

VIRGINIA:

**BEFORE THE FOURTH DISTRICT SUBCOMMITTEE, SECTION II
OF THE VIRGINIA STATE BAR**

**IN THE MATTER OF
Donald Frank Rosendorf**

VSF Docket No. 21-042-122392

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On November 10, 2021 and December 3, 2021, meetings were held in this matter before a duly convened Fourth District Subcommittee, Section II consisting of Sean Albert Orville Sherlock, Chair, Sean Peter Schmergel, member, and Marian Wiggins, lay member. During the meetings, the Subcommittee voted to approve an agreed disposition for a Public Reprimand with Terms pursuant to Part 6, § IV, ¶ 13-15.B.4. of the Rules of the Supreme Court of Virginia. The agreed disposition was entered into by the Virginia State Bar, by Renu M. Brennan, Bar Counsel, and Donald Frank Rosendorf, Respondent, pro se.

WHEREFORE, the Fourth District Subcommittee, Section II of the Virginia State Bar hereby serves upon Respondent the following Public Reprimand with Terms:

I. FINDINGS OF FACT

1. Respondent was admitted to the Virginia State Bar ("VSB") in 1978. At all relevant times, Respondent was a member of the VSB.
2. On or about August 10, 2015, the Cochran Law Firm referred to Respondent Complainant Stuart Fitzgerald's ("Mr. Fitzgerald") 42 U.S.C. § 1983 claim against a former deputy sheriff Carl Story ("Story") with the Orange County Sheriff's Department.
3. Respondent subsequently exchanged emails with Mr. Fitzgerald regarding the case and accepted the representation. The exact dates are unclear.
4. Respondent's fee was contingent on the outcome of the representation. While Respondent believes he discussed the terms with Mr. Fitzgerald, Respondent did not state in writing the method by which his contingent fee was to be determined.

5. On November 30, 2015, Respondent sent Mr. Fitzgerald an email stating that he hoped to begin drafting the complaint in January 2016.
6. On December 29, 2015, Respondent met with Mr. Fitzgerald in person.
7. Respondent did not begin drafting the complaint in January 2016.
8. From February 11, 2016 to May 2016, Respondent was unable to work because he fractured his right upper arm in three places and tore his right rotator cuff.
9. On May 26, 2016, Respondent advised Mr. Fitzgerald of his injury and stated he would file suit on Mr. Fitzgerald's behalf on or before July 1, 2016.
10. Respondent did not file suit on or before July 1, 2016.
11. Months later, on November 20, 2016, Respondent sent Mr. Fitzgerald an e-mail attaching a draft complaint and stated that the complaint would be filed that week.
12. Respondent did not file the suit for another eight months.

***Fitzgerald v. Story*, Civil Action No. 3:17CV00049, United States District Court, W.D. Virginia, Charlottesville Division**

13. On July 21, 2017, Respondent filed the first suit, *Fitzgerald v. Story*, Civil Action No. 3:17CV00049, United States District Court, W.D. Virginia, Charlottesville Division. The suit alleged counts of violation of the Fourth Amendment – 42 U.S.C. 1983, Malicious Prosecution, Intentional Infliction of Emotional Distress, False Imprisonment, and Assault, and sought two million in compensatory damages and two million in punitive damages. Respondent failed to request attorneys' fees.

The suit alleged that on May 26, 2014, Story stopped Mr. Fitzgerald for allegedly flashing his bright headlights in the direction of Story's cruiser. In the course of the stop, Story placed Mr. Fitzgerald in an illegal choke hold, and "whipped his body to the cement pavement first. He then lifted Mr. Fitzgerald up, and slammed Mr. Fitzgerald's head against the hood of his cruiser several times." Mr. Fitzgerald was treated for facial abrasions and injuries and neck, knee, shoulder, and back pain.

Mr. Fitzgerald was charged with assault and battery on two law enforcement officers, destruction of property, obstruction of justice, and driving without a license.

Mr. Fitzgerald was held for 30 days before he was given a bond hearing. On July 31, 2015, the Deputy Commonwealth Attorney dismissed the charges against Mr. Fitzgerald.

14. Respondent listed Story's address as "Mineral Springs, Virginia" instead of Mineral, Virginia.

15. Respondent did not provide proof of service within 90 days after the complaint was filed as required by Fed. R. Civ. Pro. 4(m).
16. On October 23, 2017, the Clerk issued a notice requiring Mr. Fitzgerald to provide proof of service within 15 days.
17. On November 6, 2017, Respondent filed the Proof of Service indicating that a private process server had posted a summons and copy of the complaint on the front door of Plaintiff's residence. The form contained no additional information regarding any efforts to serve Story.
18. Respondent did nothing further for five months.
19. By Order to Show Cause entered April 26, 2018, the Court directed Mr. Fitzgerald to show cause within 10 days as to why the case should not be dismissed for failure to prosecute. The Order directed that failure to respond within 10 days would result in dismissal of the case pursuant to Fed. R. Civ. Pro. 41(b).
20. On May 5, 2018, Respondent requested a two-week extension to determine whether to file a motion for default judgment or seek voluntary dismissal. Respondent further stated:

Regarding the delay, counsel wanted to give defendant ample time to respond and then got bogged down with court appearances, filing deadlines, and depositions also lost his law clerk who did a good deal of legal research and responding to discovery for counsel. Counsel has found a new law clerk but she will not be available until mid-August.
21. By Order entered May 10, 2018, the Court granted the extension.
22. On May 24, 2018, Respondent filed a Motion for Entry of Default.
23. On May 25, 2018, the Clerk, at Respondent's request, filed an entry of default against Story pursuant to Fed. R. Civ. Pro. 55(a). Respondent did nothing further.
24. By a second Order to Show Cause entered July 18, 2018, the Court directed Mr. Fitzgerald to show cause within 10 days as to why the case should not be dismissed for failure to prosecute.
25. On July 26, 2018, Respondent filed a response to the Order to Show Cause stating, among other things, that he would be on vacation until July 27, 2018; Story had been served by posting at his last known address; and Respondent would seek an affidavit from the skip tracer hired to find Story. Respondent's response also noted that the Orange County Attorney, whom Respondent had contacted, had indicated to Respondent that Story had moved.

26. On August 6, 2018, Respondent filed a Motion for Entry of Default Judgment along with an affidavit from the process server who had found several addresses for Story. The address which Respondent listed and served Story was reported as Story's address from January 2014 to December 2016.
27. By Memorandum Opinion dated August 10, 2018, the Court denied the motion for default judgment because there was insufficient evidence that service was posted at defendant's "usual place of abode" or where defendant or his family resided at the time of posting. Instead, the filings indicated that Story may have moved from the address where service was posted.
28. By Order entered August 10, 2018, the Court denied Respondent's motion without prejudice and allowed Mr. Fitzgerald 14 days to provide proper proof of service or show cause why the action should not be dismissed for failure to serve process within the requisite time period.
29. On August 24, 2018, Respondent filed a second Motion for Entry of Default Judgment. Respondent maintained that Story was served by posting on November 3, 2017.
30. By Order entered November 5, 2018, the Court denied the motion because the statutory mailing requirement was not satisfied. The Court noted:
- Although plaintiff's counsel previously docketed a copy of a letter addressed to the defendant in "Mineral Springs, Virginia," [citation omitted], plaintiff's counsel has since acknowledged that "Mineral Springs, Virginia ... does not exist as a town."
- The Court allowed Mr. Fitzgerald 10 days to comply with the statutory requirements and provide proof of compliance or the case would be dismissed for failure to prosecute.
31. On November 5, 2018, Respondent filed his response with an additional affidavit.
32. By Order dated December 19, 2018, the Court granted Mr. Fitzgerald another 14 days to comply with the requirements of the Servicemembers Civil Relief Act, 50 U.S.C. § 3931(b)(1) by providing an affidavit stating whether or not the defendant is in military service and with facts in support.
33. On January 2, 2019, Respondent filed a Notice of Voluntary Dismissal.
34. By Order entered January 7, 2019, the Court dismissed the suit without prejudice pursuant to Fed. R. Civ. Pro. (a)(1)(A)(i).

***Fitzgerald v. Story*, Civil Action No. 3:17CV00039, United States District Court, W.D. Virginia, Charlottesville Division**

35. On July 1, 2019, Respondent filed the second complaint, *Fitzgerald v. Story*, Civil Action No. 3:17CV00039, United States District Court, W.D. Virginia, Charlottesville Division.

36. Respondent did not provide proof of service within 90 days after the complaint was filed as required by Fed. R. Civ. Pro. 4(m).
37. On October 10, 2019, the Clerk issued a notice requiring Mr. Fitzgerald to provide proof of service within 15 days.
38. On October 24, 2019, Respondent filed a proof of service form indicating attempted service at an address different than the one listed on the summons and complaint.
39. On January 31, 2020, the Court issued an Order to Show Cause allowing Mr. Fitzgerald 14 days to provide proof of proper service or show cause why the case should not be dismissed.
40. By Order entered May 18, 2020, the Court held that the proof of service was sufficient and ordered that if Mr. Fitzgerald wished to proceed with the two-step default judgment process he must file motion for entry of default within 14 days; and if no further action was taken within 14 days the case would be dismissed without prejudice.
41. On June 1, 2020, Respondent filed a Motion for Entry of Default Judgment instead of seeking entry of default which must be made by the Clerk and then seeking entry of default judgment by the Court, pursuant to Fed. R. Civ. Pro. 55.
42. On June 1, 2020, Respondent was hospitalized. Respondent checked himself out that evening in order to work, but he could not do so, and he was readmitted June 2.
43. By Order entered June 3, 2020, the Court construed the motion for entry of default judgment as a motion for entry of default and directed the Clerk to enter default against Story and then granted Mr. Fitzgerald 14 days to refile the motion for default judgment.
44. On June 3, 2020, the Clerk entered default against Story. Respondent did not refile the motion for default judgment within 14 days.
45. On June 24, 2020, the Court issued an Order to Show Cause directing Mr. Fitzgerald to respond as to why the case should not be dismissed for failure to prosecute. The Court advised that failure respond within 10 days will result in dismissal without prejudice.
46. Respondent did not respond to the Order to Show Cause because he was then hospitalized and did not review his e-mails or mail.
47. By Order entered July 7, 2020, the Court dismissed Mr. Fitzgerald's suit without prejudice and struck the matter from the Court's active docket.
48. Respondent did not learn of the dismissal until late July 2020.

49. By e-mail dated August 30, 2020, Respondent advised Mr. Fitzgerald of the dismissal, the facts underlying the dismissal without prejudice of the first case, his illness in June 2020, and the second dismissal. Respondent advised Mr. Fitzgerald that he was drafting a motion to reinstate the case.

50. Respondent did not file the motion to reinstate nor did he take any further action.

Bar complaint

51. On April 12, 2021 Mr. Fitzgerald submitted a bar complaint regarding Respondent's failure to advance the case from 2015 to the present. In part, Mr. Fitzgerald stated: "Mr. Rosendorf is sitting on this case after 7 years!! There has been no updates in status! PLEASE HELP ME! My case is from 2014 and I am very concerned about "Statute of limitations" among other concerns."

52. By email April 12, the VSB requested Respondent communicate with Mr. Fitzgerald regarding the status.

53. By email to the VSB, Respondent stated that he spoke with Mr. Fitzgerald on April 16 advising as to the status. The VSB opened the matter for preliminary investigation.

54. On June 15, 2021, Respondent advised the bar that he would refile the case within two weeks.

55. As of the date of the bar interview, October 6, 2021, Respondent had not been in touch with Mr. Fitzgerald or taken any action in the matter. On October 18, Respondent called Mr. Fitzgerald to apologize for his handling of this case, and he offered to file a motion to reinstate the case on the court's docket. Mr. Fitzgerald expressed frustration and stated that he did not want to hear what Respondent planned to do, but that Respondent had done it – filed the motion. As of December 1, 2021, the motion has not been filed.

56. Respondent takes responsibility for the mistakes and errors made in his representation of Mr. Fitzgerald. Respondent believes that these errors resulted from his taking on more cases and clients than he could then handle. Respondent states that he tried to get help from other lawyers, but he was unable to do so. Respondent concedes that he should have told Mr. Fitzgerald about his limitations and allowed Mr. Fitzgerald to retain other counsel. Respondent agrees, as noted below, that he should have withdrawn from this case due to his being overwhelmed with cases and due to his physical limitations.

57. Respondent has no disciplinary history, and he cooperated in the VSB investigation.

II. NATURE OF MISCONDUCT

Such conduct by Respondent constitutes misconduct in violation of 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.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.5 Fees

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

RULE 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

III. PUBLIC REPRIMAND WITH TERMS

Accordingly, having approved the agreed disposition, it is the decision of the

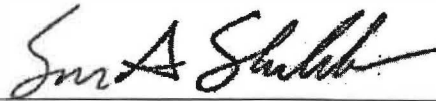
Subcommittee to impose a Public Reprimand with Terms. The terms are:

1. Respondent shall immediately stop taking new clients. Respondent shall certify compliance with this term in writing to Bar Counsel on or before December 3, 2021.
2. Respondent shall immediately take his website down. Respondent shall certify compliance with this term in writing to Bar Counsel on or before December 3, 2021.
3. Respondent shall take Retired status as soon as possible and no later than December 15, 2021. Respondent shall certify compliance with this term on or before December 15, 2021.
4. As soon as is practicable, and no later than December 31, 2021, Respondent shall give notice of his retirement, effective no later than December 15, 2021, to all clients for whom he is currently handling matters and to all opposing attorneys and the presiding judges in pending litigation.
5. As soon as is practicable, and in no event later than February 1, 2022, Respondent shall make appropriate arrangements for the disposition of matters then in his care in conformity with his clients' wishes.
6. On or before February 15, 2022, Respondent shall furnish proof to Bar Counsel that such notices have been timely given and such arrangements have been made for the disposition of matters.

If any of the terms are not met by the time specified, pursuant to Part 6, § IV, ¶ 13-15.F and G. of the Rules of the Supreme Court of Virginia, the District Committee shall hold a hearing and Respondent shall be required to show cause why a Certification of Sanction Determination should not be imposed. Any proceeding initiated due to failure to comply with terms will be considered a new matter, and an administrative fee and costs will be assessed.

Pursuant to Part 6, § IV, ¶ 13-9.E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs.

FOURTH DISTRICT SUBCOMMITTEE,
SECTION II OF THE VIRGINIA STATE BAR



Sean Albert Orville Sherlock
Subcommittee Chair

CERTIFICATE OF MAILING

I certify that on December 6, 2021, a true and complete copy of the Subcommittee Determination (Public Reprimand With Terms) was sent by email to drosendorf@aol.com and by certified mail to Donald Frank Rosendorf, Respondent, at 7721 Tremayne Place #110, McLean, VA 222102, Respondent's last address of record with the Virginia State Bar.

Renu M. Brennan

Renu M. Brennan
Bar Counsel