

VIRGINIA:

BEFORE THE CIRCUIT COURT FOR THE COUNTY OF HANOVER

**VIRGINIA STATE BAR EX REL.
THIRD DISTRICT COMMITTEE,**

SEP 21 2011

Complainant

v.

**Case No. CL11000632-00
VSB Docket No. 09-032-078278**

ROBERT HENRY SMALLENBERG,

Respondent

MEMORANDUM ORDER OF SUSPENSION AND RESTITUTION

This matter came on to be heard on July 11, 2011, upon an Agreed Disposition for a Thirty Day Suspension and Restitution, with an alternative sanction of a Six Month Suspension for failure to comply with the term of Restitution, endorsed by Assistant Bar Counsel Renu M. Brennan, as counsel for the Virginia State Bar (Bar), Respondent Robert Henry Smallenberg (Respondent), and Respondent's counsel, Gary R. Hershner. A copy of the endorsed Agreed Disposition for a Thirty Day Suspension and Restitution is attached hereto and is incorporated herein by this reference. The Bar, by counsel Renu M. Brennan, and Respondent, by his counsel, Gary R. Hershner, presented the Agreed Disposition for a Thirty Day Suspension and Restitution to a Three-Judge Court impaneled by the Supreme Court of Virginia on April 7, 2011, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to Section 54.1-3935 of the Code of Virginia (1950) as Amended, consisting of the Honorable Marc Jacobson, Retired Judge of the Fourth Judicial Circuit, the Honorable Westbrook J. Parker, Retired Judge of the Fifth Judicial Circuit, and the Honorable Cheryl V. Higgins, Judge of the Sixteenth

Judicial Circuit, designated Chief Judge. The Court convened telephonically to hear argument and consider the Agreed Disposition for a Thirty Day Suspension and Restitution.

The Court swore the Court Reporter and polled the members of the Court to determine whether any member had a personal or financial interest that might affect or reasonably be perceived to affect his or her ability to be impartial in these matters. Each member, including the Chief Judge, verified they had no such interests.

The Court heard argument from counsel and reviewed Respondent's prior disciplinary record with the Bar and thereafter retired to deliberate on the Agreed Disposition for a Thirty Day Suspension and Restitution. Having considered all the evidence before it, the Court accepted the Agreed Disposition for a Thirty Day Suspension and Restitution.

I. FINDINGS OF FACT

The Court finds facts by clear and convincing evidence that the factual allegations contained in paragraphs 1-14 (one through fourteen) of the Subcommittee Determination (Certification), issued January 28, 2011, and attached as Exhibit A to the Agreed Disposition for a Thirty Day Suspension and Restitution, attached hereto, and incorporated herein, are true, noting that Respondent asserts that he was authorized to disburse to himself as his fee \$2,500.00 of the \$7,500.00 he was holding in escrow for his client, and further noting Respondent's concession that there is no documentation to substantiate his assertion.

II. NATURE OF MISCONDUCT

The Court finds that such conduct by Robert Henry Smallenberg constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.3 Diligence

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

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.

RULE 1.15 Safekeeping Property

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

RULE 1.16 Declining Or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(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.

III. IMPOSITION OF SANCTION

Having considered all the evidence before it and determined to accept the Agreed Disposition for a Thirty Day Suspension and Restitution, the Court **ORDERS** that the Respondent's license to practice law in the Commonwealth of Virginia is **SUSPENDED** for a period of thirty (30) days, effective August 27, 2011, and further that Respondent shall pay the sum of two thousand five hundred dollars (\$2,500.00) to Complainant Stephanie L. Dembitsky within thirty (30) days of July 11, 2011.

Upon satisfactory proof that this term has been met, this matter shall be closed. If, however, it appears that Respondent has not complied with the above-stated term of restitution of \$2,500.00 within thirty (30) days of July 11, 2011, Assistant Bar Counsel shall serve notice requiring Respondent to show cause why the alternative disposition of a suspension of Respondent's license to practice law in the Commonwealth of Virginia for six months should not be imposed. The burden of proof shall be on Respondent to show compliance with the term by clear and convincing evidence. If Respondent has failed to provide the full amount of restitution of \$2,500.00 within thirty (30) days of July 11, 2011, as determined by the trier of fact, the alternative disposition of a suspension of Respondent's license to practice law in the Commonwealth of Virginia for a period of six months shall be imposed.

In accordance with the Agreed Disposition in this matter, this **ORDER** is **FINAL** and

NON-APPEALABLE.

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. 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 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 day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters. (If no matters in the Respondent's care require arrangements for disposition as a result of this Order, then the Respondent need not furnish proof of any such arrangements.)

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 hearing before a three-judge court.

It is further **ORDERED** that costs shall be assessed by the Clerk of the Disciplinary System pursuant to the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph

13-9.E.

It is further **ORDERED** that the Clerk of the Court shall send a certified copy of this order to Barbara S. Lanier, Clerk of the Disciplinary System, 707 East Main Street, Suite 1500, Richmond, VA 23219; to Robert Henry Smallenberg at Suite 204, 10035 Sliding Hill Road, Ashland, Virginia 23005, his address of record with the Virginia State Bar; to Gary R. Hershner, the Respondent's Counsel, at 9 South Adams Street, Richmond, Virginia 23220; and to Renu M. Brennan, Assistant Bar Counsel, at the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800.

Teresa L. McLean, Court Reporter, of Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222, transcribed the proceedings.

ENTERED: _____

September 13, 2011

CIRCUIT COURT, COUNTY OF HANOVER

By: _____

Cheryl V. Higgins
Cheryl V. Higgins, Chief Judge
Three-Judge Court

VIRGINIA:

BEFORE THE CIRCUIT COURT FOR THE COUNTY OF HANOVER

**VIRGINIA STATE BAR EX REL.
THIRD DISTRICT COMMITTEE,**

Complainant

v.

Case No. CL11000632-00

ROBERT HENRY SMALLENBERG,

Respondent

AGREED DISPOSITION FOR A THIRTY DAY SUSPENSION AND RESTITUTION

(disposition)

Comes now the Virginia State Bar, by Renu M. Brennan, Assistant Bar Counsel; the Respondent, Robert Henry Smallenberg, Esquire; and the Respondent's counsel, Gary R. Hershner, Esquire, and;

The Respondent and his counsel having agreed to have this proposal considered and ratified by the Three-Judge Court, hereby tender to this Honorable Court for its consideration and ratification the following Agreed Disposition (disposition) for a thirty day suspension and restitution in the sum of two thousand five hundred dollars (\$2,500.00) to be paid by Respondent to Complainant Stephanie L. Dembitsky within thirty (30) days of July 11, 2011, with an alternative sanction of a six month suspension if Respondent fails to pay Ms. Dembitsky the \$2,500.00 in full by August 11, 2011:

I. STIPULATIONS OF FACT AND DISCIPLINARY RULE VIOLATIONS

1. The Respondent hereby stipulates that all of the factual allegations contained in paragraphs 1-14 (one through fourteen) of the Subcommittee Determination (Certification), issued January 28, 2011, a copy of which is attached hereto as Exhibit A and incorporated herein, are true, with the exception that Respondent asserts that he was authorized to disburse to himself as his fee \$2,500.00 of the \$7,500.00 he was holding in escrow for his client; however, Respondent concedes that there is no documentation to substantiate this assertion.
2. The Respondent stipulates further that these facts to which he has stipulated give rise to violations of all of the Rules of Professional Conduct charged in the attached Certification, specifically, Rule 1.3(a), Rule 1.4(a), Rule 1.15(c)(3) and (4), and Rule 1.16(d) and (e).

II. STIPULATION AS TO DISPOSITION

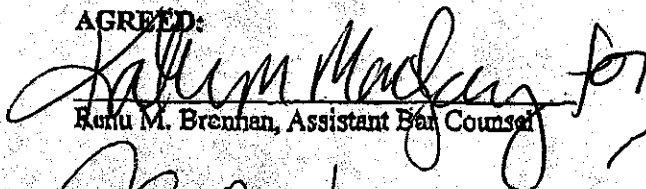
The Respondent, his counsel, and the Virginia State Bar agree that an appropriate sanction in the matter now pending is the suspension of Respondent's license to practice law in the Commonwealth of Virginia for a period of THIRTY (30) DAYS, effective August 27, 2011, and restitution of the sum of two thousand five hundred dollars (\$2,500.00) to Ms. Dembitsky within thirty (30) days of July 11, 2011, with an alternative sanction of a six month suspension of Respondent's license to practice law in the Commonwealth of Virginia if Respondent does not provide restitution in full to Ms. Dembitsky within thirty (30) days of July 11, 2011.

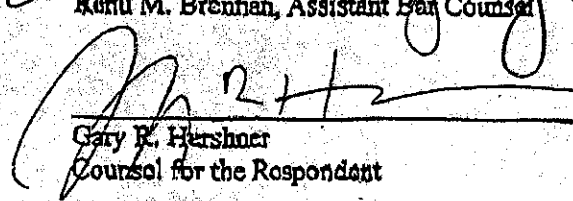
The Respondent and his counsel agree further that if the Three-Judge Court designated to hear this matter approves this disposition, that this disposition becomes Final and Non-Appealable. The Respondent and his counsel agree that the Respondent cannot and will not appeal this disposition under any circumstances if it is accepted by the Three-Judge Court.

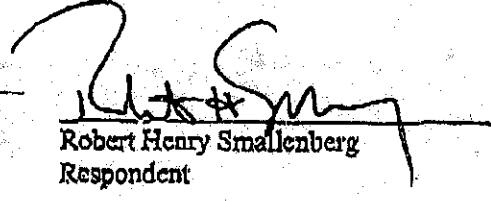
The Respondent and his counsel agree further that if, for any reason, the Three-Judge Court designated to hear this matter declines to approve this disposition, then the same Three-Judge Court designated to hear this matter shall hear, preside over and conclude the trial of this matter in the Circuit Court for the County of Hanover in accordance with the designation by the Supreme Court of Virginia, entered April 7, 2011, with trial commencing on July 12, 2011, as previously scheduled.

Pursuant to Part 6, Sec. IV, Para. 13-9 E of the Rules, the Clerk of the Disciplinary System shall assess costs.

AGREED:


Renu M. Brennan, Assistant Bar Counsel


Gary R. Hershner
Counsel for the Respondent


Robert Henry Smalberg
Respondent

APPROVED:

Cheryl V. Higgins, Chief Judge
Three-Judge Court

Westbrook J. Parker, Retired Judge
Three-Judge Court

Marc Jacobson, Retired Judge
Three-Judge Court

VIRGINIA:

BEFORE THE THIRD DISTRICT SUBCOMMITTEE, SECTION II
OF THE VIRGINIA STATE BAR

RECEIVED

IN THE MATTER OF
ROBERT HENRY SMALLENBERG

JAN 28 2011

VSJ Docket No. 09-032-078278

SUBCOMMITTEE DETERMINATION
(CERTIFICATION)

VSJ CLERK OFFICE

On January 21, 2011, a meeting in this matter was held before a duly convened Third District Subcommittee, Section II consisting of Esther J. Windmueller, Esq., subcommittee chair, Cliona M.B. Robb, Esq., member, and Judith G. Napier, lay member.

Pursuant to Part 6, Section IV, Paragraph 13-15.B.3. of the Rules of the Virginia Supreme Court, the Third District Subcommittee, Section II of the Virginia State Bar hereby serves upon the Respondent the following Certification:

I. FINDINGS OF FACT

1. At all times relevant, Respondent Robert Henry Smallenberg (Respondent) was an attorney licensed to practice law in the Commonwealth of Virginia.
2. In 2006, Complainant Stephanie L. Dembitsky hired Respondent to represent her in her divorce. The main issue between the parties was the division of equity in the marital residence.
3. In January 2007, at Respondent's suggestion, Ms. Dembitsky gave Respondent \$7,500.00 to be held in his escrow account to be used to pay her husband a portion of his alleged share of the equity in the marital residence and to resolve the matter. A January 23, 2007, letter, produced from Respondent's file and signed by Respondent's legal assistant, Obie Gravely, states "The \$9900 that was accredited to Ms. Dembitsky's account was given to her by her grandmother for settlement purposes. \$7500 of that amount was withdrawn by Ms. Dembitsky and then given to our office to be held in escrow to fund the settlement between the parties."
4. Without notifying Ms. Dembitsky, Respondent withdrew \$2,500.00 of the \$7,500.00, which Ms. Dembitsky gave to Respondent to safeguard and which was to be paid to her husband.



5. In 2007, Ms. Dembitsky decided to pay her husband the \$10,000.00 he was demanding in order to resolve their dispute. Unaware that Respondent had unilaterally withdrawn her funds, Ms. Dembitsky requested the \$7,500.00 from Respondent.
6. It was then that Ms. Dembitsky learned that Respondent had withdrawn \$2,500.00 of the \$7,500.00, and that he had applied this amount to his fee.
7. Respondent returned \$5,097.50 to Ms. Dembitsky. In exchange for a quitclaim deed to the marital residence, Ms. Dembitsky gave her husband the \$5,000.00 returned to her from Respondent's escrow account, along with funds she borrowed to replace the funds taken by Respondent.
8. Ms. Dembitsky demanded, but did not receive, an accounting of the fees and funds she provided to Respondent.
9. After she received the quitclaim deed in the fall of 2007, Respondent advised Ms. Dembitsky that all that remained to finalize her divorce was for him to conduct divorce depositions and for Ms. Dembitsky to pay Respondent an additional \$500.00. In March 2008, Ms. Dembitsky paid Respondent the \$500.00, and the depositions were completed.
10. By April 2008, all that remained was to finalize the divorce decree. By e-mail dated April 22, 2008, Respondent advised Ms. Dembitsky that opposing counsel's changes to the decree were mainly to form and were not objectionable and that he would complete the changes and deliver the decree to opposing counsel the following week.
11. In the summer of 2008, Ms. Dembitsky and opposing counsel attempted to contact Respondent, without success.
12. In the fall of 2008, Ms. Dembitsky spoke with Respondent monthly regarding finalizing the divorce. Respondent continued to provide excuses regarding his failure to finalize her divorce.
13. As of 2009, the divorce had not been concluded. Respondent did not respond to his client or opposing counsel's attempts to communicate with him regarding the status.
14. In January 2009, Ms. Dembitsky filed this bar complaint, and she fired Respondent in April 2009. Opposing counsel completed the divorce for both parties.

II. NATURE OF MISCONDUCT

Such conduct by Robert Henry Smalenberg constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.3 Diligence

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

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.

RULE 1.15 Safekeeping Property

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

RULE 1.16 Declining Or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(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.

III. CERTIFICATION


Accordingly, it is the decision of the subcommittee to certify the above matters to the Virginia State Bar Disciplinary Board.


THIRD DISTRICT SUBCOMMITTEE,
SECTION II
OF THE VIRGINIA STATE BAR

By 
Esther J. Windmueller, Esq.,
Subcommittee Chair

CERTIFICATE OF SERVICE

I certify that on January 28, 2011, I mailed by Certified Mail, Return Receipt Requested, a true and correct copy of the foregoing Subcommittee Determination (Certification) to Robert Henry Smallemberg, Esquire, Respondent, *pro se*, Suite 204, 10035 Sliding Hill Road, Ashland, VA 23005, the Respondent's last address of record with the Virginia State Bar.


Renu M. Brennan
Assistant Bar Counsel

A COPY TESTE
FRANK D. HARGROVE, JR. CLERK
HANOVER CIRCUIT COURT
By 
DEPUTY CLERK