

VIRGINIA: BEFORE THE STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF
JERROD MYRON SMITH**

VSB DOCKET No. 14-031-098855

MEMORANDUM ORDER

These matters came on to be heard on October 2, 2015, before a panel of the Disciplinary Board of the Virginia State Bar (the Board) upon the District Committee Determination for Certification by the Third District Subcommittee dated May 22, 2015 (VSB Docket No. 14-031-098855) pursuant to Part Six, Section IV, Paragraph 13-18(A) of the Rules of the Supreme Court of Virginia. A duly convened panel of the Board consisting of Whitney G. Saunders, Chair, Robert W. Carter, Lay Member, James L. Banks, William M. Moffet and Lisa A. Wilson (the Panel) heard the matter. Kathryn R. Montgomery, Deputy Bar Counsel appeared as counsel for the Virginia State Bar. The Respondent, Jerrod Myron Smith (Respondent) appeared *pro se*. The court reporter for the proceeding, Tracy Stroh, Chandler & Halasz, P.O. Box 9349, Richmond, VA 23227, telephone 804-730-1222, was sworn by the Chair. The Chair polled the members of the Panel 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 Chair, responded in the negative.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System (Clerk) in the manner prescribed by the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-18 of the Rules of Court. The case was called by the Clerk and the Respondent appeared *pro se*.

I. FINDINGS OF FACT

The Board entertained opening statements from the VSB and Respondent and received evidence. VSB Exhibits 1 – 50 were admitted without objection. Respondent Exhibit 1 and Exhibits 3 – 16 were admitted without objection. Respondent’s Exhibit 2 was objected to in part by the Bar. The Bar objected to the portion of Exhibit 2 which was offered under seal and purported to be medical records relating to the Complainant, Monica Ball. The Bar stipulated to the existence of the medical records but objected to their admission. The Chair sustained the objection with respect to the medical records of Ms. Ball. The remaining portions of Respondent’s Exhibit 2 were admitted without objection. At the close of the evidence, the Board heard arguments from the VSB and Respondent. The Board makes the following findings of fact on the basis of clear and convincing evidence:

1. At all times relevant hereto, Jerrod Myron Smith (hereinafter “Respondent”), has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. On or about May 24, 2011, Complainant, Monica Ball (hereinafter “Complainant”) retained Respondent for various legal representations. On or about February 21, 2014, Complainant terminated the representation and demanded the return of her client files as well as an accounting of Respondent’s earned fees.

StyleCraft Homes Representation

3. In 2009, Complainant purchased a home from StyleCraft Homes. The purchase agreement called for any disputes between Complainant and StyleCraft Homes be resolved through arbitration.
4. In 2010, Complainant retained Graham Henderson, a structural engineer, to evaluate

several concerns she had about perceived defects in the construction of her home. Mr. Henderson performed the evaluation and provided two remediation plans which were approved by Henrico County building officials, the Complainant and StyleCraft Homes. StyleCraft Homes implemented and paid for both remediation plans in 2010. Following the repairs, Mr. Henderson opined that the repairs brought the home up to code and provided Complainant with a “comfortable and well performing house for years to come.”

5. Despite the remediation repairs and Mr. Henderson’s opinion as to the fitness of her home, Complainant decided to retain Respondent to represent her in an action against StyleCraft Homes.

6. On May 24, 2011, Complainant and Respondent entered into a fee agreement which provided for a retainer fee of \$500 and an hourly rate of \$100 per hour. Complainant paid the \$500 retainer fee on May 24, 2011.

7. On or about October 18, 2011, Respondent filed a Demand for Arbitration on behalf of the Complainant with the American Arbitration Association. On September 28, 2012, Respondent filed a ten count Amended Complaint Due to Clarity of Contracts and Fraud Issues and Demand for Relief by Arbitrator. The Amended Complaint alleged five general causes of action: 1) breach of contract, 2) breach of implied warranty, 3) breach of express warranty, 4) fraud (actual and constructive) and 5) violation of the Virginia Consumer Protection Act.

8. Respondent advised Complainant that, pursuant to his reading of Virginia Code §55-70.1, she could prevail against StyleCraft Homes for breach of the implied warranty on her new home. Respondent further advised that under this same statute, Complainant could receive treble damages and that he could receive treble attorney’s fees. The language of Virginia Code §55-70.1

does not provide for either treble damages or treble attorney's fees.

9. On or about October 3-4, 2012 and October 15, 2012, the arbitration hearing was held. By award letter dated March 8, 2013, the Arbitrator issued his rulings. The Arbitrator found no proof of structural defects in Complainant's home. The Arbitrator awarded Complainant \$1,500.00 to repair cracks in the home's drywall. Fees for the arbitration, totaling \$16,139.50, were borne equally by Complainant and StyleCraft Homes. Complainant was awarded \$2,187.50 which represented the portion of the fees she had previously paid in excess of one half of the arbitration fees. The total amount due Complainant as a result of the Arbitration Award was \$3,687.50.

10. The Arbitrator denied Respondent's claim under Virginia Code §55-70.1 because the Purchase Agreement waived all implied warranties.

11. The Arbitrator denied Respondent's claim of fraud due to lack of evidence. Respondent had attempted to prove fraud through the testimony of the Complainant regarding statements made to her by Joshua Creel, an employee of StyleCraft Homes. Although Mr. Creel was present for at least part of the arbitration hearing, Respondent did not call him as a witness.

12. The Arbitrator denied Respondent's claim for damages to repair Complainant's driveway because Respondent failed to offer evidence of the driveway's square footage.

13. The Arbitrator found the testimony of Respondent's expert, Mr. Coates, to be unpersuasive. Mr. Coates testified from Atlanta via Skype. Specifically, the Arbitrator found that Mr. Coates's opinions were based upon construction drawings and not current as-built and as-repaired drawings; Mr. Coates was unaware of the remediation plans that were implemented in 2010; Mr. Coates had never visited Complainant's home; Mr. Coates had never qualified as an expert in Virginia and had designed "maybe one" home in the proceeding five years; and Mr.

Coates had not reviewed the Virginia Building Code applicable to the construction of Complainant's home. [At the hearing before the Board, Respondent testified that while Mr. Coates did not personally perform a site inspection of the Complainant's home, he reviewed footage of video taken by locally based members of his company].

14. On or about March 27, 2013, Respondent received a check from StyleCraft Homes in the amount of \$3,687.50 as payment of the arbitration sum awarded to Complainant. Respondent did not deposit the check into a trust account or remit any of the funds to the Complainant. Respondent testified that he kept the check under lock and key as "evidence" and in order to avoid a future claim of accord and satisfaction by StyleCraft Homes.

15. On or about April 19, 2013, Respondent filed suit in the U.S. District Court for the Eastern District of Virginia against StyleCraft Homes, Graham Henderson, John Doe Henrico County Building Inspectors and others seeking to vacate the arbitration award.

16. On or about June 24, 2013, U. S. District Court Judge Payne dismissed Respondent's lawsuit for lack of jurisdiction. Judge Payne's dismissal order described the complaint filed by Respondent as a "rambling and nubilous [sic] 119 page document."

17. Complainant did not receive a copy of Judge Payne's dismissal order.

18. On or about July 25, 2013, Respondent appealed the dismissal to the U.S. Court of Appeals for the Fourth Circuit.

19. In or about October 2013, Respondent prepared an itemization of fees which he shared with Complainant. Despite the May 24, 2011, fee agreement that provided for attorney fees at an hourly rate of \$100.00, the itemization reflected an hourly rate of \$250.00 and total attorney fees of \$94,750.00. In an email to Complainant dated October 13, 2013, Respondent told

Complainant not to worry about the inflated hourly rate because she would only be responsible for paying \$100 per hour for his time. He explained that the itemization reflected trebled attorney's fees and was prepared for submission under Virginia Code §55-70.1, which he believed provided for trebled attorney's fees.

21. On or about April 3, 2014, the Fourth Circuit dismissed the appeal, affirming Judge Payne's dismissal of Complainant's suit against StyleCraft Homes.

22. Complainant paid approximately \$20,000 in attorney's fees to Respondent and \$13,450.00 in arbitration costs to the American Arbitration Association for the StyleCraft case.

23. Respondent did not remit to Complainant any part of the \$3,687.50 that he received from StyleCraft Homes on her behalf.

24. Respondent failed to render monthly accountings to Complainant as required in the fee agreement entered into on May 24, 2011. Respondent testified that he did not provide Complainant with regular accountings because he believed she was in a "fragile" emotional state and he did not want to upset her further.

25. Complainant ultimately retained new legal counsel who was able to secure a replacement check from StyleCraft Homes in the amount of \$3,687.50. The check originally sent to Respondent in 2013 had gone stale and was no longer negotiable.

Takeda Pharmaceuticals Representation

26. On about May 24, 2011, Complainant retained Respondent to represent her in a claim for personal injuries allegedly caused by a medication she was prescribed. Complainant and Respondent entered into a fee agreement providing for a contingency fee of 40% of the amount recovered.

27. On or about September 25, 2012, Complainant gave Respondent \$2,000.00 for the purpose of retaining a medical expert for her case. Respondent applied the funds to his fees.
28. On or about September 28, 2012, Respondent filed suit on Complainant's behalf in the Henrico County Circuit Court against Takeda Pharmaceuticals claiming the Complainant was injured by medication manufactured by Takeda. The suit was removed to the U.S. District Court for the Eastern District of Virginia in October 2012.
29. On or about February 27, 2013, the U.S. District Court issued an order for Respondent to show cause why he should not be sanctioned for failing to comply with Rule 26 of the Federal Rules of Civil Procedure.
30. On or about March 15, 2013, the U.S. District Court dismissed without prejudice Complainant's lawsuit against Takeda for failure to comply with Rule 26 of the Federal Rules of Civil Procedure.
31. On or about March 15, 2013, Respondent filed a new lawsuit against Takeda on Complainant's behalf in the U.S. District Court for the Eastern District of Virginia.
32. On or about April 18, 2013, a pretrial conference was held. Judge Gibney of the U.S. District Court for the Eastern District of Virginia ordered, *inter alia*, that the parties comply with Rule 26 of the Federal Rules of Civil Procedure by making initial disclosures and that Respondent read the Federal Rules of Civil Procedure and the Local Civil Rules of the U.S. District Court for the Eastern District of Virginia.
33. On or about April 26, 2013, the U.S. District Court dismissed without prejudice Complainant's second lawsuit against Takeda, "because the pleading, despite being thirty-two pages long, is vague and repetitive, and contains numerous incomprehensible paragraphs," and

therefore the pleading failed to offer a “a short and plain statement of the claim showing that the pleader is entitled to relief,” *citing*, Fed. R. Civ. P. 8(a)(2). The Court allowed 10 days for the plaintiff to file a motion for leave to amend.

34. On or about May 19, 2013, Respondent filed an amended lawsuit against Takeda in the U.S. District Court for the Eastern District of Virginia.

35. On or about July 18, 2013, Respondent filed with the Court an affidavit stating that he had experienced difficulty reestablishing his law practice, personal and business challenges, and “overwhelming” challenges retaining an expert for Complainant’s case. Respondent stated that he wished to move forward with the representation, but lacked funding to do so. Respondent further stated that he was attempting to associate counsel on the case. Respondent further stated that he had hoped to receive “statutory attorney fees in an amount over \$99,000,” but that the “decision makers ruled not to provide any attorney fees.”

36. On or about August 8, 2013, Judge Gibney dismissed with prejudice Complainant’s case against Takeda on the basis of various failures to state claims, failure to comply with Rule 26 of the Federal Rules of Civil Procedure, and failure to designate an expert witness to support viable products liability claims against the defendants. Judge Gibney’s order described Respondent as “putting his head in the sand concerning virtually all pretrial requirements.”

37. Respondent did not timely advise Complainant that her lawsuit against Takeda had been dismissed.

38. On or about October 13, 2013, Judge Gibney denied all post-dismissal motions filed by Respondent.

39. On or about October 30, 2013, Respondent appealed to the U.S. Court of Appeals for the

Fourth Circuit. Respondent withdrew from the appeal following termination of the representation by Complainant.

Failure to Timely Return Client Files

40. On or about February 21, 2014, Complainant terminated her attorney-client relationship with Respondent and demanded her client files and accountings of Respondent's time and fees earned. Respondent did not return the files.

41. On or about March 19, 2014, Complainant again communicated to Respondent her demand for client files. Respondent did not return the files.

42. On or about April 2, 2014, Complainant filed a warrant in detinue against Respondent in the Chesterfield County General District Court seeking her client files.

43. On or about August 4, 2014, Respondent delivered six boxes of documents to Complainant purported to be her client files. Complainant found the files to be disorganized and incomplete.

Failure to Timely Comply With Bar's Request for Records

44. As part of the investigation of Complainant's bar complaint, the Bar served on Respondent a *subpoena duces tecum* seeking trust account records related to his representation of Complainant.

45. Respondent failed to provide the trust account records within the timeframe designated in the subpoena. The Bar filed a Notice of Noncompliance and Request for Interim Suspension for Respondent's failure to comply with Bar's subpoena. After receiving the Notice of Noncompliance, Respondent provided copies of the subpoenaed trust account records.

II. MISCONDUCT

The Certification charged violations of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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.

(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

(b) Specific Duties. A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(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

RULE 1.16 Declining or Termination Representation

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (will, 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

the client has paid the fees and costs owed by 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, 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 provided 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 documentation on an item-by-item basis during the course of the representation.

RULE 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

- (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.
- (e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.
- (g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

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 admission or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6;

III. DISPOSITION

Upon review of the foregoing findings of fact, upon review of evidence presented by Bar Counsel on behalf of the VSB, including Exhibits 1 – 50, upon evidence presented by Respondent in the form of his own testimony and Exhibits 1 and 3 – 16, and at the conclusion of the evidence regarding misconduct, the Board recessed to deliberate. After due deliberation, the Board reconvened and stated its findings as follows:

1. Rule 1.1: The Board determined that the Bar did prove by clear and convincing evidence that Respondent was in violation of Rule 1.1 with respect to Respondent's federal court representations in both the StyleCraft and Takeda matters. Specifically, the Board found that the pleadings filed by Respondent in the U.S. District Court for the Eastern District of Virginia and the U.S. Court of Appeals for the Fourth Circuit demonstrate a lack of the requisite knowledge of federal law and federal civil procedure needed to effectively represent Complainant's interests. Likewise, Respondent's multiple failures to comply with Federal Rule 26 governing discovery and disclosures in the Takeda lawsuit demonstrates a lack understanding of the Federal Rules of Civil Procedure and Local Civil Rules of the U.S. District Court for the Eastern District of Virginia. The Board was particularly struck by the fact that both Judge Payne and Judge Gibney

were moved to comment on Respondent's performance in their orders dismissing the lawsuits. In his Memorandum Opinion denying Respondent's post-dismissal motions in Takeda, Judge Gibney wrote "*This is the sixth time the plaintiff has moved to amend her complaint. The same deficiencies that necessitated dismissal in the plaintiff's current complaint were likewise present in the plaintiff's earlier complaints. The plaintiff's complaint failed to correct errors, remedy omissions or provide valid, supporting law, despite possessing detailed notice of those shortcomings [footnote omitted]. This Court's patience with and sympathy for the plaintiff's medical misfortunes are necessarily bounded by its responsibility for judicial efficiency and order, and its consideration of the not inconsiderable burden that plaintiff's counsel's persistent incompetence places on the defendant*". Additionally, Respondent testified that in regards to the Takeda matter he had no prior experience representing a client in a products liability case but thought he could "hold his own" until he found more experienced counsel to associate on the case. Respondent also testified that he was not admitted to practice in the Fourth Circuit at the time the Takeda case was removed from the Henrico County Circuit Court and that he was unfamiliar with the local rules of court.

2. Rule 1.4: The Board determined that the Bar did prove by clear and convincing evidence that Respondent was in violation of Rule 1.4(a) with respect to the Takeda representation. Specifically, Respondent failed to timely notify Complainant that her lawsuit had been dismissed by Judge Gibney.

The Board determined that the Bar did not prove by clear and convincing evidence that Respondent violated Rule 1.4(c) with respect to the Takeda representation.

The Board determined that the Bar did not prove by clear and convincing evidence that

Respondent violated Rule 1.4(a) and (c) with respect to the StyleCraft representation.

3. Rule 1.15: The Board determined that the Bar did not prove by clear and convincing evidence that Respondent violated Rule 1.15(b)(1),(3) or (4) with respect to either the StyleCraft or Takeda representations.

4. Rule 1.16: The Board determined that the Bar did prove by clear and convincing evidence that Respondent violated Rule 1.16(e) with respect to both the StyleCraft and Takeda representations. Specifically, Respondent failed to comply with repeated requests from Respondent to return her case files. In fact, Respondent did not return the files until Complainant filed in a warrant in detinue against him in the Chesterfield County General District Court. The files, once returned, were disorganized, incomplete and contained documents unrelated to the Complainant's cases.

5. Rule 3.1: The Board determined that the Bar did not prove by clear and convincing evidence that Respondent violated Rule 3.1 with respect to either the StyleCraft or Takeda representations.

6. Rule 3.4: The Board determined that the Bar did prove by clear and convincing evidence that Respondent violated Rule 3.4(e) with respect to the Takeda representation. Specifically, Respondent repeatedly failed to comply with Federal Rule 26 despite being admonished by the Court and failed to make timely disclosures to opposing counsel as directed by the Court.

The Board determined that the Bar did not prove by clear and convincing evidence that Respondent violated Rule 3.4(d) and (g) with respect to the Takeda representation.

The Board determined that the Bar did not prove by clear and convincing evidence that Respondent violated Rule 3.4(d), (e) or (g) with respect to the StyleCraft representation.

7. Rule 8.1: The Board determined that the Bar did not prove by clear and convincing evidence that Respondent violated Rule 8.1(c) with respect to either the StyleCraft or Takeda representations. While the Board was troubled by Respondent's delay in complying with the subpoena duces tecum, it was persuaded by his candor in testifying that he had simply become "overwhelmed" by the entire situation and did not intend to willfully disregard the subpoena.

Thereafter, the Board received further evidence of aggravation and mitigation from the Bar and Respondent, including Respondent's prior disciplinary record (admitted as VSB Exhibit 51). The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent. After due deliberation, the Board reconvened to announce the sanction imposed. The Chair announced the sanction as suspension of Respondent's license to practice law in the Commonwealth of Virginia for a period of sixty (60) days, effective October 2, 2015.

It is further **ORDERED** that Respondent must comply with the requirements of Part 6, 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 which he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall give notice within fourteen (14) days of the effective date of this Order and make such arrangements as are required within forty-five (45) days of the effective date of this Order. The Respondent shall also furnish proof to the VSB within sixty (60) days that such notices have been timely given and such arrangements made for the disposition of such matters.

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. All issues

concerning the adequacy of the notice and arrangements required by Part 6, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia shall be determined by the Board.

It is **ORDERED** that in accordance with Part 6, Section IV, Paragraph 13-9(E) of the Rules of the Supreme Court of Virginia, the Clerk shall assess all costs against Respondent.

It is further **ORDERED** that the Clerk shall mail an attested copy of this Order to Respondent, Jerrod Myron Smith by certified mail, return receipt requested, at his address of record with the Virginia State Bar, PO Box 2485, Chesterfield, VA 23832 and by first-class mail to 6802 Paragon Place, Suite 410, Richmond, VA 23230 and hand delivered to Kathryn R. Montgomery, Deputy Bar Counsel, Virginia State Bar, Bank of America Building, 1111 East Main Street, Richmond, VA 23219-3565.

ENTERED THE 27 DAY OF October, 2015

VIRGINIA STATE BAR DISCIPLINARY BOARD


Whitney G. Saunders, Chair