

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF
JONATHAN PRESTON FISHER**

**VS B DOCKET NOS.: 19-101-114660 and
19-101-115111**

ORDER

This matter, consisting of two cases, came to be heard on January 22, 2021, via Microsoft Teams Video Conference. Jonathan Preston Fisher appeared in person and was represented by Paul D. Georgiadis, Esq., his counsel. The panel members consisted of Carolyn V. Grady, Chair, Devika E. Davis, Alexander Simon, Steven B. Novey, and lay member, Martha J. Goodman. The Virginia State Bar was represented by Edward J. Dillon, Jr., Senior Assistant Bar Counsel (“The Bar”). Lisa Wright, Chandler & Halasz, PO Box 9349, Richmond VA 23227, 804.730.1222, Court Reporter, after being duly sworn by the Chair, reported this matter and transcribed the proceedings.

The Chair opened the hearing by calling both cases, explaining that the Panel would first hear argument and evidence of violations in Case #19-101-115111 (therein called “Case # 111”), and thereafter Case #19-101-114660 (therein called “Case # 660”). The Chair announced that the Board would deliberate regarding the alleged violations in both cases before hearing argument and evidence in one joint Sanctions Phase. Both parties agreed to this format and indicated they were ready to proceed.

At the outset of the hearing, the Chair inquired of each member of the Board whether any of them had any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel. All members of the Board, including the Chair, responded in the negative. All legal notices of the date and place were timely sent by the

Clerk of the Disciplinary System (hereinafter referred to as “the Clerk”) in the manner prescribed by the *Rules of the Supreme Court of Virginia* (hereinafter referred to as the “*Rule(s)*”), Part Six, §IV, ¶13-18.

This matter came before the Board pursuant to certification of the 10th District Section I Sub Committee in VSB Docket Nos.: 19-101-114660 and 19-101-115111, certified on April 20, 2020, and received in the Virginia State Bar Clerk’s Office on May 20, 2020. The Respondent answered, by counsel, on June 30, 2020, therein admitting certain violations and denying others. At the commencement of the proceedings, the Bar withdrew the alleged violation of Rule 1:15(c)(3) in both cases. Prior to the opening in each case, the Bar submitted for the Board’s review two demonstrative exhibits which were timelines for each case. These exhibits were not admitted into evidence. The Chair granted the Motion to exclude witnesses.

Counsel for both parties made opening statements in Case #111. The Virginia State Bar presented its evidence which included its exhibits and the testimony of Complainant Dr. Peter Kelly. Virginia State Bar Exhibits 1 – 12 were admitted in evidence, without objection. The Respondent cross-examined Dr. Kelly. The Virginia State Bar rested, and the Respondent made a motion to strike the Bar’s evidence as to Rule 1.3(a) regarding diligence and promptness which was taken under advisement by the Chair. The Respondent testified, was cross-examined with follow-up questions from the Board and re-direct testimony. The Respondent did not admit any exhibits in this case. The Respondent rested. No rebuttal evidence was presented. Both parties made closing arguments focusing on Rule 1.3(a) as the other violations were admitted by the Respondent in his Answer and such admissions were re-iterated by his counsel throughout the hearing.

Counsel for both parties made opening statements in Case #660. The Virginia State Bar presented its evidence which included its exhibits and the testimony of Mr. Jason Messer and Mr. Mason Walley. The Respondent cross-examined the witnesses. Virginia State Bar Exhibits 1-19 were admitted in evidence, without objection. The Respondent moved into evidence Bar Exhibit 20, an email from Complainant Zachary Luckenbaugh to the State Bar Investigator dated January 19, 2021. Exhibit 20 was admitted in evidence, without objection. The Virginia State Bar rested. The Respondent testified, was cross examined, presented re-direct testimony and answered follow-up questions from the Board. Respondent rested. No rebuttal evidence was presented. Both parties made closing arguments focusing on alleged violations of Rules of Professional Conduct 3.4(g) and 8.4(b) as all other violations were admitted by Respondent. The Respondent admitted to violations of Rule 1.3(a), which admissions were limited to his actions regarding Mr. Yu and Mr. Messer.

The Board retired in private session to consider the matter.

After its deliberation, the Board returned to the public hearing. The Chair announced that the Respondent's motion to strike the violation of Rule 1.3(a) in Case #111 was denied but that the Board failed to find clear and convincing evidence to substantiate the Respondent's violation of Rule 1.3(a) in Case #111. The Chair announced the Board found unanimously by clear and convincing evidence the following rules had been violated:

In Case #111, the Board found the following rules were violated by clear and convincing evidence:

Rule 1.4(a) was violated by failing to inform Dr. Kelly of his conviction of speeding by the Roanoke County General District Court on February 27, 2019;

Rule 1.15(b)(5) was violated by disbursing from the Respondent's Trust Account all or a portion of the \$295 flat fee paid him by Dr. Kelly in January 2019 prior to refunding the flat fee in March 2019 as the Trust Account balance was only \$249.98 on February 28, 2019;

Rule 1.15(c)(1) was violated by failing to maintain books and records, including but not limited to client subsidiary ledgers and cash receipts and disbursement journals, detailing his handling of fees paid by Dr. Kelly as admitted in Respondent's Answer and at trial;

Rule 1.15(c)(2)(i) was violated by failing to maintain books and records, including but not limited to client subsidiary ledgers and cash receipts and disbursement journals, detailing his handling of fees paid by Dr. Kelly as admitted in Respondent's Answer and at trial;

Rule 1.15(c)(2)(ii) was violated by failing to maintain books and records, including but not limited to client subsidiary ledgers and cash receipts and disbursement journals, detailing his handling of fees paid by Dr. Kelly as admitted in Respondent's Answer and at trial; and

Rule 1.15(c)(4) was violated by failing to maintain books and records, including but not limited to client subsidiary ledgers and cash receipts and disbursements journals, detailing his handling of fees paid by Dr. Kelly for at least five calendar years as admitted in Respondent's Answer and at trial.

In Case #660, the Board found the following rules were violated by clear and convincing evidence:

Rule 1.3(a) was violated by failing to appear for Mr. Messer's September 25, 2018 trial in Giles County General District Court; by failing to appear for Mr. Wally's October 10, 2018 trial in Montgomery County General District Court; by failing to appear for Mr. Simpson's October 10, 2018 trial in Montgomery County General District Court; by failing to appear for Mr. Yu's October 25, 2018 trial in Montgomery County General District Court; by failing to appear for Mr. Luckenbaugh's December 13, 2018 trial in Botetourt County Circuit Court; by failing to appear for Mr. Colonna's December 17, 2018 trial in Montgomery County General District Court; by failing to appear for Mr. Donahue's December 18, 2018 trial in Salem General District Court; by failing to appear for Ms. Brooks' January 9, 2019 trial in Montgomery County General District Court; by failing to appear for Mr. Cook's February 28, 2019 trial in Roanoke City General District Court; and by failing to perfect Mr. Yu's appeal to the Court of Appeals of Virginia;

Rule 1.4(a) was violated by failing to inform Mr. Luckenbaugh that the Botetourt County Circuit Court convicted him in absentia on December 13, 2018 of refusing to take a breath test and driving on an expired registration and failing to inform him that he took no action to have the convictions re-opened or reheard; and by failing to inform Mr. Messer that the Giles County General District Court convicted him in absentia on September 25, 2018 of speeding and possession of unapproved equipment and failing to inform that he never appealed Mr. Messer's convictions nor filed a motion to have the cases re-opened;

Rule 1.15(b)(4) was violated by failing to refund the unearned portion of the \$1,500 flat fee paid on behalf of Mr. Wally by his grandmother, by failing to promptly refund the \$295 flat fee paid to Respondent by Mr. Messer in 2018, waiting until the second or third quarter of 2020 to do so, by Respondent's own testimony and by failing to promptly refund the \$295 flat fee paid to Respondent by Mr. Colonna;

Rule 1.15(b)(5) was violated by disbursing from the Respondent's Trust Account all or a portion of the flat fee paid him or on behalf of Mr. Luckenbaugh, Mr. Messer, Mr. Yu, Mr. Donahue, Ms. Brooks, Mr. Cook, Mr. Colonna, Mr. Wally and Mr. Simpson prior to earning the flat fee and/or refunding the flat fee as admitted in Respondent's Answer and at trial;

Rule 1.15(c)(1) was violated by failing to maintain books and records, including but not limited to client subsidiary ledgers and cash receipts and disbursement journals, detailing his handling of fees paid by Mr. Luckenbaugh, Mr. Messer, Mr. Yu, Mr. Donahue, Ms. Brooks, Mr. Cook, Mr. Colonna, Mr. Wally and Mr. Simpson as admitted in Respondent's Answer and at trial;

Rule 1.15(c)(2)(i) was violated by failing to maintain books and records, including but not limited to client subsidiary ledgers and cash receipts and disbursement journals, detailing his handling of fees paid by Mr. Luckenbaugh, Mr. Messer, Mr. Yu, Mr. Donahue, Ms. Brooks, Mr. Cook, Mr. Colonna, Mr. Wally and Mr. Simpson as admitted in Respondent's Answer and at trial;

Rule 1.15(c)(2)(ii) was violated by failing to maintain books and records, including but not limited to client subsidiary ledgers and cash receipts and disbursement journals, detailing his handling of fees paid or any unexpended balances paid by Mr. Luckenbaugh, Mr. Messer, Mr. Yu, Mr. Donahue, Ms. Brooks, Mr. Cook, Mr. Colonna, Mr. Wally and Mr. Simpson as admitted in Respondent's Answer and at trial;

Rule 1.15(c)(4) was violated by failing to maintain books and records, including but not limited to client subsidiary ledgers and cash receipts and disbursements journals, detailing his handling of flat fees paid for the requisite at least five-year period as admitted in Respondent's Answer and at trial; and

Rule 1.16(d) was violated by failing to promptly refund the unearned portion of the fee paid by or Mr. Messer and Mr. Colonna and on behalf of Mr. Wally upon Respondent's termination of representation of those clients.

The Chair opened the sanctions phase of the hearing. The Virginia State Bar presented no witnesses in the sanctions phase. The Bar admitted Exhibit 13 in Case #111 and Exhibit 21 in Case #660, the Respondent's lack of any prior disciplinary record. These were admitted without objection.

The Respondent presented evidence through Exhibits 1 - 5, and through the testimony of John Lichtenstein, Attorney at Law, Roanoke, Virginia and Ms. S. Angeline Saferight Lloyd, Southwest Virginia Program Manager of the Virginia Judges and Lawyers Assistance Program (“JLAP”) and his own testimony. Respondent’s Exhibits 1-5 were admitted over the Bar’s objection to the part of Exhibit 1 which consisted of three letters, one from Dr. Kenneth W. Gray dated February 2, 2018, the second from Mark W. Prosser dated January 13, 2021, and the third from Dr. Kelly Thomas dated January 14, 2021. The Bar cross-examined Respondent’s witnesses and the Respondent. The witnesses also answered questions from the Board. The parties made closing arguments. The Board once again retired in closed session to deliberate in the consolidated sanctions phase of the combined matter.

The Board returned to the public session to announce its unanimous decision based on the following determination. The Board determined that the Respondent neglected his duties to multiple clients over a significant period of time by failing to appear for trial, by failing to appeal and move for new trials and to re-open cases and compounded these failures by not adequately communicating with some of his clients concerning them. The Respondent also failed to safeguard clients’ property due to trust accounting and fee violations. These multiple offenses evidence a pattern of misconduct; both of which are aggravating factors when considering an appropriate sanction. The Respondent is an experienced practitioner having been licensed in Virginia since 2001 and the Board determined this to be another aggravating factor.

The Board also found that there were substantial mitigating factors in Respondent’s favor. He has no prior disciplinary history. He lives with significant medical and mental health concerns, including a permanent physical disability causing him to use a wheelchair which would be wholly disabling for many. He cooperated with the State Bar’s investigation. John

Lichtenstein, an experienced Roanoke practitioner and Past President of the Virginia Trial Lawyers' Association testified to his honesty, candor, skill as a trial lawyer and described him as a "standup guy" in his professional dealings. Respondent has also exhibited remorse for his actions and made efforts to mitigate the harm to his clients by paying fines and costs for clients and refunding certain fees, even if not always timely. He has also initiated new accounting and retainer agreements in a good faith effort to fix the trust accounting violations.

The Board found that these mitigating factors outweigh, but do not override, the aggravating factors. Due to the aggravating factors, a suspension of the Respondent's law license is appropriate. Due to the mitigating factors, it is not appropriate that the suspension be a long-term suspension.

Based on the misconduct found, the duties violated and the evidence presented in aggravation and in mitigation, and having considered argument of counsel, the Board hereby ORDERS the suspension of Jonathan Preston Fisher's license to practice law for sixty (60) days effective February 1, 2021.

It is further ORDERED that:

a) the Respondent shall make his trust account books and records open to quarterly review and investigation by the Virginia State Bar's investigators for three (3) years from the date of this Order and shall cooperate in all respects with the investigations and requests in connection therewith from the Bar Investigators, and

b) the Respondent shall comply in good faith with his January 6, 2021, contract with JLAP.

It is further ORDERED that, upon the failure of Respondent to comply with any part of the continuing obligations and duties set forth above in sub-sections (a) and(b) regarding

Respondent's trust account and his JLAP contract, the Board may impose a two- year suspension of Respondent's law license in addition to any other penalties or sanctions found appropriate by the Board or by law.

On February 4, 2021, the Board Panel reconvened to address the alternative disposition which was not currently framed properly under Paragraph 13-18(O). After deliberations, the Board changed the alternative disposition to ONE year suspension not two years, and amended the "may" to "shall" as was written in the Summary order dated January 26, 2021.

It is further ORDERED that the Respondent shall comply with the requirements of Part Six, §IV, ¶13-29 of the *Rules*. The Respondent shall forthwith give notice by certified mail, of the suspension of his license to practice law in the Commonwealth of Virginia to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters in his care and conformity with the wishes of his clients. The Respondent shall give such notice within fourteen (14) days of the effective date of this order, and he shall make such arrangements as are required herein within forty-five (45) days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty (60) days of the effective date of the suspension that such notices have been timely given and such arrangements made for the disposition of matters; and its further

ORDERED pursuant to Paragraphs 13-9 (e) of the Rules, costs will be assessed. An attested copy of the Order shall be mailed to Respondent by certified mail, return receipt requested and by regular mail to his address of record with the Virginia State Bar, The Fisher Law Firm, P.C., Box 11118, Blacksburg, Virginia 24062 and Respondent's counsel, Paul. D.

Georgiadis, by electronic mail, and by electronic mail to Edward J. Dillon, Jr., Senior Assistant
Bar Counsel.

ENTERED THIS 22nd DAY OF FEBRUARY 2021.

VIRGINIA STATE BAR DISCIPLINARY BOARD

by: _____

Carolyn V. Grady, 1st Vice Chair