

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF MICHAEL JOHN DENNEY, ESQUIRE
VSB Docket No.: 06-070-2853

ORDER OF SUSPENSION

THIS MATTER came on to be heard on Friday, December, 14, 2007, at 9:00a.m. before a panel of the Disciplinary Board convening at the Virginia Worker's Compensation Commission, Courtroom A, 1000 DMV Drive, Richmond, Virginia 23220. The Board was comprised of James L. Banks, Jr., Chair, Timothy A. Coyle, Nancy C. Dickenson, David R. Schultz, and Stephen A. Wannall, lay member. The Respondent, Michael John Denney, was not present when the panel convened. The clerk called the name of the respondent in the hallway three times and he failed to appear, nor did any counsel appear on his behalf. The Virginia State Bar was represented by Alfred L. Carr, Assistant Bar Counsel.

The Chair polled the members of the Board as to whether any of them were conscious of any personal or financial interest of his which would preclude them from fairly hearing the matter and serving on the panel, to which inquiry each member responded in the negative.

The Court Reporter, Tracy J. Johnson, of Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

The matter came before the Board on a Subcommittee Determination of Certification from the Seventh District alleging misconduct in violation of the following provisions of the Rules of Professional Conduct: Rule 1.3(a) and (b) Diligence; Rule

1.4(a)(b) Communication; Rule 1.16 (a) and (e) Declining or Terminating Representation; Rule 8.1 Bar Admission and Disciplinary Matters; and Rule 8.4 Misconduct, arising from the representation of clients in a release estate matter involving an easement.

The Bar Counsel was given an opportunity to present evidence and relied upon exhibits numbered 1-24, previously filed. The Bar Counsel also presented evidence from one the complainants, Michael A. Pearson and from the Virginia State Bar investigator, Donald Lange. The respondent being absent, no evidence was presented on his behalf.

I. FINDINGS OF FACT

The Disciplinary Board Panel recessed to consider the evidence presented regarding the alleged misconduct and finds as follows on the basis of clear and convincing evidence:

1. At all times relevant hereto, Michael J. Denney, Esquire (hereinafter Respondent), has been an attorney licensed to practice law in the Commonwealth of Virginia. Respondent's Virginia State Bar license is currently suspended.¹

2. On or about March 3, 2005, Complainants, Michael A. Pearson and Lori Udall, his spouse, retained Respondent to secure an easement over several neighboring parcels of land adjacent to their property in Fauquier County because the Complainants had made numerous unsuccessful attempts to negotiate an easement with the neighbors. Mr. Pearson and Ms. Udall had to secure an easement for a 50-foot road over the neighboring properties to meet the County requirements and regulations to further subdivide their property and develop it. On March 4, 2005, Respondent made a trip out

¹ On March 29, 2006, the VSB Membership Department suspended Respondent's license for failure to comply with MCLE requirements. On October 11, 2006, the VSB Membership Department suspended Respondent's license for failure to pay bar dues

to their property and visually inspected the neighboring properties and to deliver the retainer agreement. On March 6, 2005, Mr. Pearson and Ms. Udall executed a retainer agreement with Respondent to secure said easement.

3. On or about March 28, 2005, Ms. Udall telephoned Respondent's office to inquire about the status of the lawsuit and left a voice mail message when Respondent did not answer his office phone. Respondent did return that phone call and informed his clients that it was his legal opinion that a lawsuit needed to be filed in the Fauquier County Circuit Court to get the easement. Respondent also called and informed Mr. Pearson that he needed to file an Affidavit to establish that he was the sole heir of the family farm they now lived on, which they were seeking to subdivide and develop into homes. Respondent did draft an Affidavit and Mr. Pearson did go to his office to execute it; however, Respondent did not follow through and file it in the land records of Fauquier County as he per his legal advice to Mr. Pearson.

4 During April of 2005 and early May of 2005, Mr. Pearson and his wife left numerous messages for Respondent requesting updates on the status of their lawsuit. Respondent did not return their phone calls to provide updates on the lawsuit he suggested they file to secure the easement during the same time period.

5. On or about May 15, 2005, Mr. Pearson stopped by Respondent's office. During their meeting, Respondent showed Mr. Pearson a draft Bill of Complaint and informed him that he intended to file the pleading in the Fauquier County Circuit Court within the week to initiate the lawsuit. On or about June 10, 2005, when Ms. Udall went to the Clerk's Office for the Circuit Court of Fauquier County to inquire about the lawsuit. The Clerk's Office informed her that Respondent had **not** filed a Bill of

Complaint on her behalf. (Respondent's office was located across the street from the Fauquier County Circuit Court.)

6. On or about June 15, 2005, Mr. Pearson again went to Respondent's office and asked Respondent why he did not file the Bill of Complaint as he stated he would. Respondent claimed he had filed it and that there must have been some sort of mistake at the courthouse. He informed Mr. Pearson that he would re-file the Bill of Complaint the next day.

7. On or about June 20, 2005, Mr. Pearson went to the Clerk's Office of the Fauquier County Circuit Court. Again, the Clerk's Office informed him that Respondent had **not** filed a Bill of Complaint on his behalf.

8. During July and August of 2005, Mr. Pearson continued to check online and with the Fauquier County Circuit Court Clerk's Office to see if Respondent had filed a Bill of Complaint on his behalf. Respondent never filed the Bill of Complaint.

9. On or about September 8, 2005, six months later, Mr. Pearson sent a letter to Respondent expressing their dissatisfaction with how the Respondent had handled the case up to that point. Respondent did not respond to Mr. Pearson's letter requesting an update on the lawsuit.

10. On September 14, 2005, Mr. Pearson hired new counsel, and by letter dated September 15, 2005, fired Respondent and requested Respondent return all of his legal documents. Respondent did not respond to his clients' request to return their original documents supplied to Respondent.

11. On September 27, 2005, Mr. Pearson's new counsel, David Konick, Esquire, called Respondent and demanded that he turn over the Pearsons' documents to

him. Respondent delivered the documents to Mr. Konick the next day, after a threat of legal action. Mr. Pearson estimates that he incurred additional fees and costs of \$25,000.00 due to Respondent's lack of communication, lack of follow through and misrepresentations he made to them about the lawsuit.

12. During the course of the Bar's investigation into this complaint, Respondent did not cooperate with the Bar's investigator, Donald A. Lange. On June 26, 2006, the Fauquier County Sheriff's Office served Respondent with a subpoena *duces tecum*, directing Respondent to deliver to the Virginia State Bar, on or before July 12, 2006, a copy of Mr. Pearson's file and billing records. In the alternative, Respondent could have contacted Bar Investigator Donald Lange and made other arrangements to deliver the documents to comply with the subpoena. Respondent failed to respond to the subpoena.

13. On July 12, 2006, Investigator Lange, as part of his investigation of the matter, mailed, by first class mail, a letter to Respondent at P.O. Box 718, Warrenton, VA 20188, Respondent's address of record with the Virginia State Bar, asking Respondent to contact him to discuss Mr. Pearson's Bar complaint. The U.S. Postal Service returned the letter to the Bar because it had closed Respondent's post office box, his official address of record, on May 31, 2006. Respondent did not promptly notify the Virginia State Bar Membership Department in writing of the change in his address of record, as required by Part 6, § IV, ¶ 3.

14. Investigator Lange learned that Respondent had relocated his law office to 8393 West Main Street, Suite 14, Marshall, VA 20115. On July 25, 2006, upon arriving at this new address, Investigator Lange noted that Respondent had a sign posted at

curbside advertising his law practice and photographed the sign as part of the investigation. (The VSB suspended Respondent's license to practice law on March 29, 2006.) Investigator Lange inquired of the landlord whether Respondent had a law office in the building. The landlord said he did and gave Investigatory Lange a description of Respondent's vehicle, which was parked in the parking lot adjacent to the building.

15. Investigator Lange knocked on the office door but no one answered so he waited in the parking lot. Investigator Lange noticed a male walking toward Respondent's vehicle, approached him and identified himself as a VSB Investigator. Respondent identified himself as Michael Denney. Investigator Lange asked Respondent if he had been performing any legal work after March 29, 2006. Respondent informed Investigator Lange that he had prepared a few wills for clients. Investigator Lange asked for a copy of Respondent's appointment calendar. Respondent did not comply with Investigator Lange's request to review his appointment calendar.

16. On July 21, 2006, without success, Investigator Lange attempted to contact Respondent by certified mail at his new law office address. However, on July 27, 2006, Respondent signed for the certified letter delivered to his home address in Markham, Virginia.

17. On July 27, 2006, Investigator Lange asked Respondent if he intended to respond to the subpoena. Respondent replied that he had mailed the documents one week before the deadline, but did not state to what address he had mailed the documents. Investigator Lange asked for proof of the mailing, but Respondent stated that he did not have proof that he mailed the documents. Investigator Lange extended the subpoena's July 12, 2006 deadline and asked Respondent to deliver the documents to him by August

21, 2006. As of January 9, 2007, Respondent had not delivered the requested documents to the Virginia State Bar or to Investigator Lange.

18. On August 10, 2006, the Bar notified Respondent by certified mail that he was not in compliance with the subpoena *duces tecum* issued on June 26, 2006. On August 15, 2006, Respondent signed for the August 10, 2006 certified letter delivered to his home address in Markham, Virginia. Respondent did not and has not responded to the letter directing him to comply with the subpoena.

II. MISCONDUCT

The Certification charged violations of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.3 Diligence

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

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

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.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law; or
- (3) the lawyer is discharged.

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer already admitted to the bar, in connection with a bar admission application, any certification required to be filed as a condition of maintaining or renewing a license to practice law, or in connection with a disciplinary matter, shall not:

- (c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6;

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; or

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 reviewing of the forgoing findings of facts, upon review of exhibits presented by Bar Counsel on behalf of the VSB as Exhibits 1-24, and at the conclusion of the evidence regarding misconduct, the Board recessed to deliberate. After deliberation, the Board reconvened and determined that the respondent was then present in the courtroom. The Chair announced the finding of the Board that such conduct as set out in the Finding of Facts on the part of Michael John Denny constitutes a violation, by clear and convincing evidence of:

RULE 1.3 Diligence

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

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

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.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

RULE 1.16 Declining Or Terminating Representation

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs

owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

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(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6;

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; or

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.

IV. VIOLATIONS NOT FOUND

RULE 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law; or
- (3) the lawyer is discharged.

The Board then heard evidence regarding the appropriate sanction that should be imposed. The Virginia State Bar Counsel offered evidence from the complainant, Pearson. The Virginia State Bar Counsel produced respondent's disciplinary record, showing no prior disciplinary sanctions of any kind. The respondent, Michael John Denny, pro se, presented argument on his behalf.

The Board recessed to consider the evidence presented and arguments by counsel. After deliberation, the Board finds that a three year suspension of Respondent's license to practice law is appropriate given the facts and circumstances of the misconduct.

Therefore it is ORDERED that the license of the Respondent, Michael John Denny, to practice law in the Commonwealth of Virginia be, and the same is hereby, suspended for a period of three years, effective December 14, 2007.

It is further ORDERED, pursuant to the provisions of Part Six, § IV, Paragraph 13(M) of the Rules of the Supreme Court of Virginia, that 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 clients. The Respondent shall give such notice within 14 days of the effective date of the order, and make such arrangements

as are required herein within 45 days of the effective date of this order. The Respondent shall furnish proof to the Bar within 60 days of the effective date of the order of suspension that such notices have been timely given and such arrangements for disposition of matters made.

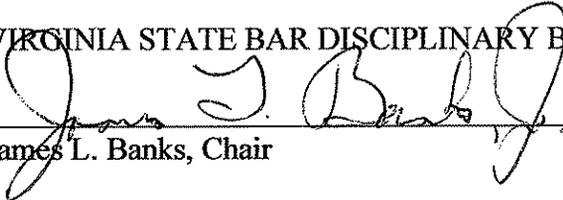
It is further ORDERED that if the Respondent is not handling any client matters on the effective date of this order, shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and the arrangement required herein shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of revocation or suspension for failure to comply with these requirements.

It is further ORDERED that a certified copy of this order shall be served by the Clerk of the Disciplinary System upon the Respondent, Michael John Denney at his address of record with the Virginia State Bar, by certified mail, return receipt requested, P.O. Box 322, Marshall, VA 20116, and a copy to Alfred L. Carr, Assistant Bar Counsel, Virginia State Bar, Suite 310, 100 North Pitt Street, Alexandria, VA 22314.

Pursuant to Part 6, Section IV, Paragraph 13.B.8(c) of the Rules, the Clerk of the Disciplinary System shall assess costs.

Entered this the 23rd day of January, 2008.

VIRGINIA STATE BAR DISCIPLINARY BOARD


James L. Banks, Chair