

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF
ROBERT HENRY SMALLENBERG**

VSB DOCKET NO. 12-000-091299

ORDER OF SUSPENSION

This matter came before the Virginia State Bar Disciplinary Board (the "Board") for hearing on May 18, 2012 upon the Virginia State Bar's (the "Bar") *Petition for Show Cause Hearing Violation of Order* requiring the Respondent, Robert Henry Smallenberg, to appear before the Board to show cause by clear and convincing evidence that he did not violate the *Agreed Disposition Summary Order* and the *Memorandum Order of Suspension and Restitution* imposed by a Three-Judge Court sitting in Hanover County.¹ Specifically, Respondent is required to show cause why his license to practice law in the Commonwealth of Virginia should not be revoked or further suspended pursuant to Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia.²

¹ The *Agreed Disposition Summary Order* and the *Memorandum Order of Suspension and Restitution* were entered by a Three-Judge Court in VSB Docket No. 09-032-078278. The Bar also presented other separate and distinct Orders relevant to Respondent's alleged failure to comply with Paragraph 13-29. These include the Bar's *Petition for Show Cause Hearing Violation of Disciplinary Board Order* regarding an *Interim Suspension Order* entered by the Board in VSB Docket No. 12-060-089121 and four additional *Interim Suspension Orders* entered by the Board under four separate VSB Docket Numbers but collectively brought in this proceeding under VSB Docket No. 12-000-091299.

² Part Six, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia reads as follows:

After a Suspension against a Respondent is imposed by either a Summary or Memorandum Order and no stay of the Suspension has been granted by this Court,

A duly convened panel of the Board consisting of Randall G. Johnson, Jr., Chair Designate, John A. Dezio, Sandra L. Havrilak, William H. Monroe, Jr. and Dr. Theodore Smith, lay member, heard the matter. Kathryn R. Montgomery, Deputy Bar Counsel and Renu M. Brennan, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar. Respondent appeared in person and represented himself. Jennifer L. Hairfield, Shorthand Reporter with Chandler & Halasz, P.O. Box 9349, Richmond, Virginia, 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings. The Chair polled members of the 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 these matters and serving on the panel, to which inquiry each member, including the Chair, responded in the negative.

I. Motion for Continuance

Respondent sought a continuance of this matter until a time when Respondent's counsel could appear at the hearing. In his Motion for Continuance, Respondent advised

or after a Revocation against a Respondent is imposed by either a Summary Order or Memorandum Order, that Respondent shall forthwith give notice, by certified mail, of his or her Revocation or Suspension to all clients for whom he or she is currently handling matters and to all opposing Attorneys and the presiding Judges in pending litigation. The Respondent shall also make appropriate arrangements for the dispositions of matters then in his or her care in conformity with the wishes of his or her clients. The Respondent shall give such notice within 14 days of the effective date of Revocation or Suspension, and make such arrangements as are required herein within 45 days of the effective date of the Revocation or Suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective date of the Revocation or Suspension that such notices have been timely given and such arrangements made for the disposition of matters. The Board shall decide all issues concerning the adequacy of the notice and arrangements required herein, and the Board may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph 13-29.

the Chair that his counsel would not be able to appear on the scheduled hearing date of May 18, 2012. Respondent's Motion was made on the afternoon of May 17, 2012.

Upon learning of Respondent's Motion for Continuance, the Chair considered Respondent's Motion and the Motion was denied. Respondent was advised that either he or his counsel could renew the request for a continuance at the hearing if they chose to do so and the Motion would be heard by the Chair and Panel.

On May 18, 2012, the Respondent appeared *pro se* and renewed his Motion for a Continuance. Respondent's reasoning for seeking a continuance included the fact that he now understood the seriousness of the charges against him and was overwhelmed. Respondent stated that he had intended to come to the hearing "with hat in hand" but was no longer comfortable representing himself.

The Bar opposed Respondent's Motion for a Continuance and argued that Respondent had been notified of this hearing date and all charges to be brought against him beginning on March 20, 2012 and also on April 4 and 5, 2012, when the Bar filed and served its notice for a Show Cause Hearing. No request for a continuance was made by Respondent or communicated to the Bar until the afternoon of May 17, 2012, less than 1 day prior to the May 18, 2012 hearing date.

As regarding Respondent's failure to appreciate the seriousness of the charges to be addressed at the hearing, Respondent had previously been represented by counsel in the past disciplinary matter from which this hearing became necessary. Respondent therefore knew or should have known the significance of the issues involved. Additionally, the request for a continuance was made with Respondent's complete understanding that the Bar had secured the appearance of witnesses to testify at the

hearing, Respondent having received a copy of the subpoena issued to one such witness by the Bar.

In rebuttal of the Bar's argument, Respondent argued that this proceeding was "quasi-criminal" in nature thereby triggering Constitutional rights guaranteed to Respondent by the United States Supreme Court. Additionally, Respondent complained that the Bar set the hearing date without regard to his schedule.

Having heard argument of the parties, the Board retired to deliberate the merits of Respondent's Motion for Continuance. Part Six, Section IV, Paragraph 13-18 (F) of the Rules of the Supreme Court of Virginia addresses the Continuance of a Hearing. It states that "[a]bsent exceptional circumstances, once the Board has scheduled a hearing, no continuance shall be granted unless, in the judgment of the Chair, the continuance is necessary to prevent injustice. No continuance will be granted because of a conflict with the schedule of the Respondent or the Respondent's counsel unless such continuance is requested in writing by the Respondent or the Respondent's counsel within 14 days after mailing of a notice of hearing. Any request for a continuance shall be filed with the Clerk of the Disciplinary System." The facts of this matter clearly show that Respondent was aware of the scheduled hearing date of May 18, 2012, having received notice on March 20, 2012 and two additional times on April 4, 2012 and April 5, 2012. Respondent's failure to appreciate the seriousness of the subject matter to be addressed in this hearing does not afford Respondent the right to change his mind regarding representation with less than one days notice to the Bar, testifying witnesses and/or the Panel. Accordingly, the Panel believes that Respondent waived his right to be represented by counsel by failing to timely notify the Clerk of his request and/or

demonstrate such “exceptional circumstances” as are called for in paragraph 13-18. For these reasons, Respondent’s Motion for a Continuance was denied.

II. Findings of Fact

In re VSB Docket No. 09-032-078278

On September 13, 2011 a Three-Judge Court, sitting in the Circuit Court for Hanover County, approved an *Agreed Disposition Summary Order* resulting from a hearing held before the Court on July 11, 2011. The terms of the Agreed Disposition provided, in part, that the Respondent receive a thirty day suspension for the violation of numerous disciplinary Rules including Rules 1.3(a), 1.4(a), 1.15(c)(3), 1.15(c)(4), 1.16(d) and 1.16(e). The Suspension became effective on August 27, 2011. Paragraph 4 of the *Agreed Disposition Summary Order* stated “The Court notes that concerning Paragraph 13-29 that the Respondent shall comply with all requirements of Paragraph 13-29 of the Rules, including but not limited to sending the required notices, making the required arrangements, and providing the required proof to the Bar.” The Respondent and his counsel each signed the *Agreed Disposition for a Thirty Day Suspension and Restitution* confirming their understanding of the terms of the disposition and their agreement to same. The matter was further confirmed in the *Memorandum Order of Suspension and Restitution* that was signed by the Chief Judge of the Three-Judge Court on September 13, 2011.

By letter dated September 22, 2011, Barbara S. Lanier, Clerk of the Disciplinary System, forwarded the Memorandum Order via certified mail to Respondent’s address of record with the Bar and to Respondent’s counsel. The Clerk’s September 22, 2011 letter to Respondent further reminded Respondent of his duties under Paragraph 13-29.

By letter dated October 27, 2011, the Clerk advised Respondent that the Clerk's office had not received proof of his compliance with Paragraph 13-29. The Clerk also advised Respondent that his continuing failure to comply with Paragraph 13-29 could result in the setting of a show cause proceeding wherein Respondent's license to practice law in the Commonwealth of Virginia could be further Suspended or Revoked.

By letter of March 06, 2012, Assistant Bar Counsel requested Respondent to provide proof of compliance with Paragraph 13-29 to the Clerk's office with a copy to Assistant Bar Counsel. No proof of compliance with the requirements of Paragraph 13-29 by the Respondent was ever received by the Clerk or Assistant Bar Counsel.

In re VSB Docket No. 12-060-089121

On January 05, 2012 the Board entered an Order of Interim Suspension, effective immediately, suspending the Respondent's license to practice law in the Commonwealth of Virginia for failure to comply with a subpoena *duces tecum* issued by the Bar in the course of a Bar investigation. The Order required the Respondent to produce documents as well as comply with all requirements of Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia. The Respondent's suspension was terminated the next day on January 06, 2012 by a subsequent Order of the Board, however the January 06, 2012 Order did not excuse Respondent from complying with Part Six, Section IV, Paragraph 13-29 of the Rules of Court. Respondent failed to provide proof of compliance with Paragraph 13-29 to the Clerk's office.

In Re VSB Docket No. 12-000-091299

On July 28, 2011 (VSB Docket No. 11-060-085684), August 4, 2011 (VSB Docket No. 11-060-087698), September 20, 2011 (VSB Docket No. 11-060-088181) and September 20, 2011 (VSB Docket No. 11-060-088180), the Board entered various Interim Suspension Orders suspending the Respondent's license to practice law in the Commonwealth of Virginia, each by reason of the Respondent's failure to comply with a subpoena *duces tecum* issued by the Bar in the course of various Bar investigations. In addition to requesting the production of documents, each Interim Suspension Order required the Respondent to comply with all requirements of Part Six, Section IV, Paragraph 13-29 of the Rules of the Virginia Supreme Court. The Respondent's Interim Suspensions were each terminated within days of their entry by a subsequent Order of the Board, however, the Orders terminating each Interim Suspension did not excuse Respondent from complying with Part Six, Section IV, Paragraph 13-29 of the Rules of Court. Respondent failed to provide proof of compliance with Paragraph 13-29 to the Clerk's office.

III. Disposition

Upon hearing the foregoing Findings of Fact, reviewing the exhibits presented by Bar Counsel on behalf of the VSB (Exhibits 1 through 9), the exhibits presented by Respondent on his own behalf (Exhibits A through C), the evidence from witnesses presented on behalf of the Bar and upon evidence presented by Respondent in the form of his own testimony, the Board recessed to deliberate. After due deliberation, the Board reconvened and stated its findings as follows:

1. The Board finds that Respondent has failed to show by clear and convincing evidence that Respondent complied with the requirements of Paragraph 13-29 as they were imposed upon Respondent in each of the matters presented by the Bar.
2. The Board finds that Respondent admitted to failing to send notice letters of his various suspensions to his clients via certified mail, to the extent notice letters were sent out at all.
3. The Board finds that despite Respondent's production of example notice letters (Exhibits A through C) prepared by Respondent for use with clients, opposing counsel and presiding judges in current litigation wherein the Respondent was involved, the Respondent failed to prove by clear and convincing evidence that these notice letters were mailed by Respondent and/or received by their intended recipients. The witness called by the Bar, Alexis Howell, who was a client of the Respondent at such time as Respondent had been suspended, provided sworn testimony that she was never informed of Respondent's suspension by way of any written or oral communication. Further sworn testimony from VSB investigator, Oren Michael Powell, confirmed that he found no confirmation of any notification letters sent by Respondent or received by judges, clients or opposing counsel in the Howell matter.
4. The Board finds Respondent's arguments in defense of his failure to comply with Orders containing the requirements of Paragraph 13-29

both unpersuasive and troubling. Respondent contends that the Orders, as entered by the VSB Disciplinary Clerk are void *ab initio* by reason that the Rules provide no authority for the Clerk to enter Orders. Respondent failed to address the procedural methods utilized by the Board wherein the presiding Chair receives all pleadings relevant to a proposed Order for his or her review. This review is conducted by the Chair in advance of any decision by the Chair regarding the entry of an Order. In the event the Chair approves the Order, the Chair notes his or her approval on the face of the Order and sends the Clerk a copy noted “approved” and initialed by the Chair. This is accomplished via telefax or via a scanned Order attached to an email instructing the Clerk to sign and enter the original Order. No Order is entered by the Clerk without the express written approval of the presiding Chair. Respondent also contends that the requirements of Paragraph 13-29 apply only to “a Summary Order or Memorandum Order” under the language contained in Paragraph 13-29. Respondent fails to recognize that he personally endorsed a Summary Order (later confirmed by the Chief Judge of the Three-Judge Court by Memorandum Order) containing specific language requiring Respondent to comply with the requirements of Paragraph 13-29. Moreover, Respondent also fails to note the clear language of Paragraph 13-6(G)(3) addressing additional Board powers to impose an interim Suspension upon attorneys who fail to comply with a summons *or subpoena* issued by any member of the Board, *the*

Clerk of the Disciplinary System, Bar Counsel or any lawyer member of a District Committee. “An Attorney suspended pursuant to this subparagraph G.3 is subject to the provisions of subparagraph 13-29.”

Having found that Respondent failed to comply with the requirements of Paragraph 13-29 as set forth in the aforementioned Orders, the Board then heard evidence regarding the appropriate sanction that should be imposed. The Board received and reviewed the prior disciplinary record (VSB Exhibit 10) of the Respondent and additionally heard arguments of Bar Counsel and Respondent.

The Board then recessed to consider the evidence and arguments by counsel. After due deliberation, the Board reconvened and the Chair announced that Respondent’s license to practice law in the Commonwealth of Virginia was **SUSPENDED** for a term of **THREE YEARS**, effective immediately.

Accordingly, it is **ORDERED** that the Respondent’s license to practice law in the Commonwealth of Virginia be, and hereby is **SUSPENDED** for a term of **THREE YEARS**, effective May 18, 2012.

It is further **ORDERED** that the 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 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 suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective date 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 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 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 Disciplinary System shall send a certified copy of this Order by certified mail to Robert Henry Smallenberg at 10035 Sliding Hill Road, Suite 204, Ashland, Virginia 23005, his address of record with the Virginia State Bar; and by regular mail to Respondent's Counsel, Gary R. Hershner, 9 South Adams Street, Richmond, VA 23229, and by hand-delivery to Kathryn R. Montgomery, Deputy Bar Counsel and Renu M. Brennan, Assistant Bar Counsel, at the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800.

ENTERED this 26 day of June, 2012

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 
Randall G. Johnson, Jr., Chair Designate