

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

IN THE MATTER OF
DEMIAN JOHN MCGARRY

CASE NO. CL2021-13480
VSB DOCKET NOS.. 20-070-117742

AGREED DISPOSITION MEMORANDUM ORDER
FOR A PUBLIC REPRIMAND WITHOUT TERMS

This matter came to be heard on Monday, March 07, 2022, before a Circuit Court Three-Judge panel, upon the joint request of the parties for the Court to accept the Agreed Disposition endorsed by the parties and offered to the Court as provided by the Rules of the Supreme Court of Virginia. The panel consisted of the Honorable Bruce D. Albertson, Judge of the Twenty-sixth Judicial Circuit, Designated Chief Judge, the Honorable David B. Franzen, Judge of the Sixteenth Judicial Circuit, and the Honorable Victoria A. B. Willis, Judge of the Fifteenth Judicial Circuit. Demian John McGarry was present and represented by counsel, Matthew W. Lee. The Virginia State Bar appeared through its Assistant Bar Counsel, Prescott L. Prince. The Chief Judge polled the members of the panel as to whether any of them were aware of any personal or financial interest or bias which would preclude any of them from fairly hearing the matter to which each judge responded in the negative. Court Reporter Lisa Wright, Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

WHEREFORE, upon consideration of the Agreed Disposition, the Certification, Respondent's Answer, Respondent's Disciplinary Record, the arguments of the parties, and after due deliberation,

It is **ORDERED** that the Circuit Court accepts the Agreed Disposition and the Respondent shall receive a Public Reprimand without Terms. The Agreed Disposition, is attached to, and incorporated in this Memorandum Order.

It is further **ORDERED** that the sanction is effective March 7, 2022.

The Clerk of the Disciplinary System shall assess costs pursuant to ¶13-9 E. of the Rules.

A copy teste of this Order shall be mailed, to the Respondent, Demian John McGarry was , at his last address of record with the Virginia State Bar, Curran Moher, 10300 Eaton Place, Ste 520, Fairfax, VA 22030, with an attested copy to: Matthew W. Lee, Wilson Elser, 8444 Westpark Drive, Suite 510, McLean, VA 22102, Prescott L. Prince, Assistant Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026, and to the Clerk of the Disciplinary System, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-0026.

ENTERED THIS 7th DAY OF MARCH, 2022

CIRCUIT COURT FOR THE FOR THE CITY OF FAIRFAX



Bruce D. Albertson, Chief Judge
Three-Judge Circuit Court

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

**VIRGINIA STATE BAR EX REL
SEVENTH DISTRICT COMMITTEE
VSB DOCKET NO. 20-070-117742**

v.

Case No. CL-2021-0013480

DEMIAN JOHN MCGARRY

and

**VIRGINIA STATE BAR EX REL
SEVENTH DISTRICT COMMITTEE
VSB DOCKET NO. 20-070-117742**

v.

GERALD RICHARD CURRAN

**AGREED DISPOSITION (DEMIAN JOHN MCGARRY)
(Public Reprimand)**

Pursuant to the Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13-6.H., the Virginia State Bar by Prescott L. Prince, Assistant Bar Counsel, and the Respondent, Demian John McGarry, and Matthew William Lee, Counsel for Respondent, hereby enter into the following Agreed Disposition arising out of the referenced matter.

FINDINGS OF FACT

1. Demian John McGarry ("Respondent") was licensed to practice law in the Commonwealth of Virginia in 2005. At all times relevant to the conduct set forth herein, Respondent was an attorney licensed to practice law in the Commonwealth of Virginia.

2. The law firm of Curran, Moher, Weiss, P.C. was retained on or about 29 March 2017 to represent Andrea Marsh, ex-wife of the complainant Timothy Marsh, in a contested

divorce case. Respondent McGarry was employed by Curran, Moher, Weiss, P.C., as was Gerald R. Curran, Esquire. Respondent Curran and Respondent McGarry were counsel of record for Andrea Marsh in her divorce matter.¹

3. Prior to her retainer of Respondent Curran and Respondent McGarry, Andrea Marsh came to believe that Tim Marsh had engaged in multiple extra-marital affairs. In furtherance of this belief, Andrea Marsh, along with members of her family, allegedly engaged in extensive illegal surveillance of her estranged husband, Tim Marsh, from the period of October 2016 through April 7, 2017.

4. Pursuant to Virginia Code Section 19.2-62, it is unlawful to use any electronic, mechanical, or other device to intercept any oral communication and/or to intentionally use or disclose the contents of any wire, electronic or oral communication knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication.

5. The allegedly illegal recordings obtained by Andrea Marsh and/or members of her family included telephone and in person communication between Tim Marsh and third parties.

6. The Marshes jointly used a computer for household purposes. On or about 7 April 2017, during the course of the couple's divorce proceeding, Tim Marsh reviewed Andrea Marsh's Gmail. While doing so, Tim Marsh discovered, among other things, two audio recordings, a report from a private investigator referencing Tim Marsh's activities from October 2016 through January 2017, and a "journal" or chronology of Tim Marsh's activities that included specific details of his activities that were not included in the private investigator's report. (During the relevant period through April 2017, Tim Marsh and Andrea Marsh shared

¹ Prior to Respondent being retained, Andrea was represented by Attorney Kathleen O'Brien.

the marital home, but were “separated” in that they lived in separate areas of the house with Tim Marsh living in the basement.)

7. One of the audio recordings was titled “Audio_M**** preppers” and the other recording was titled “Tim audio Sun Jan 8, 2017 doing her.” After listening to the two recordings, Tim Marsh confirmed that the recordings contained private communications with a third party (M**** P****, Tim Marsh’s alleged paramour) which Tim Marsh and M**** P**** both intended and expected to remain private, and that neither he nor M**** P**** had authorized or consented to the private communications being recorded, used, or disclosed.

8. Tim Marsh initially believed that there were only two recordings, but he subsequently learned in a federal civil suit he filed against individuals, including the Respondents, that the alleged illegal surveillance was extensive and included perhaps as many as 180 separate recordings, the majority of which involved the use of a concealable recording device that was secured under the seat of his car. Neither Respondent Curran nor Respondent McGarry participated in the surveillance. The information in these recordings included Tim Marsh’s conversations with M**** P****, as well as other people including, but not limited to, his mother and his bandmates.² Tim Marsh contends, but Respondents dispute, that conversations also involved his confidential financial matters and privileged discussions with his attorney.

9. On or about 10 April 2017, Tim Marsh emailed his attorney, Brian West, Esq., and informed him of the two audio recordings he had discovered on the computer and provided him a copy of the two audio recordings, along with the rest of materials he found on Andrea Marsh’s Gmail account or the hard drive of the computer.

² In addition to his regular employment, Tim Marsh played in a band.

10. During the course of the divorce proceedings, Respondent Curran and Respondent McGarry became aware of the allegedly illegal surveillance conducted by Andrea Marsh and/or her family members. Based upon the materials Tim Marsh obtained from Andrea Marsh's email account, Tim Marsh and his legal counsel were also aware of at least two of the recordings. In an email dated 13 April 2017, Mr. West sent to Respondent Curran an email informing him that it appeared that Andrea Marsh had been electronically surveilling Tim Marsh. Respondent Curran subsequently informed Respondent McGarry of Mr. West's email.

11. Notwithstanding the fact that Respondent Curran and Respondent McGarry had been informed that their client had probably engaged in the illegal recording of Tim Marsh, they failed to take prompt and definitive action to insulate themselves from the allegedly illegal recordings and to ensure that information from the recordings was not used in the course of ongoing divorce litigation.

12. Although Respondent Curran and Respondent McGarry strongly contend (and the VSB does not contest) that they informed Andrea Marsh of the illegality of the recordings, that she should stop any ongoing recording efforts, and none of the recordings could be used in the divorce litigation, Respondent Curran and Respondent McGarry subsequently received additional emails over the course of an almost two month period, some of which, contained additional potentially illegal recordings from Mrs. Marsh through her family members. Those communications included:

On 2 May 2017, Respondent Curran received an email from "pCloud Transfer" advising him that Mary Lilley (Ms. Marsh's mother) had sent him a 77.51 MB file entitled "Tim Marsh Audio.zip." The message was: "*Tim Marsh audio files. Please download, unzip, and listen to each.* " When those audio files were produced in electronic form in furtherance of the above referenced federal lawsuit, it appeared that the file contained at least 80 numbered and named audio files. Each of the audio files contained

private communications between Tim Marsh and third parties including M**** P****. When he initially received it, Respondent Curran forwarded the email to Respondent McGarry. According to Respondent Curran, he forwarded that email without examining its contents.

On 28 May 2017, Kristina Hampton (Andrea Marsh's sister) forwarded to Respondent Curran two emails from Tim Marsh to M**** P**** without explanation as to how she obtained apparently private emails. When he received the email, Respondent Curran forwarded the email to Respondent McGarry. According to Respondent Curran, he forwarded that email without examining its contents.

On 28 May 2017 Danielle Richards (another sister of Andrea Marsh) emailed Respondent Curran a detailed journal of Tim Marsh's activities and his communications with third parties (including M**** P****) during the dates of 23 October to 16 December 2016, also with no explanation as to the source of the detailed private information. When he received the email, Respondent Curran forwarded the email to Respondent McGarry. According to Respondent Curran, he forwarded that email without examining its contents.

Ms. Hampton sent additional emails containing illegal recordings to Respondent Curran on 23 June 2017 and 27 June 2017.

13. Upon receiving these subsequent emails, neither Respondent repeated to Andrea Marsh the earlier warnings they had provided to her regarding the illegality of the recordings. Further, neither Respondent instructed their client to stop sending any such recordings. The Respondents' failure to do so constitutes a violation of Rules of Professional Conduct 1.2 (e) and 1.3 (a). Respondents accept responsibility for their actions even though each Respondent strongly contends, that neither one of them asked the client or her family members to send either of them the recordings, and neither knowingly used the information in the recordings in litigating the divorce proceeding.

14. In May of 2017, the Respondents were preparing the deposition of M***** P****, Mr. Marsh's alleged paramour. The Respondents prepared an outline of topics for

questions. The topics and questions contained specific dates and locations for Mr. Marsh's and Ms. P****'s activities which appeared to have been derived from the allegedly illegal recordings.

15. The Respondents represent that they did not believe that the topics and information were derived from the recordings. They stated that the questions were prepared from the facts and substance of the PI report, from deposition outlines they had used in prior cases and from discussions with their client, Andrea Marsh, who imparted to them information that she said was derived from legal sources including the substance of cell conversations Tim Marsh had around the couple's house, information from mutual friends and acquaintances, social media searches (Tim Marsh's band had a website with photos posted of Tim Marsh), etc.

16. Each Respondent strongly asserts that he never listened to the illegal recordings or otherwise intentionally reviewed material derivative from the illegal recordings, including in preparing the deposition outline for M**** P****'s deposition. Nevertheless, the Respondents did not take adequate, affirmative measures, in preparing the deposition outline, to ensure that the topics provided by their client were not derived from the allegedly illegal recordings, such actions constituting a further violation of RPC 1.2 (e) and 1.3 (a).³

16. In entering into this Agreed Disposition, the Virginia State Bar recognizes the absence of evidence showing Respondent Curran and Respondent McGarry participated in the creation of the illegal recordings or listened to any substantial portions of them, as well as the absence of any prior disciplinary record on their parts and their acceptance of responsibility in accepting this Agreed Disposition.

II. NATURE OF MISCONDUCT

³ None of the disputed topics or questions were actually asked of M**** P**** at the June 2017 deposition because she asserted her Fifth Amendment right against self-incrimination from the outset. The parties adjourned the deposition after a few minutes to submit the matter to the court.

Such conduct by Respondent Gerald Richard Curran constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.2 Scope of Representation

- (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

RULE 1.3 Diligence

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

PROPOSED DISPOSITION (PUBLIC REPRIMAND)


Accordingly, Assistant Bar Counsel and Respondent tender to the Three Judge Panel for its approval the agreed disposition of a PUBLIC REPRIMAND.

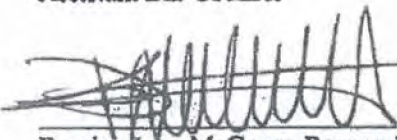
Respondent McGarry and his counsel agree that if the Three-Judge Panel designated to hear this matter approves this agreed disposition, this agreed disposition becomes **Final and Non-Appealable** and Respondent McGarry waives the right to appeal this agreed disposition or the Memorandum Order to be issued.

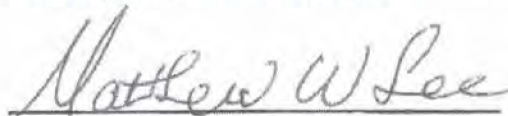
Respondent and his counsel agree further that if, for any reason, the Three-Judge Panel designated to hear this matter declines to approve this agreed disposition, then the same Three-Judge Panel shall hear, preside over and conclude the hearing of this matter in accordance with the designation by the Supreme Court of Virginia as previously scheduled, and Respondent waives any challenge to the composition of the Three-Judge Panel based on its consideration and/or rejection of this agreed disposition.

If the Agreed Disposition is approved, the Clerk of the Disciplinary System shall assess an administrative fee.

THE VIRGINIA STATE BAR

By: 
Prescott L. Prince
Assistant Bar Counsel


Demian John McGarry, Respondent


Matthew William Lee, Esquire
Counsel for Respondent