

[Filed 16-Jun-2005]

In re McGinn (2005-237)

[Filed 28-Jun-2005]

ENTRY ORDER

2005 VT 71

SUPREME COURT DOCKET NO. 2005-237

JUNE TERM, 2005

In re E. Michael McGinn, Esq.	}	Original Jurisdiction
	}	
	}	APPEALED FROM:
	}	
	}	Professional Responsibility Board
	}	
	}	PRB File Nos. 2005.069, 2005.080,
	}	2005.094

In the above-entitled cause, the Clerk will enter:

¶ 1. The entry order issued on June 22, 2005, in the above-captioned case is withdrawn, and the following is issued in its place:

¶ 2. Attorney E. Michael McGinn has filed an affidavit of resignation pursuant to Rule 19(A) of Administrative Order No. 9. Disciplinary counsel has submitted an additional Statement of Facts and Memorandum of Law recommending acceptance of attorney McGinn's resignation. Having reviewed the filings, the Court finds clear and convincing evidence that attorney McGinn violated Rules 8.4(b), (c), (d), and (h) of the Vermont Rules of Professional Conduct. Accordingly, attorney McGinn's resignation from the Bar of the Vermont Supreme Court is accepted. We hereby order that E. Michael McGinn is disbarred on consent from the office of attorney and counselor at law.

¶ 3. Attorney McGinn shall comply with the requirements of A.O. 9, Rule 23.

FOR THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: E. Michael McGinn, Esq.
PRB Docket Nos. 2005.069, 2005.080, and 2005.094

Decision No. 77

Upon receipt of the Affidavit of Resignation submitted to the Board and pursuant to Administrative Order No. 9, Rule 19, we recommend to the Court that the above referenced Respondent be disbarred. Attached hereto are the Affidavit of Resignation, Disciplinary Counsel's Statement of Additional Facts, Disciplinary Counsel's Memorandum of Law and a Proposed Entry Order.

Dated at Montpelier, Vermont this 16th day of June, 2005.

/s/

Joan Loring Wing, Esq. - Chair

attachments

cc: Peter F. Langrock, Esq., counsel for E. Michael McGinn, Esq.
Michael Kennedy, Disciplinary Counsel

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: E. Michael McGinn, Esq., Respondent
PRB File Nos. 2005.069, 2005.080, and 2005.094

Statement of Additional Facts

NOW COMES Michael Kennedy and, pursuant to Rule 19B of Administrative Order 9, submits this Statement of Additional Facts.

I. Criminal Conduct

1. The Respondent, E. Michael McGinn, is an attorney licensed to practice law in the State of Vermont. Attorney McGinn's license to practice law was suspended on an interim basis in October of 2004.

2. On May 4, 2005, the United States Attorney for the District of Vermont filed an Information that charged Attorney McGinn with committing mail fraud in violation of 18. U.S.C. § 341. The crime is a felony. A copy of the

Information is attached as Exhibit A. 3. The Information alleged that as "an attorney who represented clients in real estate transactions, MCGINN frequently received funds that represented the proceeds of those transactions." (Exhibit A, para. 2).

4. The Information goes on to allege that:

"Beginning in approximately 1998, and continuing until October 2004, MCGINN misappropriated and diverted to his own

use and benefit a portion of the funds that were entrusted to him in the course of his real estate practice. In an attempt to cover up these embezzlements, MCGINN used funds he received in connection with later transactions to pay out moneys owed on earlier transactions. In the course of executing this scheme, MCGINN used the United States mails and commercial carriers." (Exhibit A, para. 3).

5. The Information concludes by alleging that when Attorney McGinn's license to practice law was suspended on an interim basis, there was a shortfall in his trust account of approximately \$650,000.00. (Exhibit A, para. 4).

6. On May 4, 2005, Attorney McGinn filed a plea agreement in which he pled guilty to the Information. A copy is attached as Exhibit B.

7. In entering into the agreement, Attorney McGinn acknowledged that he understood that he was pleading guilty to mail fraud and, in addition, that he was guilty of mail fraud. (Exhibit B, paras. 2-3).

8. Attorney McGinn has yet to be sentenced.

9. Each of the transactions described below took place in the course of Attorney McGinn's scheme to misappropriate and divert funds that were entrusted to him in the course of his real estate practice. Attorney McGinn's misconduct is exemplified by, but not limited to, the transactions described below.

A. The Dudley/Hebert Transaction

10. In 2004, William & Kathy Dudley agreed to purchase a home from Chris and Daffney Hebert for approximately \$234,000. The closing took place on September 27, 2004. Attorney McGinn represented the Dudleys.

11. In advance of the closing, the Dudleys provided Attorney McGinn with a check for \$234,9000. Attorney McGinn deposited the check into an account at the Peoples Trust Company. 12. At the time of the closing, the Chittenden Bank held a mortgage on the Heberts' property. The Heberts owed the bank approximately \$103,000.

13. The closing was held on September 27, 2004. At the closing, Attorney McGinn issued several trust account checks, including (1) a check to Mr. Hebert in the amount of \$58,160.19 (his net proceeds from the sale); (2) a check to Mrs. Hebert in the amount of \$58,160.19 (her net proceeds from the sale); (3) a check to the Chittenden Bank in the amount of \$103,979.55 (intended to payoff the Dudleys' mortgage); and (4) a check to Coldwell Banker Choice Properties for \$9,004 (the amount owed to the real estate broker).

14. Each of the checks was issued against Attorney McGinn's trust account at Charter One Bank. That is, he did not issue the checks against the same account into which he had deposited the Dudleys' funds.

15. Each check bounced and was not paid due to insufficient funds.

16. Attorney McGinn misappropriated the funds advanced to him by the Dudleys. To date, Attorney McGinn has not accounted for the Dudleys' funds and has not made good on any of the checks issued at the closing.

B. The Miner/Bailey Transaction

17. Attorney McGinn represented John Bailey in connection with three real estate closings that took place on August 6, 2004. In the first two, Mr. Bailey sold property, earning net proceeds of \$76,000.

18. At the closing, Attorney McGinn issued Mr. Bailey a trust account check for \$35,000. Upon presentation, the check was honored. Mr. Bailey left the remaining \$41,000 with Attorney McGinn to use as a down payment on a home that he was to purchase later that day from Rick Miner.

19. Mr. Bailey had agreed to purchase Mr. Miner's property for \$275,000. He intended to use \$41,000 from the proceeds of the morning sales as a down payment. Mr. Bailey took out a mortgage for the balance - \$234,000. Mr. Bailey caused his lender to wire \$234,000 to Attorney McGinn's trust account.

20. The closing on the Bailey/Miner transaction took place on August 6, 2004. At the time, Mr. Miner owed approximately \$218,000 on the property. Wells Fargo held a first mortgage in the amount of \$193,000, and a home equity loan in the amount of \$25,000. Attorney McGinn was to pay off each note with the funds advanced to him by Mr. Bailey, with the balance to be paid to Mr. Miner.

21. At the closing, Attorney McGinn issued Mr. Miner a trust account check in the amount of \$39,000 - his net proceeds from the sale. The check was honored. Attorney McGinn eventually issued trust account checks to Wells Fargo that were intended to pay off Mr. Bailey's mortgage and home equity loan. Each check bounced and was not paid due to insufficient funds.

22. Attorney McGinn misappropriated the funds that had been advanced to him by Mr. Bailey to pay off Mr. Miner's mortgage and home equity loan. He has yet to make good on the funds.

C. Attorney McGinn's Representation of Jim Lewis

23. Attorney McGinn represented Jim Lewis in connection with Mr. Lewis' purchase of real estate from Patricia and Steven O'Dell. A closing was held on August 3, 2004.

24. In advance of the closing, Mr. Lewis issued a check made payable to Attorney McGinn in the amount of \$73,355.59. Attorney McGinn was to use the funds to pay of the sellers' mortgage and other costs associated with the closing. At the time of the closing, the United States Department of Agriculture (hereinafter "USDA") held a mortgage on the O'Dells' property in the amount of \$69,301.98.

25. At the closing, Attorney McGinn issued a trust account check in the amount of \$69, 301.98 made payable to the USDA. The check was drawn on Attorney McGinn's trust account at Charter One. The check bounced and was not paid due to insufficient funds. 26. Attorney McGinn misappropriated the funds that Mr. Lewis advanced to him. To date, Attorney McGinn has not accounted for, or made good on, the funds that Mr. Lewis advanced to him.

27. Eventually, the USDA threatened to foreclose on the property that Mr. Lewis had purchased from the O'Dells. Despite having previously advanced over \$70,000 to Attorney McGinn, Mr. Lewis was forced to secure additional financing in the amount of \$69, 301.98 in order to pay off the USDA and avoid foreclosure.

D. Tony Neyto & The Estate of Gabrielle Tynauer

28. Attorney McGinn represented Tony Neyto in connection with Mr. Neyto's purchase of real estate from the Estate of Gabrielle Tynauer. In anticipation of the purchase, Mr. Neyto took out a loan against property that he owned in Massachusetts. Then, Mr. Neyto entrusted \$144,253.00 to Attorney McGinn. The funds were to be used to pay off an existing mortgage held by Wendover Financial Services Corporation (hereinafter "Wendover") and other costs associated with the closing. At the time of the closing, the amount due to pay off Wendover's mortgage was \$80,647.96.

29. The closing took place on August 11, 2004. At the closing, Attorney McGinn issued several checks drawn on his account at Charter One to pay certain costs associated with the transaction. With the exception of a trust account check made payable to Wendover, each check was good. However, a trust account issued to Wendover in the amount of \$80,647.96 bounced and was not paid due to insufficient funds.

30. On September 21, 2004, Attorney McGinn issued another trust account check made payable to Wendover in the amount of \$80,647.96. The check bounced and was not paid due to insufficient funds.

31. On October 15, 2004, Attorney McGinn issued yet another trust account check made payable to Wendover in the amount of \$80,647.96. The check bounced and was not paid due to insufficient funds.

32. Of the funds entrusted to him by Mr. Neyto, Attorney McGinn misappropriated the \$80,647.96 that was intended to pay off the mortgage that Wendover held on the property owned by the Estate of Gabrielle Tynauer. To date, Attorney McGinn has neither accounted for nor made good on the funds.

E. Smith/Smith Transaction

33. Attorney McGinn represented Terrence Smith in connection with Mr. Smith's purchase of real estate from his sister, Fern Smith.

34. At closing, the parties agreed that \$35,000 would be placed in escrow. The parties agreed that Attorney McGinn would act as the escrow agent and that the funds would be released to Ms. Smith upon such time as she vacated the property and requested the funds. 35. Ms. Smith has vacated the property and requested the funds. Attorney McGinn misappropriated the \$35,000 his own use. The entire amount has been dissipated and is not available to be paid to Ms. Smith.

F. Gervais/Gendron Transaction

36. Attorney McGinn represented Marcel and Donna Gervais in connection with their purchase of property from Armand and June Gendron.

37. At the closing, an issue arose relating to whether the Gendrons owed money to the Vermont Department of Taxes.

38. The parties agreed that \$5,000 would be placed in escrow and would be held by Attorney McGinn pending resolution of the question as to whether the Gendrons owed money to the Department of Taxes.

39. Attorney McGinn misappropriated the \$5,000 for his own use. The money is not available to be paid either to the Gendrons or the Department of Taxes.

G. Shortfall in the Trust Account

40. At the time that Attorney McGinn's license to practice law was suspended on an interim basis, there was a shortfall in his trust account of approximately \$650,000.

41. The shortfall resulted from the fact that Attorney McGinn misappropriated approximately \$650,000 in funds that had been entrusted to him by clients or on their behalf.

DATED at Burlington, Vermont, on July 7, 2005

/s/

Michael Kennedy
Disciplinary Counsel
32 Cherry Street, Suite 213
Burlington, Vermont 05403
(802) 859-3000

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: E. Michael McGinn, Esq., Respondent
PRB File Nos. 2005.069, 2005.080, and 2005.094

Memorandum of Law

NOW COMES Disciplinary Counsel Michael Kennedy and submits this Memorandum of Law in support of his position that the Statement of Additional Facts, which is incorporated by reference herein, supports a finding that the Respondent violated the Vermont Rules of Professional Conduct.

I Rule 8.4(b) of the Vermont Rules of Professional Conduct

Rule 8.4(b) prohibits attorneys from engaging in conduct involving a serious crime. The Rule defines a "serious crime" as "illegal conduct involving any felony", as well as certain types of lesser crimes. In May of 2005, the United States Attorney charged Attorney McGinn with committing mail fraud in violation of 18 U.S.C. § 1341. (Exhibit A). The crime is punishable by up to twenty years in prison. 18 U.S.C. § 1341. As such, mail fraud is a felony. See 18 U.S.C. § 3559(a). Rule 8.4(b) prohibits "conduct". As such, neither a conviction nor criminal charges are necessary for there to be a violation of Rule 8.4(b). See *People v. Odom*, 941 P.2d 919 (Colo. 1997); *In re Hassenstab*, 934 P.2d 1110 (Or. 1997).

Attorney McGinn recently pled guilty to violating 18 U.S.C. § 1341. (Exhibit B). In other words, he pled guilty to a felony. In that the crime to which he pled guilty is a felony, it is also a "serious crime". Therefore, the facts support a finding that he violated Rule 8.4(b) by engaging in conduct involving a serious crime.

II The Offense of Misappropriation & Additional Violations

At its heart, this case involves the offense of the massive misappropriation, if not outright theft, of client funds. That is, the facts support a finding that from 1998 to 2004, Attorney McGinn embezzled client

funds and, then, misappropriated client funds to cover up his embezzlement. In other words, he regularly engaged in the unauthorized use of client funds.

Several jurisdictions have defined "misappropriation". For instance, the Nebraska Supreme Court recently stated that

"[i]n the context of attorney discipline proceedings, 'misappropriation' is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom."

State ex rel. Counsel for Dis. v. Wintroub, 678 N.W.2d 103, 112 (Neb. 2004) (citing State ex rel. NSBA v. Malcolm, 561 N.W. 2d 237 (Neb. 1997)). Misappropriation is so serious that, in Nebraska, the presumptive response thereto is disbarment. Wintroub, 678 N.W. 2d, at 112. Indeed, long before it decided the Wintroub matter, the Nebraska Court touched on the serious nature of the offense, stating that "[m]isappropriation of a client's funds is more than a grievous breach of professional ethics. It violates the basic notions of honesty and endangers public confidence in the legal profession." State ex rel. NSBA v. Gridley, 545

N.W.2d 737 (Neb. 1996) (citations omitted). The Gridley Court noted that the "fact that no client suffered any financial loss is no excuse for a lawyer to misappropriate clients' funds nor any reason why a lawyer should not receive a severe sanction." Id., at 740 (citing State ex rel. NSBA v. Veith, 470 N.W. 2d 549 Neb. 1991)).

Nebraska's view of the offense of misappropriation is consistent with views taken by other jurisdictions. For instance, in the District of Columbia, misappropriation "is defined as any 'unauthorized use by an attorney of a client's funds entrusted to him or her, whether or not temporary or for personal gain or benefit.'" In re Davenport, 794 A.2d 602, 603 (D.C. 2002) (quoting In re Choroszej, 624 A.2d 434, 436 (D.C. 1992)). The offense is considered so serious in the District that "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence." In re Addams, 579 A.2d 190, 191 (D.C. 1990); See In re Thomas-Pinkney, 840 A.2d 700 (D.C. 2004) (Reckless misappropriation of client funds warrants disbarment despite significant mitigating factors that include the absence of a dishonest motive). As the District's Board Professional Responsibility has stated, "'[t]he virtual certainty of disbarment or a six-month suspension for acts of misappropriation serves the public and the profession by providing a powerful deterrent for any attorney who might contemplate engaging in this most serious misconduct.'" Davenport, at 603.

Similar reasoning prevails across the Anacostia River. In Maryland,

"it is well settled that the sanction for misappropriation of client funds or funds entrusted to a lawyer is, in the absence of compelling extenuating circumstances justifying a lesser sanction, disbarment, because misappropriation 'is an act infected with deceit and dishonesty.' "

Attorney Grievance Comm'n v. Sperling, 844 A.2d 397, 404 (Md. 2003) (quoting Attorney Grievance Comm'n v. Sperry, 810 A.2d 487, 491-92 (Md. 2002)).

The New Jersey Supreme Court has also had occasion to consider attorneys' misappropriation of client funds. In New Jersey, misappropriation is "any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also temporary use for the lawyer's own purpose, whether or not he derives any potential gain or benefit therefrom." In the Matter of Wilson, 409 A.2d 1153, 1155 n.1 (NJ 1979); See In the Matter of Barlow, 657 A.2d 1197, 1200 (NJ 1997). Since it rendered the Wilson decision, the New Jersey Court "has not retreated from the strict rule that knowing misappropriation of client funds almost invariably warrants disbarment of an attorney." Barlow, 657 A.2d at 1200 (citations omitted). The Barlow Court went on to state that:

"Intent to deprive permanently a client of misappropriated funds, however, is not an element of knowing misappropriation. Nor is the intent to repay funds or otherwise make restitution a defense to the charge of knowing misappropriation. A lawyer who uses funds, knowing that the funds belong to a client and that the client has not given permission to invade them, is guilty of knowing misrepresentation. The sanction is disbarment." Id., at 1201.

That disbarment should be routine in cases of knowing misappropriation stems from the basic fact that "[w]hatever the need may be for the lawyer's handling of clients' money, the client permits it because he trusts the lawyer." Wilson, 409 A.2d at 1154. Furthermore, lawyers' "[a]buse of this trust has always been recognized as particularly reprehensible:

'[T]here are few more egregious acts of professional misconduct of which an attorney can be guilty than misappropriation of a clients's funds held in trust.

Id., at 1155 (citing In re Beckman 400 A.2d 792, 793 (N.J. 1979)). Indeed, citing Wilson, Vermont's Professional Conduct Board noted that the

"[t]heft of client funds is one of the most serious ethical violations which an attorney can commit. It is an offense which demands imposition of the most serious sanction." In re Mitiguy, PCB No. 59 (September 30, 1993).

In sum, a lawyer commits an egregious breach of the ethics rules when he or she uses client funds for anything other than a purpose authorized by the client. The offense is so severe that only the most serious of responses is warranted.

A. The facts support a finding that Attorney McGinn's misappropriation of client funds violated the Vermont Rules of Professional Conduct.

Over the past seven years, Attorney McGinn regularly misappropriated client funds. As the Statement of Additional Facts makes clear, Attorney McGinn's misconduct resulted in the theft of approximately \$650,000 that belonged to those clients unfortunate enough to fall at the tail end of his scheme.

1. Rule 8.4(c)

Rule 8.4(c) of the Vermont Rules of Professional Conduct prohibits lawyers from engaging in conduct involving misrepresentation, dishonesty, deceit, or fraud. Attorney McGinn's conduct is fraught with dishonesty and deceit. Indeed, the facts support a finding that he outright stole from

several clients. Certainly, theft is deceitful, dishonest and fraudulent. Moreover, each time that Attorney McGinn schemed to use funds intended to fund a particular transaction to fund an earlier transaction, he engaged in conduct "infected with deceit and dishonesty". Sperry, 810 A.2d, at 491-92. Finally, the facts support a finding that, on several occasions, Attorney McGinn issued trust account checks when he knew that the funds intended to cover those checks were not in his trust account. In sum, the evidence supports a finding that Attorney McGinn violated Rule 8.4(c).

2. Rule 8.4(d)

Rule 8.4(d) of the Vermont Rules of Professional Conduct prohibits attorneys from engaging in conduct that is prejudicial to the administration of justice. This prohibition is typically applied to misconduct that interferes with a judicial proceeding or compromises the integrity of the legal profession. In re Andres, PRB Dec. No. 41, at 5 (Sept. 18, 2002) (citing Section 31.301 ABA/BNA Lawyers' Manual on Professional Conduct, 2002 ABA BNA).

The Gridley case is instructive here. In concluding that Attorney Gridley violated, among other rules, the rule that prohibited attorneys from engaging in conduct that was prejudicial to the administration of justice, the Nebraska Court stated:

"Misappropriation of a client's funds is more than a grievous breach of professional ethics. It violates the basic notions of honesty and endangers public confidence in the legal profession. Misappropriation of client funds, as one of the most serious violations of duty an attorney owes to his client, the public, and the courts typically warrants disbarment." Gridley, 545 N.W. 2d, at 739.

Attorney McGinn's misconduct impugned the integrity of the legal profession. As did Attorney Gridley's, it represents such a betrayal of the public's trust as to bring the bar into disrepute. Moreover, Attorney McGinn's misconduct detracts from the public's confidence in the profession and, as such, constitutes a breach of the most basic duty he owes to the public and the bar. The facts support a finding that Attorney McGinn violated Rule 8.4(d).

3. Rule 8.4(h)

Rule 8.4(h) of the Vermont Rules of Professional Conduct prohibits lawyers from engaging in conduct that adversely reflects on their fitness to practice law. Attorney McGinn's misappropriation of client funds adversely reflects on his fitness to practice law.

III Conclusion

Wherefore, Disciplinary Counsel respectfully recommends that the Board conclude that the facts support a finding that Attorney McGinn violated the Vermont Rules of Professional Conduct. In addition, Disciplinary Counsel respectfully recommends that the Board accept Attorney McGinn's Affidavit of Resignation.

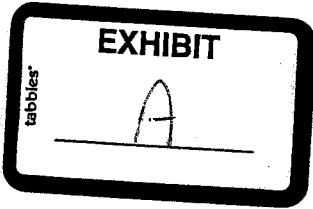
DATED at Burlington, Vermont, on July 7, 2005.

/s/

Michael Kennedy
Disciplinary Counsel

32 Cherry Street, Suite 213
Burlington, Vermont 05403
(802) 859-3000

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED



UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT 2005 MAY 4 PM 4 22

UNITED STATES OF AMERICA)

v.)

E. MICHAEL MCGINN)

CLERK
BY [Signature]

DEPUTY CLERK

Crim. No.

2:05-CR-58-1

(18 U.S.C. § 1341)

INFORMATION

The United States Attorney charges:

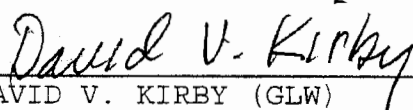
1. At all times relevant to this information, the defendant E. MICHAEL MCGINN was an attorney licensed to practice law in the state of Vermont.

2. A substantial part of MCGINN'S law practice involved the purchase, sale and refinancing of real property. As an attorney who represented clients in real estate transactions, MCGINN frequently received funds that represented the proceeds of those transactions. MCGINN typically deposited those funds in his attorney trust account.

3. Beginning in approximately 1998, and continuing until October 2004, MCGINN misappropriated and diverted to his own use and benefit a portion of the funds that were entrusted to him in the course of his real estate practice. In an attempt to cover up these embezzlements, MCGINN used funds he received in connection with later transactions to pay out moneys owed on earlier transactions. In the course of executing this scheme, MCGINN used the United States mails and commercial interstate carriers.

4. When he stopped practicing law in October 2004, there was a shortfall of approximately \$650,000 in MCGINN'S attorney trust account.

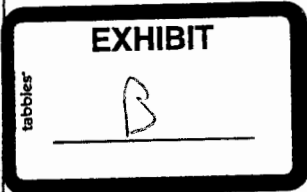
(18 U.S.C. § 1341)



DAVID V. KIRBY (GLW)
United States Attorney

Burlington, Vermont
May 4, 2005

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED



UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

2005 MAY 4 PM 4 22

UNITED STATES OF AMERICA)
)
 v.)
)
 E. MICHAEL MCGINN)
 Defendant)

CLERK
BY [Signature]
DEPUTY CLERK

Criminal No.

2:05-CR-58-1

PLEA AGREEMENT

The United States of America, by and through the United States Attorney for the District of Vermont (hereafter "the United States"), and the defendant, E. MICHAEL MCGINN, agree to the following disposition of potential criminal charges.

1. MCGINN agrees to waive indictment and to plead guilty to an information which charges him with mail fraud, in violation of 18 U.S.C. § 1341.

2. MCGINN understands, agrees and has had explained to him by counsel that the crime to which he will plead guilty is a felony for which the Court may impose the following sentence on his plea: up to 20 years of imprisonment, pursuant to 18 U.S.C. § 1341; a fine of up to \$250,000 or twice the gross gain or gross loss, whichever is greater, pursuant to 18 U.S.C. § 3571(b) and (d); a period of supervised release of not more than three years, pursuant to 18 U.S.C. § 3583(b); and a \$100 special assessment. Full restitution must also be ordered.

3. It is the understanding of the parties to this

agreement that the plea will be entered under oath and in accordance with Rule 11 of the Federal Rules of Criminal Procedure. The defendant represents that he intends to plead guilty because he is, in fact, guilty of the crime to which he will enter a plea.

4. MCGINN understands that this agreement is conditioned upon his providing the United States Attorney, at the time this plea agreement is executed, a bank cashier's check payable to the Clerk, United States District Court, in payment for the mandatory special assessment of \$100 for which he will be responsible when sentenced. The United States agrees to safeguard and pay the special assessment imposed at sentencing to the Clerk of the Court immediately after sentencing. In the event that this plea agreement is for any reason terminated or the defendant's guilty plea is not accepted by the Court, the special assessment shall be promptly refunded. In the event that the tendered bank check is not honored for whatever reason, the defendant understands that he will still be liable for the amount of the special assessment which the Court imposes. MCGINN understands and agrees that, if he fails to pay the special assessment in full prior to sentencing, the United States' obligations under this plea agreement will be terminated, the United States will have the right to prosecute him for any other offenses he may have committed, and will have the right to recommend the Court impose any

lawful sentence. Under such circumstances, MCGINN will have no right to withdraw his plea of guilty.

5. MCGINN agrees and understands that it is a condition of this agreement that he refrain from committing any further crimes, whether federal, state or local, and that he strictly abide by all conditions of release if he is permitted to remain at liberty pending sentence.

6. The United States agrees that in the event that MCGINN fully and completely abides by all conditions of this agreement, the United States will:

- (a) recommend to the sentencing Court that he be sentenced to a term of imprisonment at the bottom of the advisory Sentencing Guidelines range applied by the Court in imposing the sentence. In the event the Court downwardly departs from the applicable Guidelines range, the United States agrees only to recommend a sentence at the bottom of the range found to be applicable before departure.
- (b) recommend that the defendant should receive credit for acceptance of responsibility under U.S.S.G. § 3E1.1, provided that he cooperates truthfully and completely with Probation during the presentence investigation and further provided that no new information comes to the attention of the United States Attorney's Office relative to the issue of

his receiving credit for acceptance of responsibility.

(c) if MCGINN'S offense level is 16 or more, move that MCGINN receive a 1-level additional credit for acceptance of responsibility on grounds that he timely notified authorities of his intention to plead guilty.

(d) not prosecute MCGINN, in the District of Vermont, for any additional offenses, known to the United States Attorney at the time this agreement is signed, which relate to his embezzlement of money received in the course of his law practice.

7. If the United States determines, in its sole discretion, that the defendant has committed any offense after the date of this agreement, or violated any condition of release, or has failed to cooperate fully with the Probation Department regarding the offense of conviction, or has provided any intentionally false, incomplete or misleading information to Probation, the United States' obligations under paragraph 6 of this agreement will be void; the United States will have the right to recommend that the Court impose any sentence authorized by law; and will also have the right to prosecute the defendant for any other offenses he may have committed in the District of Vermont. The defendant understands and agrees that, under such circumstances, he will have no right to withdraw his

previously entered plea of guilty.

8. MCGINN fully understands that the sentence to be imposed on him is within the sole discretion of the Court. The defendant may not withdraw his plea because the Court declines to follow any recommendation, motion or stipulation of the parties to this agreement. The United States does not make any promises or representations as to what sentence MCGINN will receive. The United States specifically reserves the right to allocute at sentencing. There shall be no limit on the information the United States may present to the Court and the Probation Office relevant to sentencing and the positions the United States may take regarding sentencing (except as specifically provided elsewhere in this agreement). The United States also reserves the right to correct any misstatement of fact made during the sentencing process, to oppose any motion to withdraw a plea of guilty previously entered and to support on appeal any decisions of the sentencing Court whether in agreement or in conflict with recommendations and stipulations of the parties.

9. Further MCGINN fully understands that any estimates or predictions relative to the Guidelines calculations are not binding upon the Court, and fully understands that the Guidelines are advisory and that the Court can consider any and all information that it deems relevant to the sentencing determination. Thus, the

defendant expressly acknowledges that in the event that any estimates or predictions by his attorney (or anyone else) are erroneous, those erroneous predictions will not provide grounds for withdrawal of his plea of guilty, modification of his sentence, or for appellate or post-conviction relief.

10. It is further understood and agreed by the parties that should the defendant's guilty plea not be accepted by the Court for whatever reason, or later be withdrawn or vacated, this agreement may be voided at the option of the United States and the defendant may be prosecuted for any and all offenses otherwise permissible.

11. It is further understood that this agreement is limited to the Office of the United States Attorney for the District of Vermont and cannot bind other federal, state or local prosecuting authorities.

12. Both parties are free to move for a departure under the Guidelines and to argue for a sentence outside the advisory sentencing range, except as otherwise set forth in this agreement.

13. In voluntarily pleading guilty, MCGINN acknowledges that he understands the nature of the charge to which the plea is offered. He also acknowledges that he has the right to be indicted by a grand jury; that he has the right to plead not guilty or to persist in a plea of not guilty; that he has the right to be tried by a jury and at that trial a right to the assistance of counsel; that he has

the right to confront and cross-examine adverse witnesses; that he has the right against compelled self-incrimination; that if a plea of guilty is accepted by the Court, there will be no further trial of any kind, so that by pleading guilty he waives the right to a trial and the other rights enumerated here.

14. MCGINN expressly states that he makes this agreement of his own free will, with full knowledge and understanding of the agreement and with the advice and assistance of his counsel, Peter Langrock, Esq. MCGINN further states that his plea of guilty is not the result of any threats or of any promises beyond the provisions of this agreement. Furthermore, MCGINN expressly states that he is fully satisfied with the representation provided to him by his attorney and has had full opportunity to consult with his attorney concerning this agreement, concerning the applicability and impact of the sentencing guidelines (including, but not limited to, the relevant conduct provisions of U.S.S.G. § 1B1.3), and concerning the potential terms and conditions of supervised release.

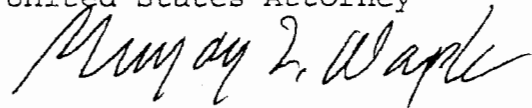
15. No agreements have been made by the parties or their counsel other than those contained herein.

16. It is agreed that a copy of this agreement shall be filed with the Court before the time of the defendant's change of plea.

Dated at Burlington, in the District of Vermont, this
4 day of ~~April~~^{May}, 2005.

UNITED STATES OF AMERICA

DAVID V. KIRBY
United States Attorney


By: 
GREGORY L. WAPLES
Assistant U.S. Attorney

4/28/2005
DATE


E. MICHAEL MCGINN
Defendant

I have read, fully reviewed and explained this agreement to
my client, E. MICHAEL MCGINN, and I hereby approve of it.

5/3/05
DATE


PETER F. LANGROCK, ESQ.
Counsel for the Defendant

CERTIFICATE OF SERVICE

I, Karen A. Arena-Leene, Legal Assistant for the United States Attorney's Office for the District of Vermont, do hereby certify that I have served a copy of the foregoing **INFORMATION AND EXECUTED PLEA AGREEMENT** on the Defendant by mailing a copy thereof to the following:

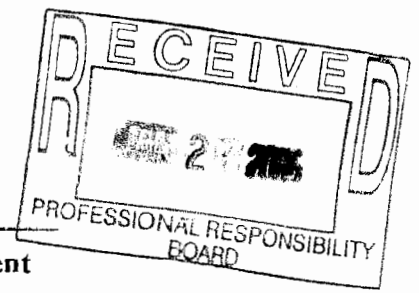
Peter F. Langrock, Esq.
111 S. Pleasant Street
P.O. Drawer 351
Middlebury, VT 05753

Dated at Burlington, in the District of Vermont, this day, May 4, 2005.



KAREN A. ARENA-LEENE
Legal Assistant
United States Attorney's Office
P.O. Box 570
Burlington, VT 05402

State of Vermont
Professional Responsibility Program



In Re: E. Michael McGinn, Esq., Respondent
Supreme Court Dkt. No. 2005-505
PRB File Nos. 2005.069, 2005.080, and 2005.094

Affidavit of Resignation

NOW COMES E. Michael McGinn, being duly sworn, and, pursuant to Rule 19(A) of Administrative Order 9, submits this Affidavit of Resignation.

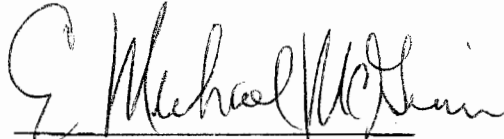
1. I am an attorney licensed to practice law in Vermont.
2. I was admitted to the Vermont Bar on February 3, 1970.
3. I desire to resign from the Vermont Bar.
4. This resignation is freely and voluntarily rendered.
5. I was not subjected to coercion or duress in tendering this resignation.
6. I have reviewed Administrative Order 9 and I am fully aware of the implications of submitting this resignation.
7. I am aware that Disciplinary Counsel is presently investigating allegations that I am guilty of misconduct that violates the Vermont Rules of Professional Conduct.
8. I am aware that Disciplinary Counsel is presently investigating whether I have misappropriated several hundred thousand dollars of client funds.
9. I acknowledge that the material facts upon which Disciplinary Counsel's investigations are predicated are true.
10. I am submitting this resignation because I know that if disciplinary charges were predicated upon the misconduct under investigation by Disciplinary Counsel that I could not successfully defend against them.

11. I am aware that, pursuant to Rule 19(B) of Administrative Order 9, Disciplinary Counsel will file a statement of facts relating to the misconduct under investigation.

12. The facts recited herein are based on my personal knowledge and I believe them to be true.


Dated at St Albans, Vermont, on this 24th day of January, 2005.

Respectfully submitted,



E. Michael McGinn, Esq.
10 South Main Street
P.O. Box 932
St. Albans, Vermont 05478

Subscribed and sworn before me
at St Albans, Vermont, on this 24th day
of January, 2005.



Notary Public