

VIRGINIA:

BEFORE THE DISCIPLINARY BOARD
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
STEVEN SCOTT BISS

VS B Docket No. 09-032-078962

ORDER OF SUSPENSION

This matter came on to be heard on September 25, 2009, before a panel of the Virginia State Bar Disciplinary Board (the "Board") comprised of William Ethan Glover, 1st Vice Chair; Pleasant S. Brodnax, III; Sandra L. Havrilak; David R. Schultz, and Dr. Theodore Smith, lay member, at the State Corporation Commission, courtroom A, Tyler Building, 1300 East Main Street, Richmond, Virginia 23219.

The Virginia State Bar ("the Bar") was represented by Kathryn R. Montgomery, Assistant Bar Counsel ("Bar Counsel"). Steven Scott Biss (the "Respondent") appeared and was not represented by counsel. Tracy J. Johnson, Registered Professional Reporter of Chandler & Halasz, P. O. Box 9349, Richmond, Virginia 23227, (804-730-1222), having been duly sworn by the Chair, reported the hearing.

The Chair inquired of the members of the panel whether any of them had any personal or financial interest or any bias which would preclude, or could be perceived to preclude, their hearing the matter fairly and impartially. Each member of the panel and the Chair answered the inquiry in the negative.

The matters came before the Board on the Certification by the Subcommittee of the Third District Committee of the Virginia State Bar. On June 19, 2009, the Subcommittee of the Third District Committee held a meeting and certified multiple

Charges of Misconduct against the Respondent to the Virginia State Bar Disciplinary Board. The Certification of these charges was sent to Respondent on June 30, 2009.

Bar Counsel and Respondent stated that they were prepared to proceed and waived the Chair's explanation of the hearing procedure.

The Certification alleged that Respondent engaged in the following acts of misconduct:

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

- (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

RULE 5.5 Unauthorized Practice Of Law

(a) A lawyer shall not:

- (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyers fitness to practice law.

On July 21, 2009, Respondent filed his Answer and Response to Subcommittee Determination (Certificate) that included affirmative defenses. On September 14, 2009 Respondent filed his Special Pleas, Demurrers and Motion to Dismiss (hereinafter "Motion to Dismiss"). Bar Counsel filed her Opposition to Respondent's Special Pleas, Demurrers and Motion to Dismiss (hereinafter "Opposition") on September 24, 2009.

The Bar offered the Memorandum Order of November 26, 2008, that was received into evidence, without objection, as part of her Opposition. Respondent offered the Investigative Report of August 6, 2009; Bar Counsel's letter to the Clerk's Office dated April 27, 2009; and the case of Kentucky Bar Association v. Harris, 269 S.W.3d 414, (2008), which were received as part of his Motion to Dismiss, without objection.

On November 26, 2008, Respondent's license to practice law was suspended for a period of one (1) year and one (1) day effective January 1, 2009. (VSB Exhibit 2). Respondent's Motion to Dismiss was predicated on the adjudication of a show cause order that Bar Counsel filed against him and was resolved by the Virginia State Bar Disciplinary Board Summary Order on April 24, 2009. Prior to the pending certification against Respondent, Bar Counsel filed a Petition for Paragraph 13.M Show Cause Hearing pursuant to Part Six, Section IV, Paragraph 13.M (now 13-29) of the Rules of the Supreme Court of Virginia, as amended, alleging that Respondent had violated the Memorandum Order that suspended his license by failing to make appropriate arrangements for the disposition of matters that are in his care; continuing to act as an attorney despite his suspension; and, that his actions after January 1, 2009, constituted the unauthorized practice of law by an attorney whose license is suspended. A Rule to Show Cause was issued and a hearing was held before the Board on April 24, 2009. After a hearing, by Summary Order, the Board found that "no disciplinary rule violations have been proved by clear and convincing evidence." Additionally, by Memorandum Order dated May 4, 2009, the Board found by clear and convincing evidence that Respondent complied with Part Six, Section IV, Paragraph 13(M) of the Rules of the Supreme Court of Virginia, and the Rule to Show Cause was dismissed.

Subsequently, on June 19, 2009, a subcommittee of the Third District Committee issued a certification of Charges of Misconduct to the Board for hearing, specifically, whether Respondent committed misconduct by violating the following Rules of Professional Conduct: Rule 3:4(a), Rule 5.5(a)(1) and Rule 8:4(c).

In his Motion to Dismiss, and as argued to the Board, Respondent argued that the certification was barred by the doctrine of *res judicata* pursuant to Rule 1:6 of the Rules of the Supreme Court of Virginia. He further argued that the Summary Order entered on April 24, 2009, states that “no disciplinary rule violations have been proved by clear and convincing evidence, and accordingly, all charges of misconduct are hereby dismissed.” No appeal was taken, therefore, the Order was final. Respondent argued that the present matters were barred by *res judicata* because they are based on the same facts, same parties and same cause of action as those litigated in the show cause proceeding.

Respondent also took the position that he had no legal or ethical duty to advise Farm Bureau that his license to practice law had been suspended effective January 1, 2009 and that because the suspension was a matter of public record, he could not hide it from anyone. Further, Respondent stated that he removed “Attorney at Law” from his letterhead.

Respondent also stated that he did not violate Rule 3:4(a) because the “proceeding” in which the Memorandum Order was entered was long over before the January/February 2009 time period and because he was not a “lawyer” when he emailed the Farm Bureau agent in January/February 2009. Respondent asserted that he did not violate Rule 5:5(a)(1) because he did not engage in the unauthorized practice of law and he did not advise and/or negotiate a claim for compensation.

Bar Counsel's Opposition and argument to the Board asserted that Part Six, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia, does not allow motions practice, therefore, Respondent's Motion to Dismiss should be dismissed and denied; or, alternatively, that the doctrine of *res judicata* does not apply to attorney disciplinary proceedings. Bar Counsel also argued that even if the doctrine of *res judicata* did apply it is inapplicable to the present case because Bar Counsel could not have brought the current charges of misconduct in the previous Paragraph 13.M show cause proceedings and because the Board did not render a final judgment on the merits of any charges of misconduct alleged against Respondent. Bar Counsel conceded that the same facts that were relied upon in support of the Show Cause, were used to support the present disciplinary violations. In fact, the alleged Rule 3.4(d) violation is the same violation Respondent defended in the Show Cause proceeding as the 13(M) violation.

The Board also received the transcript of the April 24, 2009 hearing as part of Respondent's exhibits.

The Board recessed the proceedings to deliberate. After due deliberation, the Board unanimously found that the charges that Respondent violated Rules 3:4(a) and 5:5(a)(1) were barred by the Summary Order of April 24, 2009 and Order of May 4, 2009; therefore those charges were dismissed.

The Board also found that the allegation of Respondent's misconduct under Rule 8:4(c) was not barred by the Summary Order of April 24, 2009 or the Order of May 4, 2009, and a hearing was held on that remaining charge of misconduct.

The Bar's Exhibits 1 through 10 and Respondent's Exhibits 1-5 were admitted into evidence, without objection.

Joint Stipulations of Fact between the Bar and Respondent were received. (Bar Exhibit 9).

The Bar also submitted the *de bene esse* deposition of Gregory Williams dated September 14, 2009, without objection (Bar Exhibit 8) and rested. Mr. Williams is a field claim representative for the Virginia Farm Bureau Insurance Company and was assigned to the case of Judy Guthrie. According to Mr. Williams, he worked with Respondent from December 2008 through February 2009 on this case. Mr. Williams testified that during the time period, he believed Respondent was an attorney and he did not note the letterhead change until brought to his attention in the Show Cause hearing. According to Mr. Williams, Respondent never advised him of his change in status. The last contact he had with Respondent was February 17, 2009. Mr. Williams also testified he first learned of Respondent's suspension in March 2009 when he received notice from the law firm of Paris, Black and Brown advising that they were representing Mrs. Guthrie and enclosed a copy of the State Bar newsletter stating Respondent was suspended. Mr. Williams also testified that if he knew Respondent's law license was suspended, he would have made sure that the Guthries were present or gave permission to Respondent to handle the case. Mr. Williams was concerned whether or not the Guthries knew Respondent's law license was suspended because of "The legalities of this, you know, me discussing someone else's personal situation with somebody who is no longer an attorney but still representing himself as an attorney to settle this matter."

The Bar rested its case and Respondent moved to strike the Bar's case on the basis that they had presented no evidence of affirmative misrepresentation by the Respondent and that Respondent had no duty to advise a third party that he was

suspended from the practice of law. Respondent argued that his only duty was to not make an affirmative misrepresentation to third parties regarding his suspension, and renewed his motion based on the ground of *res judicata*. The Board denied Respondent's motion to strike.

Respondent presented his case. He called Joseph Guthrie to testify. Mr. Guthrie is a former client and the husband of Respondent's client, whom he allegedly represented after his license to practice law was suspended. Mr. Guthrie testified that Respondent represented him and his wife for over six to seven years and that he considered him a friend. Mr. Guthrie said he was aware of Respondent's suspension, as he testified at the disciplinary proceedings in November, 2008. Mr. Guthrie stated that Respondent never acted as an attorney for him and his wife beyond December 31, 2008 and that he was only acting as their agent. Respondent repeatedly advised them that he could not give legal advice and did not charge him for the services provided. Mr. Guthrie affirmed his statements in Respondent's Exhibit 4. Mr. Guthrie testified that Respondent never gave advice on settlement of the case. Mr. Guthrie could not explain why Mr. Williams called his wife "Mr. Biss' client." Mr. Guthrie further testified that after February 17, 2009, his wife hired an attorney to represent her in her claim.

Respondent also testified and presented evidence on his own behalf. Respondent testified that he was forty-four (44) years old and was licensed to practice law in 1991. Since 2000, he was a sole practitioner and earned multiple multi-million dollar jury awards. He stated he had an entirely "unblemished record" until 2002-2003 when he committed "serious errors of judgment" that lead to his suspension in 2008.

Respondent testified that he fully complied with the Order of Suspension. He maintained that the Guthries were not his clients; and, after January 1, 2009, he was acting as a mere agent. Respondent testified that after January 1, 2009, he changed his letterhead, eliminated any reference to being an attorney and called Judy Guthrie “my principal.” (Bar Exhibit 5).

Respondent reluctantly acknowledged that he never informed Mr. Williams that his license was suspended, nor did he correct the error of Mr. Williams when he called Mrs. Guthrie his client. (Bar Exhibit 6). Rather, Respondent believed by removing “Attorney at Law” from his letterhead and calling Mrs. Guthrie his principal, was sufficient. In fact, Respondent testified that Mr. Williams could have found out himself that he was suspended, as he heard about Respondent’s suspension from a third party. Respondent acknowledged that in 2008, he was Mrs. Guthrie’s lawyer for twenty-two (22) days and in 2009 his change to non-lawyer/agent would be invisible to Mr. Williams. He assumed Mr. Williams would figure it out.

Respondent also testified that although he could have told Mr. Williams that he was not an attorney, there was no way that he could have hidden the fact that he was suspended from the practice of law. He also testified that while he does not believe that he had a duty to notify the insurance company regarding his suspension, he recognizes that he should have done things differently and perhaps not have done any work on behalf of the Guthrie family.

Based on the Stipulations of Fact, the Bar’s Exhibits, Respondent’s Exhibits, the testimony presented, and the argument of counsel and Mr. Biss, the Board finds as follows:

I. FINDINGS OF FACT

1. Respondent was licensed to practice law in the Commonwealth of Virginia on September 30, 1991.

2. On November 26, 2008, a three-judge panel sitting in the Circuit Court for the County of Chesterfield entered a Memorandum Order suspending Respondent's license to practice law for one year and one day. The suspension was effective January 1, 2009. (VSB docket number 05-033-0055). (Bar Exhibit 2).

3. On December 9, 2008, Respondent sent a letter to Mary J. Tomillon and John M. Tomillon stating that he represented Judy B. Guthrie in connection with her claims against them and their son relating to a crash that occurred on August 8, 2008. Respondent asked the Tomillons to forward his letter to their insurer so that "we can begin a dialogue about settlement." (Bar Exhibit 3).

4. Despite his suspension effective January 1, 2009, Respondent continued to represent Mrs. Guthrie in this matter throughout January and February, 2009.

5. On January 12, 2009, Respondent sent an e-mail to Gregg Williams, a claims adjuster at Virginia Farm Bureau (the Tomillons' insurer). Attached to the e-mail with Mrs. Guthrie's medical reports, bills, and wage loss verification. (Bar Exhibit 4).

6. On January 21, 2009, Respondent sent a letter to Gregg Williams asking about the status of his evaluation of Mrs. Guthrie's claim. The letter did not identify Respondent as an attorney at law; and, referred to Mrs. Guthrie as "my principal" not my client. (Bar Exhibit 5).

7. On February 17, 2009, Respondent engaged in an e-mail exchange with Gregg Williams concerning Mrs. Guthrie's condition and the status of settlement. At no

time did Respondent correct Mr. Williams' statement that Mrs. Guthrie was his client. (Bar Exhibit 6).

8. Respondent never advised Mr. Williams that his license to practice law had been suspended on January 1, 2009.

9. By continuing to represent Judy Guthrie in negotiations with Farm Bureau, and by failing to disclose to Farm Bureau that his license to practice law had been suspended effective January 1, 2009, Respondent violated Rule 8.4 (c) of the Rules of Professional Conduct.

II. MISCONDUCT

The Certification asserts such conduct by Steven S. Biss constitutes misconduct in violation of the following provision of the Rules of Professional Conduct:

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

III. DISPOSITION

Upon consideration of the foregoing, that based on the Stipulations of Fact, the Exhibits received into evidence from the Bar and Respondent, upon the testimony presented, and the argument of counsel and Respondent, the Board recessed to deliberate. After due deliberation, the Board recommended and stated its findings that the Bar had proved by clear and convincing evidence a violation of Rule 8.4 (c) of the Rules of Professional Conduct as charged in the Certification.

IV. SANCTION

The Board called for evidence in aggravation or in mitigation of the misconduct found. The Bar presented the Certification of Respondent's disciplinary record that consisted of a One Year and One Day Suspension effective January 1, 2009 issued in an attorney disciplinary proceeding.

Respondent presented testimony on his own behalf and the testimony of Joseph Guthrie and Elliot Purcell Park who testified as to their views of Respondent as an attorney and person.

Mr. Guthrie testified that Respondent was actively representing him on at least four (4) matters prior to December 31, 2008. That Respondent's suspension has been devastating to him. He testified that Respondent never made a false statement and never held himself out as a lawyer subsequent to December 31, 2008.

Mr. Park is an attorney in Virginia and has known Respondent for nineteen (19) years. Since January 1, 2009, Respondent has worked for Mr. Park on a daily basis as a paralegal. While Mr. Park knew Respondent was suspended, he purposely remained ignorant of the facts and charges. According to Mr. Park, Respondent is a brilliant attorney and he clearly understands that he is not a lawyer and not allowed to provide legal advice. According to Mr. Park, Respondent is known for his truthfulness and veracity.

Respondent also testified on his own behalf. Respondent testified that other than the current suspension, he had an unblemished disciplinary record. That the current complaint was from Bar Counsel and not a member of the public. That he took affirmative steps to change his letterhead and to call Mrs. Guthrie his principal. He

maintained that he did not take any affirmative action to correct the impression of Mr. Williams that he was still a licensed attorney. Respondent also acknowledges that it was hard to just stop being an attorney and that he should have been more forthright about his status.

Bar Counsel and Respondent presented argument.

The Board recessed to deliberate what sanction to impose upon its finding of misconduct. After due deliberation in closed session, the Board reconvened in open session. The Chair announced the Board's unanimous decision that the Respondent's license to practice law in the Commonwealth of Virginia should be suspended for thirty (30) days to commence at the end of his current suspension.

It is therefore ORDERED that the license of the Respondent Steven Scott Biss, to practice law in the Commonwealth of Virginia be and the same hereby is suspended for a period of thirty (30) days, effective January 1, 2010.

It is further ORDERED that Respondent must comply with the requirements of Part 6, § IV, ¶ 13 M. of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, 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 his client. Respondent shall give such notice within fourteen (14) days of the effective date of the suspension, and 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 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 the suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13 M. shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further ORDERED that pursuant to Part 6, § IV, ¶ 13.B.8.c. 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 at his address of record with the Virginia State Bar, being Steven Scott Biss at 36 Bear Alley, Suite 400, Petersburg, Virginia 23805 by certified mail, return receipt requested, and by regular mail to Kathryn R. Montgomery, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800.

Enter this Order this 3rd day of November, 2009.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 

William E. Glover, 1st Vice Chair