

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF LINDSEY OWEN SUTHERLAND

VSB DOCKET NO. 08-051-074583

ORDER OF SUSPENSION

THIS MATTER came on to be heard on February 20, 2009, before a panel of the Disciplinary Board consisting of Robert E. Eicher, Chair, Timothy A. Coyle, Peter A. Dingman, Michael S. Mulkey, and Jody D. Katz, Lay Member. The Virginia State Bar was represented by Kathleen M. Uston, Assistant Bar Counsel. The respondent, Lindsey Owen Sutherland, appeared in person and represented himself. The Chair polled the members of the Board 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 this matter and serving on the panel, to which inquiry each member, including the Chair, responded in the negative. Valarie L. Schmit May, registered professional reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

The matter came before the Board on the District Committee Determination for Certification by the Fifth District Section 1 Subcommittee.

I. FINDINGS OF FACT

Assistant Bar Counsel and the respondent made opening statements. Assistant Bar Counsel then offered VSB Exhibits 1 through 7, which were admitted into evidence without objection. Assistant Bar Counsel called David T. Yoho, President of David Yoho Associates, ("Mr. Yoho") to testify. He was cross-examined by the respondent and answered questions from the panel. The respondent testified in his own behalf, was cross-examined by Assistant Bar Counsel, and answered questions from the panel. Assistant Bar Counsel and the respondent

presented closing argument. Upon consideration whereof, the Board makes the following findings of fact on the basis of clear and convincing evidence:

1. At all times relevant hereto, Lindsey Owen Sutherland, hereinafter the “Respondent,” has been an attorney licensed to practice law in the Commonwealth of Virginia, and his address of record with the Virginia State Bar has been Suite 300, 4085 Chain Bridge Road, Fairfax, Virginia 22030-4106. The Respondent received proper notice of this hearing as required by Part Six, § IV, ¶ 13 (E) and (I)(a) of the Rules of Virginia Supreme Court.

2. On or about October 18, 2007, David T. Yoho (the “Complainant”), retained the Respondent to assist his company with a collection matter. The Respondent agreed to undertake the matter and file suit in the appropriate jurisdiction.

3. Mr. Yoho spoke to the Respondent by telephone on November 20, 2007, inquired about the status of the matter and asked Respondent to send him a copy of the demand letter. Mr. Yoho also spoke to the Respondent on December 13 and 18, 2007, asking for status updates.

4. On December 21, 2007, Mr. Yoho wrote to the Respondent asking again about the status of the case. (See VSB Exhibit 4.) In that letter, Mr. Yoho specifically requested “a copy of the letter and/or the warrant and some status report.” He also advised the Respondent: “[I]f your schedule or case files are too heavy at this moment, please advise me so that I may place this elsewhere.” Mr. Yoho testified that Respondent did not send him a copy of the demand letter or the Warrant in Debt.

5. On January 11, 2008, Mr. Yoho contacted the Respondent by email. In response, the Respondent advised that the “[T]he return date for the Warrant is March 5, 2008.” Mr. Yoho followed up with the Respondent on March 5 to inquire as to the outcome of the hearing. The Respondent did not respond to Complainant’s inquiry.

6. On March 7 and 11, 2008, Mr. Yoho again contacted the Respondent by email asking for a status report on the case. The Respondent responded by email on March 14, 2008, asking Mr. Yoho to contact him on Monday, March 17, 2008 “around noon” due to Respondent’s trial schedule.

7. On March 17, 2008, Mr. Yoho called the Respondent at noon as requested but Respondent was not available. Later that day, Respondent emailed Mr. Yoho asking him to telephone him the following morning. Mr. Yoho called twice on Tuesday, March 18, 2008 but Respondent was unavailable.

8. Mr. Yoho again tried to contact the Respondent on March 19, 2008, without success, but he did speak to Respondent's law partner. When he inquired about the status of his lawsuit, Respondent's partner informed Mr. Yoho that he could not locate the case in the firm's computer system.

9. A Complaint was filed by Mr. Yoho with the Virginia State Bar on March 28, 2008. On or about April 21, 2008, a copy of the Complaint was sent to the Respondent's last address of record with the VSB with a demand that he submit a written response within twenty-one (21) days. The Respondent failed to respond to the Complaint.

10. On or about June 27, 2008, Bar Counsel issued a *subpoena duces tecum* seeking production of the Respondent's file on Mr. Yoho's case. On August 4, 2008, the Respondent produced "the only records" he had pertaining to Mr. Yoho's case. These records did not include any evidence that a demand letter had been sent or that suit had ever been filed on behalf of Mr. Yoho's company

11. The Respondent testified that shortly after being hired by Mr. Yoho, a demand letter was sent on Mr. Yoho's behalf to the debtor. He further testified that in early December 2007, he instructed his secretary to start preparing a Warrant in Debt, that he recalled signing the suit papers on or about December 13, 2007, and that suit was in all likelihood filed on or about December 18, 2007.

12. The Respondent testified that in early January, 2008, the Clerk's Office called and advised him that the mid-February 2008 return date set forth on the Warrant in Debt could not be accommodated. Respondent stated that he refiled the same Warrant in Debt after substituting a

new return date of March 5, 2008. Respondent further testified that he appeared in Court on March 5, 2008 but the case was not on the docket and that he was advised that because of delays in obtaining service through the State Corporation Commission on out-of-state defendants, the case had not been docketed.

13. Respondent testified that his office began preparing a new Warrant in Debt in mid-March but that in the meantime Mr. Yoho terminated his services so the new paperwork was never completed. The Respondent further testified that his entire file (including the demand letter and Warrant in Debt) was returned to Mr. Yoho in a manila folder. Mr. Yoho had previously testified that he never received such a folder or any correspondence from the Respondent.

II. MISCONDUCT

The Board finds that the following violations of the Virginia Rules of Professional Conduct have been proved by clear and convincing evidence, to wit:

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 1.3 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 1.16 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).

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.

The Board finds that the alleged violation of Rule 1.4(b) has not been proved by clear and convincing evidence, and the alleged violation thereof is dismissed.

The Board notes the conflict in the testimony of the Respondent and the Complainant. The Complainant testified that he asked the Respondent for, but never received, (i) a copy of the demand letter the Respondent was to prepare and (ii) a copy of the civil warrant the Respondent was to file. The Respondent testified that a copy of the demand letter and the civil warrant were in a folder he mailed to the Complainant after his representation had been terminated. The Complainant testified that he never received a folder from the Respondent. At issue were whether the Respondent ever prepared and sent a demand letter to the Complainant's debtor and whether the Respondent ever prepared and filed a civil warrant against the Complainant's debtor.

The Respondent did not produce a copy of the demand letter or the civil warrant. His testimony was that his office computer had a DOS program that does not store a copy of any documents generated. His secretary, the Respondent testified, prepared only an original of the demand letter and the civil warrant. He did not call her as a witness.

The Complainant testified about a conversation with the Respondent's law partner. The law partner said, according to the Complainant, that he could not find any suit/warrant in the office computer system against the debtor of Mr. Yoho's company. The Respondent did not call his law partner as a witness.

According to the Respondent, the civil warrant was bundled with others for filing. They would have been accompanied by a check for their filing and service fees. The Respondent did not produce any canceled check, or even his check register, as circumstantial evidence of his preparing and tendering a civil warrant to the Clerk of the Court for the Complainant. The Respondent testified, on the one hand, that there was not a copy of the demand letter he sent. On the other hand, he testified to the manila file that he mailed to the Complainant containing the letter of demand.

The Board considered the appearance and demeanor of the Respondent and the Complainant in their testimony, as well as their interest in the outcome of this proceeding and their bias. The Board also considered the Respondent's failure to present the testimony of his secretary or his law partner, in person or by affidavit. The Board used common sense in judging the conflicting testimony and finds that the Respondent's testimony is not credible.

III. DISPOSITION

The Board received evidence of aggravation and mitigation and argument from the Bar and Respondent, including Respondent's prior disciplinary record. The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent.

After due deliberation, the Board reconvened and the Chair announced the sanction as suspension of Respondent's license to practice law in the Commonwealth of Virginia for a period of forty-five (45) days. In response to a question from the Chair as to whether Respondent had a preference as to when the suspension would begin, Respondent asked that the suspension commence on February 24, 2009.

Accordingly, it is hereby ORDERED that the license of the Respondent, Lindsey Owen Sutherland, to practice law in the Commonwealth of Virginia be, and the same hereby is, suspended for a period of forty-five (45) days effective February 24, 2009.

It is further ORDERED that, as directed in the Board's February 20, 2009 Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13(M) 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.

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 (M) 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 pursuant to Part Six, § IV, ¶ 13.B.8.c. 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 to Respondent at his address of record with the Virginia State Bar, being Suite 300, 4085 Chain Bridge Road, Fairfax, Virginia 22030-4106, by certified mail, return receipt requested, and by regular mail to Kathleen M. Uston, Assistant Bar Counsel, Virginia State Bar, Suite 310, 100 North Pitt Street, Alexandria, Virginia, 22314-3133.

ENTERED this 4th day of March, 2009

VIRGINIA STATE BAR DISCIPLINARY BOARD



Robert E. Eicher, Chair