

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF)	
HERMAN CORNELIUS SMITH,III,)	
)	VSB DOCKET NOS.: 14-022-096232
<i>Respondent</i>)	14-022-095588
)	13-022-093107
)	13-022-094763

MEMORANDUM ORDER

These matters came to be heard on September 26, 2014, before a duly convened panel of the Virginia State Bar Disciplinary Board (the "Board") on matters listed above. The Board impaneled for these matters consisted of Tyler E. Williams, Chair, John A. C. Keith, Sandra W. Montgomery, Lay Member, Samuel R. Walker, and Lisa A. Wilson. The Virginia State Bar (the "Bar") was represented by Paul D. Georgiadis, Assistant Bar Counsel. The Respondent, Herman Cornelius Smith, III, ("Respondent") appeared in person, *pro se*. The Chair polled the members of the Board as to whether any of them had any personal or financial interest or bias which would prevent any of them from fairly hearing these matters and serving on the panel, and each member responded that the member had no such interest or conflict. Teresa McLean, a certified court reporter, Chandler & Halasz, PO Box 9349, Richmond, Virginia 23227 (804) 730-1222, after duly being sworn, reported the hearing and transcribed the proceedings.

I. VSB Docket No. 14-022-096232

This matter came before the Board on the District Committee Determination for Certification by the Second District Subcommittee.

A. Findings of Fact

VSB Exhibits A, A-1, A-2, and B were admitted without objection. Respondent offered no exhibits. The Bar in its case in chief, called the Respondent. The Respondent testified on his own behalf. The Board makes the following findings on the basis of clear and convincing evidence:

1. At all times relevant hereto, Respondent has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. On July 2, 2013, Respondent, represented by counsel, pled guilty to misdemeanor Contempt of Court under Virginia Code §18.2-456 after having been indicted for Felony Obstruction of Justice under Virginia Code §18.2-460. VSB Exhibit A-1.
3. On July 2, 2013, Respondent executed a document entitled Stipulation of Facts therein stipulating or agreeing that had the Commonwealth proceeded to trial it would have presented the following evidence as set forth in the Stipulation of Facts introduced as VSB Ex. A-2:
 - a. On July 24, 2012, Respondent was present at a preliminary hearing as counsel to De'vonne Hasan Karim, who was charged along with co-defendants with "Robbery, Use of Firearm in the Commission of a Robbery, and other related violent felony matters." At that time Respondent first learned that co-defendant Antonio Burke would be testifying against his client and that Burke had in fact already reached a plea agreement with the Norfolk Commonwealth's Attorney's Office for cooperation with the prosecution.
 - b. The Commonwealth was represented by Senior Assistant Commonwealth's Attorney Lyn S. Simmons in these proceedings. At the conclusion of the joint preliminary hearing for Mr. Karim, prosecutor Simmons exited the courtroom along with Antonio Valentino Rone. Rone was a former client of attorney Smith and was from the same Young's Park neighborhood in Norfolk as co-defendant Burke.
 - c. Thereafter, Respondent exited the courtroom and remaining in the hallway yelled loudly at Rone,

Yeah, he from Young's Park, go out there tonight and tell everybody he a snitch. He a snitch, go out there and tell everybody he a snitch. He probably gon[na] have to do three years but he gon[na] have to come back. Let everybody in Young's Park know he a snitch.

- d. Smith continued the rant as he moved to the elevator. Simmons and Rone took the stairs and exited the courthouse.
 - e. When Rone and prosecutor Simmons exited the building and entered the outdoor plaza adjacent to the courthouse, Respondent again encountered them and from across the plaza resumed shouting comments to Rone.
4. Respondent has admitted to the Virginia State Bar to telling Rone “to be careful hanging around him [Codefendant Burke] because he is a snitch...” When Rone advised Respondent that Burke was a friend, Respondent admits that he cautioned Rone, “be careful who you call a friend because Mr. Burke was a snitch.”

B. Misconduct

The Certification charged violations of the following provisions of the Virginia Rules of

Professional Conduct:

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;

Rule 3.4. Fairness To Opposing Party And Counsel.

A lawyer shall not :

...

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

C. Disposition

Upon review of the foregoing findings of fact, of the exhibits presented by the Bar, the evidence presented and argument of counsel, the Board recessed to deliberate. After due deliberations, the Board reconvened and stated its findings as follows:

The Board determined that the Bar failed to prove the misconduct charged by clear and convincing evidence and this case is dismissed.

II. VSB Docket Nos. 14-022-095588, 13-022-093107, and 13-022-094763

These matters came before the Board on the District Committee Determination for Certification by the Second District Subcommittee. VSB Exhibits 1-20 were admitted without objection and comprised the Bar's exhibits in all three of these docket numbers. Respondent offered no exhibits. The Bar and the Respondent presented opening statements. The Respondent stipulated that he did not communicate adequately with his clients, and the Bar stipulated that there was no claim of lack of diligence on Respondent's part. The Board makes the following findings on the basis of clear and convincing evidence:

- A. VSB Docket No. 14-022-095588(VSB)
VSB Docket No. 13-022-093107(Morley)
(Morley Representation)**

FINDINGS OF FACT

1. At all times relevant hereto, Respondent has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. On January 3, 2012, Respondent was appointed as counsel for Gene Elliot Morley, aka Eugene Elliott Morley, herinafter "Morley", for a delayed appeal of his convictions to the Court of Appeals of Virginia, hereinafter "CAV."
3. On or about January 11, 2012, Morley filed a "Motion to Withdraw Counsel" on grounds including Respondent's failure to respond to requests for information.

4. Said motion, joined by Respondent, was denied by the CAV on February 10, 2012.
5. On June 12, 2012, the CAV issued an order denying Morley's appeal.
6. On June 20, 2012, the Clerk of the CAV wrote to Morley in response to his recent letter to the CAV concerning the status of his appeal. Therein, the Clerk advised of the denial of the appeal and enclosed an order. The Clerk sent a copy of the Clerk's letter to Respondent.
7. Notwithstanding Respondent's receipt of the Court's June 12, 2012 dismissal order and of the Clerk's June 20, 2012 letter to Morley, Respondent failed to communicate with Morley regarding the denial of his appeal and of Morley's legal options of a further appeal.
8. In the absence of any information or advice from Respondent, Morley filed a *pro se* motion for a three judge panel review on or around August 6, 2012. On August 13, 2013, the Clerk of the CAV wrote to Morley that the CAV would not consider his motion as it was untimely and copied Respondent on this. However, Respondent did not thereafter communicate with Morley on the status of his case.
9. From the June 12, 2012 CAV order, Respondent had a 30 day deadline to pursue an appeal under Rules 5:14 and 5:17 of the Rules of the Supreme Court of Virginia, hereinafter "SCV." After Respondent realized that the 30 day deadline for appeal had lapsed without his filing the appeal, Respondent filed a Motion for Leave to File Delayed Appeal on August 15, 2012 and an affidavit dated August 16, 2012 in support thereof. In both the motion and the affidavit, Respondent stated, "Gene Elliott Morley, concurs in the filing of this Motion."
10. Notwithstanding said representations to the SCV, Respondent had failed to even advise Morley much less solicit Morley's opinion of the planned filing of said motion.
11. Respondent did mail copies of his Motion and accompanying affidavit to Morley at the Norfolk City Jail. After both were returned with the notation, "Inmate No Longer in Facility", Respondent failed to take any further steps to find Morley's address. As a result, Respondent failed to advise Morley of the motion for a delayed appeal.
12. Consequently, on September 12, 2012, Morley filed a *pro se* motion, Motion for Leave to Pursue a Delayed Appeal.

**B. VSB Docket No. 14-022-095588(VSB)
(Jones Representation)**

FINDINGS OF FACT

1. At all times relevant hereto, Respondent has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. On or about December 27, 2011, Respondent was appointed to represent Darryle Lamont Jones for an appeal to the CAV.
3. On May 8, 2012, the CAV denied the appeal.
4. Notwithstanding his duty to keep his client reasonably informed about the status of his appeal, Respondent failed to advise Jones that his appeal had been denied.
5. Respondent had a 30 day deadline from the May 8, 2012 CAV order to pursue an appeal under Rules 5:14 and 5:17 of the SCV.
6. After Respondent realized that the 30 day deadline for appeal had lapsed without his filing the appeal, on or about about August 14, 2012 Respondent filed a Motion for Leave to Pursue a Delayed Appeal. Shortly thereafter, Respondent filed an Affidavit in support of the Motion. In paragraph 8 of each of these two pleadings, Respondent alleged that "Darryle Lamont Jones, concurs in the filing of this Motion." However, Respondent had not advised Jones of the dismissal of his CAV appeal, had not advised Jones of Respondent's having allowed the SCV appeal deadlines to lapse, and had not advised Jones of the need to file for a delayed appeal, and had not obtained his concurrence with seeking a delayed appeal.

**C. VSB Docket No. 14-022-095588(VSB)
VSB Docket No. 13-022-094763 (Reese)
(Reese Representation)**

FINDINGS OF FACT

1. At all times relevant hereto, Respondent has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On or around June 28, 2012, Bruce Reese retained Respondent to appeal his convictions to the CAV. On counts of Armed Burglary and Aggravated Malicious Wounding, Reese had pled guilty and was sentenced to forty (40) years with twenty (20) suspended. At that time, Reese's sister Rita Barnes paid Respondent \$800.00. Respondent received additional funds from predecessor counsel who forwarded unearned escrowed fees.
3. On or about August 9, 2012, Respondent filed a petition for appeal with the CAV.
4. On October 3, 2012, the CAV issued its opinion denying said appeal. Respondent received said order via e-mail on or about October 3, 2012.
5. Notwithstanding his duty to keep his client reasonably informed about the status of his appeal as his attorney and upon the termination and completion of his retained role as counsel for a single appeal to the CAV, Respondent failed to advise Reese of the decision of the CAV and failed to advise Reese of his further appeal rights.
6. On November 3, 2012, Reese wrote a letter to Respondent. Therein, Reese inquired about the status of his appeal and requested certain documents from his file. He further authorized Respondent to speak with his sister Rhonda Watson regarding his case.
7. Despite having received Reese's letter, Respondent did not reply to Respondent and did not contact Ms. Watson.
8. On January 2, 2013, Reese wrote a letter to Respondent which Respondent has acknowledged he received. Therein, Reese authorized Respondent to release case information to four individuals including his sisters Rita Barnes and Rhonda Watson. Although Reese's sisters thereafter called Respondent's office to inquire about Reese's case, Respondent failed to communicate with them.
9. Only after Reese filed an inquiry with the Virginia State Bar by letter dated February 6, 2013 did Respondent communicate to Reese regarding the status of his appeal when he wrote to Reese on February 20, 2013. Therein, Respondent advised of rights regarding habeas actions. He failed to advise that the deadline for a direct appeal to the SCV had run, and further failed to advise of the option to move the SCV for a delayed appeal. And he failed to advise Reese of his rights to pursue a delayed appeal to the SCV.

10. Although Reese again wrote to Respondent on March 10, 2013, which letter Respondent received, Respondent did not reply.

DISPOSITION

At the conclusion of opening statements and after the stipulations recited above, Assistant Bar Counsel and the Respondent conferred off the record and returned with a proposed disposition in all three cases, the terms of which were to be as follows:

1. The parties stipulate to a violation of the following provisions of the Rules of Professional Conduct:

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.

2. The Bar withdraws the violation of Rules 3.3(a)1 and 1.16(d) of the Rules of Professional Conduct.
3. The parties agree to a public reprimand without terms.

Assistant Bar Counsel represented to the Board that Respondent had no prior disciplinary record and also that the Bar had reviewed Respondent's newly instituted office management systems and saw no need for reform or additional training. Neither the Bar nor Respondent offered any additional evidence in mitigation or aggravation. After hearing the arguments of counsel, the Board recessed to consider the proposed disposition. After due deliberation, the Board reconvened and stated its finding that it accepted the proposed stipulation and disposition.

Accordingly, it is ORDERED that the Respondent, Herman Cornelius Smith, III, shall receive the sanction of PUBLIC REPRIMAND, without terms, effective September 24, 2014.

It is further ORDERED that pursuant to Part Six, §IV, ¶13-9 E. 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 by certified mail to Respondent, Herman Cornelius Smith, III, at his address of record with the Virginia State Bar, being Janaf Office Building Suite 416, 5900 East Virginia Beach Boulevard, Norfolk, VA 23502; and shall hand-deliver a copy to Paul D. Georgiadis, Assistant Bar Counsel, at 1111 East Main Street, Suite 700, Richmond, Virginia 23219-3565.

ENTERED this 21st day of October, 2014.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 
Tyler E. Williams, III, Chair