OFFICE OF BAR COUNSEL

February 6, 2004

BY FIRST-CLASS AND CERTIFIED
MAIL # 7160 3901 9844 1904 5405

Samuel C. Bailey, Jr., Esquire
11707 Bishops Coutent
Mitchellville, Maryland 20721

Re: Bailey/Bar Counsel
Bar Docket No. 495-97

Dear Mr. Bailey:

This office has completed its investigation of the above-referenced matter. Because your conduct reflected a disregard of certain ethical standards, we are issuing to you this Informal Admonition pursuant to Rule XI, §§ 3, 6, and 8 of the District of Columbia Court of Appeals Governing the Bar.

This matter was docketed for investigation on December 9, 1997, based an order issued December 12, 1996 (the "December 1996 Order") by the United States Court of Appeals for the District of Columbia Circuit (the "Circuit Court") in *CNPq Conselho Nacional de Desenvolvimento Cientifico e Technologico v. Fontes*, No. 95-7067. In the December 1996 Order, the Circuit Court reaffirmed its order sanctioning you and your co-counsel, Donald L. McClure, Esquire, in the amount of $1,000 and required you and Mr. McClure "to pay appellees' attorneys' fees for having to respond to two motions for enlargement of time filed [by you] on January 23, 1996 and February 15, 1996." The December 1996 Order specifically stated that "[a]ppellees' attorneys fees are to be paid by McClure and Bailey and shall not be charged to their clients." Finally, the December 1996 Order clarified an earlier order filed on October 4, 1996 (the "October 1996 Order"), that had initially dismissed the appeal for failure to prosecute and imposed the

$1,000 sanction. The December 1996 Order dismissed the appeal for "*appellants' failure to comply with the court's rules and the Federal Rules of Appellate Procedure, see D.C. Cir. Rule 38, rather than for failure to prosecute.*" (Emphasis added.)[1/]

On October 4, 1996, the Circuit Court, acting on its own motion, dismissed the appeal for failure to prosecute and discharged a Show Cause Order. In the October 1996 Order, the Circuit Court described your conduct and that of Mr. McClure, as follows:

> Appellants failed to meet almost every deadline, failed to file timely motions for extensions of time in anticipation of the delays and failed to offer adequate reasons for the late filings. Furthermore, appellants failed to provide *any* reason why they failed to comply with the court's letter directing that an amended response to the order to show cause be filed within 7 days of the letter. Appellants' explanation for the delay in filing the amended response was simply directed at why they had failed to file the final briefs, appendix and initial response to the order to show cause in a timely fashion.

On December 24, 1997, you responded to our inquiry about the December 1996 Order. You explain that your failure to comply with the Federal Rules of Appellate Procedure and the Circuit Court Rules in prosecuting the appeal was unintentional and due to a number of unanticipated circumstances. Specifically, you state that at the time you were prosecuting the federal appeal, you were preoccupied by pre-trial litigation on behalf of the same clients in a complex civil matter in the District of Columbia Superior Court. You state further that during this same time period, you were forced to hastily relocate your law offices and that a critical file was misplaced and later located which caused some delay.

Based upon our investigation we find as follows:

On or about March 28, 1995, you and Donald L. McClure, Esquire, filed an appeal on behalf of your clients, Jose Mario Fontes, Sr., and InterTrade Inc., *et al.*, (the "appellants") with the Circuit Court in the matter styled *CNPq Conselho Nacional de Desenvolvimento Cientifico e Technologico v. Fontes*, No. 95-7067. Appellants' opening brief was due on or before September 11, 1995; the reply brief was due on October 25,

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[1/] Rule 38 of the Federal Rules of Appellate Procedure provides: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

1995; the deferred appendix was due on November 1, 1995; and final briefs were due on November 15, 1995.

On August 31, 1995, appellants filed a motion to extend the time to file briefs for all parties until October 2, 1995. On September 8, 1995, the Court denied, in part, the motion to extend the time and ordered that appellants file their opening brief and the appendix by September 15, 1995; their reply brief by October 30, 1995; the deferred appendix by November 6, 1995; and the final brief and final reply brief by November 20, 1995.

On September 15, 1995, you filed appellants' opening brief, and on October 30, 1995, you filed appellants' initial reply brief.

On or about October 31, 1995, the Clerk of the Court contacted you by telephone to inform you that appellants' reply brief did not comply with the Circuit Court's rules or with the Federal Rules of Appellate Procedure. Specifically, the reply brief was deficient in that it omitted (1) the title of the document on the cover page; (2) a summary of the word count; (3) an asterisk in the table of authorities marking the cases principally relied on; (4) the notation on the cover page that the appeal was being considered pursuant to Rule 34(j); and (5) a summary of the argument. Further, the brief did not have a gray cover page indicating that the pleading was a reply brief. The Clerk informed you that these omissions or deficiencies could be corrected when you filed the final reply brief.

On November 20, 1995, you did not file either a final brief on behalf of the appellants or a final corrected reply brief.

On December 13, 1995, the Court ordered appellants to show cause on or before January 12, 1996, why the appeal should not be dismissed for lack of prosecution (the "Show Cause Order"). On December 14, 1995, you filed a request to submit appellants' final brief. On January 23, 1996, you filed appellants' answer to the show cause order, together with a request for an extension of time to file the answer, and the appendix.

On January 26, 1996, the Court sent appellants a letter acknowledging receipt of their motion for extension of time, the response to the Show Cause Order and the appendix. In the January 26, 1996, letter, the Circuit Court directed you and Mr. McClure to:

> [S]ubmit an amended show cause memorandum in light of the fact that the one submitted on January 23, 1996, is not paginated properly, and portions appear to be duplicative, both of which render the document almost

> incomprehensible. Your amended response must be filed at the court within (7) days of the date of the letter.

On February 2, 1996, you filed appellants' supplement to the lodged appendix. On February 15, 1996, you filed appellants' request for an extension of time in which to file the amended memorandum to the order to show cause.

On October 4, 1996, the Circuit Court, on its own motion, entered an order dismissing the appeal for failure to prosecute. The Circuit Court further ordered, on its own motion, that you and Mr. McClure show cause why you should not be sanctioned $1,000 for your failure to comply with the Court's rules and why you should not have to pay to the appellees their attorneys' fees and costs for having to respond to appellants' various motions. Your response was due on or before November 3, 1996. On November 1, 1996, you filed your response to the order to show cause, and a petition for rehearing and suggestion for rehearing *en banc* of the October 4, 1996, order.

On December 12, 1996, the Circuit Court granted your petition, in part, to clarify that the appeal was being dismissed for appellants' failure to comply with the Court's rules and the Federal Rules of Appellate Procedure rather than for failure to prosecute. The Circuit Court imposed a sanction of $1,000 solely on you and Mr. McClure. In addition to the $1,000 sanction, the Circuit Court also granted appellees' request for attorneys' fees and costs for having to respond to your motions for enlargement of time filed January 23 and February 15, 1996. The Circuit Court ruled that you and your co-counsel were solely responsible for payment of those fees and costs.

On January 23, 1997, the Circuit Court ordered you and your co-counsel to pay $1,386.56 in attorneys' fees and costs to appellees for having to respond to your motions.

Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that seriously interferes with the administration of justice.[2/] The Rule does not specify all the kinds of conduct that are deemed prejudicial to, or that seriously interfere with, the administration of justice, but is purposefully broad to encompass conduct "reprehensible to the practice of law." *In re Alexander*, 496 A.2d 244, 255 (D.C. 1985). To establish a violation of the Rule, the attorney's conduct must meet the following criteria: (i) the conduct must be improper, that is, the attorney must either take improper action or fail to take action when, under the circumstances, he should act; (ii) the conduct must

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[2/] Rule 8.4(d) is the successor provision to DR 1-102(A)(5) of the District of Columbia Code of Professional Responsibility which prohibited conduct prejudicial to the administration of justice. Although the language differs, the case law interpreting DR 1-102(A)(5) is incorporated into the Rule. *See* Rule 8.4, Comment [3].

bear directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) the attorney's conduct must taint the judicial process in more than a *de minimis* way – that is, it must, at least potentially, affect the process to a serious, adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996).

Among other things, the Rule prohibits conduct that undermines the Court's ability to maintain an orderly system of justice and to conduct its business. *In re Evans*, No. M-126-82 (D.C. Dec. 17, 1982) (*adopting* BPR Report and Recommendation, June 15, 1982). A failure to respond to the requests and inquiries of the Court or the Court's designee (*e.g.*, the Auditor-Master) or to respond to the inquiries of Bar Counsel violates the rule. *In re Delate*, 598 A.2d 154, 157-58 (D.C. 1991) (respondent violated DR 1-102(A)(5) in failing to complete second and final accounting, failing to respond to requests and inquiries of Auditor-Master and successor conservator, and failing to respond to Bar Counsel); *In re Tinsley*, 582 A.2d 1192 (D.C. 1990) (respondent violated DR 1-102(A)(5) and other rules when he failed to pay ward's expenses, to file timely accounts, or to respond to requests for information from auditors and successor conservator); *In re Greenspan*, 578 A.2d 1156 (D.C. 1990) (respondent violated DR 1-102(A)(5) in failing to attend meetings, to supply information to Auditor-Master or to respond to Bar Counsel); *In re Washington*, 489 A.2d 452 (D.C. 1985) (respondent violated DR 1-102(A)(5) in failing to provide information to Auditor-Master and refusing to cooperate with Bar Counsel); *In re Jones*, 521 A.2d 1119, 1121 (D.C. 1986) (respondent violated Rule 1-102(A)(5) in failing to comply with request of Auditor-Master).

Our investigation discloses that the only documents that you filed in a timely manner with the Circuit Court were the initial opening brief on September 15, 1995, the initial reply brief on October 30, 1995, and the initial response to the order to show cause on November 1, 1996. However, as discussed, the initial reply brief was deficient in several respects. All other deadlines for filings or compliance with Court directives or orders had passed by at least two weeks before you filed whatever document that was then overdue accompanied by a request for extension of time (also overdue) to file that document.

Your delinquencies, which included numerous missed deadlines and a pleading that completely failed to respond to the Court's letter of January 26, 1996, violate Rule 8.4(d). Your misconduct caused the Circuit Court and court personnel to expend considerable time addressing issues that you created by your inexplicable inability to follow court rules and orders, to meet filing deadlines or file timely requests to extend those deadlines, and to file responsive pleadings when directed by the Circuit Court to do so. Specifically, you misconduct resulted in a telephone call from the Clerk regarding errors in your reply brief and how to correct them; two orders to show cause; an order

dismissing the appeal for failure to prosecute; and a subsequent order dismissing the appeal for failure to comply with court rules.

We appreciate that your ability to timely prosecute the federal appeal may have been impeded by the relocation of your law office and your concurrent efforts to defend the clients in complex and protracted pre-trial litigation in the Superior Court. However, these circumstances cannot excuse your conduct, particularly given your ability to anticipate the circumstances and to take steps to ameliorate their effect on the diligent prosecution of the appeal, as the Circuit Court found. Because you did not, *the Court, on its own motion*, issued the extraordinary sanction of dismissal.

In issuing this Informal Admonition, we take into account that you cooperated with our investigation and that we previously issued an informal admonition to Mr. McClure, your co-counsel, for the same misconduct.

This letter constitutes an Informal Admonition pursuant to Rule XI, §§ 3, 6, and 8 of the Rules of the District of Columbia Court of Appeals Governing the Bar. Please refer to the attachment to this letter of Informal Admonition for a statement of its effect and your right to have it vacated and have a formal hearing before a Hearing Committee. Such a hearing could result in a recommendation to dismiss the charges against you or a recommendation for a finding of culpability, in which case the sanction recommended by the Hearing Committee is not limited to an Informal Admonition.

This Informal Admonition will become public 14 days from the above date unless you request a hearing. If you wish to have a formal hearing, you must submit a request in writing to the Office of Bar Counsel, 515 Fifth Street, N.W., Building A, Room 127, Washington, D.C. 20001, with a copy to the Board on Professional Responsibility, within 14 days of the date of this letter, unless Bar Counsel grants an extension.

Sincerely,

Joyce E. Peters

Joyce E. Peters
Bar Counsel

Enclosure: Attachment to Letter
of Informal Admonition