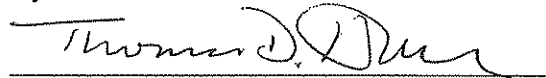
THIS ORDER IS EFFECTIVE *NUNC PRO TUNC* JANUARY 29, 2009.

AND THIS ORDER IS FINAL.

Entered this 10th day of April, 2009.

FOR THE THREE-JUDGE COURT:

By:



THOMAS D. HORNE

Circuit Judge and

Chief Judge of the Three-Judge Court

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