

**VIRGINIA:**

**BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD**

**IN THE MATTERS OF  
NICHOLAS CARON SMITH**

**VSB Docket Nos. 16-060-104001  
16-060-104859  
16-060-105281  
16-060-105911  
16-060-106252**

**ORDER OF SUSPENSION**

**THIS MATTER** came to be heard on April 28, 2017, on the District Committee Determination for Certification by the Sixth District Committee, before a panel of the Virginia State Bar Disciplinary Board (“Board”) consisting of Sandra L. Havrilak, Acting Chair, Sandra M. Rohrstaff, Nancy L. Bloom, Lay Member, R. Lucas Hobbs and Melissa W. Robinson. The Virginia State Bar (the “VSB”) was represented by Prescott L. Prince (“Bar Counsel”). The Respondent Nicholas Caron Smith (hereinafter “the Respondent”) was present and was represented by Jeffrey P. Matthews and James Calvin Breeden. Tracy J. Stroh, court reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

At the outset of the hearing, the Chair polled the members of the 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 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 Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-18 of the Rules of Court.

Prior to the proceedings and at the final Prehearing Conference, VSB Exhibits 1-49 were admitted into evidence by the Chair, without objection from the Respondent. By agreement between the VSB and the Respondent, the Stipulations of Fact and Violated Rules of Professional Misconduct (hereinafter “Stipulation”) was received as Exhibit 47. All of the

factual findings made by the Board were found to have been proven by clear and convincing evidence.

### **MISCONDUCT**

Nicholas Caron Smith (hereinafter “the Respondent”) was an attorney licensed to practice law in the Commonwealth of Virginia at all times relevant to the conduct set forth herein. The Respondent was employed in the private practice of law until approximately April of 2016, at which time he commenced employment as an Assistant Commonwealth’s Attorney of the County of Northumberland, Virginia. The Respondent’s employment as an Assistant Commonwealth’s Attorney precluded his representation of private clients; and, he was therefore required to terminate his private practice and withdraw from any remaining cases. Based upon the evidence presented, including the Certification received into evidence as Exhibit 1 and the Stipulation received into evidence as Exhibit 47, and for the reasons more particularly set forth below, the Board finds, by clear and convincing evidence, that the Respondent’s conduct, as set forth in the, constitutes misconduct in violation of Rules 1.3(a); 1.3(b); 1.4(a); 1.4(b); 1.15(a)(1); 1.15(b)(4); 1.15(b)(5); 1.15(c)(1); 1.15(c)(2); 1.15(c)(2)(i); 1.15(c)(2)(ii); 1.15(c)(3); 1.15(c)(4); 1.16(a)(1); 1.16(d); 4.1(a); 3.3(a)(1); 8.1(a); 8.1(c); 8.1(d); 8.4(c) .

#### **Rule 1.3**

The Board finds by clear and convincing evidence that the Respondent took actions in violation of Rules 1.3(a) and 1.3(b) in VSB Docket No. 16-060-104001 (hereinafter “the Hensley Case”), VSB Docket No. 16-060-105911 (hereinafter “the VSB Case”), and VSB Docket No. 16-060-105281 (hereinafter “the Burrell Case”).

Pursuant to Rule 1.3(a) and Rule 1.3(b), a lawyer must act with reasonable diligence and promptness in representing his clients and must not intentionally fail to carry out a contract of employment entered into with a client for professional services. In the Hensley Case, the Respondent accepted a referral to represent Jason Hensley (hereinafter “Hensley”) in his effort to recover his mobile home from real property from which he had been ejected after a foreclosure. After meeting with Hensley, the Respondent filed a Warrant in Detinue in Essex County Circuit

Court on August 21, 2014; however, he subsequently took no significant action to proceed with the lawsuit or obtain an agreement to remove or sell the mobile home. He essentially ignored Hensley's case and all requests from his client for information.

The Respondent took similar actions in the VSB Case. In 2016, the Respondent was appointed to represent William Edward Mullins (hereinafter "Mullins") by the Circuit Court of Westmoreland County on charges of rape and abduction with intent to defile. Mullins was convicted on both charges by a jury and was awarded a life sentence. Although the Respondent did not perceive any grounds for appeal, he noted an appeal. Nevertheless, he never filed a Petition for Appeal and failed to perfect the appeal, resulting in the appeal being dismissed due to procedural default on March 7, 2016.

In the Burrell Case, the Respondent was appointed on November 10, 2015 to represent Troy L. Burrell (hereinafter "Burrell") by the Essex County Circuit Court for appellate proceedings of Burrell's conviction on a charge of unlawful wounding. Subsequent to his filing of the Petition of Appeal to the Court of Appeals, the Respondent was hired to serve as Assistant Commonwealth's Attorney of Northumberland County, which caused a non-waivable conflict to his continued representation of Burrell. Although the Respondent filed a Motion to Withdraw as counsel, he neglected to specify that his position in the Commonwealth Attorney's office would ethically preclude him from carrying on his representation of Burrell, and the Motion was denied. The Respondent failed to effectively withdraw from his representation of Burrell upon being hired as an Assistant Commonwealth's Attorney; and, he took no action to pursue the appeal or otherwise protect the interests of his client. He merely ceased his representation of Burrell.

The Respondent's failure to take any action to move Hensley's case forward and his failure to properly perfect the appeal in the VSB Case constitute violations of Rule 1.3(a). Furthermore, the Board finds that the Respondent intentionally failed to effectively withdraw from his representation of Burrell or to follow up on the Supreme Court of Virginia's denial of his Motion to Withdraw to determine what actions were required in order to effectively withdraw

and/or take other action to protect his clients' rights, which constitutes a violation of both Rule 1.3(a) and Rule 1.3(b).

#### Rule 1.4

The Board finds by clear and convincing evidence that the Respondent violated Rules 1.4(a) and (b) of the Rules of Professional Conduct in both the Hensley Case and the VSB Case. Rule 1.4(a) requires a lawyer to keep a client reasonably informed about the status of his or her case and promptly comply with reasonable requests for information; and, Rule 1.4(b) imposes a duty upon a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions.

After the Respondent filed a Warrant in Detinue in the Hensley Case, Hensley made numerous attempts to contact the Respondent regarding his case. Hensley scheduled four office appointments, at all of which the Respondent failed to appear; and, he made multiple telephone calls to the Respondent, none of which were answered or returned. As a result, Hensley filed a complaint with the Virginia State Bar (hereinafter "VSB"); nevertheless, the Respondent continued to miss and reschedule appointments with Hensley. Furthermore, the Respondent failed to promptly inform Hensley of the existence of a conflict upon his acceptance of employment as an Assistant Commonwealth's Attorney and his need to withdraw from the matter.

In the VSB Case, following Mullins's convictions on charges of rape and abduction with intent to defile, the Respondent failed to maintain contact with Mullins to discuss the appeal and to keep him apprised of the status of the appeal. Moreover, after the appeal was dismissed on March 7, 2016, the Respondent failed to promptly notify Mullins of the dismissal and to inform him of his right to file a late appeal.

The Respondent's failure to maintain communication with Hensley and his failure to maintain contact with Mullins and to notify him that the appeal had been dismissed constitute violations of Rule 1.4(a). Moreover, the Respondent acted in violation of Rule 1.4(b) when he failed to inform Hensley of his need to withdraw from his case.

### Rule 1.15

Rule 1.15 of the Rules of Professional Conduct pertains to the safekeeping of a client's property and the handling of a client's funds, including maintaining proper books and records. The Board finds that the Respondent violated numerous provisions of this Rule in VSB Docket No. 16-060-104859 (hereinafter "the Deaver Case"), VSB Docket No. 16-060-106252 (hereinafter "the Griner Case"), and VSB Docket No. 16-060-104001 (hereinafter "the Hensley Case").

Pursuant to Rule 1.15(b)(4), a lawyer must 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. In July of 2015, the Respondent was retained to represent Michael Deaver (hereinafter "Deaver") on charges of forcible sodomy and aggravated sexual battery of victims under 13 years of age in Westmoreland and Hanover counties. In furtherance of the representation, the Respondent advised that he believed that a psychosexual evaluation of Deaver would be beneficial and recommended that such evaluation be performed by Evan Nelson, Ph.D. Dr. Nelson had informed the Respondent that his fee for such evaluation would be \$3,000, to be paid in advance. The Respondent recommended to Deaver that the fee be paid to him and that he, in turn, would engage Dr. Nelson. Deaver's father, James Deaver, provided the Respondent with a check in the amount of \$3,000 on August 25, 2015. The Respondent accepted the check and deposited it into his trust account; however, he did not forward the \$3,000 to Dr. Nelson, despite the fact that both Deaver and Dr. Nelson made numerous inquiries regarding the funds. On November 18, 2015, the Respondent was notified that Deaver had retained substitute counsel, and he was again directed to forward the \$3,000 to Dr. Nelson. The Respondent subsequently withdrew from the matters in Hanover and Westmoreland Circuit Courts; however, he still failed to forward the \$3,000 to Dr. Nelson. The Respondent's holding of Deaver's funds for nearly three months, rather than properly delivering the funds to Dr. Nelson, constitutes a violation of Rule 1.15(b)(4).

Rule 1.15(a)(1) requires a lawyer or law firm to deposit funds held on behalf of a client into a trust account; and, Rule 1.15(b)(5) prohibits a lawyer from disbursing or converting funds of a client without the client's consent. Upon investigation by the Bar following a bar complaint filed by James Deaver, it was discovered that, subsequent to depositing the \$3,000 into his trust account, the Respondent improperly transferred the funds to his operating account. Thereafter, the funds were seized by the Internal Revenue Service (IRS) for employment taxes that the Respondent had failed to pay, which prevented the Respondent from timely refunding the \$3,000 to Deaver.

Likewise, in the Griner Case, the Respondent was retained in December 2015, to represent Brenda Griner (hereinafter "Griner") for a traffic matter in Westmoreland General District Court and was paid \$800 in advance for legal fees; however, on the court date, the Respondent failed to appear. The Respondent subsequently explained to Griner that he was in another court during the trial and agreed to make a full refund of Griner's retainer. He further stated that he may be able to approach the court to have the matter reconsidered but that, in any event, he would refund some or all of the \$800 paid. The Respondent never took any other action in furtherance of Griner's case and never provided a refund. Griner subsequently filed a bar complaint; and, upon investigation, the Respondent acknowledged that he had deposited the \$800 into his operating account and never transferred them to his trust account. The Respondent's failure to properly deposit and maintain the funds of both Deaver and Griner in his trust account constitutes a violation of Rules 1.15(a)(1) and (b)(5).

Rule 1.15(c) further requires a lawyer to maintain certain minimum books and records demonstrating his or her compliance with the Rule's requirements regarding the safe-keeping of a client's property; and, in the Deaver Case and the Hensley Case, the Respondent failed to act in accordance with this Rule. In response to a subpoena *duces tecum* issued by the Bar in the Deaver Case, the Respondent was able to produce only portions of his trust account statements and failed to provide cash receipts journals, cash disbursements journals, or subsidiary ledgers related to the representation Deaver. Similarly, in the Hensley Case, the Respondent was unable

to produce any trust account records prior to August of 2015. The Respondent's failure to properly maintain his trust account records in these cases constitutes a violation of Rules 1.15(c)(1), 1.15(c)(2), 1.15(c)(2)(i), 1.15(c)(2)(ii), 1.15(c)(3), 1.15(c)(4).

Rule 1.16(a)(1) and (d)

The Board finds by clear and convincing evidence that the Respondent violated Rule 1.16(a)(1) in the Hensley Case and Rule 1.16(d) in the Deaver Case and Griner Case when he failed to properly terminate his representation.

Rule 1.16(a)(1) requires a lawyer to withdraw from representation of a client when the representation will result in a violation of the Rules of Professional Conduct. In the Hensley Case, the Respondent's employment as an Assistant Commonwealth's Attorney necessarily resulted in a conflict in his continued representation of Hensley. The Respondent's failure to withdraw from Hensley's case upon his acceptance of employment as an Assistant Commonwealth's Attorney thus constitutes a violation of Rule 1.16(a)(1).

In accordance with Rule 1.16(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 properly handling records. Upon the Respondent's termination in the Deaver Case, he failed to forward the \$3,000 received from Deaver for the psychosexual evaluation to Dr. Nelson, despite being asked numerous times to do so. Likewise, the Respondent refused to refund his client's funds in the Griner Case despite never appearing in court on the client's behalf and stating both to Griner and the Bar that the funds would be returned. These actions constitute violations of Rule 1.16(d).

Rule 3.3 and Rule 4.1

The Respondent violated Rule 3.3 and Rule 4.1 in the Deaver Case when he knowingly made false statements of fact to both his client and the Bar. On numerous occasions throughout his representation of Deaver, the Respondent stated that he had forwarded the client's funds to Dr. Nelson for the purpose of performing a psychosexual evaluation of Deaver. However, Dr.

Nelson never received the funds. During the Bar's investigation of the matter, a subpoena *duces tecum* was issued to the Respondent regarding the funds; and, the Respondent failed to comply with the subpoena in a timely manner. On June 21, 2016, Bar Counsel forwarded to the Respondent a Notice of Noncompliance and Request for Interim Suspension that stated, in pertinent part, that if the Respondent did not comply with the subpoenas *duces tecum* by or before July 1, 2016, Bar Counsel would request an interim suspension until the Respondent did comply with the subpoenas *duces tecum*. On August 26, 2016, a hearing was held before the Disciplinary Board, and the Respondent was asked if he had refunded the \$3,000 to James Deaver. The Respondent stated that he had done so; however, the check was later dishonored due to insufficient funds as a result of the funds in the Respondent's operating account being seized by the IRS. The Respondent subsequently informed the Bar that he reissued a check to Deaver on August 25, 2016, yet Deaver has not received the check. The Board finds that the Respondent knew that he had not returned the funds to Deaver and that he had intentionally lied to the Board. These continued intentional misrepresentations to both James Deaver and the Bar regarding the status of the case and whether he had forwarded the funds to Dr. Nelson constitute violations of Rules 3.3(a) and 4.1(a).

#### Rule 8.1

Rule 8.1 of the Rules of Professional Conduct governs disciplinary matters before the Bar and prohibits lawyers from making false statements of material fact, failing to respond to demands for information, or otherwise obstructing an investigation by a disciplinary authority. As a result of his conduct as set forth herein, numerous bar complaints were filed against the Respondent; and, the Board finds that the Respondent intentionally failed to cooperate in resolving the complaints and intentionally obstructed the investigations in violation of Rule 8.1.

In the Deaver Case, the Respondent not only lied to Deaver and the Bar regarding the status of sending the client's funds to Dr. Nelson, but he also lied to the investigator assigned to investigate the complaint as well as Assistant Bar Counsel in stating that he had mailed the check. In doing so, the Respondent violated Rule 8.1(a).

Furthermore, in the Deaver, Griner, and VSB Cases, the Respondent was sent a letter by the Bar providing him with copies of the complaints and informing him of his duty to respond to the complaints and comply with the Bar's demands for information. Nevertheless, the Respondent refused to respond to the bar complaints, which the Board finds to be an intentional violation of Rule 8.1(c).

Following the Respondent's refusal to respond and during the course of the Bar's investigations of each of the bar complaints filed against the Respondent, numerous subpoenas *duces tecum* were issued summoning the Respondent to produce documents to the Bar regarding the incidents of misconduct alleged in the complaints against him. In the Deaver, Hensley, VSB, and Burrell Cases, the Respondent failed to respond to the subpoenas in a timely manner, which necessitated the scheduling of a hearing for consideration of the Bar's request that the Respondent's license to practice law be suspended until he complied with the subpoenas. Although the Respondent did produce documents prior to the hearing in each case, his responses were insufficient; and, in the Deaver Case, he testified at the hearing that he had not produced all the documents in his possession. The Respondent's intentional failure to respond to the subpoenas *duces tecum* in a timely manner, thereby necessitating the scheduling of hearings for consideration of a Request for Interim Suspension constitutes violations of Rule 8.1(d).

#### Rule 8.4(c)

The Board finds by clear and convincing evidence that the Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation adversely reflecting on his fitness to practice law in violation of Rule 8.4(c) in his representation of Mullins in the VSB Case. In the subpoena *duces tecum* issued by the Bar, the Respondent was asked to provide documentation pertaining to any communications with Mullins regarding whether he wished to continue the appeal after it was dismissed due to failure to file the petition for appeal and documentation of any notification to Mr. Mullins stating that the appeal was dismissed. In response to the subpoena, the Respondent produced two letters. The first letter, dated July 21, 2016, provided notice to Mullins that Respondent had missed the appeal and that Mullins had a

right to file a delayed appeal. The second letter purported to be a letter for Mullins to send to the Court of Appeals requesting new counsel to assist with his appeal. However, during the course of the investigation, Mullins stated that he never received such letters and, moreover, had received no communication whatsoever from the Respondent since January of 2016. The Respondent's assertion that he sent Mullins a letter dated July 21, 2016, informing him that the Respondent had failed to perfect his appeal when, in fact, no such letter was sent or received by Mullins constitutes a violation of Rule 8.4(c).

### **THE BOARD'S FINDINGS**

Having received the Stipulations received into evidence as Exhibit 47 which admit the violations contained in the Certification received into evidence as Exhibit 1 and having considered the testimony and evidence presented at the hearing, the Board recessed to deliberate; and, after due deliberation, reconvened and stated its finding that the VSB had proven, by clear and convincing evidence, each of the Rule violations charged. The Board then reconvened for the sanction phase of the hearing, as addressed herein.

### **SANCTION PHASE OF HEARING**

After the Board announced its findings by clear and convincing evidence that the Respondent had committed the Rule violations charged in the Certification, it received further evidence regarding aggravating factors applicable to the appropriate sanction for the conduct of the Respondent underlying the Rule violations. The VSB relied upon Exhibit 48 concerning Respondent's prior disciplinary record, thereafter resting its case.

Subsequently, the Board heard evidence regarding mitigating factors applicable to the appropriate sanction. Respondent testified on his own behalf and also relied upon testimony from James Leffler, who qualified as an expert in the field of mental health and substance abuse relating to attorneys practicing in the Commonwealth of Virginia; and, Jane Wrightson,

Commonwealth Attorney for Northumberland County. The Respondent testified that, during the period in which each of these incidents of misconduct occurred, he was struggling with numerous personal issues. Not only did one of his clients overdose shortly after the Respondent negotiated his release from prison, but a close friend and mentor of the Respondent's also committed suicide, and the Respondent felt that he was, in part, to blame because he failed to notice that his friend was planning to do so. The Respondent also testified that, during this time, his father became a Commonwealth's Attorney and left him to run their firm on his own.

Following the Respondent's testimony, Mr. Leffler provided testimony regarding the Respondent's depression during the period in which the violations occurred. Mr. Leffler's testimony indicated that the Respondent met the criteria for major depression which, in his opinion, was brought on by several events, including the suicide of a close friend and the death of a client, among other incidents, all of which were compounded by the stress of running a small business.

The Respondent then called Commonwealth Attorney Jane Wrightson as his final witness, who provided testimony regarding her hiring of the Respondent and his efforts to address his misconduct. Ms. Wrightson testified that the Respondent was a good, smart lawyer and worked well with others. Respondent's Exhibits 1-3 were admitted into evidence, without objection, during this phase of the hearing.

### **DISPOSITION**

At the conclusion of the evidence in the sanctions phase of this proceeding, the Board recessed to deliberate. After due deliberation and review of the foregoing findings of fact, upon review of Exhibits 1-49 presented by Bar Counsel on behalf of the VSB, upon review of Respondent's Exhibits 1-3, upon the testimony from the witness presented on behalf of the VSB and upon the testimony of witnesses presented by Respondent, the Board reconvened and stated

its finding that, when considered together, Respondent's pattern of violations over such a limited period of time, along with his prior disciplinary record, demonstrate a severe failure to uphold his duties to his clients and the profession. The Board's finding is mitigated by the Respondent's evidence regarding his personal and emotional problems during the period in which the violations occurred, as well as his relative inexperience in firm management as a solo practitioner, his demonstration of remorse, and his acknowledgement of the severity of his breach of duty to his clients during the timeframe in question. The Board also notes that the Respondent has taken action to rectify his conduct and prevent future violations, including attending counseling.

Therefore, upon consideration of the evidence and the nature of the misconduct committed by the Respondent, it is ORDERED, by majority vote of the Board, that the Respondent's license to practice law in the Commonwealth of Virginia is suspended for a period of two (2) years, effective April 28, 2017. The Respondent is also advised that he should continue counseling with Lawyers Helping Lawyers.

It is further ORDERED that, as directed in the Board's April 28, 2017 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 forthwith give notice by certified mail, return receipt requested, of the two (2) year 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. Respondent shall give such notice within 14 days of the effective date of April 28, 2017 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 April 28, 2017, the Respondent shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within 60 days of the effective day of the suspension. 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, which may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph.

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 Opinion and Order to Respondent, Nicholas Caron Smith, at his address of record with the Virginia State Bar, being P.O. Box 59, Mt. Holly, VA 22524, and his alternate address of record, being Northumberland Commonwealth Attorney's Office, 39 Judicial Place, Heathsville, VA 22473, by certified mail, return receipt requested; by regular mail to Respondent's Counsel, James C. Breeden and Jeffrey P. Matthews, at Breeden & Breeden, 265 Steamboat Road, Irvington, VA 22480; and by hand delivery to Prescott L. Prince, Assistant Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

This is Order is final.

ENTERED this 23 day of May, 2017.

VIRGINIA STATE BAR DISCIPLINARY BOARD

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Sandra L. Havrilak, Acting Chair