

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
MARCUS NOAH PERDUE, III

VSB DOCKET NOS: 09-080-074933
09-080-078894
09-080-076688
09-080-076228

MEMORANDUM ORDER
(SUSPENSION)

THIS MATTER came to be heard before panels of the Virginia State Bar Disciplinary Board on October 22, 2009, and October 23, 2009. The Panel convened at the Lewis F. Powell, Jr., U.S. Courthouse, Tenth and Main Street, Richmond, Virginia 23219. The Panel was comprised of Thomas R. Scott, Jr., Chair, Stephen A. Wannall, Lay Member, Nancy C. Dickenson, Randall G. Johnson, Jr., and Michael S. Mulkey. Jennifer L. Hairfield, court reporter, with Chandler & Halasz, PO Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings. Kathryn R. Montgomery appeared as counsel for the Virginia State Bar; Marcus Noah Perdue, III, appeared pro se.

The Chair inquired of the respective Panel members whether any member had any personal or financial interest or bias which would preclude any of them from fairly hearing the matters and serving on the Panel, to which inquiry each member, including the Chair, answered in the negative. The matters came before the Board on the District Committee Determination for Certification by the Subcommittee of the Eighth District Committee of the Virginia State Bar.

A motion to admit agreed upon Exhibits from the Bar was granted. Respondent did not file an Exhibit's List. A motion to admit the Bar's Witness List was admitted. Respondent did

not file a Witness List. However, a motion to allow testimony from a witness for Respondent was taken under advisement by the Board and was subsequently granted.

Bar Counsel called the following witnesses:

Witnesses Relevant to All Cases

1. Marcus Noah Perdue, III, Respondent
2. Albert E. Rhodenizer, Bar Investigator

VS B Docket Number 09-080-078894 (Cooper)

1. Vincent Cooper, Complainant
2. Tina Cooper
3. William A. Parks, Jr., Esquire

VS B Docket Number 09-080-074933 (Siers)

1. Cynthia Siers, Complainant
2. Pamela Wolfe
3. Dean Rogers

VS B Docket Number 09-080-076688 (Frazier)

1. Travis Frazier
2. Edward K. Stein, Esquire
3. Rhonda Hayes

VSB Docket Number 09-080-076228 (Smith)

1. Robert Smith

At the conclusion of the Bar's case, Respondent made a Motion to Strike all charges in all five cases, challenging the sufficiency of the evidence. On each occasion the Board recessed the proceedings to deliberate. After each deliberation the Board ruled that a prima facie case had been made out by the Bar and Respondent's Motion to Strike was denied.

Following evidence from the witnesses, questions from the Board and argument of counsel, the Board made the following Findings of Fact:

I. FINDINGS OF FACT

1. At all relevant times Respondent has been an attorney duly licensed to practice law in the Commonwealth of Virginia and his address of record with the Bar is 233 West Locust Street, Covington, Virginia 24426. Respondent has been licensed to practice law since April 16, 1998.

2. Respondent was properly served with notice of these proceedings in accordance with Part 6, § ¶13 E. and I.1.a. of the Rules of Professional Conduct.

A. The Cooper Matter (VSB Docket No. 09-080-078894)

1. In April 2002, the complainant, Vincent Cooper ("Complainant") retained Harold K. St. Clair of the law firm of St. Clair & Wilson to represent him in a personal injury action arising from an automobile accident. Complainant agreed to pay a one-third contingency fee.

2. At the time, Respondent practiced with St. Clair & Wilson. He performed some work on Complainant's case, including but not necessarily limited to obtaining Complainant's medical records and bills.

3. Complainant's case settled in or about November, 2002, for \$9,500.

4. Complainant signed a settlement statement dated November 14, 2002. The statement itemized deductions from the settlement, including costs and attorney's fees. It also contained the following statements:

I agree that the sum of \$4,300 should be kept by my attorney until such time that my bankruptcy is filed and this money is claimed under a homestead exemption. At that time, these funds shall be returned to me, as the medical lien for my hospital bills would be released by the bankruptcy. I have been paid the sum of \$325 from my attorney on November 14, 2002.

5. Complainant received \$325 of the settlement funds. Complainant has not received any additional funds from his settlement.

6. Respondent advised the bar that he received no money from Mr. St. Clair's escrow account when he died.

7. According to Complainant, in 2008 he asked Respondent about the settlement funds. Respondent told him that he was holding \$4,300 and that Complainant could have the money in June, 2009, unless he wanted to file bankruptcy and have the medical liens released sooner.

8. According to Respondent, Complainant's wife visited his office in late 2008 and asked about the settlement money. She said they were behind on the rent. Respondent told her that he could not release the funds until June, 2009 when the liens expired. He also told Complainant's wife that they could file bankruptcy to discharge the medical liens.

9. On March 10, 2009, Respondent wrote Complainant a letter stating:

As I informed you in the past, I have the sum of \$4,300.00 which I can release to you in July. The reason for the delay has been explained numerous times. However, as an alternative to get the funds to you earlier, if you agree, I could give you my 1996 Suburban which is worth in excess of \$4,300.00 and in that way I have not touched the money. You are free to sell the vehicle to recoup your money or you can use it as you please. However, to do this I would need an agreement with you in writing allowing me to have the \$4,300.00 in July.

Please be advised that I do not want you to feel any pressure to do this. This is just an alternative to give you your funds at an earlier date.

10. Respondent admitted to the bar that he does not have the \$4,300.00, never had the \$4,300.00 and does not know where it is.

B. The Siers Matter (VSB Docket No. 08-08074933)

1. Dean Rogers retained Respondent to represent him on assault and battery charges in the General District Court of Alleghany County. Mr. Rogers was convicted.

2. Respondent then represented Mr. Rogers on an appeal of the conviction to the Circuit Court of Alleghany County. Complainant, Cynthia Siers, was to be a witness for Mr. Rogers in the new trial.

3. Trial was originally set for March 24, 2008, but was continued by the Court due to a heavy trial schedule.

4. On April 13, 2008, (term day), the Court set a new trial date of April 24, 2008.

5. Respondent did not advise Mr. Rogers or Ms. Siers of the new trial date. Respondent also did not issue a subpoena for Mr. Rogers' or Ms. Siers' appearance. Respondent, however, maintains that he did advise Mr. Rogers and Ms. Siers of the new trial date.

6. Ms. Siers and Mr. Rogers did not appear at Court on the morning of trial.

7. At approximately 9:30 A.M. on April 24, 2008, Respondent's secretary called Ms. Siers at the school where she worked as a teacher. His secretary advised Ms. Siers to contact Mr. Rogers and report to the courthouse immediately for trial.

8. Ms. Siers arranged for a substitute teacher, and with the assistance of Mr. Rogers' sister, located Mr. Rogers working at his jobsite in the woods cutting timber. His jobsite was approximately 30 minutes from the courthouse.

9. Respondent did not inform Judge Trumbo or the Deputy Commonwealth's Attorney prosecuting the case that he had failed to notify Mr. Rogers of the court date. But again, Respondent maintains that he advised Mr. Rogers of the new trial date.

10. Prior to the arrival of Mr. Rogers and Ms. Siers at the courthouse, the Deputy Commonwealth's Attorney told Respondent that she would not pursue a failure to appear charge if Mr. Rogers accepted a plea agreement he had previously rejected.

11. Ms. Siers and Mr. Rogers arrived at the courthouse at approximately 11:57 A.M. By that time, Judge Trumbo had dismissed the jury and had issued a capias for Mr. Rogers.

12. At the courthouse, Respondent met with Mr. Rogers and Ms. Siers. He advised Mr. Rogers that he could be prosecuted for failing to appear if he did not take the plea agreement the prosecutor was offering. Respondent recommended that Mr. Rogers accept the plea agreement.

13. Mr. Rogers wanted a jury trial, but because Respondent told him that he could be prosecuted for failure to appear, he accepted the plea agreement.

14. Mr. Rogers pled no contest and Judge Trumbo approved the plea agreement. The capias was dismissed. Mr. Rogers received a 60 day sentence with 30 days suspended and paid costs to the Court.

C. The Smith Matter (VSB Docket No. 09-080-76228)

1. Robert Smith hired Respondent in June, 2006, to handle his divorce. According to Mr. Smith, Respondent told him the entire fee would be \$1,400. According to Respondent, he told Mr. Smith his fee would be \$1,400, and an additional \$1,500 if an equitable distribution was required.

2. Mr. Smith paid the \$1,400 to Respondent in increments over the next few months. Mr. Smith, however, never paid the \$1500 equitable distribution fee.

3. In February, 2008, the division of property was determined at an equitable distribution hearing.

4. Following the equitable distribution hearing, Mr. Smith asked Respondent to finalize his divorce. Respondent's file contains a telephone message from Mr. Smith dated June 9, 2008,

indicating that he had been diagnosed with prostate cancer and wanted Respondent to finalize the divorce as soon as possible.

5. On August 8, 2008, Mr. Smith filed a bar complaint against Respondent.

6. In response to the bar complaint, Respondent wrote a letter dated August 25, 2008, to Mr. Smith and to Mary W. Martelino, Assistant Intake Counsel with the Virginia State Bar. In it, Respondent said that Mr. Smith owed him \$1,500 in addition to all fees for the equitable distribution hearing. He also said that "I do not finalize divorces until the fee is paid in full. However, as stated above, I will make an exception in this case."

7. On September 2, 2008, the attorney for Mr. Smith's wife sent Respondent a draft of the Final Decree of Divorce. Respondent signed the degree and it was entered on September 19, 2008.

D. The Frazier Matter (VSB Docket No. 09-080-076688)

1. Respondent was court-appointed to represent complainant, Travis Frazier, on burglary and larceny charges in Alleghany Circuit Court.

2. The alleged burglary and larceny occurred on or about April 26, 2007. Mr. Frazier was arrested later that month. He was evaluated for competency to stand trial on or about July 4, 2007. He was found to be competent.

2. Mr. Frazier remained in jail from the time of his arrest in April, 2007, until the sentencing hearing on March 5, 2008.

3. Under the sentencing guidelines, Mr. Frazier would have received little, if any, jail time for the charges he faced.

4. According to Mr. Frazier, Respondent visited him twice while he was in jail.

5. While he was in jail, Mr. Frazier instructed Respondent to move for a bond hearing, but Respondent did not do so.

6. At the preliminary hearing, Respondent sought to exclude Mr. Frazier's confession based on mental incompetence. Respondent's motion was denied because he did not present any expert testimony to support his position.

7. At the suppression hearing before the Circuit Court, Respondent sought to exclude the confession based on mental incompetence, but again failed to present expert testimony. Respondent's motion was denied.

8. Mr. Frazier was convicted and a pre-sentencing report was ordered.

9. Respondent did not meet with Mr. Frazier to review the pre-sentencing report prior to the March 5, 2008, sentencing hearing. Instead, Judge Trumbo recessed the sentencing hearing so that Respondent could meet with Mr. Frazier and discuss the report. Following their discussion, the hearing was resumed.

10. At the sentencing hearing, the Commonwealth's Attorney moved for Mr. Frazier's conviction to be vacated. In so moving, the Commonwealth's Attorney said, "Justice has not been done in this case, Your Honor, through no fault of Mr. Frazier. It is clear to the Commonwealth that Mr. Frazier's representation in this case clearly falls under the minimum competency that is required." Judge Trumbo granted the motion, released Mr. Frazier on a personal recognizance bond with intensive pre-trial supervision, and appointed new counsel to represent him.

II. MISCONDUCT

In the Cooper Matter (VSB Docket No: 09-080-078894) the Certification charged the Respondent with violation of the following Rules of Professional Conduct: Rule 1.1 Competence; Rule 1.2(c) Scope of Representation; Rule 8.4 (c) Misconduct.

In the Siers Matter (VSB Docket No: 09-080-074933) the Certification charged Respondent with violation of the following Rules of Professional Conduct: Rule 1.4(a) Communication; Rule 1.7(a) Conflict of Interest; Rule 1.7(a) Conflict of Interest; Rule 1.7(a) Conflict of Interest; Rule 1.16(a) Declining or Terminating Representation; Rules 1.6(a)(c) and 8.4(c) Engage in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation.

In the Smith Matter (VSB Docket No: 09-080-076228) the Certification charged Respondent with violation of the following Rules of Professional Conduct: Rule 1.3(a) Diligence; Rule 1.5(b) Fees; Rule 1.16(a) Declining or Terminating Representation; Rule 1.16(a)(1) Declining or Terminating Representation.

In the Frazier Matter (VSB Docket No: 09-080-076688): the Certification charged Respondent with violation of the following Rules of Professional Conduct: Rule 1.1 Competence; Rule 1.1(a) Scope of Representation; Rule 1.3(a) Diligence; Rule 1.14(a) Communication.

The Respondent's Motion to Strike was granted with respect to the following charges of misconduct set forth in the Certification:

In the Cooper Matter, violation of Rules 1.1; 1.2(c);

In the Siers Matter, violation of Rules 1.4(a); 1.7(a)(1); 1.7(a)(2); 1.16(a); 1.16(a) and (c); 8.4(c);

In the Smith Matter, violation of Rules 1.3(a); 1.5(b); 1.16(a); 1.16(a)(1);

In the Frazier Matter, violation of Rules 1.1; 1.2(a); 1.14(a).

After granting the Motion to Strike in the above referenced charges the following charged violations of the Rules of Professional Conduct remained to be considered by the Board:

In Cooper, Rule 8.4(c); in Frazier, Rule 1.3(a).

The text of charged violations of the Rules that remained to be considered by the Board follows:

Rule 1.3(a) Diligence:

(a) A lawyers shall act with reasonable diligence and promptness in representing a client.

Rule 8.4(c) Misconduct:

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

III. DISPOSITION

In the Cooper Matter (VSB Docket No. 09-080-078894), after mature consideration of the evidence and after accessing the credibility of the evidence the Board determined that Respondent had been dishonest with his client regarding the proceeds from the settlement of a personal injury matter. The Board found by clear and convincing evidence that Respondent had violated Rule 8.4(c) of the Rules of Professional Conduct and Ordered that the license of Respondent to practice law in the Commonwealth of Virginia is hereby suspended for sixty (60) days effective November 2, 2009.

In the Frazier Matter (VSB Docket No. 09-080-076688), after mature consideration of the evidence and after accessing the credibility of the evidence the Board determined that Respondent had failed to act with reasonable diligence and promptness resulting in his client having served an extended period of incarceration where the circumstances would normally dictate that his client would serve no time of incarceration. The Board found by clear and convincing evidence that Respondent had violated Rule 1.3(a) and ordered that Respondent's license to practice law in the Commonwealth of Virginia is hereby suspended for sixty (60) days effective November 2, 2009. The suspensions will run concurrently.

In the Siers (VSB Docket No. 09-080-074933) and Smith (VSB Docket No. 09-080-76228) matters no disciplinary rule violations have been proved by clear and convincing evidence, and accordingly all charges of Misconduct are hereby dismissed.

It is further ORDERED that pursuant to the provisions of Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia, 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. 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. 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 Respondent is not handling any client matters on the effective date of 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 13-29 shall be determined by the Virginia State Bar Disciplinary Board, unless 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 Respondent.

It is further ORDERED that an attested copy of this Order be mailed to Respondent, Marcus Noah Perdue, III, by certified mail, return receipt requested, to his Virginia State Bar address of record, 233 West Locust Street, Covington, Virginia 24426, and by hand delivery to

Kathryn R. Montgomery, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia.

ENTERED THIS 15th DAY OF DECEMBER, 2009

VIRGINIA STATE BAR DISCIPLINARY BOARD



Thomas R. Scott, Jr., 2nd Vice Chair