

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
JAMES KEVIN CLARKE

VS B Docket No.: 08-000-073830

ORDER AND OPINION

This matter came before the Virginia State Bar Disciplinary Board (“Board”) for hearing on April 25, 2008, upon a Notice to Show Cause Hearing on Terms Failure entered on February 28, 2008 (“Show Cause”). A duly convened panel of the Board consisting of Robert E. Eicher, 1st Vice Chair, presiding, Paul M. Black, Martha JP McQuade, Sandra L. Havrilak, and Dr. Theodore Smith, lay member, heard the matter. Paulo E. Franco, Jr., Assistant Bar Counsel, appeared on behalf of the Virginia State Bar (“VSB”). The Respondent, James Kevin Clarke (“Respondent”) appeared on his own behalf, without counsel. The court reporter for the proceeding, Tracy J. Johnson, Chandler and Halasz, P. O. Box 9349, Richmond, Virginia 23227, telephone 804-730-1222, was duly sworn by the Chair.

All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System (“Clerk”), in the manner prescribed by law. Part Six, Section IV, ¶13(I)(2)(g) of the Rules of the Supreme Court, *Enforcement of Terms*, provides, in relevant part, that whenever it appears that the Respondent has not complied with the Terms imposed in a prior disposition, Bar Counsel shall serve notice requiring the Respondent to appear and show cause why the alternate disposition should not be

imposed. Such a show cause proceeding shall be set for hearing before the Board at its next available hearing date. The burden of proof shall be on the Respondent to show compliance by clear and convincing evidence. If the Respondent has failed to comply with the Terms of the prior disposition, the alternate disposition shall be imposed.

The Chair opened the hearing by polling the Board members to ascertain whether any member had any personal or financial interest or bias which would interfere with or influence each such member's determination, and each member responded that there were no such conflicts.

Procedural Background

By Order of this Board entered on May 24, 2004 in VSB Docket No. 03-031-1625 (the "Prior Order"), the Respondent was found by clear and convincing evidence to have engaged in misconduct, specifically violating Rules of Professional Conduct 1.3 (Diligence), 1.4 (Communication), 1.15 (Safe-Keeping Property), and 1.16 (Declining or Terminating Representation) . The Prior Order determined that a Public Reprimand with Terms was the appropriate disposition of the matter addressed by the Prior Order. Among the Terms imposed with the Public Reprimand in the Prior Order was the following:

[Respondent] shall be on disciplinary probation with respect to his conduct as an attorney after December 1, 2002, and before December 31, 2006, and warrants that he has no reason to believe that he will be found to have engaged in any additional misconduct arising during that period.

The Prior Order further provided that "[Respondent's] failure to comply with any one or more of the agreed terms or conditions, including a finding that he engaged in attorney

misconduct between December 1, 2002 and December 31, 2006, will result in the imposition of the alternate sanction of an eighteen month suspension.

Findings of Fact

Following opening statements by Bar Counsel and Respondent, Bar Counsel offered VSB Exhibit 1, which was admitted without objection. The evidence adduced at the hearing, including the testimony of the Bar's Investigator, established the following:

1. On April 17, 2007, the Third District Committee, Section I, of the Virginia State Bar, found that the Respondent engaged in misconduct in violation of Rules of Professional Conduct 1.3 (Diligence) and 1.4 (Communication).
2. The Third District Committee, Section I, determined that the appropriate disposition was a Dismissal *De Minimis*, pursuant to Part 6, Section IV, ¶ 13(G)(1)(a)(3) of the Rules of the Supreme Court.
3. Pursuant to Part 6, Section IV, ¶ 13(A) of the Rules of the Supreme Court, a "Dismissal *De Minimis*" means a 'finding that the Respondent has engaged in Misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and Respondent has taken reasonable precautions against recurrence of same.'
4. The Bar offered, without objection, that there were three (3) additional misconduct charges pending against the Respondent as of the hearing on the Show Cause. However, the Board declined to consider these matters as not germane to the Show Cause before the Board.

At the conclusion of the evidence regarding the Show Cause, the Board recessed to deliberate. After deliberation, the Board reconvened and stated that it found that (i)

the Respondent did not prove by clear and convincing evidence compliance with the Prior Order, in that the Respondent had engaged in misconduct both within the scope of the Prior Order and the Rules of the Supreme Court, and (ii) that the alternate disposition in the Prior Order, suspension for eighteen (18) months, shall be imposed effective April 25, 2008.

Accordingly, it is

ORDERED that the Respondent's license to practice law in the Commonwealth of Virginia is SUSPENDED for eighteen (18) months, effective April 25, 2008. It is further

ORDERED that the Respondent must comply with the requirements of Part 6, Section 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 clients. The Respondent shall give such notice within fourteen (14) days of the effective date of the Suspension, and make such arrangements as are required within forty-five (45) days of the effective date of the suspension. The Respondent shall also furnish proof to the VSB within sixty (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. It is further

ORDERED that all issues concerning the adequacy of the notice and arrangements required by ¶13(M) shall be determined by the Board, unless Respondent makes a timely request for a hearing before a three judge court. It is further

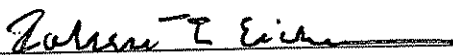
ORDERED that because the Respondent's license has been suspended for more than one year, the Respondent's license shall not be reinstated unless and until the Respondent fully complies with the provisions of Part Six, §IV, ¶13(I)(8)(c) of the Rules of the Supreme Court. It is further

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. Finally, it is further

ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Order and Opinion to the Respondent James Kevin Clarke at his address of record with the Virginia State Bar, being 1500 Bellevue Avenue, Richmond, VA 23227 by certified mail, return receipt and by regular mail to Paulo E. Franco, Jr., Assistant Bar Counsel, 707 E. Main Street, Suite 1500, Richmond, VA 23219.

ENTERED THIS 1st DAY OF MAY, 2008.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By 
Robert E. Eicher
First Vice Chair