

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
MICHAEL DENIS KMETZ

VSB DOCKET NO. 19-022-115796

MEMORANDUM ORDER OF SUSPENSION

THIS MATTER was heard via videoconference on December 11, 2020, before a panel of the Disciplinary Board consisting of Carolyn V. Grady, Chair, Stephanie G. Cox, Michael J. Sobey, John D. Whittington, and Martha J. Goodman, Lay member. The Virginia State Bar (the "The Bar" or "VSB") was represented by Christine M. Corey, Assistant Bar Counsel. Michael D. Kmetz (the "Respondent"), appeared and represented himself. The Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. Lisa Wright, court reporter, Chandler and Halasz Stenographic Reporters, PO Box 9349, Richmond VA 23227, 804.730.1222, after being duly sworn, reported the hearing and transcribed the proceedings.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System ("Clerk") in the manner prescribed by the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-18 of the Rules of Court.

The matter came before the Board on the District Committee Determination for Certification by the Second District, Section II Subcommittee pursuant to Part Six, § IV, ¶ 13-18 of the Rules of the Supreme Court of Virginia involving misconduct charges against the Respondent. Prior to the proceedings and at the final Pretrial Conference VSB Exhibits 1 through 31 were admitted into evidence by the Chair, without objection from the Respondent. The Respondent did not offer either a witness or exhibit list. On December 8, 2020, the Bar and Respondent entered into written stipulations of fact and Rule violations, and filed a joint motion

requesting that the Board accept an Agreed Disposition for a two year suspension of the Respondent's license to practice law in Commonwealth of Virginia.

The Bar introduced the Respondent's disciplinary record which was introduced as VSB Exhibit 32. The Board heard testimony from Respondent, who was sworn under oath. The Board considered the testimony of the witness, the exhibits introduced by the Bar, the written stipulation as to the facts and Rule violations, the motion to accept the Agreed Disposition entered into by Assistant Bar Counsel and Respondent, heard arguments of counsel and the Respondent; and met in private to consider its decision.

I. FINDINGS OF FACT

The Board makes the following findings of fact based on clear and convincing evidence:

1. At all times relevant hereto, Respondent was licensed to practice law in the Commonwealth of Virginia.
2. Christopher O. Smith retained Respondent for a divorce case in 2016.
3. During the pendency of the divorce, Respondent did not act with reasonable diligence and promptness in representing Mr. Smith, he did not thoroughly and reasonably prepare for the representation, he did not keep Mr. Smith reasonably informed about the status of the matter or promptly comply with requests for information, and he did not inform Mr. Smith of facts pertinent to the matter and of communications from other parties that could significantly impact settlement or resolution of the matter.
4. Respondent filed the divorce case in Norfolk Circuit Court on May 10, 2016. Respondent also filed a Notice and Motion for *pendente lite* relief, scheduled a hearing for May 20, 2016 at 9:00 a.m., and subpoenaed witnesses for the hearing. The Court's file indicates that Respondent did not appear at the hearing on May 20, 2016, to represent his client.
5. Opposing counsel appeared at the hearing and requested a transfer of the case from Norfolk to Chesapeake. The Court entered an Order stating that plaintiff's counsel was not present as of 9:35 a.m. for the 9:00 a.m. hearing. Defense counsel was present and moved for a change of venue and the motion was granted.
6. Mr. Smith told the bar investigator that he did not attend the hearing because Respondent told him there was no need for him to appear. Respondent told Mr. Smith that he was at the hearing, despite the order stating that Respondent was not present.

7. Once the case was transferred to Chesapeake, opposing counsel set a *pendente lite* hearing on June 1, 2016, in Chesapeake Circuit Court. Respondent again did not appear at the hearing. Mr. Smith told the bar investigator that Respondent knew about the scheduled hearing two weeks in advance. Mr. Smith also told the bar investigator that Respondent did not notify the court that he wanted a continuance until the evening before the hearing and did not tell Mr. Smith anything about a continuance until the day before the hearing when Respondent called Mr. Smith and told him to come by the office and pick up a letter that Respondent said he also sent to the Court.
8. The bar investigator asked Mr. Smith if Respondent prepared him for the hearing and Mr. Smith told the investigator that there was no preparation for the hearing. The hearing took place as scheduled and Mr. Smith had to proceed without representation.
9. On June 2, 2016, Respondent filed a Motion to Reopen and Stay the Court's *Pendente Lite* Order claiming that the "court persisted in going forward" with the hearing despite knowing that Respondent had a hearing obligation in Norfolk General District Court, which forced the Defendant to proceed without counsel.
10. The court entered the *pendente lite* decree, adding handwritten changes to the Order, stating that "the date was set with opposing counsel, Michael Kmetz, who did not appear, but the defendant did, and due to the found necessitous circumstances of the Plaintiff took testimony from both parties." Respondent maintains that the hearing date was not set with his dates despite the notation written by the court.
11. During the divorce case, a guardian *ad litem* ("GAL") was appointed to represent the children. The GAL sent a request to Respondent for information about the case and Respondent took several months to respond. The GAL had to bring the issue to the Court before Respondent complied.
12. The GAL needed Respondent's permission to meet with Mr. Smith. The GAL sent several emails to Mr. Smith with a copy to Respondent trying to schedule a meeting or obtain Respondent's permission to meet with Mr. Smith alone, but Respondent never acknowledged or responded to the emails.
13. The GAL told the bar investigator that he had problems communicating with Respondent, Respondent was very difficult to contact, and he found it difficult to obtain any information or documentation from Respondent.
14. During the course of the proceedings, opposing counsel sent discovery requests to Respondent on August 23, 2016. Opposing counsel had to file three motions to compel for failure to file complete responses. Ultimately, opposing counsel filed a motion to strike Mr. Smith's evidence due to the failure of Respondent to respond.
15. Opposing counsel filed a show cause motion against Mr. Smith for failure to pay the children's medical expenses. Opposing counsel sent the evidence of the medical

expenses to Respondent on May 19, 2017. After further attempts to get a response from Respondent on June 21, 2017 and July 7, 2017, opposing counsel filed the motion after receiving no response from Respondent.

16. Opposing counsel told the bar investigator that he had problems communicating with Respondent and Respondent was very slow to respond to anything. Opposing counsel said there were a number of times that Respondent said he would provide something, but then never did.
17. Mr. Smith told the bar investigator that he provided three binders of information to Respondent regarding the divorce case. At the trial, Respondent did not submit any exhibits related to equitable distribution on behalf of Mr. Smith. Following the trial, Mr. Smith sent several emails asking Respondent why he did not submit evidence on behalf of Mr. Smith and what he was going to do to fix the issue.
18. The emails provided by Mr. Smith did not include any substantive response from Respondent regarding why he did not submit certain evidence at the trial.
19. Mr. Smith provided many additional emails to the bar investigator demonstrating that Mr. Smith attempted to get information from Respondent and Respondent failed to communicate with Mr. Smith.
20. Mr. Smith also told the bar investigator that he did not receive information from Respondent about what was happening in the case and he did not receive pleadings and orders filed in the case. Mr. Smith went to the court and paid for copies of the pleadings and orders because he could not get them from Respondent.

II. NATURE OF MISCONDUCT

Based on the submitted Agreed Disposition which was submitted within a time period which converted it to a Stipulation of the Facts and Finding of Violations, the Board finds by clear and convincing evidence that the following conduct by Respondent constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Respondent violated this rule by failing to appear for two court hearings on behalf of the client; leaving the client to represent himself on June 1, 2016 before the Chesapeake Circuit Court; by failing to timely respond to discovery requests resulting in three motions to compel and a motion to strike his evidence at trial; by failing to timely respond to the Guardian *ad litem* appointed to represent the children; by failing to present any exhibits during the equitable distribution hearing which the client had previously provided to him, or explain to the client this decision.

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

Respondent violated this rule by failing to appear for two court hearings on behalf of the client; leaving the client to represent himself on June 1, 2016 before the Chesapeake Circuit Court; by filing a continuance motion with the Chesapeake Circuit Court the day before the hearing on June 1, 2016; by failing to timely respond to discovery requests resulting in three motions to compel and a motion to strike his evidence at trial; by failing to timely respond to the Guardian *ad litem* appointed to represent the children; by failing to present any exhibits during the equitable distribution hearing which the client had previously provided to him, or explain to the client this decision.

RULE 1.4 Communication

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

Respondent violated this rule by advising the client that he had appeared at the May 20, 2016 hearing in the Norfolk Circuit Court when he did not; by not timely informing his client of his continuance request of the June 1, 2016 hearing in the Chesapeake Circuit Court which resulted in the

client representing himself on that date; and by not responding to the client's repeated requests for copies of court pleading and orders regarding the status of his divorce case resulting in the client obtaining these documents from the Court directly.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Respondent violated this rule by failing to appear for two court hearings on behalf of the client; leaving the client to represent himself on June 1, 2016 before the Chesapeake Circuit Court; by failing to timely respond to discovery requests resulting in three motions to compel and a motion to strike his evidence at trial; by failing to timely give permission for the Guardian *ad litem* appointed to represent the children to speak with the client; by failing to present any exhibits during the equitable distribution hearing which the client had previously provided to him, or explain to the client this decision.

III. IMPOSITION OF SANCTION

Thereafter, the Board received and reviewed Exhibit 32, the Respondent's prior disciplinary record, and arguments in aggravation and mitigation from the Bar and Respondent, and withdrew to deliberate.

In consideration of an appropriate sanction, the Board found the Respondent's misconduct violated his duty to his client. The Board found that Respondent violated this duty knowingly and at times negligently, rather than intentionally. The Board found that there was injury to the client in the delay of the divorce proceedings which are still ongoing with new counsel, however the extent of this injury is speculative based on the evidence presented.

In further consideration of an appropriate sanction, the Board considered the following aggravating factors: The Respondent's prior disciplinary record, multiple rule violations, and

Respondent's substantial experience in the practice of law. The Board considered the following mitigating factors: Respondent has significant personal and emotional problems with the full-time care of his infirm 98-year old mother and his own heart condition for which he underwent open heart surgery in February of 2020. Respondent lacked a selfish motive. After due deliberation the Board reconvened to announce the sanction imposed.

Upon consideration of the written stipulations of fact and Rule violations, and further upon consideration of the evidence and the nature of the misconduct committed by the Respondent, the Board accepts the Agreed Disposition proffered by Bar Counsel and the Respondent.

It is therefore ORDERED that the Respondent's license to practice law in the Commonwealth of Virginia is SUSPENDED FOR TWO YEARS, effective October 24, 2022 and extending through October 24, 2024. This suspension will run consecutively with a two-year suspension previously imposed in case number 19-000-116040 effective October 23, 2020.

It is further ORDERED that, as directed in the Board's December 11, 2020 Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. 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 then in his care in conformity with the wishes of the client. Respondent shall give such notice within 14 days of the effective date of the suspension, and make such arrangements as are required herein within 45 days of the effective date of the Summary Order. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension that such notices have been timely given and such arrangements

made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within 60 days of the effective day of the suspension. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to Respondent, by certified mail, return receipt requested and by regular mail, to his address of record with the Virginia State Bar, being PO Box 64547, Virginia Beach, Virginia, 23467-4547 and by electronic mail to Christine M. Corey, Assistant Bar Counsel.

ENTERED this 29th day of December, 2020

VIRGINIA STATE BAR DISCIPLINARY BOARD

Carolyn V. Grady, 1st Vice Chair