

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF

NICHOLAS CARON SMITH

VS B DOCKET NO. 14-060-097508

AGREED DISPOSITION MEMORANDUM ORDER

On February 3, 2015, this matter was heard by the Virginia State Bar Disciplinary Board upon the joint request of the parties for the Board to accept the Agreed Disposition signed by the parties and offered to the Board as provided by the Rules of the Supreme Court of Virginia. The panel consisted of William H. Atwill, Jr., 2nd Vice Chair, R. Lucas Hobbs, John A.C. Keith, Esther J. Windmueller, and Sandra W. Montgomery, Lay Person. The Virginia State Bar was represented by Prescott L. Prince, Assistant Bar Counsel. Respondent, Nicholas Caron Smith, was present and was not represented by counsel. The Chair polled the members of the Board as to whether any of them were aware of any personal or financial interest or bias which would preclude any of them from fairly hearing the matter to which each member responded in the negative. Court Reporter Lisa A. Wright, Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

WHEREFORE, upon consideration of the Agreed Disposition, the Certification, Respondent's Disciplinary Record and any responsive pleadings of counsel,

It is **ORDERED** that the Board accepts the Agreed Disposition and the Respondent shall receive a Public Reprimand with Terms, as set forth in the Agreed Disposition, which is attached to this Memorandum Order.

It is further **ORDERED** that the sanction is effective February 3, 2015.

The Clerk of the Disciplinary System shall assess costs pursuant to ¶ 13-9 E. of the Rules.

A copy teste of this Order shall be mailed by Certified Mail, Return Receipt Requested, to Nicholas Caron Smith, at his last address of record with the Virginia State Bar, P.O. Box 59, Mt. Holly, VA, and also by Certified Mail, Return Receipt Requested to 112 Peach Grove Lane, Montross, VA 22520, and hand-delivered to Prescott L. Prince, Assistant Bar Counsel, 1111 East Main Street, Suite 700, Richmond, Virginia 23219.

ENTERED THIS 3rd DAY OF FEBRUARY, 2015

VIRGINIA STATE BAR DISCIPLINARY BOARD

William H. Atwill,
Jr.

Digitally signed by William H. Atwill, Jr.
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William H. Atwill, Jr. 2nd Vice Chair

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VIRGINIA:

BEFORE THE DISCIPLINARY BOARD OF THE VIRGINIA STATE BAR

IN THE MATTER OF
NICHOLAS CARON SMITH

VSB Docket No. 14-060-097508

AGREED DISPOSITION
(Public Reprimand with Terms)

Pursuant to the Rules of the Virginia Supreme Court Rules of Court Part 6, Section IV, Paragraph 13-6.H., the Virginia State Bar, by Prescott L. Prince, Assistant Bar Counsel and Nicholas Caron Smith, Respondent, *pro se*, hereby enter into the following Agreed Disposition arising out of the referenced matter.

I. STIPULATIONS OF FACT

1. At all times relevant to the conduct set forth herein, Nicholas Caron Smith ("Respondent") was an attorney licensed to practice law in the Commonwealth of Virginia.
2. Complainant Desiree Smith (hereinafter "Mrs. Smith") and her husband Paul Smith (hereinafter "Mr. Smith"), neither of whom are related to the Respondent, first met with Respondent in the fall of 2012 for legal assistance on a debt collection matter. Mr. and Mrs. Smith owed a large balance on a boat that the lender (Green Tree) had repossessed pursuant to a voluntary repossession and sold for what Mr. and Mrs. Smith believed was a fraction of the boat's value. Green Tree then sued them for the deficit owed. Paul and Desiree Smith believed that the deficit alleged by Green Tree was excessive and sought out the services of an attorney to determine whether their financial exposure could be reduced or eliminated.

3. Respondent quoted Mr. and Mrs. Smith a fee of \$5,000 for representation against Green Tree. The \$5,000 was to be paid in advance and Respondent would charge \$250 an hour for his attorney fees. Desiree and Paul Smith agreed to the representation and paid Respondent the \$5,000 to retain him to represent them against Green Tree. Respondent did not provide the Smiths with an engagement letter.
4. At the initial meeting between Respondent and the Smiths, Respondent informed them that he believed that they had a substantial chance of reducing their obligation to Green Tree.
5. During the initial meeting, Respondent called the attorney for Green Tree (Mr. Epps) and requested additional time to respond to the complaint filed by Green Tree in the Westmoreland County Circuit Court. Mr. Epps agreed to provide an extension and asked Respondent to send him an Order noting his representation of the Smiths and that Green Tree agreed to allow an extension of time to file the responsive pleading.
6. Within weeks of their initial meeting, Mr. and Mrs. Smith provided substantial documentation to Respondent in hopes that it would assist him in researching the matter. Thereafter, Mr. and Mrs. Smith did not receive any communication from the Respondent for several months.
7. Respondent failed to prepare the requested order and further failed to file any responsive pleading to the lawsuit against the Smiths that had been filed by Green Tree in the Westmoreland County Circuit Court.
8. Having not heard from Respondent, and in the absence of Respondent having made any appearance in said lawsuit on behalf of the Smiths, Mr. Epps set a hearing for

- entry of a default judgment with a return date of 23 January 2013 and provided notice to Mr. and Mrs. Smith.
9. After receiving notice of the upcoming hearing, Mrs. Smith contacted Respondent. Mrs. Smith was extremely concerned because she was about to undergo surgery that would require her to be hospitalized for a period of seven days and would put her out of work for an additional 30 days. Respondent advised Mrs. Smith that he would take care of the matter and that she did not have to come to court.
 10. Respondent contacted Mr. Epps on 22 January 2013, the day before the scheduled hearing, and Mr. Epps agreed for the matter to be taken off of the docket for 23 January 2013.
 11. Respondent took no further substantial action on the case and made no effort to contact Mr. and Mrs. Smith.
 12. Mr. and Mrs. Smith contacted Respondent in May of 2013 when they were again served with a Notice of Hearing for entry of a default judgment with a return date of 13 June 2013.
 13. Mr. and Mrs. Smith met with Respondent on or about 31 May 2013. At that time, Respondent acknowledged that he had not successfully obtained any relief for them. Respondent did not inform them, however, that he had not spoken with Mr. Epps since 22 January 2013. Respondent further did not inform the Smiths that his only other contact with Mr. Epps was to request the extension of time to file responsive pleadings.
 14. During the meeting on 31 May 2013, Respondent offered to refund the \$5,000 to Mr. and Mrs. Smith. Mr. and Mrs. Smith did not refuse the refund, but advised

Respondent that they wanted and needed Respondent to negotiate a settlement with Green Tree. Respondent promised Mr. and Mrs. Smith that he would contact Mr. Epps and that he would contact the Smiths on 3 June 2014 to advise them of the status of the negotiation and further confirm that they did not need to appear in court on 13 June 2013.

15. Respondent did not attempt to contact Mr. Epps as he promised and he did not contact Mr. or Mrs. Smith on 3 June 2013.
16. Respondent did appear in Westmoreland Circuit Court on 13 June 2013, but was not able to stop the entry of a default judgment. Respondent did not contact Mr. and Mrs. Smith to advise them that a judgment in the amount of \$90,780.82 was entered against them.
17. Respondent further failed to respond to any messages from the Smiths after the judgment was entered.
18. Respondent's failure to respond to the attempts by the Smiths' to contact him constituted a *de facto* termination of representation. The Smiths specifically requested that Respondent return all of the original documents provided to him, but he has failed to do so.
19. As the result of the actions described above, a bar complaint was filed by Mrs. Smith and an investigation was opened by the Virginia State Bar.
20. When interviewed by Virginia State Bar Investigator Oren M. Powell, Respondent acknowledged that he failed to follow through on communicating with the attorney for Green Tree and that he failed to file a responsive pleading in behalf of Mr. and Mrs. Smith. He stated that after entry of the default judgment he had offered to either

refund to Mr. and Mrs. Smith the \$5,000 he was paid to represent them or to apply those funds to the judgment owed to Green Tree; he acknowledged, however that, up to that point, he had done neither.

21. In furtherance of the investigation, a subpoena *duces tecum* was issued on 29 October 2013 by the Virginia State Bar ordering Respondent to produce the following documents on or before 19 November 2014:
 - i. Copies of 1) all files, records and reports; and 2) all trust account and operating account records, including cancelled checks, cash receipts journals, cash disbursements journals, subsidiary ledgers, bank statements, deposit tickets and evidence of reconciliations; which are in your possession, custody or control, relating to your representation of Desiree Ann Smith;
22. Respondent failed to comply with the subpoena *duces tecum* in a timely manner.
23. After his initial non-compliance, Deputy Bar Counsel Kathryn Montgomery wrote a letter to Respondent, dated 11 December 2013 advising that failure to produce the subpoenaed documents would result in the filing of a Notice of Noncompliance and request for interim suspension. Respondent did not respond to this letter.
24. On 21 January 2014, a Notice of Noncompliance and Request for Interim Suspension was filed by bar counsel. On the day before the interim suspension was to have gone into effect, Respondent provided approximately 460 pages of documents in response to the subpoena *duces tecum*. No trust account records were produced in response to the subpoena *duces tecum* request.
25. Mr. Smith subsequently did fully reimburse Mr. and Mrs. Smith the \$5,000 paid for representation against Green Tree.

II. NATURE OF MISCONDUCT

Such conduct by the Respondent 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.

(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.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

RULE 1.15 Safekeeping Property

(a) Depositing Funds.

(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

(b) Specific Duties. 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 accountings to the client regarding them;

(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 that such person is entitled to receive; and

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Cash receipts and disbursements journals for each trust account, including entries for receipts, disbursements, and transfers, and also including, at a minimum: an identification of the client matter; the date of the transaction; the name of the payor or payee; and the manner in which trust funds were received, disbursed, or transferred from an account.

(2) A subsidiary ledger containing a separate entry for each client, other person, or entity from whom money has been received in trust.

The ledger should clearly identify:

(i) the client or matter, including the date of the transaction and the payor or payee and the means or methods by which trust funds were received, disbursed or transferred; and

(ii) any unexpended balance.

(3) In the case of funds or property held by a lawyer as a fiduciary, the required books and records shall include an annual summary of all receipts and disbursements and changes in assets comparable in detail to an accounting that would be required of a court supervised fiduciary in the same or similar capacity; including all source documents sufficient to substantiate the annual summary.

(4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

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;

(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 (c).

(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; or

(d) obstruct a lawful investigation by an admissions or disciplinary authority.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

III. PROPOSED DISPOSITION (Public Reprimand with Terms)

Accordingly, Assistant Bar Counsel and the Respondent, Nicholas Caron Smith, tender to the Disciplinary Board for its approval the agreed disposition of a Public Reprimand With Terms as representing an appropriate sanction if this matter was to be heard through an evidentiary hearing by a panel of the Disciplinary Board.

The terms and conditions, compliance with which is a predicate for this agreed disposition, and with which the Respondent must comply are as follows:

1. Within 30 days of the date that this Memorandum Order is forwarded to Respondent, as provided by the Certificate of Service herein, the Respondent shall further:
 - a. Engage an approved practicing attorney or law office management consultant (both known as "Consultant") acceptable to the Virginia State Bar. The Consultant's engagement shall be for the purposes of reviewing Respondent's current law practice policies, methods, systems and record-keeping to ensure compliance with all provisions of Rules 1.3, 1.4, 1.15 and with the other provisions of law office management Rules of the Virginia Rules of Professional Conduct (hereafter "said Rules"), as determined relevant by the law office management consultant and to report to the Bar on a quarterly basis regarding Respondent's compliance with the Consultant's recommendation.
 - b. In the event the Consultant determines that Respondent has complied with the Consultant's recommendations, the Consultant shall so certify in writing to the Respondent and the Virginia State Bar. In the event the Consultant determines that Respondent has not complied with the Consultant's recommendations, the Consultant shall notify the Respondent and the Virginia State Bar, in writing, of the measures that Respondent must take to bring himself into compliance with the Consultant's recommendations.
 - c. Upon receipt of a report of non-compliance with the Consultant's recommendations, the Respondent shall have thirty (30) days following the date the Consultant issues his written statement of the measures Respondent must take to bring his law office practice and procedures into compliance. The Consultant shall be granted access to Respondent's office, books, records, and files following the passage of the thirty (30) day period to determine whether Respondent has brought himself into compliance, as required. The Consultant shall thereafter certify in writing to the Virginia State Bar and to the Respondent either that the Respondent has brought his practice and procedures into compliance within the thirty day (30) period, or that he has failed to do so. Respondent's failure to bring

himself into compliance with the Consultant's recommendations by the conclusion of the aforesaid thirty (30) day period shall be considered a violation of the Terms set forth herein.

- d. The Consultant shall periodically examine the Respondent's law practice consistent with paragraph a. above, for a period of twelve (12) months following the date of the Consultant's initial certification of compliance pursuant to the terms hereof. The Consultant shall report to the Virginia State Bar on a quarterly basis and in said report either recertify Respondent's compliance with Consultant's recommendations said Rules or issue a report to the Virginia State Bar and the Respondent stating that the Respondent is not in compliance, and the basis for such a determination. The Respondent shall be deemed to have violated the Terms hereof in the event the Consultant, upon such re-examination of Respondent's said law practice policies, methods, systems and record-keeping reports any material noncompliance.
2. That Respondent shall obtain six (6) continuing legal education credits by attending courses approved by the Virginia State Bar in the subject matters of law office management. Respondent's Continuing Legal Education attendance obligation set forth in this paragraph shall not be applied toward his Mandatory Continuing Legal Education Requirement in Virginia or in any other jurisdiction in which Respondent is licensed to practice law. Respondent shall certify his compliance with the terms set forth in this paragraph by delivering a fully and properly executed Virginia MCLE Board Certification of Attendance Form to Assistant Bar Counsel, Prescott L. Prince, or his designee, promptly following Respondent's attendance of each such CLE program and no later than twelve (12) months of the date that this Memorandum Order is forwarded to Respondent, as provided by the Certificate of Service herein.
3. The Respondent shall be obligated to pay when due any reasonable fees and costs charged by the Consultant for his or her services, (including provision to the Bar and to Respondent of information concerning this matter).

Upon satisfactory proof that such terms and conditions have been met, this matter shall be closed. If, however, all the terms and conditions are not met by the deadlines imposed above, the Respondent agrees that the Disciplinary Board shall impose a six (6) month suspension pursuant to Rules of Court, Part Six, Section IV, Paragraph 13-18.O.

If the Agreed Disposition is approved, the Clerk of the Disciplinary System shall assess an administrative fee.

THE VIRGINIA STATE BAR

By: 

Prescott L. Prince, Assistant Bar Counsel



Nicholas Caron Smith, Respondent, *pro se*