STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of November, 1995, the following order was made and entered:

Lawyer Disciplinary Board,
Complainant

vs.) No. 22450

Cecil C. Varney, a member of The
West Virginia State Bar, Respondent

On a former day, to-wit, June 7, 1995, came the complainant, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by R. Kemp Morton, its chairperson, pursuant to Rule 3.10, Rules of Lawyer Disciplinary Procedure, and presented to the Court its written recommended disposition in the above-captioned proceeding, recommending that the charges be dismissed in the above-captioned proceeding. Thereafter, on the 9th day of June, 1995, pursuant to Rule 3.11, Rules of Lawyer Disciplinary Procedure, came the Office of Disciplinary Counsel, by Teresa A. Tarr, and presented to the Court its agreement thereto.

There being heard neither consent nor objection from the respondent, Cecil C. Varney, pursuant to Rule 3.11, Rules of Lawyer Disciplinary Procedure, it is hereby ordered that the written recommended disposition of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board be, and it hereby is, adopted. It is therefore ordered that the charges in the above-captioned proceeding be, and they hereby are, dismissed.

Service of a copy of this order upon all parties shall constitute notice of the contents herein.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals

BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA

IN RE: CECIL C. VARNEY, a member of The West Virginia State Bar **I.D. No. 90-03-271**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DISCIPLINE

I.

PROCEEDINGS

On September 9, 1990, a complaint, styled I.D. No. 90-03-271, was filed against Cecil C. Varney (hereinafter Respondent). On August 10, 1994, the Office of Disciplinary Counsel, at the direction of the Investigative Panel of the Lawyer Disciplinary Board filed a Statement of Charges with the West Virginia Supreme Court of Appeals (hereinafter State Supreme Court) alleging that Respondent violated Rules 8.4(b),(c) and/or (d) of the Rules of Professional Conduct. On or about October 21, 1994, the Statement of Charges was voluntarily dismissed without prejudice by Agreed Order of both parties. The matter was then re-presented to the Investigative Panel in November 1994. At that time, the Panel voted to issue an Amended Statement of Charges which reflected the same Rule violations. The Amended Statement of charges was filed with the State Supreme Court on November 18, 1994.

On March 6, 1995, a Subcommittee Hearing Panel of the Lawyer Disciplinary Board held a hearing in the above-captioned matter. The Panel consisted of Subcommittee Chairman R. Kemp Morton, Esquire; Cheryl L. Henderson, Esquire; and Layperson Debra K. Sullivan. The Office of Disciplinary Counsel called Angela

Varney as a witness. Disciplinary Counsel also called the Respondent as an adverse witness. The following Disciplinary Counsel Exhibits were admitted into evidence: DCE 1, except for the original Statement of Charges and Answer; DCE 2 and 3; DCE 5 (the Secretary of State Hearing Transcript); DCE 5-2; DCE 5-3; DCE 5-6; DCE 5-8; DCE 5-9; DCE 5-10; and DCE 6 through 17. The Respondent called Anita Musick and Mary Lou Varney as witnesses. Likewise, Respondents Exhibits 1 and 2 were admitted into evidence.

II.

STATEMENT OF FACTS

In March 1985, Respondent became a notary public. Respondent was required to take the oath of office (DCE 14). The oath, which is found in W. Va. Code 29C-2-204 (1984), requires a notary to swear or affirm that he "carefully read the notaries public law of this state, and, if appointed and commissioned as a notary public, [he] will perform faithfully, to the best of [his] ability, all notarial acts in accordance with the law" (DCE 14). A notary who engages in the unauthorized, unlawful, abusive, negligent, reckless or injurious exercise of a power or performance of a duty has engaged in official misconduct as set forth in W. Va. Code 29(c)-6-201 (1984), DCE 14).

Any notary who has an interest in a transaction may not perform the notarial act on any documents pertaining to the matter (DCE 14). W. Va. Code 29C-3-102 provides:

> (a) A notary public who has a disqualifying interest, as hereinafter defined, in a

> transaction may not legally perform any notarial act in connection with the transaction.
>
> (b) [A] notary public has a disqualifying interest in a transaction in connection with which notarial services are requested if he: (1) May receive directly, and as a proximate result of the notarization, any advantage, right, title, interest, cash or property, exceeding in value the sum of any fee properly received in accordance with 29C-4-301, or exceeding his regular compensation and benefits as an employee whose duties include performing notarial acts for and in behalf of his employer; or (2) is named individually, as a party to the transaction.

(DCE 14). Additionally, W. Va. Code 29C-6-203 (1984) states that one notary cannot act as or impersonate another notary (DCE 14). Moreover, W. Va. Code 29C-6-204 (1984) provides that one notary cannot unlawfully possess another notary's seal (DCE 14). If a notary violates any of these statutes, he may be guilty of a misdemeanor (DCE 14).

In September 1989, Mary Lou Varney (hereinafter Respondent's mother) deeded property at Double Camp Fork, Mate Creek, Mingo County, West Virginia to her son "for and in consideration of the sum of One Dollar ($1.00) cash" (hereinafter Double Camp Fork Deed) (DCE 5-2). The Deed of Conveyance, which was recorded at pages 516-518 in Mingo County Deed Book 303 on October 27, 1989, provided:

> I, Anita G. Musick, a Notary Public in and for the County and State aforesaid, do certify that MARY LOU VARNEY, whose name is signed to the foregoing Deed of Conveyance bearing date the 30th day of September, 1989, has this day before me in my said County and State acknowledged same to be her own free act and deed GIVEN under my hand this 30th day of September 1989. My Commissioner Expires: 3-29-99.

(DCE 5-2). The attestation was signed ANITA G. MUSICK, Notary Public. The document was also stamped with Ms. Musick's official notary seal (DCE 5-2).

On or about October 30, 1989, Respondent sold the Double Camp Fork property to Eaglehawk for the sum of $80,000.00 (DCE 5-3). Respondent then kept $40,000.00 from the proceeds of the sale and gave the remaining $40,000.00 to his mother (H.Tr. at 66). Mary Lou Varney, in turn, gifted $10,000.00 from her portion of the sale proceeds back to Respondent (H.Tr. at 66). Importantly, Respondent testified that "the whole reason for selling the property, one of the reasons for [my mother] agreeing to split the proceeds with me in the first place was for the financial problems we were having" (H.Tr. at 66-67).

On September 7, 1990, Angela L. Varney (hereinafter Ms. Varney), then Respondent's wife, filed complaints against Respondent with the appropriate disciplinary agencies for attorneys and realtors in both W. Va. and Kentucky, various prosecuting attorneys, FBI and State Police, including the West Virginia Secretary of State's Office. (DCE 2; H.Tr. at 34, 44-45, 48). The complaints alleged that Respondent, and not Ms. Musick, signed the name Anita G. Musick to the Double Camp Fork Deed (DCE 2 & 5). The complaints further alleged that Respondent used Ms. Musick's notary stamp to notarize the deed (DCE 2 & 5). Ms. Varney apparently, through the efforts of her divorce attorney, Cabell County assistant prosecutor, Charles Hatcher, testified before a Cabell County Grand Jury and an indictment was

returned against Respondent, but the Court disqualified the Cabell County Prosecuting Attorney and his staff and a special prosector reviewed the case and dismissed the indictment.

Ms. Varney also made the following assertions: (1) The Double Camp Fork Deed had been prepared without the knowledge of Respondent's mother; (2) Respondent forged Ms. Varney's signature to the deed conveying the Double Camp Fork property to Eaglehawk; (3) Respondent forged Ms. Varney's name to the $80,000.00 check from Eaglehawk which was made out to both husband and wife; and (4) Respondent forged Ms. Varney's name in connection with a loan transaction where he allegedly received money from C & O Credit Union[1] (DCE 2; H.Tr. at 36, 50-51).

At the time Ms. Varney filed the complaints, she and the Respondent were separated, and engaged in a custody battle over an infant son (H.Tr. at 31, 46, 51-52). The Varneys were married in 1983 and separated in 1989[2] (H.Tr. at 31).

On September 17, 1990, Disciplinary Counsel sent Respondent a copy of the Complaint and asked him to reply to the allegations contained therein. Disciplinary Counsel received Respondent's reply on or about October 1, 1990 (DCE 3). In that reply, Respondent failed to address or even mention the allegations concerning his forging Ms. Musick's name and using her notary

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[1] The Investigative Panel of the Lawyer Disciplinary Board found that there was insufficient evidence to support a finding of probable cause to proceed to hearing on these allegations.

[2] Respondent and Angela Varney were divorced in January 1991 (H.Tr. at 31).

stamp on the Double Camp Fork Deed DCE 3). however, Respondent did address all of Ms. Varney's remaining allegations concerning the forging of her name to various documents (DCE 3). For example, Respondent stated that he had Ms. Varney's permission to sign her name to the deed of conveyance of the Double Camp Fork property to Eaglehawk and to the $80,000.00 check (DCE 3 and 5-3). He also attached an affidavit from his mother to rebut the allegation that she knew nothing about the sale of the Double Camp Fork property to Eaglehawk (DCE 3 and 5-8). The affidavit did not address the circumstances surrounding the notarization of the Double Camp Fork Deed which transferred ownership of the property from mother to son (DCE 3 and 5-8).

On November 28, 2990, the Secretary of State sent a letter to Ms. Musick asking her to address the Double Camp Fork Deed. The letter stated:

> [An allegation] has been made alleging that the notarization on a deed of conveyance in Deed Book 303 at page 516 is not your signature. Please let me know if the notarization on this document was performed by you. Also, please relate any of the circumstances you may be aware of surrounding the notarization of this deed of conveyance.

(DCE 5-9).

By letter dated December 4, 1990, Ms. Musick replied to the Secretary of State's letter. Ms. Musick stated:

> In answer to the Complaint you have received concerning Deed Book 303 at Page 516, I respond as follows: it is correct that this is not my signature. This deed was signed by Mary Lou Varney on September 30, 1989. This was a Saturday when our office is normally closed. I was unable at that time to come to the office to notarize the signature of Mary Lou Varney. Mr. Varney then assumed it would be all right if he would sign my

name and use my seal to notarize the signature so that the transaction could be closed that day. I assumed that Mr. Varney then did sign my name and use my seal to notarize the signature of Mary Lou Varney who was there a the office at the time. (Emphasis supplied)

(DCE 5-10).

Thereafter, the Secretary of State recommended that Respondent's notary commission be revoked and set a hearing for April 12, 1991. During the hearing, Ms. Musick testified as follows concerning the notarization of the Double Camp Fork Deed:

Q. You never saw it prior to that. Is this your signature that appears on the notarization of this document?

A. No Ma'am it is not.

Q. Is this your a stamp of your notary stamp that appears on this document?

A. Yes, it is my stamp.

Q. Do you have any knowledge of this particular notarization and how it took place or when it took place?

A. I only had knowledge of it after the fact and Mr. Varney had acknowledged to me that he did use my signature and it has been submitted in writing that I had no knowledge until many months after that. I never seen the deed before.

Q. Mr. Varney did acknowledge to you that he used your stamp and signed your name on this document?

A. Yes.

Q. Do you remember approximately when?

A. No, I don't.

Q. I just have a couple more questions.

. . . .

C.[3] I believe we are talking about Exhibit A are we not? I think we are talking apples and oranges here.

Q. No, Exhibit No. 10 which is a letter from Anita Musick to Ken Hechler regarding Secretary Heckler's letter.

C. Oh, Okay.

Q. She acknowledges in the second paragraph that it was not her signature.

A. Correct.

C. We will stand by I believe the language of the exhibit which assumes Mr. Varney signed it. (Emphasis added.)

A. Yes.

Q. Are you recanting what you said a moment ago when you said he told you he did it.

A. I questioned him about the document but I did not see him sign it. No I did not.

Q. But he told you he signed it.

A. Yes, more or less. (Emphasis added.)

DCE 5 at pages 7-9).

The Secretary of State also called Respondent to testify (DCE 5). Respondent asserted his 5th Amendment privilege against self-incrimination (DCE 5). Respondent offered no witnesses at hearing (DCE 5).

On May 17, 1991, the Hearing Examiner issued a recommended decision stating that Respondent's notary commission should be revoked (DCE 6).

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[3] "C" is Ms. Musick's former attorney who represented her during this particular proceeding.

On June 12, 1991, the Secretary of State issued a Final Order revoking Respondent's notary commission effective June 24, 1991.

Respondent filed an appeal with the Circuit Court of Mingo County. On May 4, 1992, the Circuit Court reversed and vacated the decision revoking Respondent's notary commission (Exhibit 8). The Secretary of State then appealed the Circuit Court decision to the West Virginia Supreme Court of Appeals.

On july 16, 1993, the State Supreme Court ruled in favor of the Secretary of State (DCE 9).

On August 10, 1994, the Office of Disciplinary Counsel filed a Statement of Charges with the State Supreme Court alleging that Respondent violated Rules 8.4(b), (c) and/or (d) of the Rules of Professional Conduct. On or about October 21, 1994, the Statement of Charges was voluntarily dismissed without prejudice by Agreed Order of both parties (DCE 1). The matter was then re-presented to the Investigative Panel in November 1994. At that time, the Panel voted to issue an Amended Statement of Charges which reflected that either Respondent or someone else at his direction signed Ms. Musick's name to the Double Camp Fork Deed and used her notary stamp to notarize the document (DCE 1). The Amended Statement of Charges was filed with the State Supreme Court on November 18, 1994 (DCE 1).

Meanwhile, in September 1994, Respondent had Kenneth W. Blake, a document examiner, compared the forged signature of Ms. Musick with that of handwriting samples submitted by him (DCE

10). Mr. Blake stated the following in his September 5, 1994 report:

> Examination of photocopies is based on the assumption that the photocopies submitted are accurate reproductions in all pertinent details of the respective original document which each purports to depict. Someone has made a blotched attempt to simulate the signature of Anita G. Musick appearing on exhibit QC-1. Because of this there is no basis to identify the K-1 writer (Cecil C. Varney) as being the writer of this questioned signature. I see no handwriting characteristics to support the theory that Cecil C. Varney may have written it.

(DCE 10).

Mr. Blake also compared Kenneth Simon's signature to that of the forged Anita Musick signature on the Double Camp Fork Deed (DCE 11). Mr. Blake stated in his October 9, 1994 Report:

> As stated previously in my report dated September 5, 1994, someone has made an attempt to simulate the signature of Anita G. Musick appearing on Exhibit QC-1. Because of this, there is not basis to identify the KC-3 writer, Kenneth P. Simons as being the writer of this questioned signature. I examined the numerals that the notary would have probably written, and they are completely different than those of Kenneth P. Simons.

(DCE 11).

Disciplinary Counsel subsequently submitted the same documents that were examined by Mr. Blake to former FBI Agent and Document examiner Hartford R. Kittel. Mr. Kittel found:

> From the examination possible of the photocopy, QC-1, it was determined that the questioned Anita G. Musick signature on QC1 is a simulated forgery of the true signature of Anita G. Musick as represented by KC2. This simulation has effectively distorted the normal handwriting of the perpetrator sufficiently to preclude the determination of the writer's identity or non-identity.

(DCE 13).

A disciplinary hearing on the ethics charges was held on March 6, 1995 (H.Tr.). At that time, Disciplinary Counsel admitted several exhibits into evidence which included the following documents: (a) the Double Camp Fork Deed; (b) the December 4, 1990 letter from Ms. Musick indicating that Respondent had assumed that it would be all right if he signed her name to and used her notary seal on the Double Camp Fork Deed; (c) the transcript of the notary revocation hearing conducted by the Secretary of State (d) the recommendation of the Hearing Examiner for the Secretary of State; (e) the final decision of the Secretary of State; (f) Varney v. Heckler, 189 W.Va. 655, 434 S.E.2d 15 (1993); and (g) the various reports of the handwriting experts (DCE at 5, 5-2, 5-10, 6, 7, 9, 10, 11, 13).

Disciplinary Counsel also called Ms. Varney as a witness. Ms. Varney testified that she was a distant relative of Ms. Musick's and that she had known her all her life (H.Tr. at 26). Ms. Varney also testified that she was familiar with Ms. Musick's handwriting: "I saw her name on many documents while she was employed by Mr. Varney . . .. [F]or a couple of years, I had offices in the same building with Mr. Varney and Ms. Musick and was there everyday in their offices, therefore, I could see samples of her writing" (H.Tr. at 27). Ms. Varney further testified that the signature on the Double Camp Fork Deed did not belong to Ms. Musick (H.Tr. at 27-29).

Ms. Varney also testified that she was familiar with Respondent's handwriting:

> Q. During the course of your marriage to Mr. Varney did you have occasion to become familiar with his handwriting style?
>
> A. Yes, I did.
>
> Q. How so?
>
> A. From seeing it on many, many documents and just various types of handwriting, notes, handwritten notes, forms that were filled out in his handwriting.
>
> Q. Approximately how many documents did you see his handwriting on in those years?
>
> A. I don't know the exact number. I would say at least 100.
>
> Q. Were you familiar with his handwriting style in September of 1990?
>
> A. Yes.
>
> Q. Approximately how many documents had you viewed at that time which were handwritten by Mr. Varney?
>
> . . . .
>
> A. I would say approximately the same number.

(H.Tr. at 25-26). Disciplinary Counsel was not allowed to elicit non-expert opinion from Ms. Varney as to whether or not the forged acknowledgment on the Double Camp Fork Deed could have been written by the Respondent (H.Tr. at 29-31). The Panel permitted the Disciplinary Counsel to vouch the record (H.Tr. at 43-44). During the avowal, Ms. Varney testified that in her <u>opinion</u> the forged notary signature on the Double Camp Fork Deed was done by the Respondent (H.Tr. at 43-44).

Respondent denied that he signed Ms. Musick's name to and used her notary stamp on the Double Camp Fork Deed. According to Respondent he prepared the Double Camp Fork Deed conveying the property to him from his mother (H.Tr. at 56-57). On Friday, September 29, 1995, Respondent took the deed to his mother's house to show it to her (H.Tr. at 57). Respondent testified that he told his mother that he could not notarize the deed as he was a party to the transaction (H.Tr. at 57-58).

Respondent then stated that he agreed to meet his mother at his office on Saturday so that Ms. Musick could notarize the deed (H.Tr. at 58). On Saturday, Respondent was at his office with the deed when his mother arrived between 11:00 and 11:30 a.m. (H.Tr. at 58-59).

Respondent testified that he unsuccessfully attempted to contact Ms. Musick by telephone after his mother arrived at the office (H.Tr. at 59-60). Respondent said that his mother and he were just leaving to go to a local bank and have the deed notarized when Mr. Simons came into the office (H.Tr. at 60-61). Respondent asked Mr. Simons to notarize the deed (H.Tr. at 61). According to Respondent, Mr. Simons observed his mother sign the deed (H.Tr. at 61). However, Mr. Simons could not find his notary stamp (H.Tr. at 61). Respondent said that it did not bother him too much because "I figured he would find it eventually and even if he didn't find it right away, there was no hurry in getting the deed recorded, so he could have found or ordered him another one if he'd lost it" (H.Tr. at 61).

Respondent said he told Mr. Simons to put the deed on his desk when he finished notarizing it (H.Tr. at 62). Respondent and his mother then left to go to lunch (H.Tr. at 62). Respondent did not look at the deed again for over a year after he left the office on Saturday.

Q. So you didn't come back to pick up the deed at that time?

A. No.

Q. When did you get the deed?

A. When I got back in the office on Monday morning, it was sitting on my desk up on the right-hand corner. It sat there probably two or three weeks.

Q. Did you look at it?

A. No.

Q. You never looked at the deed?

A. I didn't look at it.

Q. You never looked to see if it was notarized?

A. No I didn't. Not at that time.

Q. Why not?

A. Again, as I said, there was no urgency. It was not going to be recorded yet. I assumed that he did what he said he was going to do. He never came to me and said anything like, "By the way, I was unable to get that deed notarized because I couldn't find the seal," and anything like that. He never said that. It sat there for three or four weeks.

Q. You didn't even look at it during those three or four weeks?

A. In fact, when my mother signed the deed on that Saturday morning, that's when I signed the part down there at the bottom where it says I certify that I prepared it so I had no reason to look at it again.

(H.Tr. at 62-63).

Although Respondent testified that he would normally review deeds at some point after they were notarized but before they were recorded when he was the preparer of the document, he did not do so in this case (H.Tr. at 64-65). In fact, Respondent said that he did not look at the deed again until Fall 1990 or after Ms. Varney filed complaints with the Office of Disciplinary Counsel and the Secretary of State (H.Tr. at 65).

Respondent said that after his estranged wife filed complaints, he reviewed the deed and he confronted Mr. Simons:

> "He said that after we left, he was unable to find his seal, he looked through all the drawers, he ran across Anita's seal in her drawer and just decided that what the heck, no big deal. I'll just use her seal and sign her name."

Respondent stated that he did not have his mother testify during the Secretary of State's hearing because:

> "I was worried that if I did anything like that to have to bring her in and then explain her testimony, I would be waiving my Fifth Amendment privilege and, at this point in time, . . .[my wife] had gone to the grand jury in Cabell County . . . and that an indictment of some kind might be imminent. . . . That's why I couldn't even say anything about what happened with Ken because I though they might be involving that in some way."

(H.Tr. at 71-72).[4] Respondent also stated that if his mother had testified at the hearing someone else would have had to explain her testimony, and by doing that, he may have waived his Fifth Amendment privilege against self-incrimination (H.Tr. at

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[4] Respondent was indicted one month following the Secretary of State's hearing by a Cabell County Grand Jury on uttering charges unrelated to the Double Camp Fork Deed (H.Tr. at 96, 99). The indictment was eventually dismissed (H.Tr. at 96).

72). Respondent also testified that he did not cross-examine Ms. Musick during the Secretary of State's hearing because he again felt he would have waived his Fifth Amendment privilege against self-incrimination (H.Tr. at 75).

In addition to having his mother testify at the disciplinary hearing, Respondent also called Anita Musick as a witness. Ms. Musick testified that she did not notarize the Double Camp Fork Deed (H.Tr. at 129). Ms. Musick testified that Respondent never acknowledged to her that he signed her name to and used her notary stamp on the deed (H.Tr. at 126-127). Instead, Ms. Musick said that Respondent merely nodded his head when she asked him about it (H.Tr. at 127). According to Ms. Musick's testimony, the Respondent did not indicate one way or the other by that nod whether he had forged her name (H.Tr. at 127). Ms. Musick stated that she had testified incorrectly during the Secretary of State's hearing because she was nervous and confused (H.Tr. at 126-127).

III.

CONCLUSION OF LAW

A. DISCIPLINARY COUNSEL HAS NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED RULES 8.4(b), (c) AND/OR (d) OF THE RULES OF PROFESSIONAL CONDUCT

Generally, the Rules of Professional Conduct state the "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381, (1984). A violation of any of the Rules must be established by clear and convincing

evidence. See Lawyer Disciplinary Board v. Kohout, slip op. No. 22629 (W.Va. April 14, 1995). Specifically, the State Supreme Court held that "before discipline may appropriately be imposed the charges against the respondent must be proved by clear and convincing evidence." Id. at 5-6. See also, Committee on Legal Ethics v. Six, 181 W.Va. 52, 380 S.E.2d 219 (1989); Committee on Legal Ethics v. Daniel, 160 W.Va. 388, 235 S.E.2d 369 (1977); Committee on Legal Ethics v. Lewis, 156 W.Va. 809, 197 S.E.2d 312 (1973). The burden of proof rests with Disciplinary Counsel. Id.; Kohout, supra.

1. Rule 8.4(b).

Rule 8.4(b) of the Rules of Professional Conduct provides that "[i]t is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Generally, proof on the record of a final conviction of a crime satisfies the burden of proof of a violation of the Rule. Committee on Legal Ethics v. Moore, 186 W.Va. 127, 411 S.E.2d 452 (1991). However, the State Supreme Court has also held that uncharged criminal acts can constitute a violation of Rule 8.4(b). Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989).

In order to violate Rule 8.4(b), a lawyer must commit a crime. Disciplinary Counsel must establish each and every element of the crime by clear and convincing evidence in order to

prove that Respondent violated the Rule. In the instant case, Respondent is charged with violating Rule 8.4(b) by engaging in official misconduct in violation of W. Va. Code 29(C)-6-201 and 202 (1984) and/or by willfully impersonating Anita Musick and/or unlawfully possessing her seal in violation of W.Va. Code 29(C)-6-203 and 204 (1984).

Therefore, in order to establish that Respondent violated W.Va. Code 29(C)-6-201 and 202 (1984), Disciplinary Counsel must show that Respondent engaged in the unauthorized, unlawful, abusive, negligent, reckless or injurious exercise of a notarial power or performance of a notarial duty. Disciplinary Counsel must prove that Respondent willfully impersonated Anita Musick and unlawfully possessed her seal to establish violations of W. Va. Code 29(C)-6-203 and 204 (1984). Disciplinary Counsel has not sustained the burden of proof by clear and convincing evidence, that the Respondent violated Rule 8.4(b).

2. **Rule 8.4(c)**

Rule 8.4(c) of the Rules of Professional Conduct provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Unlike, Rule 8.4(b), Disciplinary Counsel does not have to establish that Respondent committed a crime. Disciplinary Counsel merely has to prove that Respondent's conduct fell with the purview of Rule 8.4(c).

Under Rule 8.4(c), a showing of intent is not required. See Committee on Legal Ethics v. Woodyard, 174 W.Va. 40, 321 S.E.2d

690 (1984) (no showing of intent necessary for violation of DR 1-102(A)(4)[5] where lawyer charged with misrepresenting work efforts on a case and requesting funds from his client to pay non-existent estate taxes)' Committee on Legal Ethics v. Taylor, 187 W.Va. 39, 415 S.E.2d 280 (1992) (intent showing not required for DR 1-102(A)(4) violation where a lawyer wrote worthless checks under circumstances demonstrating dishonesty and misrepresentation; however, must show that attorney was aware checks were worthless when written, and he failed to make them good within a reasonable time frame). Finally, like Rule 8.4(c), a lawyer can violate Rule 8.4)c) even when the misconduct is unrelated to the practice of law. See Argument A-3, infra. Disciplinary Counsel has not sustained the burden of proof by clear and convincing evidence that Respondent violated Rule 8.4(c).

3. **Rule 8.4(d).**

Rule 8.4(d) of the Rules of Professional Conduct provides that "[i]t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice." In many instances where a lawyer has been disciplined under this Rule, the misconduct occurred during or was directly related to litigation. However, in certain cases, misconduct has been found to prejudicial to the administration of justice when the misconduct fell outside professional activities. See Committee

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[5] DR 1-102(A)(4) is the Code of Professional Responsibility's counterpart to Rule 8.4(c). The two Rules have identical language.

on Legal Ethics v. Fletcher, slip op. No. 22132 (W.Va. May 20, 1994) (lawyer acting as fiduciary commissioner violated Rule 8.4(d) by neglecting an estate which was pending before him.) See also Committee on Legal Ethics v. Veneri, 186 W.Va. 210, 411 S.E.2d 865 (1991) (lawyer acting as administrator of his mother's estate acted improperly and therefore subject to disciplinary action.)

4. Evidence submitted was insufficient to prove the allegations of misconduct.

In the instant case, Disciplinary Counsel has not proven by clear and convincing evidence that Respondent violated Rules 8.4(b), (c) and/or (d) of the Rules of Professional Conduct. It is undisputed that Respondent prepared the Double Camp Fork Deed. Respondent also does not contest the fact that he had a disqualifying interest in the Deed that should have prevented him from notarizing the document. It is further undisputed that Ms. Musick did not sign her name to and notarize the Double Camp Fork Deed.

Disciplinary Counsel proffered the December 4, 1990 letter from Anita Musick in which she stated that "Mr. Varney then assumed it would be all right if he would sign my name and use my seal to notarize the signature so that the transaction could be closed that day" (DCE 5-10). She also proffered Ms. Musick's original Secretary of State Hearing testimony in which she volunteered that Respondent had "acknowledged to me that he did use my signature" (DCE 5 at 7), and later through her counsel, Respondent denies he signed the acknowledgment and two experts

have opined that Respondent did not sign the acknowledgment. Ms. Musick has retracted her statement before the Secretary of State. Ms. Varney, hardly a credible witness, considering her apparent motive in filing numerous complaints, was deemed not competent to give expert opinion on handwriting and contradict the expert opinions introduced by Disciplinary Counsel and the Respondent's denial that he signed the name of Ms. Musick. Ms. Musick's evidence before the Secretary of State was hardly clear and convincing. She stated she assumed Respondent signed her name and her testimony taken in its entirety, in the Secretary of State's Hearing, about Respondent admitting that he signed her name was equivocal and self-contradictory. Thus, Disciplinary Counsel has not proven by clear and convincing evidence that it was Respondent who signed Ms. Musick's name to and used her notary stamp on the Double Creek Fork Deed.

Article 3, Section 5 of the Constitution of West Virginia provides that no person "in any criminal case [shall] be compelled to be a witness against himself." This provision is identical to the provision against self-incrimination contained in the Fifth Amendment to the United States Constitution. Respondent could not have cross-examined Ms. Musick himself without impacting on his Fifth Amendment privilege against self-incrimination and the calling of his mother might implicated Respondent in some sort of criminal conspiracy charge with Mr. Simons.

Respondent then testified that he never bothered to look at the deed when he returned to the office the following Monday and found it laying on his desk. He also testified that he did not look at the deed before it was filed in October 1990. According to Respondent, he first looked at the deed after the complaints were filed with the Secretary of State's Office and the Office of Disciplinary Counsel. Respondent also testified that it was his general custom to look at a deed sometime after it was notarized and before it was filed if he was the preparer of the document. Respondent apparently did not even check the deed to see if it was, in fact, notarized before he had it recorded. A case of poor judgment, maybe negligence, but not an ethical violation.

However, this conduct does not constitute clear and convincing evidence of a violation 8.4(b)(c) or (d) of the Rules of Professional Conduct, in that it has not been proven that Respondent's actions constituted the exercise of a notarial power or performance of a notarial duty.

Every act of negligence or error of judgment does not constitute a violation of the Rules of Professional Conduct. State Bar v. Mullins, 226 S.E.2d 427 (W.Va. 1976).

Thus, Disciplinary Counsel has not established by clear and convincing evidence that Respondent violated Rules 8.4(b), (c) and/or (d) of the Rules of Professional Conduct.

The Subcommittee Hearing Panel ruled that Ms. Varney could not testify that the handwriting in question belonged to Respondent.

1. Exclusion of Ms. Varney's Non-Expert Opinion

Rule 701 of the West Virginia Rules of Evidence governs lay opinion testimony and provides that "[if the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony of determination of a fact in issue." The excluded testimony dealt with proffered expert opinion that the Respondent forged Ms. Musick's signature, with the only foundation being the witness's familiarity with the Respondent's handwriting. Moreover, lay opinion testimony can be presented at a hearing despite the fact that experts on the matter in question have already testified. See State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986) (lay witnesses may give opinion about defendant's mental condition even though experts had already testified on the issue). The holding of State v. McWilliams, supra, has been modified by the recent case of Mildred L. M. v. John O. F., _____ W.Va. _____, 452 S.E.2d 436 (1994), which holds that a finder of fact may not disregard uncontradicted scientific testimony by a qualified expert, at least as to scientific facts. The Panel takes judicial notice of the fact that handwriting analysis is a scientific discipline and to attribute a forgery to a specific individual requires experience in the study and comparison of a sample of handwriting with the forged signature. Ms. Varney was not qualified as an expert in this discipline and the Panel

properly excluded her expressing an opinion concerning the author of the forgery. It is possible for non-expert testimony to call into question the validity of expert opinion, however, unchallenged scientific testimony may not be rejected by the finder of fact. As a layperson, Ms. Varney is limited by Rules of Evidence to authenticating handwriting and establishing that a signature is or is not genuine, but not expressing opinions that her ex-husband forged Ms. Musick's name.

Rule 901(b)(2) of the West Virginia Rules of Evidence allows nonexpert opinion on handwriting. The Rule provides that "[n]on-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of litigation" is satisfactory to establish authentication and identification. For the purpose of the Rule, it is one thing for a non-expert to say I recognize the handwriting as genuine and an entirely different matter to state that the signature is a forgery and to opine who forged the signature.

At hearing, Disciplinary Counsel argued that Ms. Varney should be allowed to testify as to whether or not the signature of Anita Musick on the Double Camp Fork Deed was written by Respondant. Disciplinary Counsel argued both Rule 701 and Rule 901(b)(2) of the West Virginia Rules of Evidence (H.Tr. at 31), permit such opinion evidence from a layperson. The Subcommittee Hearing Panel refused to allow such testimony. The Subcommittee Hearing Panel allowed Ms. Varney to testify that the signature in question did not belong to Anita Musick (H.Tr. at 27-28). This

ruling not inconsistent with the Panel's decision not to allow Ms. Varney give expert opinion that the forged signature on the document in question was done by the Respondent.

The Panel allowed Disciplinary Counsel to vouch the record (H.Tr. at 43). Assume, for the sake of argument, the Panel erred and the ex-wife should be permitted to give a lay opinion that Respondent forged Ms. Musick's signature to the acknowledgment, such evidence could be contrary to the weight of the evidence, three other witnesses, two of whom are experts dispute this assertion, one of the experts says that its impossible to say who did the forging. Even if admissible, Ms. Varney's unscientific opinion is against the weight of the evidence and certainly her credibility has been impugned.

2. Ms. McCune's Testimony.

Ms. McCune's testimony concerning Ms. Simons' practices is irrelevant to the issue of whether or not the Respondent forged Ms. Musick's signature on the acknowledgment and affixed her notarial seal, or directed someone else to forge Ms. Musick's name and affix her seal. The Panel did not consider Ms. McCune's evidence.

Disciplinary Counsel offered no evidence that Respondent signed or directed someone else to sign Ms. Musick's name on the acknowledgment.

IV.

RECOMMENDATION

The violation of Rules 8.4(b), (c) and/or (d) of the Rules of Professional Conduct has not been proven by clear and convincing evidence. Wherefore, the Panel recommends that the charges be dismissed.

May 22, 1995
Date

R. Kemp Morton
R. Kemp Morton, Chairperson
Hearing Panel Subcommittee

May 22, 1995
Date

Cheryl L. Henderson
Cheryl L. Henderson, Esquire
Member Hearing Panel
Subcommittee

June 2, 1995
Date

Debra K. Sullivan
Debra K. Sullivan
Member Hearing Panel
Subcommittee

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