

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF)
MERCER THEODORE KISSINGER, JR.)
) VSB DOCKET NO.: 12-000-091065
)

MEMORANDUM ORDER OF SUSPENSION

THIS MATTER came on to be heard on January 11, 2013 before a panel of the Virginia State Bar Disciplinary Board consisting of Paul M. Black, Acting Chair, presiding, J. Casey Forrester, R. Lucas Hobbs, Whitney G. Saunders, and Jody D. Katz, lay member. The Virginia State Bar was represented by M. Brent Saunders, Assistant Bar Counsel. The Respondent, Mercer Theodore Kissinger, Jr., appeared in person and was represented by counsel, Paul E. Turner, Jr. The Chair polled the members of the Board as to 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, and each member responded that there were no such conflicts. The court reporter for the proceeding, Angela N. Sidener of Chandler & Halasz, Post Office Box 9349, Richmond, Virginia 23227, telephone: (804) 730-1222, after duly being sworn, reported the hearing and transcribed the proceedings.

This matter came before the Board on the Petition alleging impairment filed by the Virginia State Bar.

The exhibits of the Virginia State Bar, Exhibits 1 through 10 were admitted. The Respondent's objections to Bar Exhibits 1, 2, 3, 5, 6, 7, 8 and 9 were overruled.

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

I. FINDINGS OF FACT

1. Respondent was born on January 21, 1934. He was licensed to practice law on February 15, 1963.

2. Respondent has been engaged in the practice of law.

3. On December 19, 2011, Respondent appeared in the Newport News General District Court to defend his client, Edwin Mathias, against a charge of sexual battery, a Class 1 Misdemeanor. The presiding judge in the case, The Honorable Gary A. Mills, reported to the bar that during the trial of the case, Respondent had significant difficulty focusing and understanding the nature of the charge being prosecuted. Specifically, Respondent, *inter alia*: could not remember the names of witnesses; misunderstood testimony; missed key facts; focused on immaterial facts; failed to cross-examine witnesses on key facts; requested the Court not to certify the charge to the grand jury; and moved to strike on the basis that the Commonwealth had not proven a felony.

4. On March 1, 2012, Bar Counsel initiated an Impairment Investigation by filing with the Clerk's Office a Petition for Impairment Examination and Releases for Respondent's Psychiatric, Psychological and Medical Records.

By consent order entered by the Disciplinary Board on April 20, 2012, Respondent was ordered to undergo an Impairment examination.

On August 29, 2012, Respondent underwent a mental status examination performed by Dr. James L. Levenson, Vice Chairman, Department of Psychiatry, and Professor of Psychiatry, Medicine, and Surgery, at the Virginia Commonwealth University School of Medicine. Based on his observations of Respondent, including significant memory deficits, Dr. Levenson found, *inter alia*, Respondent suffers from cognitive deficiencies. Dr. Levenson recommended that a full neuropsychological assessment be performed by a clinical psychologist for the purpose of more fully measuring Respondent's cognitive deficits.

On October 3, 2012, Dr. Scott W. Sautter, Licensed Clinical Psychologist, performed a neuropsychological assessment of Respondent. Based on the results of the neuropsychological assessment, Dr. Sautter, *inter alia*, found that Respondent suffers from a cognitive disorder coupled with impaired verbal memory and processing speed which he suspects is secondary to dementia. Dr. Sautter has concerns for Respondent's "current cognitive capacity to practice law".

5. Based on the results of the Impairment Investigation, Bar Counsel determined there is reason to believe Respondent has an Impairment.

6. At the hearing, Dr. Levenson testified that in his opinion Respondent's cognitive deficits materially impair his fitness to practice law.

7. In addition, the Respondent was evaluated by a psychologist, Dr. David Powell, chosen by his primary care physician through the Medical Center for the Veterans Administration in Hampton, Virginia, on or about December 13, 2012. The Respondent submitted a copy of Dr. Powell's report to the Bar which was admitted into evidence as Bar's Exhibit 9, but the report was missing page 12. Respondent's counsel

declined to produce page 12 or introduce the complete report into evidence. Dr. Powell, however, found that the Respondent was in an early stage of dementia which best fits an Alzheimer's type process. He found a global decline in the Respondent's cognitive abilities with particular weaknesses in the areas of semantic knowledge, verbal reasoning, and complex frontal lobe executive capacities.

II. DISPOSITION

After review of the foregoing findings of fact, the exhibits presented by Bar Counsel on behalf of the Virginia State Bar, including the medical reports from Dr. Levenson, Dr. Sautter and Dr. Powell, and the evidence from witnesses presented on behalf of the Bar and on behalf of the Respondent, the Board recessed to deliberate. After due deliberation, the Board determined that the Respondent suffers from an Impairment. The Board determined that the Respondent's license should be suspended indefinitely for the Impairment.

Accordingly, it is ORDERED that the license of the Respondent, Mercer Theodore Kissinger, Jr., be suspended as of January 11, 2013 for an indefinite period.

It is further ORDERED that Respondent must comply with the requirements of Part Six, Section IV, Paragraph 13-29 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. Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client(s).

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 suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective date of the suspension if 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 13-29 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for a hearing before a three-judge court.

It is further ORDERED that the Clerk of the Disciplinary System shall send a certified copy of this Order by certified mail to Mercer Theodore Kissinger, Jr. at his last address of record with the Virginia State Bar at 9610 Sherwood Place, Apt. 41, Norfolk, Virginia 23503; and by first-class mail to his counsel, Paul E. Turner, Jr., 813 Forrest Drive, Suite 2, Newport News, Virginia 23606; and shall hand-deliver a copy to M. Brent Saunders, Assistant Bar Counsel, at 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 28th day of January, 2013.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 

Paul M. Black, Acting Chair