VIRGINIA:

BEFORE THE DISCIPLINARY BOARD OF THE VIRGINIA STATE BAR

IN THE MATTER OF
DIANE BAILY FENTON

VSB DOCKET NOS. 09-022-078407

ORDER OF SUSPENSION

THIS MATTER came on to be heard on the 23rd day of April 2010, before a panel of the Disciplinary Board consisting of William H. Monroe, Jr., Chair, John S. Barr, Randall G. Johnson, Jr., Russell W. Updike, and Jody D. Katz, Lay Member. The Virginia State Bar was represented by Paul D. Georgiadis. The respondent, Diane Bailey Fenton, appeared pro se. The Chair polled the members of the Board Panel 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 responded in the negative. Valarie L. May, court reporter, Chandler & Halasz, PO Box 9349, Richmond, VA 23227, 804-730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

The matter came before the Board on a Second District Subcommittee Determination for Certification.

I. STIPULATION OF FACTS

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

2. On or about April 7, 2007, Ron Newell retained Respondent with a payment of $3,000 to represent him in his on-going child support matters, Margaret M. Hoskins v. Ronald Ernest Newell, pending in Virginia Beach Juvenile and Domestic Relations Court. At that time there was a hearing pending for May 1, 2007. Newell had previously appeared *pro se* on October 25, 2006 and at that time had won a temporary decrease from a prior Texas support order of $1150.00 per mos. to $845.00 per mos. based upon his change of circumstances of unemployment. Newell explained to Respondent that the Court had considered his termination package and unemployment income in arriving at the reduced child support figure.

3. The May 1 hearing was continued by the opposing party Hoskins in order for her to obtain counsel.

4. On July 2, 2007, opposing party's new counsel, Mary Elizabeth Davis, propounded interrogatories and requests for production of documents to Respondent. Davis thereafter moved for a continuance of the July 17 hearing due to her unavailability. The court continued the matter to October 25, 2007, without having obtained Respondent's available dates.

5. On August 26, 2007, Newell e-mailed Respondent with the query, "Has Ms. Hoskin's attorney requested any information ?" Respondent did not respond, although Respondent does not have a record of receiving that e-mail.

6. On October 10, 2007, Davis moved to continue the 10/25/07 hearing and moved *in limine* to preclude certain issues from being introduced because of Respondent's failure to respond or answer the outstanding discovery. Respondent contends that this was her first notice that the matter had been set for October 25, 2007. On October 25, 2007, the Court continued the hearing to November 26, finding that Respondent had not responded to the discovery. The Court ordered Respondent to provide the requested discovery by November 8 and reserved the issue of attorney's fees.

7. Notwithstanding the Court's order to provide the discovery by November 8, Respondent failed to do so until November 21, when she sent Davis a letter-fax summarizing Newell's employment and income status. The response failed to include signed answers to the outstanding interrogatories and failed to produce any documents in response to the outstanding request for production.

8. On November 21, Davis again filed a motion *in limine* and a motion for sanctions for failure to answer discovery.

9. On November 26, the Court held a hearing which Newell did not attend on Respondent's advice. The Court entered an order finding that the discovery was still not answered, ordered that it be answered within 10 days, ordered that Mr. Newell pay attorneys fees of $600.00, and continued the matter to January 31, 2008.

10. On December 15, 2007 and January 12, 2008 Newell e-mailed Respondent to inquire about a new hearing date and whether he needed to provide any further information from him. Receiving no response from Respondent, Newell went on vaction to California and was shocked to receive a telephone call on January 30, 2008 that there would be a hearing the next day. He was not able to return to Virginia to attend the January 31 hearing. Respondent believes she advised Newell of the January 31 hearing date, but has no records to corroborate this. Respondent further denies having received Newell's e-mails. By letter dated December 7, 2007, Respondent received from Newell documents responsive to the outstanding discovery requests.

11. On January 28, 2008, Davis moved to dismiss the case, to reinstate the Texas support order, and moved *in limine* for Respondent's continued failure to provide discovery.

12. On January 31, 2008, the Court found that Respondent only that morning provided unsigned discovery responses. The Court dismissed Newell's case, awarded additional attorney's fees of $1,000, reinstated the Texas support order of $1150, and found an arearage of $4,270.

13. Respondent appealed the order to the Circuit Court and timely posted an appeal bond.

14. On June 2, 2008, the Circuit Court heard two motions, both of which ended in Newell's favor as set forth in the Court's letter opinion dated July 23, 2008 which directed Respondent to draft orders in the two motions. It over-ruled Davis's motion to dismiss the appeal for lack of jurisdiction arising out of deficiencies in the appeal bond. The court found the bond sufficient. Although the court ordered Respondent as the prevailing party to draft the sketch order, Respondent failed to submit the sketch order until December 9, 2008. On a second motion, Respondent prevailed in reinstating the lower court's temporary support award of $845.00. Although this meant an immediate reduction in Newell's support from the Texas-ordered support of $1150, Respondent failed to submit the sketch order until December 9. The Circuit Court entered both orders on December 11, 2008. Upon entry, the support order reduced the support obligation effective June 1, 2008.

15. On June 9, 2008, Davis again propounded interogatories and requests for production. These went unanswered through December 9, 2008.

16. On August 28, Davis wrote to Respondent requesting a status as to her outstanding discovery. Respondent failed to respond to the request.

17. On September 26, Newell e-mailed Respondent asking whether Davis had requested anything of him. Respondent failed to respond to this. Respondent avers that she believes she spoke with Newell by telephone regarding this, but has no record of doing so.

18. On September 26, Davis moved to compel and moved for attorney's fees for Respondent's failure to respond to the outstanding discovery. At the October 24 hearing which Respondent attended, the Court entered an order requiring Respondent to answer the discovery by November 5. Respondent endorsed the order.

19. Notwithstanding the Court's order, Respondent failed to answer the discovery.

20. On November 17, Davis moved for sanctions and moved *in limine* to preclude evidence on issues contained in the outstanding discovery.

21. At the December 11 hearing, the Court found in Newell's favor, reducing his support obligation to $655/mos. However, because of Respondent's failure to comply with discovery, the Court's final order as entered on May 22, 2009, made the reduction prospective, not retroactive due to Respondent's delay in prosecuting this matter. The Court further awarded $4,000 attorney's fees to the opposing party—the losing party, with the appeal bond to be turned over to defense for this, with $270 balance to be paid over to Newell. The Court specifically found a failure "to prosecute his case in a timely and responsbile manner and has failed to cooperate with Defendant's reasonable requests

for discovery." Respondent avers that the failure to make the child support reduction retroactive and the findings in support thereof, were not findings and holdings made by the Court, but were language to which Newell later agreed through his new attorney in April, 2009 after he terminated Respondent. Respondent further avers that she notified her successor counsel that the language was not correct.

22. Notwithstanding the favorable ruling, Respondent failed to draft the sketch order until March 4, 2009, despite a reminder from Davis on January 13, 2009 and e-mails of February 7 and February 12 from Newell. Opposing counsel and Respondent's successor counsel used a different order prepared by oppposing counsel. That order ultimately was entered on May 22, 2009 only after Newell retained new counsel Garrett.

23. On March 27, 2009, Garrett forwarded to Respondent a sketch order of substitution of counsel requesting that she endorse it and return it to him. Notwithstanding this and further requests, Respondent failed to endorse and return the substitution order until May 12, 2009, causing yet further delay in the entry of the final order.

II. MISCONDUCT

The parties agreed that such conduct by Diane Baily Fenton constituted 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.

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:

...

(3) the lawyer is discharged.

III. DISPOSITION

Upon review of the foregoing Stipulation of Facts, Counsels' suggested disposition of this matter and argument of Counsel, the Board recessed to deliberate. After due deliberation the

Board reconvened and advised Counsel for the Bar and Respondent that terms of the suggested Disposition was acceptable.

Accordingly, it is ORDERED that the respondent's license to practice law in the Commonwealth of Virginia is suspended for 60 days, effective April 30, 2010, upon the following terms:

1. On or before July 1, 2010, Respondent shall acquire, install, and begin using for all new legal representation accepted on or after July 1, 2010 a software- based Case Management System.
2. On or before July 1, 2010, Respondent shall certify by letter to Assistant Bar Counsel Georgiadis that she has acquired, installed, and begun using said Case Management System for all new legal matters accepted on or after July 1, 2010 and to set forth details describing and identifying the particular software, date of acquisition, date of installation, and matter(s) on which she has begun using the system.

If the terms and conditions are not met by July 1, 2010, the Respondent agrees that the Disciplinary Board shall impose a further and additional 60 day suspension pursuant to Rules of Court, Part Six, Section IV, Paragraph 13-18 O.

It is further ORDERED that, as directed in the Board's April 23, 2010, Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall provide the Clerk of the Disciplinary System a written statement that, within 14 days of the Summary Order, that she gave notice by certified mail, return receipt requested, of the Suspension of her license to practice law in the Commonwealth of Virginia, to all clients for whom she 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 her care in

conformity with the wishes of her client. Respondent shall make such arrangements as are required 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 Suspension, she 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 13-29 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, 13-9 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 to respondent at her address of record with the Virginia State Bar, by certified mail, return receipt requested, 5122 Greenwich Road, Virginia Beach, Virginia 23462-6023, and hand delivered to Paul D. Georgiadis, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 12th day of MAY, 2010

VIRGINIA STATE BAR DISCIPLINARY BOARD

William H. Monroe, Jr., Chair