

VIRGINIA: BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF WAYNE RICHARD HARTKE
VSB DOCKET NO. 17-051-107328

MEMORANDUM ORDER

This matter came to be heard on August 25, 2017 before a duly-convened panel of the Virginia State Bar Disciplinary Board ("Board") at the State Corporation Commission, Courtroom A. The Panel consisted of Lisa A. Wilson, 1st Vice Chair, Presiding; Melissa W. Robinson; R. Lucas Hobbs; Thomas R. Scott, Jr., and Stephen A. Wannall, lay member. Two new members of the Board, Yvonne S. Gibney and Michael J. Sobey, were present for the proceedings, but did not participate in the deliberations.

The Virginia State Bar ("Bar") was represented by Kathleen Maureen Uston, Assistant Bar Counsel. Respondent Wayne Richard Hartke was present. No counsel appeared for Respondent. Jennifer L. Hairfield, court reporter, Chandler and Halasz, Inc., P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after having been duly sworn, reported the hearing and transcribed the proceeding.

The Chair polled members of the Panel regarding any personal or financial interest or conflict they might have which would preclude them from fairly hearing the matter before them. Each member, including the Chair, responded in the negative.

The Respondent filed no Answer, nor did he designate any witnesses or exhibits.

The Bar moved for the introduction of four (4) exhibits which it had previously submitted, pursuant to the Board's Pre-Hearing Order of April 21, 2017. The exhibits,

marked as Bar Exhibits 1-4 were admitted into evidence, without objection, although Exhibit 3, an affidavit of Respondent's bar membership, was not provided at that time, as it had not yet been executed. The Bar also provided certified copies of the court documents which were portions of those exhibits, which copies were admitted, without objection.

The Bar made its opening statement, and Respondent did as well.

The allegations against Respondent stemmed from his failure to appear for a preliminary hearing in a criminal felony matter ("the underlying matter") in the Fairfax County General District Court ("GDC") on August 9, 2016, his statements in relation thereto, and a finding of contempt of court made by the GDC against Respondent.

The Bar thereafter called its investigator, David G. Fennessey, as a witness. He testified consistent with his Report of Investigation, which was a part of Bar Exhibit 4.

Mr. Fennessey was unable to explain the apparent conflict on Exhibit 3 to his Report of Investigation, in which two different times for court on August 9, 2016 are shown. The Bar then rested.

Respondent then testified, stating that he did not fail to appear in the GDC on August 9, 2016 because he had not been paid. He said he did not intend to not appear, and only failed to appear because he had failed to calendar the preliminary hearing. Respondent explained that the two different times for court on August 9, 2016 were actually not in conflict or confusing, because he was aware that 2:00 p.m. was the regular time for preliminary hearings in the GDC.

Respondent then rested.

The Bar then supplied Exhibit 3 to the Board, and paragraphs 4 and 5 of it were stricken from being admitted at that time.

The parties then delivered their respective closing arguments.

FINDINGS OF FACT

Having heard the evidence, the Board recessed to deliberate, and therein made the following findings of fact:

1. At all times relevant hereto, Respondent has been licensed to practice law in the Commonwealth of Virginia, having practiced for more than 30 years.
2. This matter came to the attention of the Bar upon receipt of an Order entered on September 13, 2016, which Order found Respondent in criminal contempt of the GDC. The Order was entered by the Honorable Tina Snee following Respondent's failure to appear on August 9, 2016 in the underlying matter.
3. Prior to the August 9, 2016 hearing, on May 31, 2016, Respondent had entered his written appearance as retained counsel of record for the defendant in the underlying matter. On August 9, 2016, when the case was called for the preliminary hearing, Respondent's client, the Assistant Commonwealth's Attorney assigned to the case, and the Commonwealth's witnesses were all present. As noted above, Respondent failed to appear and a telephone call was therefore placed to him from the courtroom.
4. During this call, Respondent represented to the court that he had not appeared since he had not been paid. Judge Snee advised Respondent that, since he had entered his appearance in the case, his attendance at the

hearing was required regardless of whether or not he had been paid.

Respondent then stated that he was physically unable to come to court that day.

5. A Rule to Show Cause was entered against Respondent and a hearing thereon was held on September 12, 2016. At that time, Respondent appeared and advised the court that he had not appeared on August 9, 2016, since in February 2016, his home had been foreclosed upon and the Sheriff had removed all of his active files. Respondent represented to the court that, as a result, he was not aware of the court date for the preliminary hearing.
6. The court found that, since Respondent had entered his appearance on May 31, 2016, the Sheriff could not have removed this particular client file at the time of the foreclosure since, according to Respondent, the Sheriff's action had occurred in February 2016. The court also noted that Respondent had previously represented to the court a different reason for his non-appearance, namely that he had not been paid. Respondent acknowledged that he had, in fact, made that representation to the court on August 9, 2016.
7. Following the Show Cause hearing, the court found that Respondent's statements to the court were "not true or correct statements befitting of an officer of the court." The court found further that Respondent's failure to appear "obstructed and interrupted the administration of justice." The

court therefore found Respondent in contempt of court and sentenced him to ten (10) days in jail.

8. During the course of the hearing before the Board, the Board did not find Respondent to be a credible witness regarding his explanation for the reasons he gave to the GDC for his failure to appear for the hearing on August 9, 2016. Although he conceded that he had affirmatively discussed his client's failure to pay his fee and the foreclosure on his home, Respondent accepted no responsibility for the impression that the GDC understood these to be the reasons for his absence.

DISPOSITION

The Board found that the Bar has proven, by clear and convincing evidence, that Respondent violated Rule 3.3(a)(1) of the Rules of Professional Conduct ("the Rules") in that he made a knowingly false statement of fact to a tribunal, the GDC. Specifically, the Board found that Respondent's statement to the GDC on September 12, 2016, as found and stated above, was knowingly false. The Board found that the Bar had not met its burden of proof as to the alleged violation of Rule 3.5(f) of the Rules, and specifically that there was insufficient evidence of intent on that allegation.

The Board announced its decision in the open Courtroom.

It proceeded to receive evidence of Respondent's prior disciplinary record, which was received into evidence as Bar Exhibit 5, and which was extensive, including a suspension last year, and including a prior violation of Rule 3.3 of the Rules. The

Board then heard argument from the Bar and Respondent about the appropriate sanction which should be imposed.

The Board recessed to deliberate about the appropriate sanction which should be imposed against Respondent. Upon consideration of the evidence and argument, which shows a pattern of misconduct by Respondent during his many years of practice, but in mitigation shows that he has had some personal issues and was jailed for contempt by the GDC, the Board imposed a sanction of suspension of Respondent's license for a period of five (5) years.

Accordingly, it is ORDERED that, effective August 25, 2017, that Respondent's license to practice law within the Commonwealth of Virginia be and hereby is SUSPENDED for a period of five (5) years, effective October 27, 2019 ("the effective date"), the date on which his current suspension from the practice of law which was imposed in VSB Docket No. 17-000-107101, will expire, so that this suspension runs consecutive to his current suspension, and it is further

ORDERED that the 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 suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is, as of the effective date of the suspension, 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 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. The Respondent shall not undertake the representation of any new clients from the date of this Opinion and Order until the effective date.

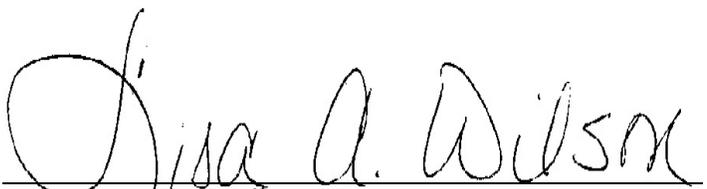
It is further ORDERED that if the Respondent is not handling any client matters on the effective date, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for a hearing before a three-judge court.

It is further ORDERED that, pursuant to Part Six, Section IV, Paragraph 13-29 (E) of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against Respondent; and it is further

ORDERED that an attested copy of this Order be mailed by certified mail, return receipt requested, to Respondent, Wayne Richard Hartke, Esquire, at Hartke Law Offices, 11890 Sunrise Valley Drive, Reston, VA 20191, Respondent's last address of record with the Virginia State Bar, and to Kathleen Maureen Uston, Assistant Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-0026.

ENTERED THIS 11th DAY OF September, 2017

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 
Lisa A. Wilson, 1st Vice Chair, Presiding