CLERK
SUPREME COURT OF VIRGINIA
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JUL 23 1980
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 800878

IVY P. BLUE, JR.,

.....Appellant

v.

VIRGINIA STATE BAR, EX REL,
FIRST DISTRICT COMMITTEE,

.....Appellee

APPENDIX

ROBERT S. GANEY
P. O. Box 174
Hanover Law Building
Hanover, Virginia 23069

Counsel for Appellant

MARSHALL COLEMAN
Attorney General of
Virginia
Supreme Court Building
Richmond, Virginia 23219

Counsel for Appellee

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA. (804) 643-7789

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COMPLAINT

TO THE HONORABLE JUDGES OF THE AFORESAID COURT:

Complainant, Virginia State Bar, at the relation of the First District Committee, hereby files this COMPLAINT pursuant to Paragraph 13C of Section IV, of the Rules of the Supreme Court of Virginia, Part Six and Section 54-74 of the Code of Virginia of 1950, as amended. In support of its complaint, the Virginia State Bar states as follows:

1) Respondent, Ivy P. Blue, Jr., is a licensed attorney at law and maintains his office in Hanover County, Virginia.

2) On April 27, 1978, Ivy P. Blue, Jr. appeared before the Honorable Dixon L. Foster, Judge, in the Circuit Court of Westmoreland County, Virginia in connection with a misdemeanor appeal filed by his client, James Lewis Smith. On that date, Mr. Blue advised the Court that a tree had fallen on a court reporter's car and the court reporter could not be present for the hearing of the misdemeanor appeal and, therefore, Mr. Blue requested a continuance. Mr. Blue further advised the Court that, since the case was being continued, his client wished to have a jury trial. Mr. Blue stated that the court reporter whose vehicle had been damaged was employed by Crane-Snead & Associates, Richmond, Virginia.

3) Subsequent to the April 27, 1978 hearing, Ivy P. Blue, Jr. requested one Barbara D. Watts to falsely inform the Commonwealth's Attorney and/or the Court for Westmoreland County, should either enquire, that she was the court reporter involved in Mr. Blue's representation to the Court and to further state that the reason for her failure to appear was that a tree or a pole fell on her automobile during a windstorm.

4) Such conduct by Ivy P. Blue, Jr. is Misconduct in violation of Rules 1-102(A)(4),(5),&(6), DR 7-102 (A)(5) and 7-106(C)(6) of the Virginia Code of Professional Responsibility.

Attached hereto and made a part hereof as Exhibit One(1)

is a copy of the Certification to the Virginia State Bar Disciplinary Board by the First District Committee of its findings following a hearing held December 13, 1978. The allegations contained in paragraphs two through four have been served upon the Respondent, Ivy P. Blue, Jr., and he has made timely demand that the allegations be heard by a Three Judge Court pursuant to Section 54-74 of the Code of Virginia as amended.

WHEREFORE, Complainant prays that this Court assume jurisdiction of its complaint and impose appropriate discipline against Ivy P. Blue, Jr.

Respectfully submitted,
VIRGINIA STATE BAR
Ex Rel First Dictrict Committee

By _____
Counsel

Stephen J. Telfeyan
Assistant Bar Counsel
Suite 1622, 700 Building
700 East Main Street
Richmond, Virginia 23219
804-786-2061

AFFIDAVIT

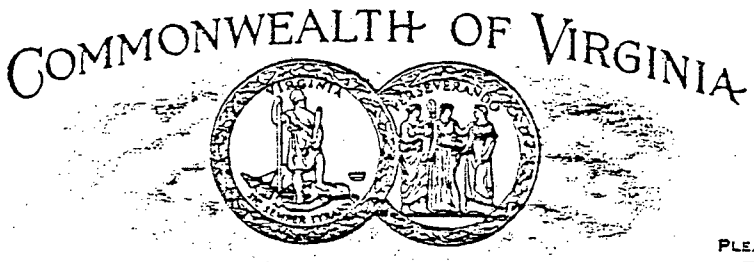
IN THE CITY OF RICHMOND, STATE OF VIRGINIA:

This 17th day of July, 1979, Stephen J. Telfeyan, Assistant Bar Counsel, personally appeared before me, a Notary Public in and for the City and State aforesaid and made oath that the statements and allegations of the foregoing COMPLAINT are true and accurate to the best of his knowledge and belief.

Jeanette T. Stevenson
Notary Public

My Commission Expires 9-7-79

Exhibit One (1)



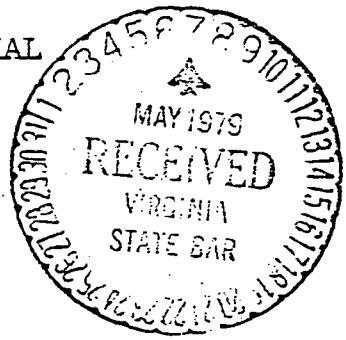
PLEASE REPLY TO:
P. O. Box 235
Heathsville, Va. 22473
(804) 580-3262

VIRGINIA STATE BAR

FIRST DISTRICT COMMITTEE

May 2, 1979

PERSONAL AND CONFIDENTIAL



Executive Director
Virginia State Bar
700 Bldg., Second Floor
700 E. Main Street
Richmond, Virginia

CERTIFICATION

Re: BC-DC First District Committee, Blue, Jr., Ivy P.
Complaint of Dixon L. Foster, Judge
Docket No. 79-2

To the Executive Director:

REPORT OF INVESTIGATION AND RECOMMENDATION

Following is the Certification of the above referenced matters.

I. STATEMENT OF MISCONDUCT

A. On April 27, 1978, Mr. Ivy P. Blue, Attorney at Law, Hanover, Virginia appeared before Judge Dixon L. Foster in the Circuit Court of Westmoreland County, Virginia in connection with a midsdmeanor appeal filed by his client, James Lewis Smith. On that date Mr. Blue advised the Court that a tree had fallen on a court reporter's car and the court reporter could not be present for the hearing of the misdemeanor appeal and, therefore, Mr. Blue requested a continuance. Mr. Blue further advised the Court that, since the case was being continued, his client wished to have a jury trial. Mr. Blue stated that the reporter whose vehicle had been damaged was employed by Crane and Snead Associates in Richmond, Virginia.

B. An investigation was made at the instance of the Commonwealth Attorney for Westmoreland County, Virginia, resulting in a letter from the would-be court reporter, Mrs.

Barbara D. Watts, to Mr. Fox, Commonwealth Attorney. Mrs. Watts advised (and testified at the Committee hearing) that Mr. Blue called her on the evening of April 27, 1978, identifying himself and stating that he feared that he had gotten himself in some trouble with the Court with a "little white lie I told". Mr. Blue then asked Mrs. Watts if she would be willing to tell the Commonwealth Attorney of Westmoreland County or the Court, if either were to call her, that she was the court reporter that he had requested and that the reason for her failure to appear was that a tree or a pole fell on her automobile in a windstorm. Mrs. Watts declined to do so and reported Mr. Blue's conduct to Mr. Fox on June 9, 1978. The foregoing facts resulted in the complaint made against Mr. Blue by Judge Dixon L. Foster by letter of July 6, 1978 to Bar Counsel.

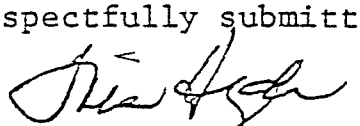
C. Mr. Blue was present for the formal hearing held on this matter on December 13, 1978, and was not represented by counsel. The following witnesses testified at the request of Committee counsel, Mr. Hyde: Judge Dixon L. Foster, the complainant; Robert B. Fox, Commonwealth Attorney for Westmoreland County; and Barbara D. Watts, court reporter. Mr. Blue testified in his own defense.

D. It is respectfully submitted that Mr. Blue violated DR 1-102(A)(4)(5)(6), DR 7-102(A)(5) and DR 7-106(C)(6). The Committee further recommends that a thorough investigation be made to determine the name and address of Mr. Blue's former secretary whom Mr. Blue was asked to identify during the hearing (see transcript pages 76 - 78). Mr. Blue testified that the information regarding the fallen tree was transmitted to him by his former secretary, and the Committee feels strongly that the unidentified former secretary should be questioned regarding this matter.

II. TRANSCRIPT AND EVIDENCE

Enclosed herewith are all portions of the transcript and exhibits received or refused at the hearing pertaining to or considered by the Committee in certifying the foregoing misconduct.

Respectfully submitted,



Tristram T. Hyde, IV
Committee Counsel

Date Executed: May 2, 1979

STATE OF VIRGINIA
COUNTY OFWESTMORELAND

This date Tristram T. Hyde, IV appeared before me and made oath that the foregoing statements are true to the best of his knowledge and belief.

Phyllis A. Dise
Notary Public

My commission expires June 18, 1979

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

VIRGINIA STATE BAR
EX REL FIRST DISTRICT COMMITTEE — Complainant

v.

IVY P. BLUE, JR. — Respondent
P. O. Box 174
Hanover, Virginia 23069

It appearing to the Court that on July 18, 1979, the First District Committee of the Virginia State Bar filed in this Court a complaint against Ivy P. Blue, Jr., verified by affidavit, praying that this Court suspend or revoke the license of Ivy P. Blue, Jr., to practice law, said complaint having been filed pursuant to Section 54-74 of the Code of Virginia, 1950, as amended;

It is hereby ORDERED that Ivy P. Blue, Jr., appear before this Court on the 18th day of September, 1979, at 9:00 a.m. to show cause why his license to practice law shall not be revoked or suspended.

It is FURTHER ORDERED that a copy of this rule shall be served on Ivy P. Blue, Jr., personally.

ENTER: 7/19/79

A COPY TESTE
Richard L. Shelton, Clerk
By Judith M. Torres
DEPUTY CLERK

JUDGE

CHIEF JUSTICE
LAWRENCE W. I'ANSON
JUSTICES
HARRY L. CARRICO
ALBERTIS S. HARRISON, JR.
GEORGE M. COCHRAN
ALEX. M. HARMAN, JR.
RICHARD H. POFF
A. CHRISTIAN COMPTON

SUPREME COURT OF VIRGINIA

Fifth Floor
11 South 12th Street
Richmond, Virginia 23219
(804) 786-6455

CLERK
ALLEN L. LUCY
DEPUTY CLERK
DAVID B. BEACH
EXECUTIVE SECRETARY
ROBERT N. BALDWIN
ASST. EXECUTIVE SECRETARY
FREDERICK A. HODNETT, JR.
SPECIAL ASSISTANT
ROBERT S. IRONS

July 27, 1979

Honorable E. Everett Bagnell, Judge
Fifth Judicial Circuit
P. O. Box 1262
Suffolk, VA 23434

Honorable Carlton E. Holladay
Retired Judge
Sixth Judicial Circuit
P. O. Box 548
Wakefield, VA 23888

Honorable Thomas V. Warren, Judge
Eleventh Judicial Circuit
Nottoway Circuit Court
Nottoway, VA 23955

Gentlemen:

Thank you for agreeing to sit as members of the three-judge court which will consider the case of Virginia State Bar, ex rel First District Committee v. Ivy P. Blue, Jr. Judge Richard H. C. Taylor has set a show cause hearing in this case for September 18, 1979.

Judge Taylor has requested that he and the other judges in the Fifteenth Judicial Circuit not be required to preside in this case. Accordingly, I have asked Judge Warren to serve as the designated resident judge to coordinate all details for the panel.

As you will note from his letter, Judge Taylor will be present for the return of the rule on September 18, 1979. Previous to that day, he will have contacted each of you to determine mutually agreeable dates for you to hear this case. I am sure that he will also notify all of the attorneys involved concerning your designation. By copy of this letter to the Clerk of the Circuit Court of Hanover, I am notifying him of your designation should he need to contact any of you.

JUL 1979
RECEIVED
VIRGINIA
CLERK'S OFFICE
HANOVER CIRCUIT
COURT

FILED

Teste: JAN 9 1980
Richard L. Shelton, Clerk
By [signature]
Dep. Clerk

MOTION TO SET ASIDE JUDGMENT

Now comes the respondent, Ivy P. Blue, Jr., by counsel, and moves the Court as follows:

1. The Court that heard this matter was not empaneled pursuant to the Code of Virginia, Title 54, Section 74, subsection 2, as amended.

2. That, specifically, Virginia Code §54-74, as amended, supra, specifically provides "that the Chief Justice of the Supreme Court of Virginia shall designate two judges, other than the judge of the Court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule.

3. That the requirements of §54-74 are jurisdictional and, in fact, this is a special statute dealing with extraordinary matters.

4. That pursuant to subsection (2) of said section jurisdictional error was committed when, (a) Hanover Circuit Judge, Richard H. C. Taylor issued the rule but failed to sit, (b) no other judge of the 15th Circuit Court sat in this case and only two outside judges are called for, (c) Judge Carlton Holladay is not a circuit judge or judge of a court of record of a city of the first class within the definition and intent of the legislature, (d) that the intent of the statute is that the Court be composed of Judges who are sitting judges and who are therefore, familiar with the current and ever-damaging definition of what constitutes misconduct, (e) nothing is mentioned in the statute

which calls for a retired judge to sit in this extraordinary proceeding.

5. That jurisdictional error was also committed when subsection (3) of Code 54-74 was not complied with, to-wit: the Commonwealth's Attorney of the Circuit prosecuted the alleged charges of misconduct against Ivy P. Blue, Jr.

6. That as a result of the jurisdictional violations cited in paragraphs 1, 2, 3, 4 and 5 of this motion, the respondents due process rights are under the Virginia and United States constitutions have been violated.

IVY P. BLUE, JR.

BY Robert S. Ganey
Counsel

LAW OFFICES
ROBERT S. GANEY
HANOVER LAW BUILDING
P. O. BOX 174
HANOVER, VIRGINIA 23069

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion to Set Aside Judgment was hand delivered to the Clerk, Hanover Circuit Court, Hanover Court House, Virginia this 9 day of January, 1980, as well as, Mr. Willard M. Robinson, Jr., Commonwealth's Attorney, City of Newport News, Courthouse Building, Newport News, Virginia, 23609; Mr. C. Hardaway Marks, Attorney At Law, 320 East Broadway, Hopewell, Virginia, 23860; Honorable E. Everett Bagnell, Judge, Fifth Judicial Circuit, P. O. Box 1262, Suffolk, Virginia, 23434; Honorable Carlton E. Holladay, Retired Judge, Sixth Judicial Circuit, P. O. Box 548, Wakefield, Virginia, 23888; and Honorable Thomas V. Warren, Judge, Eleventh Judicial Circuit, Nottoway Circuit Court, Nottoway, Virginia, 23955.

Robert S. Ganey
Robert S. Ganey

MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT

The respondent, as his Memorandum in Support of Motion to Set Aside Judgment of December 18, 1979, respectfully submits the following:

On December 18, 1979, a hearing was conducted by the three-judge panel appointed by the Chief Justice of the Supreme Court namely; Honorable E. Everett Bagnell, Judge, Fifth Judicial Circuit; Honorable Thomas V. Warren, Judge, Eleventh Judicial Circuit; and Honorable Carlton E. Holladay, Retired Judge. Subsequent to the hearing on December 18, 1979, the respondent filed his motion to set aside the judgment of the Court in which he challenges jurisidiction of the Court and the appointment of a prosecutor from an area outside of the County of Hanover to prosecute this cause.

STATEMENT OF FACTS

The respondent is an attorney whose license was suspended by a three-judge panel. The judge who originally issued the rule disqualified himself from the panel and was replaced by a retired judge from outside the circuit. The Commonwealth's Attorney also disqualified himself and was replaced by a Commonwealth's Attorney from another jurisdicition. No objection to the constitution of the panel was raised at the hearing. This objection was raised for the first time in the Motion to Set Aside Judgment.

QUESTIONS PRESENTED

1. DID THE THREE-JUDGE PANEL LACK JURISDICTION ON THE GROUNDS THAT ONE OF THE JUDGES WAS A RETIRED JUDGE AND NOT A CIRCUIT JUDGE AND THE JUDGE WHO ISSUED THE RULE DID NOT SIT ON THE PANEL?

2. SHOULD ANY OTHER ATTORNEY FOR THE COMMONWEALTH OTHER THAN THE HANOVER COUNTY COMMONWEALTH'S ATTORNEY PROSECUTE THE CASE?

ARGUMENT

The statute requires that the panel include the judge who issued the rule. That requirement is mandatory so that a panel not including that judge would lack jurisdiction. The participation of the retired judge is prohibited by the doctrine of "expressio unius est exclusix alterius." Lack of jurisdiction cannot be waived and can be raised at any time. Further, Title 54-74, §3, prohibits any other attorney for the commonwealth other than the Hanover County Commonwealth's Attorney from prosecuting the case.

DISCUSSION OF AUTHORITIES

The hearing was held pursuant to §54-74 of Va. Code Ann. (1978), which reads in pertinent part:

> (2) Judges hearing case. At the time such rule is issued the Court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the chief justice of the Supreme Court of Virginia, who shall designate two judges other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule.....

> (3) DUTY OF COMMONWEALTH'S ATTORNEY. It shall be the duty of the attorney for the Commonwealth for the County or City in which such case is pending to appear at the hearing and prosecute the case.

Further, the Commonwealth's Attorney of Hanover County should have prosecuted the case.

It is the respondent's contention that the requirement that the judge who issued the rule must sit on the panel is mandatory and that the failure of that judge to sit on the panel deprived the panel of jurisdiction over this case.

Thus, in Schmidt v. City of Richmond, 206 Va. 211, 142 S.E.2d 573 (1965), landowners appealed from a compensation award in a condemnation proceeding. The Court quoted the relevant statute as follows:

> Code, §25-16.20 reads in part as follows:
> "If the issue of just compensation is to be determined by a commission, the Court shall summon nine disinterested freeholders, or five disinterested freeholders if the parties so agree, * * *. If nine are summoned, the petitioner and the owners shall each have two peremptory challenges and the remaining five , or the original five if only five are summoned, shall be appointed, any three or more of who may act, * * *."

142 S.E.2d at 578 (emphasis by the Court). In that case, only five freeholders had been summoned. The Court reversed the award, stating:

> The statute plainly states that the Court shall summon nine disinterested freeholders unless the parties agree to the summoning of five such freeholders. When the word "shall" appears in a statute it is generally used in an imperative or mandatory sense. Black's Law Dictionary, (4th ed.), p. 1541; 21A M.J., Words and Phrases, p. 461; 39 Words and Phrases, p. 123 et seq. Here, the Schmidts did not at any time agree with the city that only five disinterested freeholders should be summoned. Under the statute they had a right to expect that

> nine freeholders would be summoned in order that they might have the privilege of exercising two peremptory challenges. It is true that the Schmidts did not make an appearance, but the court ould have struck two freeholders for them in their absence. We hold that the court committed prejudicial error in failing to comply with the statute which required that nine freeholders be summoned.

Id. (emphasis by the Court).

In Ladd v. Lamb, 195 Va 1031, 81 S.E.2d 756 (1954), the Court stated:

> "A mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding; and a statute may be mandatory in some respects, and directory in others." 82 C.J.S., Statutes, §374, page 868.

81 S.E.2d at 759. It has been held that an exercise of power by a special judge without statutory authority to do so is without jurisdiction and is a nullity. Lewis v. Harris, 238 N.C. 642, 78 S.E.2d 715 (1953) (Appendix A). See also Philpot v. Commonwealth, 240 Ky. 289, 42 S.W.2d 317 (1931), where it is stated:

> In the absence of statutory authority for the selection of a special judge, parties litigant may not confer judicial power upon any person, nor will they be estopped by their consent from denying jurisdiction.

42 S.W.2d at 318. Therefore, it is contended that the failure of the judge who issued the rule to sit on the panel, as mandated by statute, deprived that panel of jurisdiction.

Neither does the statute allow for the participation of retired judges. V.C.A. §54-74 states that

> The chief justice of the Supreme Court of

> Virginia . . . shall designate two judges ... of circuit courts or courts of record of cities of the first class.....

The statute specifically omits reference to retired judges.

> A statute, limiting a thing to be done in a particular manner or by a prescribed person or tribunal implies that it shall not be done otherwise. Expressio unius est exclusio alterius.

17 Michie's Jur. "Statutes" §45 at 330 (1971) (footnote omitted); Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938); Miller v. Commonwealth, 180 Va. 36, 21 S.E.2d 721 (1942). See, however, Gordon v. Board of Supervisors of Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967), where it was stated:

> However, it must be remembered that the maxim that the mention of one thing implies the exclusion of another is an aid to statutory construction, not a rule of law. 50 Am. Jur., Statutes, §245, p. 240.

153 S.E.2d at 275.

Whether the objection to the panel is deemed to be waived by the failure to object at the hearing will depend upon whether the defect in the panel was jurisdictional. If the panel is held to have had jurisdiction, any defect will have been waived. Akers v. Commonwealth, 155 Va. 1046, 156 S.E. 763 (1931); 48 C.J.S. "Judges" §108 (1948). However, if the defect was jurisdictional, the defect cannot be waived.

Thus, in Schmidt v. City of Richmond, supra, the court held that where the compensation panel was not properly constituted, the defect was not waived by the failure of the landowners to appear and participate at the hearing. The court stated:

> We have many times said that in eminent domain proceedings the jurisdiction of courts is wholly statutory and that the statutes must be strictly construed and followed. West v. Anderson, 186 Va. 554, 561, 42 S.E.2d 876, 879; Dillon v. Davis, supra, 201 Va. 514, 519, 112 S.E.2d 137, 141; Williamson v. Housing Authority, 203 Va. 653, 655, 125 S.E.2d 849, 850. The failure of the Schmidts to file thier answer and grounds of defense or to appear and take part in the proceedings did not constitute a waiver of the mandatory requirements of the statutes.

142 S.E.2d at 577. See also Commonwealth v. P. Lorillard Co., 129 Va. 74, 105 S.E. 683 (1921), where it is stated:

> The first error assigned is that the hustings court had no jurisdiction of the question submitted to it. If this be true, its judgment is void. The Legislature alone can fix the classes of cases of which the courts of the commonwealth are to take jurisdiction, and no consent or waiver of the parties can in any way confer a jurisdiction not so fixed. Objection for the want of such jurisdiction may be made anywhere, or in any way, and at any time, and this court will, of its own motion, take judicial notice of the lack of such jurisdiction of the trial court.

105 S.E. at 683.

Therefore, for the above reasons, the judgment of the circuit court should be set aside, for the reasons that the statute grants jurisdiction only where the panel includes the judge who issued the rule, that the statute does not allow for the participation of retired judges, and that lack of jurisdiction cannot be waived.

In so far as Title 54, Section 74, §3, it certainly would require the Commonwealth's Attorney of Hanover County to prosecute the case. This particular provision of our Code is an unequivocal mandate to the Commonwealth's Attorney in the

jurisdiction where the matter is pending. The words, "it shall be the duty", leave no area for discretion no matter how distasteful it was to the Commonwealth's Attorney. It is submitted that the failure of the Hanover County Attorney to prosecute the case against the respondent is reversable error and should be considered on this motion for the respondent. In fact, the respondent submits that §3 of Title 54-74, is as much as jurisdiction requires as §2, which specifies the nature of the Court to hear the case.

CONCLUSION

It is respectfully submitted on behalf of Ivy P. Blue, Jr. the respondent, that his constitutional rights under the Virginia and United States Constitutions (all sections of said constitution dealing with due process of law) have been violated and that this matter must be re-heard before a proper tribunal with the appropriate prosecutor handling the case.

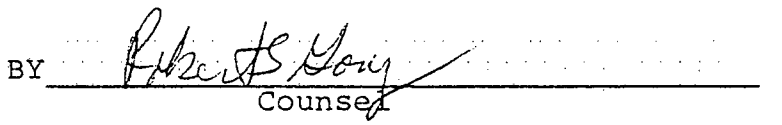
The nature of the prosecution as it is set forth in this case, is an inquisition, therefore, certainly an attorney subject to any such proceeding should have basic constitutional guarantees.

Even a common criminal is entitled to a jury of his peers. In the inquisition proceeding against the respondent, certainly a judge and a prosecutor of the attorney's prosecuting area would be best suited how to judge the actions of the attorney and advise the other circuit judges on the behavior and conduct of the attorney under charges so that a fair and

just decision could be reached.

WHEREFORE, the respondent moves this Court to sustain his motion and allow another prosecutor in a proper format, to conduct the inquisition with all the constitutional quarantees available to the respondent.

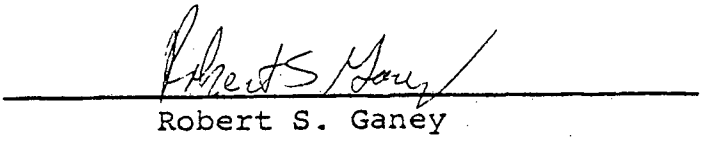
IVY P. BLUE, JR.

BY 
Counsel

ROBERT S. GANEY
ATTORNEY AT LAW
P. O. BOX 174
HANOVER, VIRGINIA 23069

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Memorandum was this 14th day of February, 1980, mailed to Honorable Thomas V. Warren, Judge, Honorable Carlton Holladay, Retired Judge, Sixth Judicial Circuit, P. O. Box 548, Wakefield, Virginia, 23888, Honorable E. Everett Bagnell, Judge, Fifth Judicial Circuit, P. O. Box 1262, Suffolk, Virginia, 23434, Honorable Willard M. Robinson, Jr., Commonwealth's Attorney, City of Newport News, Courthouse Building, 247 28th Street, Newport News, Virginia, 23607, Mr. C. Hardaway Marks, Attorney at Law, 320 East Broadway, Hopewell, Virginia, 23860, and the Clerk's Office, Circuit Court of Hanover, Hanover, Virginia, 23069.


Robert S. Ganey

ANSWER IN OPPOSITION TO MOTION TO SET ASIDE JUDGMENT

Comes now the Virginia State Bar, ex rel First District Committee, by counsel, and submits its Answer in Opposition to respondent's Motion to Set Aside Judgment. In support of its Answer, the Virginia State Bar, ex rel First District Committee (Bar) states:

1. The proceedings to which respondent now objects to in his Motion to Set Aside Judgment were brought by the Bar pursuant to and in accordance with Paragraph 13 of Section IV, of the Rules of the Supreme Court of Virginia, Part Six and Section 54-74 of the Code of Virginia, as amended.

2. Section 54-74 of the Code of Virginia, as amended provides, in part, as follows:

> (1) Issuance of rule.-If the Supreme Court of Virginia, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended. If the complaint, verified by affidavit, be made by a District Committee of the Virginia State Bar, such court shall issue a rule against such attorney to show cause why his license to practice law shall not be revoked or suspended.

In accordance with this Section, Judge Richard H.C. Taylor, on July 19, 1979, issued a rule to show cause why the license of Ivy P. Blue, Jr. to practice law should not be revoked or suspended. When a complaint against an attorney is filed by a District Committee of the Virginia State Bar, the court in which it is filed must issue a rule against the charged attorney. When a similar complaint is filed by "any person", as opposed to a District Committee, the issuance of the rule is within the discretion of the court if the court deems it appropriate. In the present case, the issuing of the rule against Mr. Blue on July 19, 1979, by Judge Taylor was mandatory and not a discretionary act. No error was, therefore, committed by Judge Taylor when he issued the rule and thereafter requested not to sit and hear the charges against Mr. Blue.

3. Following the issuance of the rule, the Honorable Lawrence W. I'Anson, Chief Justice of the Supreme Court of Virginia designated the Honorable E. Everett Bagnell, Judge of the Fifth Judicial Circuit, The Honorable Carlton E. Holladay, Retired Judge of the Sixth Judicial Circuit, and the Honorable Thomas V. Warren, Judge of the Eleventh Judicial Circuit to act as Resident Judge as members of the three-judge court to hear the case against Mr. Blue. Respondent now contends that the Chief Justice erred in his designation. However, the appointment of the three judges was authorized by Code §54-74 and other applicable provision of the Code of Virginia.

4. Section 17-7 of the Code of Virginia, as amended provides, in part, as follows:

> (2) Interest, etc.- If all the judges of any court of record are so situated in respect to any case, civil or criminal, pending in their court as to render it improper, in their opinion, for them to preside at the trial, unless the cause or proceeding is removed, as provided by law, they shall enter the fact of record and the clerk of the court shall at once certify the same to the Chief Justice of the Supreme Court, who shall designate a judge of some other court of record or a retired judge of any such court to preside at the trial of such case.

This statute only requires that the judges must, in their own opinion, deem it inappropriate for them to sit before a judge of some other court or a retired judge can be designated. Such was the opinion of all the judges in the Fifteenth Judicial Circuit as set forth in Judge Richard H.S. Taylor's letter to Chief Justice Lawrence W. I'Anson dated July 19, 1979, and as recited in the subsequent designation by the Chief Justice. Accordingly, error was not committed when none of the judges of the Fifteenth Judicial Circuit presided as members of the court which heard the charges against Mr. Blue. In addition, it was entirely appropriate that the Chief Justice designate Judge Warren as Resident Judge pursuant to Code §17-7.

5. The Honorable Lawrence W. I'Anson, Chief Justice of the Supreme Court of Virginia did not err when he appointed the Honorable Carlton E. Holladay, Retired Judge of the Sixth Judicial Circuit to hear the charges against Mr. Blue. The recall and appointment of a retired judge to hear a specific case or cases pursuant to the provisions of Code §17-7 is specifically authorized by Section 51-178 of the Code of Virginia, as amended. Code §51-178 also provides that the recalled judge shall have all the powers, duties and privileges attendant on the position he is recalled to serve.

6. Mr. Blue further contends that error was committed when the

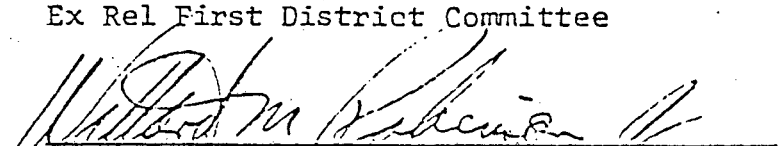
Commonwealth's Attorney for Hanover did not prosecute the charges against him. However, the appointment of Willard M. Robinson,Jr. to prosecute the charges was authorized and pursuant to Section 19.2-155 of the Code of Virginia, as amended. That statute provides that a substitute attorney may be appointed if the attorney for the Commonwealth is so situated with respect to the accused as to render it improper, in his opinion, concurred in by the judge, for him to act. By order entered August 17, 1979, Judge Thomas V. Warren allowed the Hanover County Commonwealth's Attorney to withdraw from the case and appointed Willard M. Robinson,Jr. to act in his place.

7. The Virginia State Bar, ex rel First District Committee further states that jurisdictional error has not been committed and that Mr. Blue's due process rights under the Virginia and United States Constitutions have not been violated.

For the foregoing reasons, the Virginia State Bar respectfully requests that the motion of Ivy P. Blue,Jr. to Set Aside Judgment be denied.

The Virginia State Bar

Ex Rel First District Committee



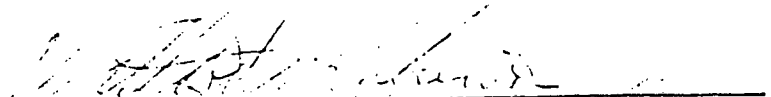
Willard M. Robinson,Jr.

Willard M. Robinson,Jr.
Commonwealth's Attorney
247 28th Street
Newport News, Va. 23607

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer in Opposition to Motion to Set Aside Judgment has been mailed this 29 day of January, 1980, to Mr. C. Hardaway Marks, Attorney at Law, 320 East Broadway, Hopewell, Va., 23860; Mr. Robert S. Ganey, Attorney at Law, Hanover Law Building, P. O.Box 174, Hanover, Va. 23069; Honorable E. Everett Bagnell,Judge, Fifth Judicial Circuit, P.O.Box 1262, Suffolk, Va. 23434; Honorable Carlton E. Holladay, Retired Judge, Sixth Judicial Circuit, P. O.Box 548, Wakefield, Va. 23888; and Honorable Thomas V.Warren, Judge, Eleventh Judicial Circuit, Nottoway CircuitCourt, Nottoway, Va., 23955.

I further certify that I have this 27 day of [illegible], 1980 mailed the original of the foregoing Answer to Richard L. Shelton, Clerk, Hanover Circuit Court, Hanover Courthouse, Hanover, Va. 23069.



Willard M. Robinson, Jr.

JUDGE HOLLADAY: Gentlemen, we are here this morning to hear further argument on a motion that was made by the defendant in the case of Virginia State Bar, ex rel First District Committee against Ivy Blue, Jr.

Is counsel for the State Bar ready?

MR. ROBINSON: Your Honor, the State Bar is ready.

JUDGE HOLLADAY: Is counsel for Ivy P. Blue ready?

MR. GANEY: Yes, sir; we are ready.

JUDGE HOLLADAY: Are there any preliminary motions, any preliminary action before the argument?

MR. GANEY: Judge, I would ask that the court reporter be sworn in in this case for purposes of the record. I imagine she probably was last time.

THE CLERK: She was previously sworn in the same matter.

JUDGE HOLLADAY: I think that is enough, if she has already been sworn once.

MR. GANEY: We are prepared to argue.

JUDGE HOLLADAY: All right, proceed with the argument.

MR. GANEY: Has the court received the memorandum that I sent in this case?

1 JUDGE HOLLADAY: I received a copy of it,
2 yes.
3 MR. GANEY: The memorandum basically sets
4 out our position. There are a few supplemental comments
5 that I would like to make.
6 I would state, for the record, that, as I
7 have indicated in the letter we previously sent to the
8 court, we will not be appealing the prior record and the
9 prior decision rendered back in December in this case.
10 Pending the outcome of this hearing, we may or may not
11 appeal. I would assume we probably -- in fact, I am sure
12 we will if we don't prevail in this case.
13 We are here on the content of the motion I
14 have sent. In the event I don't prevail on the motion, I
15 do have questions as to the Order. The wording of the
16 Order, which was previously written, which indicates that
17 Mr. Blue shall disassociate himself with any law firm and
18 not hold himself out or allow his name to be used in any
19 manner in the practice of law, we do have questions as to
20 that. We would submit to the Court that if our motion is
21 not granted, it should simply read he is suspended from
22 practicing law. As far as the details as to what he is to
23 do and not do, as I have indicated in the letter, I am
24 attempting to work that matter out with the State Bar at

1 their headquarters in Richmond.

2 As to the motion itself, our argument is
3 basically on three main points, as far as the motion is
4 concerned. Point number one is that the judge in this case,
5 Judge Taylor, who issued the rule in this case is required
6 by statute to sit on the Court that decides this case. And
7 we believe that is clearly called for by the statute itself.
8 And the word "shall," I will come to discussion of what the
9 word "shall" means very shortly. But that word is used in
10 there. And, regardless of who sits on the Court, or whoever
11 issues the rule, initially, that person must sit on the
12 Court that actually decides this case.

13 Now, Judge Taylor issued the rule. He did
14 not sit on this Court. We take the position the Court,
15 therefore, lacks jurisdiction and is unable to hear this
16 case. And the matter which previously had been heard is,
17 therefore, null and void. What has happened is -- the
18 Latin term is corum nonjuris, that the Court is without
19 jurisdiction to have made a decision.

20 Our second main point is that Judge Holladay,
21 being a retired judge in this case, has sat on the Court
22 which has decided this case. We take the position that
23 the statute -- and I am referring to 54-72, judges hearing
24 the case. And it says at the time the rule is issued, the

1 Court issuing the same shall certify the fact of such
2 issuance, the time and place thereon, to the Chief Justice
3 of the Supreme Court of Virginia, who shall designate two
4 judges other than the Judge of the Circuit Court issuing
5 the rule, of Circuit Courts or Courts of Record of cities
6 of the first class to hear and decide the case in conjunc-
7 tion with the judge issuing the rule. And it goes on to
8 talk about compensation.
9 Now, this second item says judges of certain
10 cities, and also Circuit Court judges. Now, the circuits
11 in Virginia, of which Judge Holladay comes from, the judges
12 are already there in that Circuit Court, the circuit is
13 complete. The statute doesn't talk about District Court
14 judges, it talks about judges of Courts that are actually
15 there. And Judge Holladay, who I am respectfully referring
16 to -- I don't take this personally, as to your age, or
17 anything. I hope you don't misunderstand me in that. But
18 we feel like you are not a part of the Court as required by
19 the statute. And the statute sets it out clearly. And the
20 Latin argument is Expressio unius est exclusio alterius.
21 All that means, very simply, in everyday language, when a
22 statute sets out things that are to be done in a certain
23 manner by certain people, and in a certain fashion, that it
24 implies -- clearly implies -- that it shall not be done in

1 any other manner. That Latin argument is valid for two
2 points, the first point that I made, and the point about
3 the retired judge. A retired judge is not called for to
4 sit on this panel. The first argument, which I have already
5 stated, is that the judge issuing the rule shall, in fact,
6 sit on the Court and on the panel. The argument applies in
7 those cases. Judge Taylor has not sat on the Court, has not
8 dealt with the arguments that are there. We believe these
9 are Constitutional arguments that we are raising.
10 Let's talk about that for just a minute. The
11 Bar proceedings are different than a number of other proceed-
12 ings. If you go out and commit a crime somewhere, for
13 instance, you commit a crime in Alexandria, they don't try
14 you in Richmond if you practice law down there, they try
15 you up there, is what they do. And, in this state, there
16 is no jury trial allowed in a Bar proceeding. This person,
17 Mr. Blue, my client today, has to go where he lives for the
18 case to be tried. It is clearly called for.
19 In addition to the cases I have cited in the
20 brief, I would also cite the 1979 New York case, Smith v.
21 The Department Judiciary Committee, cited at 416 N.Y.
22 Sup. 609. And that case clearly points out that it doesn't
23 matter where the alleged crime was committed, it matters
24 where the man practiced law or engaged in the practice of law.

1 What is the purpose in that? Why do you
2 come to this area? Is it to bring other judges from
3 another area that are not called for by the statute?
4 When the judge issues the rule, isn't he entitled to
5 have the prosecutor from the county try the case, which
6 is our other main point?
7 The statute goes on. Section 3 says the
8 duty of the Commonwealth's Attorney, it shall be the duty
9 of the Attorney for the Commonwealth for the county or
10 city in which the case is pending to appear at the hearing
11 and prosecute the case. Again, the word "shall" appears.
12 It appears throughout this statute.
13 So, Mr. Blue has committed the alledged
14 crime in a different county than this area, but he is
15 brought back here for this hearing. What is the purpose
16 of bringing him back here? Isn't he entitled to the local
17 prosecutor, someone familiar with him? And isn't he
18 entitled to the Court being here, and someone that is
19 familiar with him from the standpoint of the Court, and
20 familiar with practices in this area? He doesn't have a
21 right to a jury trial. And the question is, is he entitled
22 to a trial of his peers? These are his peers in the area,
23 the local prosecuting attorney and the local judge that is
24 in the area. And these people have not been here. And, in

1 our opinion, he has suffered a severe injustice as a
2 result of that.
3 And the Constitutional argument of his right
4 to a jury of his peers would follow in this vein, as I
5 state.
6 Now, I would like to talk about the statute
7 itself for just a minute. In 1972, the statute was changed.
8 It would be helpful to the Court if I passed these copies
9 out, so I could explain that.
10 Now, what I have presented to the Court and
11 counsel for the State Bar is as follows: We have two
12 documents. What is listed at the bottom of page 5 is
13 the old code dealing with section 54-74. Now, by "old,"
14 I am referring to prior to 1972. Now, the other document
15 that I am giving you, which is the more clear document,
16 is the 1972 code itself, with the amendment. I am going
17 to direct the attention of the Court to it, and a portion
18 at the bottom of the new document. This is H44 at the top
19 here. This is the act of assembly passed. And I am going
20 to read the whole section 54-74, Procedure for Suspension
21 or Revocation of License. "If the Supreme Court of
22 Virginia or any Court of record of this state observes,
23 or if complaint, verified by affidavit, be made by any
24 person to such Court of any malpractice or of any unlawful

1 or dishonest or unworthy or corrupt or unprofessional
2 conduct on the part of any attorney, or that of any person
3 practicing law, is not duly licensed to practice law in
4 this state, such Court shall, if it deems the case a proper
5 one for such action, issue a rule against such attorney,
6 or other person, to show cause why his license to practice
7 law shall not be revoked or suspended. If the complaint,
8 verified by affidavit, be made by a district committee of
9 the Virginia State Bar, such Court shall issue a rule
10 against such attorney to show cause why his license to
11 practice law shall not be revoked or suspended."
12 Let me stop for just a second to go back and
13 read that one sentence again. "...if it deems the case a
14 proper one for such action, issue a rule against such
15 attorney, or other person, to show cause why his license
16 to practice law shall not be revoked or suspended."
17 So now, this is the law. As you can see,
18 from the other section, prior to 1972, the law simply
19 stated, at that time, that the Court had discretion to
20 determine whether or not the rule should be issued. But
21 then, we have the 1972 amendment, which goes -- it has
22 this additional portion, which is the present law in this
23 state. And I am reading further. It says, "If the
24 complaint, verified by affidavit, be made by a district

1 committee of the Virginia State Bar, such Court shall issue
2 a rule against such attorney to show cause why his license
3 to practice law shall not be revoked or suspended."
4 Now, in 1972, the statute was made absolutely
5 mandatory, with the addition that the Court shall issue the
6 rule and shall proceed to do it. The legislature tightened
7 up the procedures, at that time; the law changed. The
8 word "shall" clearly appears. There is no discretion as to
9 what he should do when the State Bar comes forward. As I
10 stated, the word "shall" is used clearly throughout this
11 section as requiring the Court that issued the rule to sit
12 on this panel. This has not been done in this case.
13 That is the total, exclusive argument to
14 our second point, that a retired judge is also not called
15 for by this statute to sit on the Court. It designates
16 who is supposed to sit, doesn't say a word about a retired
17 judge.
18 Then, the duty of the Commonwealth's Attorney,
19 it shall be the duty of the Attorney for the Commonwealth
20 or city in which such case is pending to appear at the
21 hearing and prosecute the case. And he simply has not
22 done that in this case.
23 So, where are this man's Constitutional
24 guarantees of a jury of his peers in this case? He is

1 stripped of his right to a jury trial ab initio. He
2 doesn't have that to start with. Then, he comes to Court,
3 and doesn't have the prosecutor who knows him in the area,
4 for whatever plea bargaining, or whatever purposes that
5 means, someone that knows the substance of the trial and
6 the practices in the area. He is deprived of the judge in
7 the area who also knows the practice.
8 I am not here to go back into the evidence
9 in the case, but one of the statements that I heard which,
10 quite frankly troubled me substantially, the other judge
11 had commented that he doesn't always grant jury trials in
12 criminal cases. As I understand, his reasoning was, in
13 some cases, he thinks people are deliberately asking for a
14 delay or postponement.
15 But, be that as it may, that strikes me as
16 being a serious matter, as it stands. It seems to me as if
17 that particular situation should be dealt with by a judge
18 in this circuit, familiar with the practices up here,
19 whatever they are, whatever they may not be.
20 Now, I have cited in my brief a number of
21 cases that are existing, and the word "shall" is cited in
22 the Schmidt v. City of Richmond, 206 Va. 211, 142 S.E.2nd.
23 573, the case says the statute plainly states that the
24 Court shall summon nine disinterested freeholders, unless

1 the parties agree to the summoning of five such freeholders.
2 When the word "shall" appears in a statute, it is generally
3 used in an imperative or mandatory sense, also citing
4 Black's Law Dictionary. I think the Court is well aware
5 of what the word "shall" means in the statute. We have it
6 throughout the statute.
7 This is a special proceeding. The recent
8 219 Wilder v. State Bar case, there, the Court says these
9 are not civil nor criminal cases, these are inquisitions
10 and special proceedings dealing with what happens to be
11 misconduct. Now, whatever misconduct is at a certain
12 given point in time may vary. And I think that argument
13 is valid as to why. And I respectfully, again, say that
14 a retiring judge should not sit.
15 What misconduct is in 1980 or '79 or '78
16 might be different from what it was thirty years ago.
17 That is our original argument as to why the Court has to
18 be constituted in this fashion. These are not cases where
19 you apply what a simple law is. In criminal cases, it is
20 set out; it is, also, in civil cases, about what misconduct
21 may be. And the statute is as vague as anything could be
22 as to misconduct. That is something that could be very
23 well determined by what the nature of our times are, and
24 what they are in that particular point of time. And that

1 is why we feel like the Court has been, also, improperly
2 conducted.
3 And I think the cases that I have cited
4 clearly set out the law. I think the argument, the legal
5 principles set out by the law in documents are very valid,
6 and I would submit to the Court that the argument which I
7 have seen from the State Bar in support of the memorandum
8 they filed just don't address these questions.
9 And this statute was clearly changed to make
10 it mandatory, in 1972, as to what the court shall do under
11 these instances. The law is tightened up, and I would
12 submit to the Court that the Court is without jurisdiction,
13 and the argument that I have cited in my brief, going back
14 to the old Virginia case Commonwealth v. P. Lorillard
15 Company, 129 Va. 74, 105 S.E. 683, "objection for the want
16 of such jurisdiction may be made anywhere, or in any way,
17 and at any time, and this Court will, of its own motion,
18 take judicial notice of the lack of such jurisdiction of
19 the trial Court."
20 And I would submit to the Court that that
21 argument has been valid for 100 years, and it is still
22 very much valid today. I would respectfully ask your
23 consideration.
24

1 MR. ROBINSON: I am not exactly sure what to
2 say, as we obviously, today, have a change of counsel for Mr.
3 Marks. I am sorry my brief missed the question. I thought we
4 did a pretty good job of evaluating the documents in the Court
5 records and putting a reasonable interpretation on them, which
6 comes from, really, the quoting of the language.
7 I believe counsel argues that we should be a
8 nation of man rather than a nation of law. This is the first
9 time I have ever felt that my being in a courtroom was error.
10 I've often jokingly said my being there is prima facie evidence,
11 but, particularly, not error.
12 The Court has had the benefit of the answer
13 which we filed. The Court has had the benefit of the documents
14 that were supporting the appointment of each of us parties who
15 are here. I see no reason to go back through and reread the
16 statutes, being that I think they are clear to a person who
17 would take the time and read them.
18 I disagree on the points which counsel touches
19 on that are supposed to attack the jurisdiction of the Court.
20 I don't disagree with the principle that if this Court does not
21 have jurisdiction, then its actions would be void ab initio.
22 I disagree with that principle.
23 I don't disagree with the phraseology "shall"
24 meaning mandatory, as long as it is jurisdictional, and the
distinction that can be drawn from procedural versus

1 jurisdictional. I don't disagree with that.

2 I disagree with some of the interpretations

3 of the cases cited by counsel, particularly, I would make

4 reference to the case of Schmidt v. City of Richmond.

5 Counsel's interpretation would be somewhat different

6 from mine, and I would quote just a part of it in support

7 of what I feel is more reasonable. Quoting from that

8 case, it states, "The statute plainly states that the

9 Court shall summons nine disinterested freeholders, unless

10 the parties agree to the summonsing of five such free-

11 holders. When the word "shall" appears in a statute,

12 it is generally used in an imperative or mandatory sense."

13 Skipping some citations, "Here, the Schmidts

14 did not at any time agree with the City that only five

15 disinterested freeholders should be summoned. Under the

16 statute, they had a right to expect that nine freeholders

17 would be summoned in order that they may have the privilege

18 of exercising two peremptory challenges."

19 The Court reversed the case on a number of

20 reasons; this was just one of them. But, here, they said

21 that the party was denied the right to exercise two

22 peremptory challenges of the panel that was determined.

23 Ladd v. Lamb, 195 Va. 1031, 81 S.E. 2nd. 756,

24 purely says that "shall means shall."

1 I would refer to some of the history of our
2 state, first with reference to the point of special
3 prosecutor. The Order entered by Judge Designate Warren
4 set forth that the Commonwealth's Attorney disqualified
5 himself, and an outside person who did not have either the
6 preconceived prejudices or what he considered a conflict in
7 handling the case, that he would be free from those, and I
8 was designated. The statute says you can do it. It was
9 clearly done. I don't see how they can argue it. To even
10 bring it up is frivolous.
11 With reference to the resident judge issue,
12 by letter -- and I am confident the Court has reviewed
13 these documents -- by letter, the local resident judge
14 notified the Virginia Supreme Court that he and others in
15 the circuit -- obviously, Judge Foster, a member of the
16 circuit, was going to be a witness -- and properly concluded
17 that it would be improper for them to sit in judgment. And
18 he notified, by letter, the Supreme Court. And that is a
19 part of the record. And he requested that he and the other
20 judges not be required to preside in the case. And he has
21 discussed this with them; therefore, by the Supreme Court
22 Order, which is issued under signature of Mr. Chief Justice
23 I'Anson, and filed in the Order Book of this Court at
24 Chancery Order Book 52, page 122, it sets forth as a

1 matter of record that Judge Warren is designated the
2 resident judge of the circuit. It is clearly designated
3 and set forth in the record pursuant to this statute.
4 To say and to argue that Judge Taylor, who
5 issued the rule as mandated by the statute, which brings
6 the matter before the Court -- prior to that, it was filed
7 with the judge. And I am familiar with the earlier
8 statute, which says it was not mandatory on the circuit
9 judge to issue the rule. There were times when the rules
10 didn't get issued for a year or two years, or maybe never.
11 They were just sat on.
12 And the legislature considered that they
13 would take away the discretion, and they did take away the
14 discretion and made it an administrative procedural matter
15 that the Circuit Court Judge shall issue it.
16 Upon his issuance, he notified the Court
17 there was a conflict. And, by statute and statute
18 authorization, a clear reading of the statute -- I hesitate
19 to even cite them, but with reference to the statutes, I
20 have them all here, the statute which says that you can
21 designate a retired judge who is retired under 54-- the
22 retirement act, 160 -- and it is 51-178, which says that
23 you can appoint him, retired, to either hear specific case
24 or cases, and that he shall follow through. It is very

1 clear.

2 Going a bit to the case law, I would direct
3 to the Court's attention 212 Va. 278, the Seventh District
4 Committee of the Virginia State Bar v. Eugene Gunter. This
5 was a case in which the disbarment procedure was brought
6 because the lawyer gave false information to the committee
7 who was examining it. But the point of this case that I
8 would like to bring out is in the head note. It says,
9 "Error to the judgment of the Corporation Court of the
10 City of Winchester, Honorable George M. Coles, resident
11 judge designate." And then Judge Winston and Judge Foster
12 were the other two judges designate.

13 And, in this case, at 213 Va. 523, Eighteenth
14 District Committee v. Baum, quoting from that head note,
15 "Error to the judgment of the Corporation Court of the
16 City of Alexandria, Honorable Franklin P. Baccus, resident
17 judge designate." Again, this was an outside judge desig-
18 nated as resident judge.

19 But I think that we don't have to go but so
20 far to find that the motion is without substance. You
21 really only have to look down in the notes right under the
22 section. You will see references made to the case of
23 Akers v. Commonwealth. This was decided in 1931. I have
24 Shepardized the case. It has been cited a number of times

1 on the issue of seduction. It is interesting, that issue
2 of seduction, in somewhat of a much-cited case. But, on
3 the issue we are here on, the appointment of another judge
4 in a prior case, it is the law and has been so much the law
5 that I can find where the issue hasn't been tested until
6 today. If it has, the Supreme Court of Virginia has
7 completely ignored it as frivolous. I might note there is
8 an automatic right of appeal in each disbarment case. It
9 is not a question of granting a writ. And counsel has
10 already announced they are going to appeal whatever happens.
11 I was attempting, first, to make a real good
12 record. I decided that would be wasting the taxpayers'
13 time.
14 In this case, the seduction case, quoting
15 from the case -- and it is cited as Akers v. Commonwealth,
16 156 S.E. 763, a 1931 case -- "The accused, a single man,
17 was tried and convicted for seduction under promise of
18 marriage."
19 "It appears that the Honorable Beverley
20 Berkley, Judge of the Law and Chancery Court of the City
21 of Roanoke, was requested by the Honorable P. H. Dillard,
22 Judge of the Circuit Court of Franklin County, to try this
23 case."
24 "On the morning of April 17, 1930, Judge

1 Berkley appeared at the courthouse of Franklin County for
2 the purpose of going into the trial. On motion of the
3 accused, and for good cause shown, the case was continued
4 until May 6, and the accused was admitted to bail."
5 "(1) Pursuant to adjournment, on May 6,
6 Judge Berkley again appeared at the courthouse of Franklin
7 County, and the case was tried. After the jury had rendered
8 an adverse verdict, the accused, for the first time, raised
9 an objection to Judge Berkley sitting and moved to set the
10 verdict aside on the grounds that he was not the judge of
11 the Circuit Court of Franklin County, that no formal order
12 had been entered by the regular judge of said Court desig-
13 nating him to sit, nor had he been commissioned by the
14 Governor for this purpose. The motion was overruled. This
15 action constitutes the first assignment of error," which is
16 the same point we are on today.
17 I might point that the distinction the 1931
18 statute has -- and if you would like to follow with these
19 statutes, the first phraseology, it says, at that time, in
20 paragraph (2) "In the event that he is so situated as to
21 render it improper, in his opinion, for him to preside at
22 trial, then he shall enter that fact of record, in which
23 event the clerk shall certify the statement of the judge
24 to the Governor, who shall designate another judge to

1 preside."

2 Well, here is the change, now, the Chief
3 Justice who shall designate another judge to preside. The
4 difference between that statute and the current Virginia
5 statute is the substitution of the word Chief Justice of
6 the Supreme Court for the word Governor. And, in the first
7 phrase, it says, "If all the judges of any court of record
8 are so situated in respect to the case -- "

9 Now, in this case, Judge Taylor advised the
10 Chief Justice that all the judges considered it improper,
11 or they were so situated that it would be improper, in
12 their opinion, for them to preside at the trial. And the
13 Governor then made the appointment of the resident judge.
14 Now, following the case, quoting from the case again, this
15 section was discussed in the case of Smith v. White, 107 Va.
16 616. "The facts in that case were that Judge White, the
17 regular judge of the Circuit Court of Albemarle County, was
18 interested in a matter and filed a bill in chancery request-
19 ing the construction of a certain clause in a will. Judge
20 Christian, of the Corporation Court of the City of Lynchburg,
21 presided. It did not affirmatively appear that there had
22 been any entry of record by the clerk of the fact that it
23 was improper for Judge White to preside, nor did it appear
24 that Judge Christian had been designated by the Governor.

1 It was held that unless the objection was properly made in
2 the lower Court, it could not be raised for the first time
3 in this Court. The Court stated that the entry which the
4 statute required was not an Order or Decree in the case,
5 but was a mere statement of fact to be entered of record,
6 and that, in the absence of affirmative proof that it was
7 not done, it will be presumed that the presiding judge
8 acted under proper authority."
9 And, in this case, the Court says, "There is
10 no merit in this contention, and in any event, the objection,
11 after one continuance, bail, and an adverse verdict, came
12 too late."
13 And here, a man was convicted of a crime.
14 And the Court approved the designation and the trial by
15 one other than the presiding judge over that specific
16 circuit.
17 I think it is clear, quoting -- and I would
18 reiterate, since 1931 that the law has been set down by
19 our Court, and there has been no change, and really no
20 challenge to it. And the reasons come from Smith v.
21 Commonwealth, which is 1980. And I think the quote in there
22 is a little bit important. Quoting from there, "Suppose
23 the judge of one county is sick or disabled or resigned or
24 dies or is removed? Must the administration of justice stop?

1 Must there be no tribunal to try criminals or satisfy
2 controversies in such county? Is it possible that the
3 framers of the Constitution intended that the whole
4 machinery of law and administration of justice shall cease
5 by death, resignation, sickness or other accident? We
6 think not. The very language used in the Constitution,
7 there shall be a Court called the County Court, which
8 shall be held by a judge learned in the law of the state,
9 plainly indicates that it was not intended to limit the
10 jurisdiction of the County Court to a particular person
11 who might be appointed as County Judge."
12 We are talking about Courts. And the Court
13 is duly constituted when, under the statute, the Supreme
14 Court designates one other than the resident judge to act
15 in law thereof.
16 I have copies of the Orders. I am confident
17 they are in the file before the Court, because that is
18 where we really got all of ours, setting forth that all
19 parties here are proper. I submit that the motion to set
20 aside the verdict as being without jurisdiction is without
21 any merit at all. And I will be happy to answer any
22 questions about any of the procedure as I have studied it.
23 JUDGE HOLLADAY: Any questions? No questions
24 from the bench.

1 MR. GANEY: Would the Court care for a brief
2 response to the argument? I will make it brief. I think
3 both of us have spoken a great deal today.
4 What has actually happened in this case is
5 that Judge Warren was subsequently appointed the resident
6 judge, but he did not issue the rule in this case and sit
7 on the Court as the statute requires. And Mr. Robinson has
8 done a great deal of talking, but he is not dealing with the
9 first main point we have raised. That procedure is set out
10 clearly by law and has not been complied with. I haven't
11 heard anything that changes what the Code says as to what
12 is supposed to be done. It should be set aside and remanded
13 for a new trial against this man, and in the procedure set
14 out by law.
15 I deeply resent the insinuation that there
16 has been a change of counsel all of a sudden. I was here
17 last time this proceeding came up. I have taken over the
18 other case. I will be arguing that before the full Supreme
19 Court next week. I was aware of this proceeding. I am
20 here in place of Mr. Marks. He is in the General Assembly.
21 We had previously already stated it was our desire, with the
22 consideration of the Court, to go forward. But I deeply
23 regret that remark was made. That is not the case.
24 I also deeply regret that our argument is

1 frivolous. I fail to see where they have proved that. I
2 have cited the Akers case in the brief. I pointed out to
3 the Court that there are -- this is a Bar jurisdiction, a
4 Bar case regarding jurisdiction. This isn't a criminal
5 case, as it stands. I have set out ample law in our brief
6 where a Court, lacking the jurisdiction, the decision is
7 void and must be set aside. And this is a special Bar
8 proceeding. This isn't a criminal case regarding something
9 else in the Virginia law. I have cited and pointed out
10 that a lack of jurisdiction can be brought up at any time.
11 They don't disagree with that, as I understand. They say
12 they don't. Then, they do, later on.
13 We take the position this is a Constitutional
14 due process question before the Court. We think the argu-
15 ment set out in our brief is perfectly valid. This statute
16 was changed in 1972. The statute has been toughened up as
17 to what the Court shall do. It does not call for a retired
18 judge to sit on the Court. I have amplified the reasons
19 why we think that is valid. I haven't heard anything to
20 rebut the reasons why. I have set that out because this is
21 not a situation where the Court -- any judge comes along
22 and opens up something and looks at it to see what the law
23 says. This isn't -- the Bar hearing regarding this conduct
24 is something that is -- whatever a certain time is what

1 misconduct may or may not be. That is the reason why
2 certain people are asked to sit on it. I again state, we
3 are in Hanover. Why are we in Hanover County? Not because
4 this alleged incident occurred here. It didn't occur here.
5 It was somewhere else. What is the reason for being here?
6 And the reason for being here is set by the statute, is that
7 the local judge shall issue the rule, and he shall sit on
8 the Court, and the local Commonwealth's Attorney shall do
9 this. And they are asking the Court, as I understand it,
10 to say the word "shall" is frivolous in this case.
11 That is the first time I have heard anyone
12 say that our Supreme Court has not said this at all. In
13 54-74, the procedure for suspension or revocation of
14 license, where it is all set out in a separate section,
15 that clearly deals with a special problem.
16 In the Akers case, decided in '32, was there
17 a Bar Association in this state when these rules were in
18 existence? Of course not, that dealt with these problems.
19 And I would ask the Court to set the case aside, which was
20 decided in December, remand the matter for a new trial
21 consistent with the proper procedures set out by statute.
22 That is what I am specifically asking for.
23 JUDGE HOLLADAY: The Court will recess for a
24 brief period of time, and then adjourn. We will return to

1 the bench and proceed later on.

2

(Recess.)

3

4 JUDGE WARREN: Gentlemen, the motion to
5 overrule the verdict as contrary to the law and evidence
6 is overruled on all three points.
7 MR. GANEY: Note our exception.
8 JUDGE WARREN: Note your exception.
9 The next question was the question concerning
10 the language in the decree, Mr. Ganey. And did you all
11 want to address that? I don't think you did, in your
12 argument. I didn't know whether you intended to.
13 MR. GANEY: The last paragraph on page 1 of
14 the Order itself says that it is further ordered that Ivy P.
15 Blue, during said time, disassociate himself from any law
16 firm and not hold himself out or allow his name to be used
17 in any manner in the practice of law. We would ask the
18 Court that this paragraph be deleted from the Order and
19 that the Order be amended to delete this paragraph. It
20 should simply say that his license is suspended for a period
21 of nine months, as I have set out in the letter to the
22 Court. If this was true of a citizen or anyone else, they
23 couldn't serve as a secretary or in a paralegal capacity,
24 or anything of this sort. And we understand, from my

1 discussions with Mr. Rigsby at the State Bar office that,
2 although it is a little bit unclear in certain cases, that
3 he would be able to perform the functions of a nonlawyer
4 like any citizen, if he elects to. We are not sure if he
5 is going to or if he will have to, but I would ask the
6 Court that that paragraph be deleted, the last paragraph
7 on the first page, from the Order of the Court.
8 And, although I am getting ahead of myself,
9 I would ask the Court to be heard on whether the Order
10 itself would be stayed pending appeal of the hearing today.
11 As I stated before, we have no intention of appealing the
12 substantive decision of this Court prior to this time in
13 the previous hearing, but we do fully intend to appeal this
14 decision today. And we would ask that the transcript be
15 made a part of the record on the case so that we can appeal
16 this decision. I would ask for a stay of this Court's
17 Order pending an appeal of the ruling today.
18 MR. ROBINSON: You are asking that the
19 paragraph "It is further ordered that Ivy P. Blue, during
20 said time, disassociate himself from any law firm and not
21 hold himself out or allow his name to be used in any manner
22 in the practice of law -- "
23 MR. GANEY: That's correct.
24

1 MR. ROBINSON: Are you saying his name can
2 still -- is your argument -- I am trying to clarify this --
3 can be used in the phraseology, and I believe it is Blue,
4 Ganey & Ganey, can still be used on the sign?
5 MR. GANEY: No. As to that specific question,
6 my understanding is that it cannot be done. But what I am
7 saying is, he should be suspended from the practice of law.
8 We are not denying that.
9 JUDGE WARREN: Are you saying that is included
10 in the suspension, if he is suspended? He cannot do that.
11 There is no reason to add that last paragraph.
12 MR. GANEY: That is what I am saying. He
13 cannot perform the functions of a lawyer. That is what
14 this Court has done, suspended him from doing that. And
15 the State Bar has set out certain things that he can do and
16 can't do, as we understand. By having the name put out, he
17 is exactly correct on that, we would have to comply with
18 that. But that would certainly be covered by saying he is
19 suspended. But, as far as totally disassociating himself
20 with any law firm, we believe that is excessive and over-
21 broad as to what is called for in this instance.
22 MR. ROBINSON: I think that it means disassoc-
23 iate in the law firm and the practice of law. I am not
24 arguing that he cannot do what a layman can do. But I find

1 that it is very good to be as specific as I can so that
2 you don't have to argue later on and to draw up an Order.
3 And I drew it, and I wanted it specific, because I think it
4 is -- it should be. I don't know whether we are talking
5 about semantics or not. I would hope that is all we are
6 talking about. But, I don't think he can use his name in
7 any manner to be used in the practice of law. I think that
8 his name cannot go out on stationery as an attorney. I
9 think his name on the outside of a building has to come
10 down on the practice of law. And if a phone book comes out
11 in the meantime, I don't think that his name in any way
12 could be under the practice of law, because he will be a
13 layman. And that, to me, is clear. I think the paragraph
14 is appropriate in its specifics.
15 MR. GANEY: We don't disagree with the
16 specifics he has referred to. In fact, I agree completely
17 with those. But our understanding -- and I have discussed
18 this matter with Mr. Rigsby. He is the head Chief Counsel
19 for the State Bar. And my discussions with him indicate
20 that there are certain things that Mr. Blue could do if he
21 elected to, things that a paralegal person could do. He
22 could answer the phone in a law office. He could do some
23 typing. He could do investigative work. Of course, his
24 name could not be used on the stationery, on the building.

1 We are not disputing these facts. But there are certain
2 things, as a nonlawyer, he could do if he elects to. We
3 are not sure that he will, at this point. I would ask the
4 Court it be limited so that his suspension --
5 JUDGE WARREN: What does the last paragraph
6 preclude him from doing that he could otherwise do?
7 MR. GANEY: "During said time shall
8 disassociate himself from any law firm." What if we used
9 him to help us answer Interrogatories, or to do paralegal
10 work as a title examiner, which we have paralegal people
11 doing that all the time. He could certainly do these things.
12 From what Mr. Rigsby has informed me, he would obviously
13 have some association with a law firm if he was doing these
14 things, no different than a secretary that works in the
15 office has an association with our law firm. That is why
16 I think it is overbroad, the language in the last paragraph.
17 JUDGE BAGNELL: Let me ask you a question.
18 Do you have any problem in "not hold himself or allow his
19 name to be used in any manner in the practice of law"?
20 Because, certainly, if he is going to answer Interrogatories
21 --
22 MR. GANEY: I would concur.
23 JUDGE BAGNELL: If he is going to answer
24 Interrogatories, he would certainly have to explain that he

1 is not a lawyer at that time, his license is suspended.
2 MR. GANEY: I don't dispute that at all.
3 JUDGE BAGNELL: So the only problem you have
4 is the lack of "disassociate himself from any law firm,"
5 is that it?
6 MR. GANEY: Yes, sir.
7 JUDGE BAGNELL: Mr. Robinson, do you want to
8 address yourself to the state of the Order pending the appeal,
9 which counsel has indicated?
10 MR. ROBINSON: I am thinking, trying to
11 reflect back on procedures I have been involved in before.
12 The substantive factors, according to the statements of
13 counsel, as to the reasons for his license being taken
14 away, they are not appealing. And I believe that was --
15 that statement was made to us. I agreed and the Court
16 agreed to give them until March the first for the benefit
17 of the client to get in a position to, in effect, put the
18 Order into effect, after the hearing. I know that that
19 agreement is not binding. They are not going to appeal the
20 trial, they are going to appeal the motion. I guess I will
21 be honest with you. I can't get around the fact that I
22 think that you are appealing to Mr. Chief Justice I'Anson
23 saying, "You blew it, sir, start us all over again."
24 And I think that that is what the appeal

1 would be. And I, frankly, see no merit at all in it. So
2 I would say, don't even stay it. If the Supreme Court
3 concludes there is sufficient merit to stay it, let them
4 do it. That is my position on it.
5 I was reflecting back, trying to find out if
6 I could come up with any valid reason to do it, and I can't
7 do it. That is my position.
8 JUDGE HOLLADAY: We will recess, gentlemen.
9 MR. GANEY: I would like, on the issue of the
10 stay itself, I would like to refer this Court -- the Court
11 is probably already aware of this case, the recent decision,
12 Commonwealth of Virginia v. Muriel L. Smith. She is a
13 City Council member in the City of Richmond where she was
14 ordered removed by Judge Spain in Division II from the
15 council seat. And she fought a stay in that Court. They
16 decided it. She appealed, seeking what is called a
17 peremptory writ of mandamus, which was issued, citing that
18 a stay had to be granted to her to allow her an appeal of
19 this case. This is a major, well-publicized case to our
20 Supreme Court indicating that she did have the right of a
21 stay from the Circuit Court pending the appeal. And I think
22 the appeal in this case would be speedily processed on the
23 issue which is involved here today. And I would ask the
24 Court to allow us a stay pending that appeal.

1 MR. ROBINSON: I hate to bounce up again. We
2 are playing like yo-yos. But I must confess my ignorance.
3 I am not familiar with the Supreme Court case you cited.
4 But you state that the Supreme Court really issued the Order
5 that the suspension should not be during the appeal; is that
6 correct?
7 MR. GANEY: They said she had an automatic
8 right of appeal and had a stay pending the right of appeal.
9 It was an automatic right of a stay, as I understand.
10 MR. ROBINSON: I think under 54-74, the person
11 or persons making the complaint of the defendant -- well,
12 this is saying we have a right to appeal, too, the person
13 or persons making the complaint of the defendant may, as a
14 right, appeal from the judgment of the Court to the Supreme
15 Court of Virginia by petition based on a true transcript of
16 the record which shall be made, and in all such cases where
17 a defendant's license to practice law has been revoked by
18 the judgment of the Court, his privilege to practice law
19 shall be suspended pending the appeal.
20 MR. GANEY: The key word there is "revoked,"
21 and not suspended. I think there is a substantial difference
22 in the wording of that statute.
23 MR. ROBINSON: That is 54-74.
24 JUDGE BAGNELL: Anything further, gentlemen?

1 MR. ROBINSON: No, sir.

2 JUDGE BAGNELL: All right. Court will be

3 in recess.

4

(Recess.)

5

6 MR. ROBINSON: May I correct one error? I

7 said that on the disbarment proceeding, the defendant had

8 an automatic right of appeal. I checked. That is not in

9 this form. The automatic right of appeal, when it comes up

10 through the administrative channel, he still has to file for

11 a petition for a writ of error. I was just thinking wrong.

12 JUDGE WARREN: The Court has decided to

13 delete the words "disassociate himself from any law firm,"

14 in the next to the last line of the Order, so that it would

15 read, "It is further ordered that Ivy P. Blue, during said

16 time, not hold himself out, or allow his name to be used in

17 any manner."

18 And the Court has also decided to suspend the

19 execution of this order pending a determination and

20 resolution of the matter by the Supreme Court.

21 MR. GANEY: Thank you.

22 JUDGE WARREN: And so, this Order of the

23 nineteenth of January will be altered to that extent.

24

1 MR. ROBINSON: Do you want me to prepare a
2 new Order and send it to you?
3 JUDGE WARREN: I think that would be the
4 best thing.
5 JUDGE BAGNELL: Yes, sir, prepare an Order.
6 Any other motions, gentlemen, before we
7 adjourn? You are clear on the Order, Mr. Robinson?
8 MR. ROBINSON: Well, on one thing, the
9 execution part, I want to clarify that with the Court. I
10 am not sure. I am thinking in terms of criminal cases. I
11 am not sure whether the phraseology is in general terms or
12 -- do you put in there that you must file for a petition of
13 writ of error within a certain length of time?
14 JUDGE BAGNELL: If he does not file within
15 the prescribed time, then this Order automatically is the
16 Order. So the matter would be resolved by the Supreme
17 Court if he did not file and do the necessary things within
18 the statutory period of time. So I don't think that presents
19 a problem.
20 MR. GANEY: Yes, sir.
21 MR. ROBINSON: I will circulate the Order
22 very quickly. Do you want it still circulated to Mr. Marks,
23 or do you want it to you?
24 MR. GANEY: You could send it to me.

1 MR. ROBINSON: No need to send it to Mr. Marks?
2 MR. GANEY: No, unless the Court wishes.
3 THE CLERK: May I ask, will the Order speak
4 to the filing of the transcript? Will it automatically
5 become a part of the record?
6 JUDGE BAGNELL: They have asked that your
7 Order should state, Mr. Robinson -- you and Mr. Ganey can
8 get together -- that the transcript of these proceedings
9 should be made a part of the record, unless you have some
10 objection.
11 MR. ROBINSON: I have no objection. I will
12 go back to a conversation we were having a little bit
13 earlier. This is with the court reporter while the Court
14 was considering it. We were talking about who pays the bill.
15 It was my understanding, and the practice that I have been
16 involved in before, if the defendant appeals, as in a civil
17 case, he pays for the transcript; and we, of course, have
18 to buy a copy. And my understanding is that you only want
19 today's proceedings typed up. You do not want the earlier
20 proceeding typed up.
21 MR. GANEY: That's correct.
22 JUDGE BAGNELL: I think that would be
23 appropriate, since that is all he states he is appealing
24 is the jurisdictional question. Then, your Order, then,

1 should read that the transcript of this proceeding, today's
2 proceeding, be made a part of the record in this case, there
3 being no objection from you, sir.
4 MR. GANEY: Yes, sir.
5 JUDGE BAGNELL: All right, sir.
6 JUDGE WARREN: One further thing, I think,
7 and that is the unresolved question concerning Mr. Robinson's
8 fee.
9 JUDGE BAGNELL: We will take that up.
10 JUDGE WARREN: I wonder if we could talk with
11 you back in chambers about that.
12 JUDGE BAGNELL: Court will stand adjourned.
13
14 (The hearing was concluded.)
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O R D E R

This cause came to be heard before the three judge court on the 19th day of February, 1980 pursuant to a Motion heretofore filed by the defendant that the Court

(1) Set aside the verdict heretofore entered in this court at the hearing on December 18, 1979 on the grounds that the court was without jurisdiction,

(2) Set aside the verdict aforesaid on the grounds that the statutes required the then elected Commonwealth's Attorney of Hanover County to prosecute said proceedings rather than, upon his disqualification, a specially appointed prosecutor,

(3) Amend the Order entered as a result of the December 18, 1979 hearing.

After hearing argument of counsel and review of the record, the Court doth overrule Motions 1 and 2 as being without merit.

The court does on motion of the defendant modify the heretofore entered order to read as follows:

This cause came to be heard before the three judge court on December 18, 1979 pursuant to the complaint heretofore filed by the Virginia State Bar, Ex Rel First District Committee.

The court heard evidence and argument of counsel on the following charges:

Violation of:

(a) Rule 1-102 (A) (4), (5), and (6)

(b) D. R. 7-102 (A) (5)

(c) D. R. 7-106 (C) (6)

of the Virginia Code of Professional Responsibility

It is the unanimous finding of the court that Ivy P. Blue,Jr. is guilty of Violation of (a) Rule 1-102 (A) (4), (5) and D. R. 7-102 (A) (5) and the evidence is sufficient on any one or more of the charges to revoke his license to practice law.

It is hereby ORDERED that on each of the charges, the license of Ivy P. Blue to practice law in the State of Virginia is hereby revoked and suspended for a period of nine (9) months.

It is further ORDERED that Ivy P. Blue during said time not hold himself out, or allow his name to be used in any manner in the practice of law.

It is further ORDERED that Ivy P. Blue forthwith give notice, by certified mail, of his suspension to all clients for whom he is currently handling matters and to all opposing attorneys and the presiding judges in pending litigation, and appropriate arrangements for the disposition of matters then in his care be instituted in conformity with the wishes of his client.

On motion of the defendant after having announced his intention to appeal the overruling of his motion to set aside the verdict, it is hereby ORDERED that the effective date of this Order be stayed so that the defendant may petition the Supreme Court of Virginia for an appeal.

It is further ORDERED on motion of the defendant that the transcript of this hearing be made a part of the record with no objection by counsel for Virginia State Bar.

It is further ORDERED that the Clerk of this court forward a certified copy of this Order to Ivy P. Blue,Jr., defendant, Robert S. Ganey, Attorney for Ivy P. Blue,Jr., Hanover Law Building, P. O. Box

174, Hanover, Virginia 23069, C.Hardaway Marks, Secretary of the Virginia State Bar, Secretary of the Board of Bar Examiners, Clerk of the Virginia Supreme Court, and the Chairman of the First District Committee of the Virginia State Bar.

ENTER:

this 12th day of March, 1980

I ASK FOR THIS:

Special Prosecutor

HAVE SEEN: AND OBJECT.

Robert S. Ganey, Attorney for
Ivy P. Blue, Jr.

A COPY TESTE
Richard L. Shelton, Clerk
By
DEPUTY CLERK

NOTICE OF APPEAL

Comes now the defendant, Ivy P. Blue, Jr., by counsel, and gives Notice of his intentions to appeal the Order entered on March 12, 1980, in the Circuit Court of Hanover, Virginia, by a special panel of judges.

ASSIGNMENTS OF ERROR

The defendant assigns the following error to the actions of the special panel of judges in the judgment order entered on March 12, 1980, in the Circuit Court of Hanover, Virginia:

1. The special panel of judges was without jurisdiction to hear the charges against the defendant on December 18, 1979.

2. That the special panel of judges erred in entering its Order of March 12, 1980, and failing to grant the defendant's motion to set aside the judgment it rendered on December 18,1979.

3. That the Court empaneled to hear the charges against the defendant on December 18, 1979, was empaneled contrary and not pursuant to the mandatory provisions of Title 54, Section 74, sub-sections 1 and 2 of the Code of Virginia 1950, as amended, to-wit:

(a) The judges that issued the rule did not sit on the panel, but was allowed to be disqualified.

(b) That a retired Judge was a member of the panel and only active judges of courts of record were eligible to serve on such a panel.

4. That the Court erred in allowing a special prosecutor to serve in violation of Title 54, Section 74, sub-section 3, of the Code of Virginia, 1950, as amended, instead of requiring the prosecutor of the County of Hanover, Virginia, to serve.

5. That by failing to comply with the provisions of Title 54, Section 74, and its sub-sections, the Court which had no jurisdiction to try the defendant deprived the defendant of his constitutional rights for due process of law under the United States Constitution and the Constitution of the Commonwealth of Virginia.

IN THE

SUPREME COURT OF VIRGINIA

IVY P. BLUE, JR.

Appellant

v.

VIRGINIA STATE BAR
EX REL FIRST DISTRICT COMMITTEE

Appellee

PETITION FOR APPEAL

ROBERT S. GANEY
HANOVER LAW BUILDING
P. O. BOX 174
HANOVER, VIRGINIA 23069

WILLARD M. ROBINSON, JR.
COMMONWEALTH'S ATTORNEY
CITY OF NEWPORT NEWS
COURTHOUSE BUILDING
247 28th STREET
NEWPORT NEWS, VIRGINIA 23607

STATEMENT OF THE CASE

On December 18, 1979, a special panel of judges conducted an evidentiary hearing and suspended Ivy P. Blue, Jr., for nine months. Said Order was stayed to allow Blue to challenge the jurisdiction of the proceedings. Ivy P. Blue's license was subsequently suspended by a three judge panel, by Order dated March 12, 1980, after Blue's challenges to the jurisdiction of the proceedings were overruled. The Judge who originally issued the rule dis qualified himself from the panel and was replaced by a retired judge from outside the circuit. The Commonwealth's Attorney for Hanover disqualified himself, and he was replaced by a Commonwealth's Attorney from another jurisdiction.

QUESTIONS PRESENTED

1. WAS THE SPECIAL PANEL OF JUDGES WITHOUT JURISDICTION TO HEAR THE CHARGES AGAINST THE DEFENDANT ON DECEMBER 18, 1979?

2. DID THE SPECIAL PANEL OF JUDGES ERR IN ENTERING ITS ORDER OF MARCH 12, 1980, AND FAILING TO GRANT THE DEFENDANT'S MOTION TO SET ASIDE THE JUDGMENT IT RENDERED ON DECEMBER 18, 1979?

3. WAS THE COURT EMPANELED TO HEAR THE CHARGES AGAINST THE DEFENDANT ON DECEMBER 18, 1979, EMPANELED CONTRARY AND NOT PURSUANT TO THE MANDATORY PROVISIONS OF TITLE 54, SECTION 74, SUB-SECTIONS 1 AND 2 OF THE CODE OF VIRGINIA, 1950, AS AMENDED, TO-WIT:
   (a) THE JUDGE THAT ISSUED THE RULE DID NOT SIT ON THE PANEL, BUT WAS ALLOWED TO BE DISQUALIFIED.
   (b) THAT A RETIRED JUDGE WAS A MEMBER OF THE PANEL AND ONLY ACTIVE JUDGES OF COURTS OF RECORD WERE ELIGIBLE TO SERVE ON SUCH A PANEL.

4. DID THE COURT ERR IN ALLOWING A SPECIAL PROSECUTOR TO SERVE IN VIOLATION OF TITLE 54, SECTION 74, SUB-SECTION 3, OF THE CODE OF VIRGINIA, 1950, AS AMENDED, INSTEAD OF REQUIRING THE PROSECUTOR OF THE COUNTY OF HANOVER, VIRGINIA, TO SERVE?

5. THAT BY FAILING TO COMPLY WITH THE PROVISIONS OF TITLE 54, SECTION 74, AND ITS SUB-SECTIONS, THE COURT WHICH HAD NO JURISDICTION TO TRY THE DEFENDANT DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHTS FOR DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE COMMONWEALTH OF VIRGINIA.

LAW AND ARGUMENT

The statute requires that the panel include the judge who issued the rule. That requirement is mandatory so that a panel not including that judge would lack jurisdiction. The participation of the retired judge is prohibited by the doctrine of "expressio unius est exclusix alterius." Lack of jurisdiction cannot be waived and can be raised at any time. Further, Title 54-74, §3, prohibits any other attorney for the commonwealth other than the Hanover County Commonwealth's Attorney from prosecuting the case.

The hearing was held pursuant to §54-74 of Virginia Code Ann. (1978), which reads in pertinent part:

> (2) Judges hearing case. At the time such rule is issued the Court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the chief justice of the Supreme Court of Virginia, who shall designate two judges other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule.....
>
> (3) Duty of Commonwealth's Attorney. It shall be the duty of the attorney for the Commonwealth for the County or City in which such case is pending to appear at the hearing and prosecute the case.

Further, the Commonwealth's Attorney of Hanover County should

have prosecuted the case.

It is the Appellant's contention that the requirement that the judge who issued the rule must sit on the panel is mandatory and that the failure of that judge to sit on the panel deprived the panel of jurisdiction over this case.

Thus, in Schmidt v. City of Richmond, 206 Va. 211, 142 S.E. 2d 573 (1965), landowners appealed from a compensation award in a condemnation proceeding. The Court quoted the relevant statute as follows:

> Code, §25-16.20 reads in part as follows:
> "If the issue of just compensation is to be determined by a commission, the Court shall summon nine disinterested freeholders, or five disinterested freeholders if the parties so agree, ***. If nine are summoned, the petitioner and the owners shall each have two peremptory challenges and the remaining five, or the original five if only five are summoned, shall be appointed, any three or more of who may act, ***."

142 S.E. 2d at 578 (emphasis by the Court). In that case, only five freeholders had been summoned. The Court reversed the award, stating:

> The statute plainly states that the Court shall summon nine disinterested freeholders unless the parties agree to the summoning of five such freeholders. When the word "shall" appears in a statute it is generally used in an imperative or mandatory sense. Black's Law Dictionary, (4th ed.), p. 1541; 21A M.J., Words and Phrases, p. 461; 39 Words and Phrases, p. 123 et seq. Here, the Schmidts did not at any time agree with the city that only five disinterested freeholders should be summoned. Under the statute they had a right to expect that nine freeholders would be summoned in order that they might have the privilege of exercising two peremptory challenges. It is true that the Schmidts did not make an appearance, but the Court could have struck two freeholders for them in their absence. We hold that the

> court committed prejudicial error in failing to comply with the statute which required that nine freeholders be summoned.

Id. (emphasis by the Court).

In Ladd v. Lamb, 195 Va. 1031, 81 S.E. 2d 756 (1954), the Court stated:

> "A mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding; and a statute may be mandatory in some respects, and directory in others." 82 C.J.S., Statutes, §374, page 868.

81 S.E. 2d at 759. It has been held that an exercise of power by a special judge without statutory authority to do so is without jurisdiction and is a nullity. Lewis v. Harris, 238 N.C. 642, 78 S.E. 2d 715 (1953) (Appendix A). See also Philpot v. Commonwealth, 240 Ky. 289, 42 S.W. 2d 317 (1931), where it is stated:

> In the absence of statutory authority for the selection of a special judge, parties litigant may not confer judicial power upon any person, nor will they be estopped by their consent from denying jurisdiction.

42 S.W. 2d at 318. Therefore, it is contended that the failure of the judge who issued the rule to sit on the panel, as mandated by statute, deprived that panel of jurisdiction.

Neither does the statute allow for the participation of retired judges. V.C.A. §54-74, states that:

> The chief justice of the Supreme Court of

> Virginia ... shall designate two judges ... of circuit courts or courts of record of cities of the first class.....

The statute specifically omits reference to retired judges.

> A statute, limiting a thing to be done in a particular manner or by a prescribed person or tribunal implies that it shall not be done otherwise. Expressio unius est exclusio alterius.

17 Michie's Jur. "Statutes" § 45 at 330 (1971) (footnote omitted); Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938); Miller v. Commonwealth, 180 Va. 36, 21 S.E. 721 (1942). See, however, Gordon v. Board of Supervisors of Fairfax County, 207 Va. 827, 153 S.E. 2d 270 (1967), where it was stated:

> However, it must be remembered that the maxim that the mention of one thing implies the exclusion of another is an aid to statutory construction, not a rule of law. 50 Am. Jur., Statutes, §245, p. 240.

153 S.E. 2d at 275.

Thus, in Schmidt v. City of Richmond, supra, the court held that where the compensation panel was not properly constituted, the defect was not waived by the failure of the landowners to appear and participate at the hearing. The Court stated:

> We have many times said that in eminent domain proceedings the jurisdiction of courts is wholly statutory and that the statutes must be strictly construed and followed. West v. Anderson, 186 Va. 554, 561, 42 S. E. 2d 876, 879; Dillon v. Davis, supra, 201 Va. 514, 519, 112 S.E. 2d 137, 141; Williamson v. Housing Authority, 203 Va. 653, 655, 125 S.E. 2d 849, 850. The failure of the Schmidts to file their answer and

> grounds of defense or to appear and take part in the proceedings did not constitute a waiver of the mandatory requirements of the statutes.

142 S.E. 2d at 577. See also Commonwealth v. P. Lorillard Co., 129 Va. 74, 105 S.E. 683 (1921), where it is stated:

> The first error assigned is that the hustings court had no jurisdiction of the question submitted to it. If this be true, its judgment is void. The Legislature alone can fix the classes of cases of which the courts of the commonwealth are to take jurisdiction, and no consent or waiver of the parties can in any way confer a jurisdiction not so fixed. Objection for the want of such jurisdiction may be made anywhere, or in any way, and at any time, and this court will, of its own motion, take judicial notice of the lack of such jurisdiction of the trial court.

105 S.E. at 683.

Therefore, for the above reasons, the judgment of the Circuit Court should be set aside, for the reasons that the statute grants jurisdiction only where the panel includes the judge who issued the rule, that the statute does not allow for the participation of retired judges, and that lack of jurisdiction cannot be waived.

In so far as Title 54, Section 74, §3, it certainly would require the Commonwealth's Attorney of Hanover County to prosecute the case. This particular provision of our Code is an unequivocal mandate to the Commonwealth's Attorney in the jurisdiction where the matter is pending. The words, "it shall be the duty", leave no area for discretion no matter how distasteful it was to the Commonwealth's Attorney. It is submitted that the failure of the Hanover County Attorney to prosecute the case against the Appellant

is reversible error and should be considered on this motion for the Appellant. In fact, the Appellant submits that §3 of Title 54-74, is as much as jurisdiction requires as §2, which specifies the nature of the Court to hear the case.

CONCLUSION

It is respectfully submitted on behalf of Ivy P. Blue, Jr., the Appellant, that his constitutional rights under the Virginia and United States Constitutions (all sections of said constitutions dealing with due process of law) have been violated and that this matter must be re-heard before a proper tribunal with the appropriate prosecutor handling the case.

The nature of the prosecution as it is set forth in this case, is an inquisition, therefore, certainly an attorney subject to any such proceeding should have basic constitutional guarantees.

Even a common criminal is entitled to a jury of his peers. In the inquisition proceeding against the Appellant, certainly a judge and a prosecutor of the attorney's prosecuting area would be best suited how to judge the actions of the attorney and advise the other circuit judges on the behavior and conduct of the attorney under charges so that a fair and just decision could be reached.

WHEREFORE, the Appellant, for his appeal of right, urges that his conviction be set aside.

IVY P. BLUE, JR.

BY _____
Counsel

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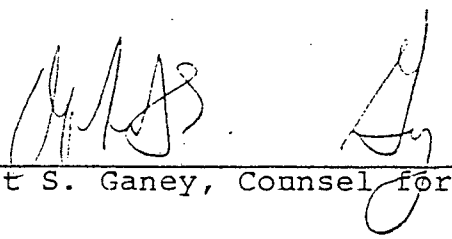
HANOVER, VIRGINIA 23069

C E R T I F I C A T E

I certify that the Appellant is Ivy P. Blue, Jr., his counsel is Robert S. Ganey, P. O. Box 174, Hanover, Virginia, 23069, the Appellee is the Virginia State Bar Ex Rel First District Committee, the Appellee's counsel is Willard M. Robinson, whose address is Courthouse Building, 247, 28th Street, Newport News, Virginia, 23607; Supersedeas is not requested; oral argument is apparently not needed because this is an appeal of right.



Robert S. Ganey, Counsel for Appellant