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3

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 800744

THOMAS E. SMOLKA,
Appellant

v.

SECOND DISTRICT COMMITTEE OF THE
VIRGINIA STATE BAR DISCIPLINARY BOARD,
Appellee

JOINT APPENDIX

R. Wayne Nunnally
451 Court Street
Portsmouth, Virginia 23704

Counsel for Appellant

Walter H. Ryland
Chief Deputy Attorney General
1001 E. Broad Street
Richmond, Virginia 23219

Counsel for Appellee

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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January 30, 1980

PERSONAL AND CONFIDENTIAL

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Thomas E. Smolka, Esquire
P.O. Box 1855
Norfolk, VA 23501

Re: SECOND DISTRICT COMMITTEE v. THOMAS E. SMOLKA
Docket No. 79-32

Dear Mr. Smolka:

I am writing to advise you that the above-captioned matter has been set for hearing before the Disciplinary Board on Thursday, February 28, 1980, in Room 350 of the Virginia Employment Commission, 703 East Main Street, Richmond, Virginia 23219. The hearing will commence promptly at 1:00 p.m.

You have the right to have summons and/or subpoenae issued on your behalf subject only to the proviso that such right be exercised reasonably and promptly. Any request for the issuance of summons and/or subpoenae should be mailed to me for handling, with a copy of such request to Bar Counsel.

Sincerely,

N. SAMUEL CLIFTON
Secretary

NSC:jc

P09 0637335

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Richmond, Virginia 23219
(804) 644-4131

Charlottesville, Virginia Office
Court Square Building
Charlottesville, Virginia
(804) 977-2500

February 20, 1980

Murray Janus, Esquire
7th and Franklin Building
Suite 1500
Richmond, Virginia 23219

Re: Thomas E. Smolka ads Second District Committee
Docket No. 79-32

Dear Mr. Janus:

I represent Thomas E. Smolka in the above matter which is, I understand, scheduled for hearing before the Committee on February 28, 1980 at 1:00 p.m. in Richmond.

To confirm telephone conversations I have had with Mike Rigsby and Steve Telfeyan, I would respectfully request that the matter be continued to the Committee's next meeting date of March 27, 1980.

I have also told Mike and Steve that I am willing to stipulate the evidence to avoid the necessity of inconveniencing any witnesses. In fact, paragraphs 1, 2, 3 and 4 of the Statement of Charges of Misconduct have been admitted.

I would appreciate being advised that the matter has been continued and of the exact time when it will be heard.

Thanking you in advance for your consideration, I am,

Sincerely yours,

Stephen D. Harris

Stephen D. Harris

SDH/
cc: Thomas E. Smolka
Michael L. Rigsby/Stephen J. Telfeyan

February 25, 1980

Stephen D. Harris, Esquire
P. O. Box 379
Williamsburg, Virginia 23185

Re: Thomas E. Smolka ads Second District Committee

Dear Mr. Harris:

Thank you for your letter of February 20, 1980 which I will treat as a motion for a continuance. The motion is granted.

By copy of this letter to Mike Rigsby, I am advising him to set a new date as soon as possible compatible with our schedule.

Very truly yours,

Murray J. Janus

MJJ/kmh

cc: Michael L. Rigsby, Esquire

ORDER

The charges of misconduct certified against the respondent, Thomas E. Smolka, by the Second District Committee of the Virginia State Bar were heard on March 27, 1980, before a duly convened panel of the Virginia State Bar Disciplinary Board consisting of Samuel N. Klewans, Frank C. Bedinger, Jr., John H. Duvall, William R. Rakes, James N. Garrett, Jr. and Murray J. Janus, Chairman, presiding. Notice of the charges of misconduct and of the hearing before the Virgina State Bar Disciplinary Board were served upon the respondent in the manner provided by the Rules applicable to this proceeding.

The respondent appeared in person and with counsel, Stephen D. Harris. Stephen J. Telfeyan appeared as counsel for the Virginia State Bar.

Upon consideration of the documentary evidence and testimony presented, the Board finds by clear and convincing evidence as follows:

1. That the respondent, Thomas E. Smolka, was prior to the alleged conduct in question, acting as a sales agent for Busch Properties, Inc., the corporation which operates and is developing a subdivision in James City County, Virginia, known as Kings Mill on the James. He was not acting in any way in his capacity as an attorney, but solely in his capacity as sales agent for Busch Properties. As sales agent for Busch Properties, he had access to the Kings Mill sales center located in the development known as Kings Mill on the James in James City County, Virginia. On or about December 2, 1978, the respondent went into the

sales center and removed from the same two IBM typewriters and two electric calculators having a value of approximately $2,200.00, which said pieces of equipment he transported and placed in his law offices located in the City of Norfolk, Virginia. On or about February 24, 1979, said items of equipment were discovered in his law offices located in the City of Norfolk, Virginia, and were recovered. There was no damage to the equipment in question.

2. That subsequent to the discovery of equipment in the respondent's law offices in Norfolk, two warrants were obtained for his arrest in James City County, Virginia, charging him with grand larceny of the equipment in question and the breaking and entering of the Busch Properties sales office located in James City County, Virginia, with the intent to commit larceny therein. The respondent thereafter waived his right to a preliminary hearing, and subsequent thereto the charges in question were Certified by the grand jury in and for the County of James City, Virginia.

3. That upon trial of the certified charges in the James City County Courthouse before the Honorable Russell Carneal, Judge, a plea agreement was entered into between the respondent and the Commonwealth's Attorney wherein the respondent agreed to plead guilty of the breaking and entering of the offices of Busch Properties with the intent to commit larceny therein on the date in question in return for the nol prossing of the charge of grand larceny. The Court accepted the plea agreement, and after hearing evidence on the date in question, found the respondent to be guilty and referred the matter for a presentence report.

4. That on August 9, 1979, the sentence and hearing on the criminal charge pending against him in the Circuit Court of the County of James City was heard, and after reviewing the presentence report and hearing arguments, the Court vacated its previous finding of statutory burglary and found the respondent guilty of trespass. The respondent was sentenced to twelve months in jail with all suspended save and except thirty days and placed upon probation for a period of twelve months. The thirty-day jail sentence began on September 10, 1979, and was served by the respondent.

5. That respondent, Thomas E. Smolka, has engaged in conduct in violation of Disciplinary Rules 1-102(A)(1), (3), (5) and (6) of the Virginia Code of Professional Responsibility.

WHEREFORE, it is the judgment of the Board that the license of the respondent, Thomas E. Smolka, to practice law in the Commonwealth of Virginia be suspended for a period of four (4) years. Accordingly,

It is ORDERED that the license of Thomas E. Smolka to practice law in the Commonwealth of Virginia be, and the same is hereby, suspended for a period of four (4) years.

On the motion of counsel for respondent, it is further ORDERED that the suspension imposed herein begin on the first day of May 1980, so that the respondent can curtail his existing business. As an expressed condition of this delay, respondent will not accept or take on any new clients or business during this time.

It is further ORDERED that Thomas E. Smolka shall, immediately upon entry of this Order, give notice by certified mail of his suspension to all clients for whom he is currently handling matters and to all opposing attorneys and the presiding judges in pending litigation; and he shall further make immediate appropriate arrangements for the disposition of matters presently in his care in conformity with the wishes of his clients, all pursuant to paragraph 13 (J)(1) of Section IV, Part Six, of the Rules of the Supreme court of Virginia.

It is further ORDERED that Thomas E. Smolka shall furnish evidence of his compliance hereto to the Secretary of the Virginia State Bar Disciplinary Board certifying that he has complied with the requirements of the Rules of the Supreme Court of Virginia, Part Six, Section IV, paragraph 13 (J)(1) and this Order.

It is further ORDERED that the Secretary of the Virginia State Bar Disciplinary board shall mail a copy of this ORDER to Stephen D. Harris, Esquire, P.O. Box 379, Williamsburg, Virginia 23185, counsel for respondent.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Murray D. Janus, Chairman

ENTER: 4/7/80

Seen:

Stephen D. Vani
Counsel for Respondent

Stephen J. Fellerman
Counsel for Virginia State Bar

ORDER

This day came the parties, by counsel, on the Petition of the Respondent, Thomas E. Smolka, to review its decision made on March 27, 1980, which Petition this Board will also treat as a motion to set aside its Order entered on April 7, 1980, and on the authorities cited in said Petition and attachments thereto, and on the Answer and Memorandum in Opposition to the Petition filed by the Virginia State Bar. And it appearing to the Board after reviewing the facts of the case that the Respondent came before this Board on a complaint certified by the Second District Committee of the Virginia State Bar, there being no evidence that their jurisdiction was ever questioned before said District Committee or before this Board until this Petition was filed; and further that the gravamen of the offense was misconduct which occurred within the Second District as well as other jurisdictions; and further that an Answer was filed by the Respondent, which Answer under the Rules of the Supreme Court, Part 6, § IV, ¶ 13C(5) shall be conclusively deemed to be a consent to the jurisdiction of this Board; and further that no valid objection to the jurisdiction of the Board was timely made; it is therefore

ORDERED that the relief prayed for in the Petition be, and the same hereby is, denied and the Order of April 7, 1980 is affirmed in all respects. It is further ORDERED that a copy of this Order be mailed to counsel for the Bar, Stephen D. Harris, Esquire, P. O. Box 379, Williamsburg, Virginia, and R. Wayne Nunnally, Esquire, 451 Court Street, Portsmouth, Virginia, counsel for the Respondent, whose exception is noted.

ENTER:

Chairman

4/21/80

NOTICE OF APPEAL

COMES NOW the appellant, Thomas E. Smolka, and gives this Notice of Appeal to a final order rendered by the Virginia State Bar Disciplinary Board on April 7, 1980, finding him guilty of conduct in violation of Disciplinary Rules 1-102(A)(1), (3), (5), and (6) of the Virginia Code of Professional Responsibility.

THOMAS E. SMOLKA

By R. Wayne Nunnally
Of Counsel

R. Wayne Nunnally
451 Court Street
Portsmouth, Virginia 23704

I certify that I mailed a copy of the foregoing Notice of Appeal to N. Samuel Clifton, Executive Director, Virginia State Bar, Suite 1622, 700 Building, 700 East Main Street, Richmond, Virginia 23219, and Murray J. Janus, Esquire, 7th and Franklin Building, Richmond, Virginia 23219, on the 24th day of April, 1980.

R. Wayne Nunnally

APR 25 1980
STATE BAR

ASSIGNMENTS OF ERROR

COMES NOW the appellant, Thomas E. Smolka, by counsel, and for his assignments of error to the decision of the Virginia State Bar Disciplinary Board rendered on April 7, 1980, adjudging him guilty of conduct in violation Disciplinary Rules 1-102(A) (1), (3), (5), and (6) of the Virginia Code of Professional Responsibility, and states as follows:

1. ASSIGNMENT OF ERROR NUMBER ONE: It was error for the Virginia State Bar Disciplinary Board to hear and decide this cause in that same was before them without proper jurisdiction being first established.

2. ASSIGNMENT OF ERROR NUMBER TWO: It was error for the Second District Committee to hear this cause in that the alleged act constituting the alleged misconduct transpired within the jurisdiction of the First District Committee, which had exclusive jurisdiction under the facts of this case.

3. ASSIGNMENT OF ERROR NUMBER THREE: It was error for the Virginia State Bar Disciplinary Board to refuse appellant's petition to remand the cause to the First District Committee.

4. ASSIGNMENT OF ERROR NUMBER FOUR: It was error for the Virginia State Bar Disciplinary Board to fail to follow its

mandatory rules of procedure, thus violating petitioner's rights to due process and equal protection of the laws.

5. ASSIGNMENT OF ERROR NUMBER FIVE: It was error for the Virginia State Bar Disciplinary Board to find the appellant guilty of conduct in violation of Disciplinary Rules 1-102(A)(1), (3), (5), and (6) of the Virginia Code of Professional Responsibility in that the facts do not constitute such a violation.

Respectfully submitted,

THOMAS E. SMOLKA

By _____
Of Counsel

R. Wayne Nunnally
Counsel for Petitioner
451 Court Street
Portsmouth, Virginia 23704

I certify that I mailed a copy of the foregoing Assignments of Error to N. Samuel Clifton, Executive Director, Virginia State Bar, Suite 1622, 700 Building, 700 East Main Street, Richmond, Virginia 23219, and Murray J. Janus, Esquire, 7th and Franklin Building, Richmond, Virginia 23219, on the 24th day of April, 1980.

_____

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MAY 19 1980
RICHMOND, VIRGINIA

VIRGINIA STATE BAR HEARING

SECOND DISTRICT COMMITTEE

-vs-

THOMAS E. SMOLKA

TRANSCRIPT of the evidence and other incidents of the above when heard on March 27, 1980 at 12:00 noon before the Virginia State Bar Disciplinary Board.

1 APPEARANCES:

2 Stephen Telfeyan - Bar Counsel

3 Stephen D. Harris - Counsel for the defendant

4

5

6 BOARD MEMBERS PRESENT:

7 Murray J. Janus - Chairman

8 Samuel N. Klewans

9 John H. Duvall

10 James N. Garrett, Jr.

11 Frank C. Bedinger, Jr.

12 William R. Rakes

13

14

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23

24

25

Hearing on

March 27, 1980.

I N D E X

	DIRECT	CROSS	REDIRECT	RECROSS
Forest Elkins	10	12	16	--
Thomas Edward Smolka	18	23	--	--

E X H I B I T S

Page

Bar Exhibit No. 1----------6
Certification of the Committee
Notice of Charges
Answer filed
Notice of hearing

Bar Exhibit No. 2----------7
Stipulation

Reported by Lynn Aligood.

NOTE: The case is called to be heard.

THE CHAIRMAN: Are there any witnesses you are expecting?

MR. TELFEYAN: I have one witness who will testify briefly.

THE CHAIRMAN: Of course there is no one else in the hearing room, but the witnesses will be excluded.

The rules require, Mr. Harris, we read the Statement of Charges of Misconduct to Mr. Smolka and I will be reading from the November 7, 1979 Statement of Charges.

MR. HARRIS: Is it appropriate for me to waive the reading of the Statement of Charges, Mr. Janus, which I am more than willing to do?

THE CHAIRMAN: Our rules say they shall be read. I am going to allow you to waive that regardless if you are willing to do that, and that is agreeable to Mr. Smolka.

MR. SMOLKA: Yes, sir.

MR. HARRIS: I will be happy to waive that.

THE CHAIRMAN: Fine. The procedure we

have today will be that the Bar will put on any evidence and/or stipulations. You will have a right to put on any evidence and the Bar will have an opportunity to put on rebuttal evidence, if any.

The Bar will have an opportunity to make closing remarks and then you will have your opportunity and the Bar briefly will be allowed to respond.

At the conclusion of the evidence, this Board will have several options. The Board has the option to revoke Mr. Smolka's privilege to practice law in the Commonwealth. It will have the option to suspend any period of time up to five years. It could give him a public reprimand, a private reprimand, or in the event we are not satisfied by clear and convincing evidence that he has violated the Code of professional responsibility provisions, we, of course, will dismiss the charges against him.

Is there any problem or question about the notice to Mr. Smolka?

MR. HARRIS: No, sir. No question.

THE CHAIRMAN: Mr. Telfeyan, do you care to make an opening statement?

1 MR. TELFEYAN: No, sir.
2 THE CHAIRMAN: Mr. Harris?
3 MR. HARRIS: No, sir, I would waive
4 opening statement.
5 THE CHAIRMAN: Fine. Call your first
6 witness, Mr. Telfeyan.
7 MR. TELFEYAN: By way of preliminary
8 matters, I would like to introduce the certification
9 of the committee, the Notice of Charges, the
10 answer filed, and the notice of today's hearing.
11 MR. HARRIS: No objection.
12 THE CHAIRMAN: The papers will be
13 received collectively as Bar Exhibit No. 1. They
14 include a letter to Mr. Harris dated February 27,
15 1980. The answer to that was filed by Mr. Smolka,
16 the letter to Mr. Smolka dated November 7, 1979
17 which contains the Statement of the Charges of
18 Misconduct.
19 In addition to that, there was a
20 certification that came up from the Second District
21 Committee.
22 NOTE: At this point, the above-described
23 documents are marked as Bar Exhibit No. 1.
24 THE CHAIRMAN: Proceed, Mr. Telfeyan.
25 MR. TELFEYAN: The next thing I would

like to introduce is a stipulation of documents that Mr. Harris and I have entered into which stipulates the two Court files which are applicable in this case.

THE CHAIRMAN: Has Mr. Harris seen copies?

MR. HARRIS: Yes, sir, I have seen copies of these, Mr. Chairman, and I have endorsed the stipulation that is being presented.

THE CHAIRMAN: The stipulation will be received as Bar Exhibit No. 2.

NOTE: At this point, the above agreed upon stipulation is marked as Bar Exhibit No. 2.

MR. TELFEYAN: Here is the original of the documents and we have copies made.

THE CHAIRMAN: That would be your stipulation, Mr. Harris?

MR. HARRIS: Yes, sir, your Honor -- I mean, Mr. Chairman.

THE CHAIRMAN: That would suffice.

MR. HARRIS: I elevated you to a higher bench.

MR. TELFEYAN: Copies of the stipulation, they each represent the two Court files.

MR. GARRETT: I have got two of the same thing.

1 MR. TELFEYAN: No.
2 MR. GARRETT: I have got two that say
3 3149.
4 MR. TELFEYAN: I apologize.
5 MR. GARRETT: I got three items.
6 THE CHAIRMAN: Bar Exhibit No. 2 is
7 identical to the two handouts that you have passing
8 to the individual members of the Board, is that
9 correct?
10 MR. TELFEYAN: Yes, sir. Would you like
11 to take a moment and read the stipulation or would
12 you like to proceed.
13 THE CHAIRMAN: Do you want us to read
14 the entire file now? That is the stipulation.
15 Would that be easier for us?
16 MR. TELFEYAN: In my opinion it would be.
17 You would have the benefit of what is in there.
18 THE CHAIRMAN: You think that would be
19 a more orderly manner as opposed to hearing the
20 evidence? If you want us to read it -- what do
21 you think Mr. Harris?
22 MR. HARRIS: I might suggest this, Mr.
23 Chairman, that you might want to hear what Mr.
24 Elkins has to say. I would prefer that you have
25 had an opportunity to look through the stipulation

before Mr. Smolka testifies because I think his testimony would make more sense to you whereas Investigator Elkins' testimony is somewhat, I think, is going to be somewhat cumulative to what you already have before you.

THE CHAIRMAN: We will read the stipulation now. You may be at leisure as we do that. It looks like it is going to take us ten minutes.

The second file is not really necessary since it was the grand larceny charge that had been nolle pros'd as a result of the plea agreement.

MR. HARRIS: Are we free to step out in the hall?

THE CHAIRMAN: Yes, sir.

NOTE: A short recess is taken, following which the hearing resumes as follows:

THE CHAIRMAN: The Court Reporter has been previously sworn from the last hearing, and of course that will continue with this hearing.

FOREST ELKINS, a witness called by the Bar, having previously been duly sworn, testifies as follows:

1 DIRECT EXAMINATION
2 BY MR. TELFEYAN:
3 Q Please state your full name and address.
4 A Forest Elkins. I'm Investigator for
5 James City County Sheriff's Department in Williamsburg,
6 Virginia.
7 Q How long have you been so employed?
8 A Year and a half with the James City
9 County Sheriff's Department and approximately eight years
10 with the City of Williamsburg as a police officer until I
11 transferred.
12 Q Could you tell us if you had occasion to
13 investigate a matter involving the removal of property from
14 Busch Gardens, Incorporated?
15 A Yes, sir.
16 Q Busch Properties, Incorporated.
17 A Yes, sir, I did.
18 Q When was that, sir?
19 A I was initially contacted on the 23rd
20 of February 1979 about the incident.
21 Q Can you tell us whether or not your
22 investigation led you to the law office of Mr. Smolka?
23 A Yes, sir, it did.
24 Q When was that?
25 A That was on the following day of

1 February 24, 1979.
2 Q What day of the week was that?
3 A Saturday.
4 Q Was Mr. Smolka in his office?
5 A He arrived in his office after we had
6 been there for about 45 minutes.
7 Q Can you tell us exactly just what
8 happened on that day?
9 A After Mr. Smolka arrived at his office,
10 he was letting himself into his office. I identified myself
11 and asked him if I could talk to him and he said that I
12 could, and after verifying that he was or had been employed
13 with the sales office at Kingsmill, I advised Mr. Smolka
14 of his legal rights and told him I wanted to talk to him
15 about the burglary that had happened at Kingsmill, and at
16 that point Mr. Smolka paused and then asked if Kingsmill
17 would be satisfied if the items were returned by 5:00 p.m.,
18 and after telling Mr. Smolka that the calculators and
19 typewriters that were setting on the desk out front were
20 similar to those that had been taken, if he had any objection
21 to comparing the serial numbers, at which time we did, and
22 then he showed me where there was another typewriter that
23 had been taken, and at which time we took the evidence and
24 told Mr. Smolka that we would be in touch with him later on
25 another day, that I'd call.

1 I gave him a receipt for the items and
2 took them with us.
3 Mr. Smolka helped us carry, I believe it
4 was, a typewriter down to the car.
5 Q When you first discussed the typewriters,
6 did you ask where they were purchased or how he acquired
7 them?
8 A Yes, sir, I did, and he stated that he
9 had bought them at a sale. I don't recall whether it was in
10 Norfolk or at Virginia Beach, but he stated that he didn't
11 get a receipt for them. He had bought them at a sale.
12 Q All right, sir, just one final question:
13 How did you know to go to Mr. Smolka's office?
14 A I had information from a reliable person
15 that the items may be in the office.
16 Q And you received this information when?
17 A I was first contacted on the 23rd of
18 February and I went the next day.
19 MR. TELFEYAN: Those would be all the
20 questions I have.
21 THE CHAIRMAN: Mr. Harris?
22 CROSS-EXAMINATION
23 BY MR. HARRIS:
24 Q After you left the office that day,
25 Mr. Elkins, you then contacted Mr. Smolka and told him the

1 warrants were going to be issued, is that right?
2 A I forget whether I contacted him, Mr.
3 Harris, or whether he contacted me, whether any time I
4 wanted him up here, he had talked to you.
5 Q From that point on he cooperated with
6 you fully, did he not?
7 A Yes, sir.
8 MR. HARRIS: I don't have any other
9 questions.
10 THE CHAIRMAN: Mr. Bedinger?
11 MR. BEDINGER: This was on Saturday when
12 you went into his office?
13 THE WITNESS: Yes, sir.
14 MR. BEDINGER: Was his office locked?
15 THE WITNESS: Was his office locked?
16 MR. BEDINGER: Yes, sir.
17 THE WITNESS: He had to open it before
18 he got in.
19 MR. BEDINGER: You were in the building
20 before he arrived?
21 THE WITNESS: I was there before he
22 arrived.
23 MR. BEDINGER: He arrived and let you
24 in the office?
25 THE WITNESS: I was just hoping he would

1 come down Saturday morning. I believe he had his
2 dog with him that morning.
3 MR. BEDINGER: Did he admit that he took
4 these from Kingsmill?
5 THE WITNESS: No, sir.
6 MR. BEDINGER: He did not?
7 THE WITNESS: No, sir.
8 MR. BEDINGER: That is all.
9 THE CHAIRMAN: Mr. Klewans?
10 MR. KLEWANS: No.
11 THE CHAIRMAN: Mr. Duvall?
12 MR. DUVALL: No questions.
13 THE CHAIRMAN: Mr. Garrett?
14 MR. GARRETT: All right, just so I'm
15 sure, reading from this indictment, it alleges that
16 the burglary and theft occurred on December 2nd.
17 Is that what you show?
18 THE WITNESS: Between the evening of
19 Saturday, December 2nd and 5:20 a.m. on Sunday,
20 December 3rd.
21 MR. GARRETT: This was March 24th?
22 THE WITNESS: February.
23 MR. GARRETT: Excuse me. February 24th
24 of '79?
25 THE WITNESS: Yes, sir.

1 MR. GARRETT: When you went to his
2 office --
3 THE WITNESS: Yes, sir.
4 MR. GARRETT: -- and had you been
5 investigating the case before that?
6 THE WITNESS: No, sir.
7 MR. GARRETT: That is all I have.
8 THE CHAIRMAN: Mr. Rakes?
9 MR. RAKES: No questions.
10 THE CHAIRMAN: You didn't have a search
11 warrant when you went to the building there based
12 on probable cause?
13 THE WITNESS: No, sir.
14 THE CHAIRMAN: The office he let you
15 into and the office in which the typewriter and
16 calculator were was a law office, is that correct?
17 THE WITNESS: Yes, sir.
18 THE CHAIRMAN: Did it have a sign saying
19 Thomas Smolka, Attorney at Law?
20 THE WITNESS: Yes, sir, it had something
21 to that effect.
22 THE CHAIRMAN: Now sir, what actually
23 did you seize from the office? You mentioned a
24 calculator and at least two typewriters. Do you
25 have a list of that?

1 THE WITNESS: Yes, sir, I do.
2 THE CHAIRMAN: Would you give us that,
3 please?
4 THE WITNESS: There was two IBM Selectric
5 Correctable typewriters. There was one Canon
6 calculator. There was an Olympia calculator and
7 two typewriter pads.
8 THE CHAIRMAN: You say pads. Just a
9 little pad that a typewriter rests on?
10 THE WITNESS: That, yes, sir.
11 THE CHAIRMAN: What was the value that
12 had been reported to the Sheriff's Department by
13 Busch Properties as to the two typewriters and the
14 two calculators?
15 THE WITNESS: The total given to us was
16 $2,270.00.
17 THE CHAIRMAN: Did the two typewriters
18 and the two calculators and the two pads constitute
19 all that had been reported as being stolen from
20 the break-in?
21 THE WITNESS: Yes, sir.
22 THE CHAIRMAN: They were not damaged?
23 THE WITNESS: No, sir.
24 THE CHAIRMAN: How had entry been gained,
25 do your records reflect, to Busch Properties? Was

1 it forced entry or use of a key by someone?
2 THE WITNESS: Just stated that during --
3 there was no forced entry, that he found the rear
4 door unlocked.
5 THE CHAIRMAN: I have no further
6 questions. Mr. Telfeyan, any redirect?
7 MR. TELFEYAN: Just one question.
8 REDIRECT EXAMINATION
9 BY MR. TELFEYAN:
10 Q Were the typewriters and calculators,
11 did they appear in plain view and did they appear to be in
12 use in his office?
13 A Yes, sir. The one typewriter and one
14 calculator were setting on the receptionist's desk as you
15 walk into the office.
16 THE CHAIRMAN: Mr. Harris, any recross?
17 MR. HARRIS: No, sir, Mr. Chairman.
18 THE CHAIRMAN: Thank you for coming,
19 Sheriff Elkins. You may be excused.
20 - - - - - - - - - - - -
21 WITNESS STOOD ASIDE.
22
23 THE CHAIRMAN: Mr. Telfeyan, next
24 witness?
25 MR. TELFEYAN: I have no further evidence.

1 THE CHAIRMAN: Mr. Harris?
2 MR. HARRIS: I'd like to call Mr. Smolka,
3 Mr. Chairman.
4 THE CHAIRMAN: Come around, Mr. Smolka,
5 if you would, sir.
6
7 THOMAS EDWARD SMOLKA, the defendant
8 herein, having previously been duly sworn, testifies as
9 follows:
10 DIRECT EXAMINATION
11 BY MR. HARRIS:
12 Q Please state your full name and age for
13 the Board.
14 A Thomas Edward Smolka. 33.
15 Q Where is your place of residence?
16 A Virginia Beach.
17 Q Are you married?
18 A Yes, sir.
19 Q Do you have any children?
20 A I'm expecting next month.
21 Q When were you licensed to practice law
22 in the State of Virginia?
23 A 1975.
24 Q Could you explain to the Board where you
25 have practiced since that time up to the present?

1 A After graduation from Marshall Wythe,
2 I commenced as an Assistant City Attorney in Norfolk, served
3 there for a year, and then I went in private practice with
4 Joseph Anderson in Norfolk, Virginia.
5 After being with him approximately two
6 years,after his death I went in private practice myself
7 again in Norfolk.
8 Q Where is your office at the present
9 time?
10 A Duke-Grace Building in downtown Norfolk.
11 Q Could you tell the members of the Board
12 what type of practice you have?
13 A Real estate and corporate.
14 Q Now have you had an opportunity prior to
15 this date to read the presentence report which was prepared
16 as a part of the proceedings before the Circuit Court of
17 the City of Williamsburg and County of James City?
18 A Yes, sir.
19 Q Does that report, or does the contents
20 of that report accurately set forth your background prior
21 to this time?
22 A Yes, sir.
23 Q And your education?
24 A Yes, sir.
25 Q With regard to the letters of character

1 reference which were introduced at the time the matters
2 were heard in the Circuit Court of the City of Williamsburg
3 and County of James City, could you tell the members of the
4 Board how those letters came to be written and submitted
5 on your behalf?
6 A Yes, sir. I talked, after this all
7 came up, I talked to each person concerning what had
8 happened, explained the circumstances and asked them if they
9 would, in their writing, write to Judge Carneal, tell what
10 type person I was.
11 Q Now directing your attention to the day
12 that those items were removed from the Kingsmill Sales Center,
13 at that time were you employed by Busch Properties?
14 A Yes, sir. I worked on a part-time basis
15 on weekends.
16 Q Can you tell the Board members how long
17 you had been employed by Busch Properties and in what
18 capacity?
19 A I was employed in the capacity of real
20 estate salesman. I had been with them over three years in
21 that capacity.
22 When I first started, it was right
23 after I graduated from law school. I was the Assistant --
24 I was an Assistant City Attorney and I worked every weekend
25 selling property up there and then I switched to every other

1 weekend because of the mental grind and physical grind on
2 me.
3 This particular day I was showing
4 property. It was a Saturday.
5 Q Could you speak up just a little bit,
6 Mr. Smolka?
7 A I had been showing property. It was a
8 Saturday, and after I was done with the people showing them
9 around, showing people around Kingsmill, it was probably
10 about 5:30 at night. We had just broken up.
11 We were up at the Club, Kingsmill Club.
12 I guess we each had a couple beers.
13 I had to go back to the office to pick
14 up some papers and I thought about, for some reason, I chose
15 to take those items.
16 During this time I had a dispute with
17 Kingsmill over a commission which was substantial. I wasn't
18 thinking. I did this reckless act. I have had to suffer
19 these consequences. It was a stupid thing. I offer no
20 excuse for doing it, but it has been done and it has
21 affected me mentally. It's torn me up, my family and my
22 friends. I'm going to have to live with it for the rest of
23 my life.
24 Q When you entered the Sales Center and
25 removed these items, how did you get into the Sales Center?

1 A I think the door was still open. I have
2 a key or had a key and free access to the building at any
3 time.
4 I, occasionally, when I first started
5 with Kingsmill, I lived in Williamsburg, commuted back and
6 forth to Norfolk to work, and I had to go and use the office
7 at nights, and I was free -- usually down there until maybe
8 10:00 at night on occasions.
9 Q Was there any damage done to any of
10 the items?
11 A No, sir.
12 Q Have you made restitution to Busch
13 Properties for the loss, to them for the loss of the use of
14 the equipment?
15 A Yes, sir. I gave them $500.00 which
16 they contributed to a charity.
17 Q Do you feel you have learned anything
18 from this entire experience?
19 A Yes, sir. You know, I have thought about
20 it at least a million times. There's not an hour of the day
21 that it doesn't come up in my mind. It was a stupid thing.
22 It was something that should not have been done. It was
23 done and I'm sorry.
24 Q Do you think it would ever happen again?
25 A No, sir.

1 MR. HARRIS: Answer any questions Mr.
2 Telfeyan might have.
3 CROSS-EXAMINATION
4 BY MR. TELFEYAN:
5 Q I just have a few questions, Mr. Smolka.
6 You are a licensed realtor?
7 A I'm a licensed real estate agent.
8 Q Real estate agent, and after you left
9 the Busch Gardens Properties with the typewriters, did you
10 ever go back there again? In other words, did you report
11 to work the next weekend or subsequent weekends after that?
12 A I believe at that rate, shortly thereafter,
13 I resigned because of the difficulties I had with them.
14 Q You say you had a key and that is how
15 you entered the premises?
16 A I had a key. I'm not sure that the
17 door was not open.
18 Q When you entered the premises, did you
19 go in there with the intent to take the property or was
20 that an afterthought?
21 A That was an afterthought. It was a
22 stupid afterthought.
23 Q With reference to the character letters
24 that are in the Court file, can you tell us whether or not
25 you are related by family or marriage to any of those

1 individuals that wrote those letters of reference?
2 A I'm related by marriage to Willis
3 Stephenson.
4 Q He is the Chairman of the Board of
5 Atlantic Permanent Savings and Loan, is it?
6 A Yes, sir. I might state that because of
7 all this I have lost clients. I was an approved attorney
8 with Atlantic Permanent. I'm no longer an approved attorney.
9 I had an agency with Commonwealth Land
10 Title as both an agent and an approved attorney and I'm no
11 longer --
12 MR. DUVALL: Could you keep your voice
13 up, sir, so we can hear you a little bit better?
14 A (Continuing) Yes, sir. I have lost
15 business relationships with people because of all this.
16 I was an approved agent and approved attorney with Commonwealth
17 Land Title which I'm not any longer.
18 I have lost maybe ten clients because
19 of this. I have clients now that, as late as last week,
20 called the State Corporation Commission to find out if I
21 paid for its last taxes, the Corporation. I mean, it's
22 something that I'm going to have to deal with for the rest
23 of my life. It was a stupid thing. I offer no excuse for
24 doing it. I have to live with it.
25 Q Is Mr. Stephenson the only individual

1 you are related to?
2 A Yes, sir.
3 Q Are you still practicing law now?
4 A Yes, sir. My capacity is in corporate
5 and real estate fields.
6 Q Your practice is real estate and
7 corporate work solely or general practice? Could you be a
8 little more specific?
9 A From time to time I have to service
10 general deeds of clients which would be general type law,
11 but my main emphasis is real estate and corporate.
12 MR. TELFEYAN: All right, sir, I have
13 no further questions.
14 THE CHAIRMAN: Mr. Bedinger?
15 BY MR. BEDINGER:
16 Q Mr. Smolka, how much was the disputed
17 commission? What did it amount to?
18 A It was approximately $5500.00.
19 Q $5500.00?
20 A Yes, sir.
21 Q Did you feel when you took these items
22 that you were getting part of what Busch Properties owed
23 you?
24 A At that time I was thinking like that.
25 It shouldn't have been thought of in that manner, but at

1 the time I guess I did, in retrospect.
2 Now that I have had an occasion maybe a
3 million times to think it over, in my mind, probably at the
4 time, was thought that way. It was a stupid way to think.
5 Q Were you ever able to resolve your
6 dispute with Busch Properties? In other words, did they
7 pay you any additional money ever?
8 A I have been paid a certain amount but
9 not the total sum, no, sir.
10 I had another dispute with them which
11 Mr. Harris has cleared up for me on another piece of property
12 sold.
13 Q Did you use these items in your law
14 office after you acquired them?
15 A Yes, sir.
16 Q You did?
17 A Yes, sir.
18 THE CHAIRMAN: Mr. Klewans?
19 MR. KLEWANS: No, sir.
20 THE CHAIRMAN: Mr. Duvall?
21 BY MR. DUVALL:
22 Q Well, with respect to Mr. Bedinger's
23 question about the amount due and being resolved, have you
24 contemplated suing them or anything like that or you are
25 not contemplating that for the remainder you think they

1 owe you?

2 A Well, I really wanted to stay clear of

3 them, especially after this happened.

4 Q Let me ask you this: Have you stolen

5 anything before?

6 A No, sir.

7 Q This is the first time in your life?

8 A Yes, sir, first and last.

9 Q Let me ask you this: As a result of

10 this, and you say you have thought about it a million times

11 and it was a stupid act, one you are going to have to live

12 with the rest of your life, have you undergone psychiatric

13 counseling?

14 A No, sir.

15 Q You felt there was no need to seek any

16 help in that respect for yourself?

17 A I think that I have -- I think in my

18 own mind that I have realized what a stupid thing it was

19 and shouldn't have been done, and I have cleared it up in

20 my mind that it is something that has to be faced, lived with,

21 and regretted.

22 Q I see. That is all I have.

23 THE CHAIRMAN: Mr. Garrett?

24 MR. GARRETT: Yes, sir.

25

1 BY MR. GARRETT:
2 Q In the probation report on one page,
3 third paragraph from the bottom, it says it appeared that
4 in discussing the offense with the subject and reviewing
5 and verifying all information that the subject was under
6 tremendous financial pressure which may have contributed to
7 his actions, is that an accurate statement?
8 A Yes, sir. After I went into a
9 partnership relationship with Mr. Anderson --
10 MR. HARRIS: Speak up.
11 A (Continuing) After I went into a
12 partnership relationship with Mr. Joseph Anderson who is now
13 deceased -- he died July of '78 -- because of various
14 dealings with him and because of his way he conducted
15 business, I was forced into debt. He did things that I
16 wasn't aware of that I found out later, and I found this out
17 shortly before he died.
18 I probably went into debt somewhere
19 around $22,000.00.
20 Thereafter I went into partnership with
21 Mr. David Berry. That lasted three and a half months because
22 I was being drawn further in debt and I decided to go out
23 on my own, and I figured if I was going to go into debt,
24 it should be my doing and not somebody elses.
25 I offer that as not any excuse for

1 doing this but I was under quite a bit of pressure, I guess.
2 Q Was it at this point that you decided
3 to go with somebody else that you needed this equipment?
4 A This is when I was on my own.
5 Q How were you operating?
6 A I had just started practice. I had just
7 moved into the Duke-Grace Building.
8 Q What I'm getting at is did you have any
9 office equipment of this nature which was replaced by the
10 things taken from Busch Properties?
11 A I have since --
12 Q No. No. At that time. In other words,
13 did you use these things that were taken to open up your
14 office in effect?
15 A I had some other things that were lent
16 to me that weren't adequate. I had two manual typewriters
17 and two portable manuals.
18 THE CHAIRMAN: Mr. Rakes?
19 BY MR. RAKES:
20 Q Someplace in this I think I read that
21 you stated as a reason for taking this equipment the fact
22 that you could not afford to buy equipment for your office.
23 Do you recall having made that statement?
24 A Well, I know that I didn't have the
25 money to buy things. I don't recall that I --

1 THE CHAIRMAN: It is stated on page 2
2 of the presentence report, offender's version of
3 present offense.
4 BY MR. RAKES:
5 Q I guess what I'm getting at is did you
6 go there for the purpose of getting these typewriters and
7 calculators to furnish your law office on the date in
8 question? Did you plan to do this?
9 A I hadn't planned until I came back to
10 the office after dropping these people off and having a
11 couple beers. Then at that time I thought well, maybe that
12 would be a good idea.
13 Q This was at a time when you did have
14 some anger toward Busch Properties?
15 A Yes, sir.
16 Q How long have you been practicing law?
17 A Approximately five years.
18 Q Have you had any problems since you have
19 been practicing law as far as anyone making a complaint
20 against you?
21 A No, sir.
22 Q Fee disputes?
23 A No, sir. I have tried to conduct myself
24 in a proper manner.
25 Q Do you feel like as far as your

1 functioning as an attorney at law, a member of the Bar,
2 that your conduct and your work, relationship with other
3 members of the Bar, your Court, your clients, has been
4 satisfactory? There have been no problems?
5 A Yes, sir.
6 MR. RAKES: I think that is all, Mr.
7 Chairman.
8 BY THE CHAIRMAN:
9 Q Did you actually serve the 30 days in
10 jail?
11 A 20 days, yes, sir.
12 Q When you got arrested and subsequently
13 indicted and then convicted on your plea of guilty, did
14 this make the newspapers in Williamsburg?
15 A I was told that it did in Williamsburg.
16 Q How about in Norfolk?
17 A Yes, sir. It's come -- this has come
18 out in Norfolk. Other articles have come out in Norfolk
19 that are just things that I have to live with.
20 Q What kind of other articles? Anything
21 other than attendance to this particular charge and
22 conviction?
23 A I showed the article to Mr. Harris about
24 an hour ago. Maybe he could explain the basis of it.
25 Q Mr. Harris can address that if he

1 decides in closing argument. We don't need to get into it
2 now.
3 A It's basically a situation where a
4 corporation -- I had bought a piece of property I had at
5 foreclosure before it was going to be foreclosed on the day
6 before it was set for foreclosure, and the bank gave us a
7 first Deed of Trust. A second Deed of Trust was taken back
8 by the people that were forced to sell the property and some
9 labor paper tried to make a big to-do about a foreclosure
10 sale in which a corporation that I was a part of bought a
11 piece of property.
12 Q It wasn't related to any --
13 A No, sir.
14 Q Has the Real Estate Board taken your
15 license?
16 A No, sir.
17 Q Is there any pending action?
18 A No, sir.
19 Q Since you got out of jail, you have been
20 practicing law in your Norfolk office through today, is that
21 right?
22 A Yes, sir.
23 THE CHAIRMAN: I have no further
24 questions.
25 Mr. Harris, do you have any redirect?

1 MR. HARRIS: No, sir.
2 THE CHAIRMAN: Mr. Telfeyan?
3 MR. TELFEYAN: No, sir.
4 THE CHAIRMAN: Thank you. You may take
5 your seat. Resume your seat.
6 - - - - - - - - - - - -
7 WITNESS STOOD ASIDE.
8
9 THE CHAIRMAN: Mr. Harris, any additional
10 witnesses?
11 MR. HARRIS: No, sir, Mr. Chairman, we
12 have no additional witnesses nor do we have any
13 additional evidence to introduce other than the
14 stipulation which has previously been shown to the
15 Court.
16 THE CHAIRMAN: Mr. Telfeyan, do you have
17 any rebuttal?
18 MR. TELFEYAN: No, sir.
19 THE CHAIRMAN: Do you need a minute or
20 so to gather your thoughts for closing remarks?
21 MR. TELFEYAN: I am ready to go.
22 THE CHAIRMAN: Go ahead, please.
23 MR. TELFEYAN: I just have a few points
24 that I'd like to address.
25 First I would like to state that

1 throughout this, my experience in handling this
2 complaint, that Mr. Harris and Mr. Smolka
3 cooperated fully and I appreciate their cooperation.
4 I think we have to first answer the
5 question of what effect does it have? This conduct
6 occurred outside of his practice of law and should
7 that make a difference, and I don't think so. I
8 think we need to look at the conduct in question
9 and then I think we need to say, is this the type
10 of person that can practice law, and I think what
11 is important is that we are talking about the
12 practice of law where the public is placing their
13 trust in attorneys with their property and with
14 their lives.
15 In any case, there is a case, the Norfolk
16 and Portsmouth Bar Association vs. Drewry at
17 161 Va. 833 where the Court stated in reference
18 to a lawyer disciplinary proceeding that it is not
19 necessary that the offense charged be committed
20 in Court or even in the discharge of any
21 professional duty.
22 The second point that needs to be
23 addressed is whether or not there has been a
24 violation of disciplinary rules, and if so, what
25 is the discipline that should be imposed, and the

1 second question is the harder one.
2 I think clearly there has been misconduct
3 there and there has been a violation of the canons.
4 In the record before us, we see that there were
5 two indictments. One was for grand larceny and
6 one was for breaking and entering with intent to
7 commit larceny. A plea agreement was entered into.
8 The charge of grand larceny was nolle pros'd and
9 the breaking, there was a guilty plea to the
10 breaking and entering with intent to commit larceny.
11 The potential exposure under that statute is
12 20 years, and I am not commenting on the criminal
13 process, but I think in that sense that the
14 sentence, in reducing it to trespass was fairly
15 lenient.
16 But it is not the criminal conviction
17 that we need to look at. It's the underlying
18 conduct, and I think that is what we need to
19 address ourselves to. And the underlying conduct
20 is that taking personal property with the intent
21 to permanently deprive the owners of it, and the
22 Supreme Court does not usually set down standards
23 as to what the punishment should be in disciplinary
24 matters. They usually leave it to the triers of
25 the fact, but the fact remains that in this case,

1 and a case where an attorney has been convicted
2 of larceny -- I realize there has been no
3 conviction here -- but that type of conduct,
4 according to the Rules of the Supreme Court,
5 requires revocation of the attorney's license.
6 I think in this case, obviously, you
7 have discretion. There has been no conviction
8 although, I think in this case, the conduct could
9 have warranted such a conviction, but in
10 determining mitigation, if you will, I think you
11 need to look at the following factors, and that
12 is that the equipment was taken in December of
13 1978. It was found on February 24 of 1979,
14 approximately three months later. It was found
15 as a result of a tip that the Sheriff received,
16 was not found as a result of any action on the part
17 of Mr. Smolka.
18 When it was found, it was in use in his
19 office, and all the evidence indicates that but
20 for the fact there was such a tip, that it would
21 still be in that office today, and I think you
22 need to take that into consideration when reaching
23 a decision. Thank you.
24 THE CHAIRMAN: Does the Bar have a
25 recommendation?

1 MR. TELFEYAN: Mr. Chairman, I think in
2 this case that if you believe that this was a
3 one-time deviation and not a pattern of conduct
4 but a one-time deviation --
5 MR. RAKES: There is no evidence of any
6 pattern.
7 MR. TELFEYAN: No, sir, there has not
8 been, but I think there has been evidence of
9 character introduced into the record in terms of
10 recommendations and the presentence report, and I
11 haven't seen any evidence that -- well, in any
12 case, I would recommend that the minimum discipline
13 to be imposed would be a suspension for five years,
14 but I think in this case the standard for larceny
15 has been a revocation and that has to be
16 considered if this Board is going to be consistent
17 in what it does.
18 THE CHAIRMAN: Thank you. Mr. Harris?
19 MR. HARRIS: Mr. Janus and members of
20 the Board, I think lawyers are fond of getting up
21 before Judges and other bodies and saying, I'm
22 going to be brief. So I don't want to preface my
23 remarks by saying I'm going to be brief, but I
24 will try and be to the point.
25 I have had the pleasure and the privilege

1 of being before the Bar for 13 years, or it will
2 be 13 on July 1st of this year, and five of those
3 years I had the privilege of serving on the First
4 District Committee, and that experience, or those
5 five years of experience has led me to say that
6 I'd rather be on this side of the Bar today rather
7 than on your side of the Bar because I think this
8 is an extremely difficult case. Where cases come
9 before us for discipline and an attorney has dipped
10 into a trust account or let a statute of limitations
11 run, those aren't hard to decide. It doesn't
12 take a great deal of thought to reach a
13 determination as to what to do, but this is a
14 difficult case.
15 There are a number of factors to be
16 considered and I would urge you to consider in
17 making your deliberations and I would say that I
18 don't have a recommendation for you. I don't want
19 to say that you would give him a private reprimand
20 or a public reprimand or suspend his license for
21 five years or one year or two years. I can't
22 make that choice for you, but I think, as we all
23 know, hindsight is a wonderful thing, and if we
24 were all blessed with hindsight and foresight,
25 maybe a whole lot of us wouldn't have a job. That

1 would be one thing.

2 And maybe Mr. Smolka wouldn't be sitting
3 here before you today, embarrassed and chagrined
4 and having gone through an awful lot, and that
5 doesn't mean that you should let him walk out of
6 here and say, well, we are just going to let you
7 go. We think this is a one-time thing. I don't
8 think you can do that. I don't think you can
9 discharge your responsibility to the Bar if you
10 do that, but I think that you have to consider the
11 fact that here is a man who, and at least the
12 presentence report reflects and the testimony
13 before you prior to this particular incident, had
14 never had any involvement with the law, with any
15 disciplinary body in the course of practice of
16 his profession.

17 For some reason he made a grievous
18 mistake on that evening and he took this item,
19 these items out of there with no excuse, no
20 justification, and then he didn't have the good
21 sense in the cool light of day the next day or a
22 week later or two weeks later to say, Jesus, I
23 have really screwed up. I ought to send this
24 stuff back. I ought to get it back to them. He
25 didn't do that and it sat in his office until

1 February 24th until the investigator came down
2 there and got it. But up until that time he has
3 got an unblemished record.
4 Now Mr. Telfeyan has pointed out that
5 if he had been convicted of grand larceny, you
6 would really have no choice in the matter, or
7 actually we wouldn't be sitting here today. It
8 would be long disposed of, but he wasn't convicted
9 of grand larceny, and that charge was nolle pros'd,
10 and the breaking and entering charge was reduced.
11 That is a decision that Judge Carneal made at
12 the time upon a consideration of the facts, and I
13 can't say what went through his head.
14 I know what I had to say to him and I
15 know what he had an opportunity to look at, the
16 presentence report, and I know what Mr. Person,
17 the Commonwealth's Attorney said to him, but he
18 did reduce the charge. Mr. Smolka made restitution
19 to Busch Properties for the use of the equipment,
20 if you will.
21 Even though he has not been convicted
22 of breaking and entering, he has been convicted
23 of a crime, trespass. He was sentenced to 30 days
24 in jail and he did serve the 30 days. I think
25 he mentioned, in response to a question by

1 Mr. Janus that he spent 20 days in jail, which
2 he did, but giving him credit for the good time,
3 which they did, that amounts to the 30 days. So
4 he has fulfilled his 30-day sentence.
5 He is on probation from the Circuit
6 Court in Williamsburg, and as he has said to you,
7 it really doesn't matter what you all do today in
8 a sense because he is going to have to live with
9 this thing for the rest of his life.
10 It is a perplexing question, I think,
11 that you have to resolve. Is this conduct such
12 that it should permanently remove or remove him
13 from any period of time for dealing with the public
14 in the capacity of an attorney?
15 He has stated to you that in his practice
16 before the Bar that he has tried to meet the
17 ethical standards, that he has not had any complaint
18 made against him, and as far as I know, that is
19 correct.
20 But I think that each of you gentlemen
21 must, I guess, look to your own conscience in this
22 matter. I view this differently than if it had
23 occurred in the course of his employment as a
24 lawyer. If it did, as I told him the first time
25 I talked to him, I would have told him to put his

1 license in an envelope and get it up here because
2 it is an entirely different matter, but the
3 pressures of society are such, and he has not
4 offered this as an excuse, and I don't bring it
5 before you to offer it as an excuse, but he did
6 have a problem with Busch Properties. He did have
7 some pressures on himself, and who is to say what
8 we do when we are put in a situation of pressure?
9 I think that we all find that as each
10 day goes by we learn a little more and hopefully
11 we have a little more maturity and a little more
12 judgment that helps us to deal with situations.
13 The law says when we are 18 we are adults,
14 but that doesn't necessarily mean that you are
15 capable of coping with the pressures we find placed
16 on ourselves, and he had pressure on him. He
17 dealt with it in a manner which was entirely
18 unappropriate. He shouldn't have done it, and
19 there is no excuse in having done it, but he has
20 been punished. He will continue to be punished,
21 and I would just ask that each of you gentlemen
22 take these points into consideration in reaching
23 your decision, and I thank you for your attention
24 and I appreciate your taking the time to go through
25 the documents that have been stipulated.

1 THE CHAIRMAN: Mr. Telfeyan, do you have
2 anything briefly in rebuttal?
3 MR. TELFEYAN: No, sir.
4 THE CHAIRMAN: We will go into executive
5 session.
6 NOTE: At this point, the Board goes
7 into executive session, following which the hearing
8 is reconvened as follows:
9 THE CHAIRMAN: The Board has reconvened
10 after being in executive session. The Board finds
11 by clear and convincing evidence, and it was in
12 the stipulations and the evidence that Mr. Smolka
13 did, in fact, commit the acts that have been
14 admitted to, and this conduct does constitute
15 violations of the Virginia Code of Professional
16 Responsibility defined by clear and convincing
17 evidence that he violated DR1-102a, 1, 3, 5, and 6.
18 Mr. Harris hit the nail on the head
19 when he said our task isn't an easy one, he didn't
20 envy us. It is not easy to do, especially in
21 light of the fact Mr. Harris' rate of pay was the
22 same as your first rate of pay when you were on
23 the First District Committee.
24 Without any further adieu, Mr. Smolka,
25 it is the holding of the Board that your license

be suspended for a period of four years. I tell you, sir, with the thought in mind that we were satisfied by clear and convincing evidence beyond a reasonable doubt that your conduct would have amounted to grand larceny.

Your lawyer did a good job for you in the Circuit Court in the City of Williamsburg when he convinced Judge Carneal to reduce it to trespass. He did an excellent job for you here today. The Board was impressed with Mr. Harris, and we were impressed with you in the fact you were remorseful. You have our sympathy. You don't have our understanding.

Perhaps this is me talking individually. Perhaps we can't understand or justify what you did. What you did was not stupid or reckless. It was criminal. You are a lawyer. You have to know there was thought -- more than thought on the Board to revoke your license because your conduct was tantamount to being convicted of a crime.

Because we felt you were sincerely remorseful because of your lawyer, we reached a holding of four years. You are a young man. You are bright. You finished number one in your class in Delaware in your major. You can still

1 be in your mid-30's and get your life back
2 together and reapply after the expiration of the
3 four years.
4 Some future Board, at that time, is
5 going to look into what you have done with yourself
6 in the four years, whether you continued your
7 legal training, keeping up with advance sheets,
8 keeping up your library, what have you.
9 You may choose not to come back into
10 the practice of law. That, of course, is a personal
11 decision. We are not unmindful of the fact that
12 four years is a long time, nor are we unmindful
13 there is no question beyond a reasonable doubt
14 that your actions constitute grand larceny and
15 that is, everyone agrees, wouldn't even necessitate
16 a hearing. It would just be the formality of
17 proving the record. That is all.
18 Thank you, very much, Mr. Telfeyan.
19 Thank you, Mr. Harris. Good luck to you, Mr.
20 Smolka.
21 MR. HARRIS: Mr. Chairman, could I pose
22 a question to the Board? Is the suspension
23 effective immediately or --
24 THE CHAIRMAN: Yes, sir.
25 MR. HARRIS: Is there any provision

that would permit him to wind up the affairs of his practice by a certain date?

THE CHAIRMAN: I will be happy to caucus briefly with my fellow members of the Board and then get back, and we certainly will owe the courtesy of considering that. However, I will tell you before that that we considered the fact that he has been practicing from the time he got out of jail after, I assume, 20 days after August 9, 1979 until today. We will consider that. Give us what is your request.

MR. HARRIS: Well, my request would be, Mr. Chairman, that be effective May 1. I just use that because we are almost here at the end of the month of March, and I don't make the request to permit him to continue practice so much as to permit him to properly wind up the affairs with which he is now engaged.

THE CHAIRMAN: Is anyone in the office with Mr. Smolka by way of a partnership or sharing office space?

MR. SMOLKA: Sharing office space?

THE CHAIRMAN: You have no associates working for you?

MR. SMOLKA: No, sir. I have a secretary.

1 THE CHAIRMAN: Have you discussed with
2 the person you share office space or any other
3 lawyers as far as taking over your files or
4 helping you wrap things up?
5 MR. SMOLKA: No, sir. I did not think
6 that it was going to be this serious today.
7 THE CHAIRMAN: You did not think it was
8 going to be this serious?
9 MR. SMOLKA: I thought that it was going
10 to be a serious matter today but I did not think
11 that it was going to be a situation of four years
12 suspension.
13 THE CHAIRMAN: Be that as it may, we
14 will consider it, Mr. Harris. We will let you
15 know in just a minute.
16 MR. HARRIS: In case I forget when you
17 let me know, I do appreciate the comments of the
18 Chairman. I think it is helpful. At least it is
19 helpful to me in understanding the sentence of
20 the Board.
21 NOTE: At this point, the Board goes
22 again into executive session, following which the
23 hearing resumes as follows:
24 THE CHAIRMAN: Mr. Harris, the Board
25 will grant your request on behalf of Mr. Smolka.

1 Mr. Smolka will have until May 1st, 1980 to wrap
2 up his affairs and that means exactly that.
3 Mr. Smolka, you are to take on no new
4 clients. You are not to do any additional work.
5 You are just to wrap up the work that you have
6 started for the clients.
7 The Rules of the Bar -- Mr. Harris can
8 advise you on this -- but any lawyer who is
9 suspended shall forthwith give notice by certified
10 mail of your suspension to all your clients for
11 whom you are currently handling matters and to
12 all opposing Judges and attorneys in pending
13 litigation.
14 You make immediate, appropriate
15 arrangements for disposition of matters then in
16 his care in conformance with the wishes of the
17 clients. You have 30 days to do that with notice.
18 You are going to have to comply with that forthwith.
19 As I say, we will grant your request
20 as made through your attorney.
21 MR. HARRIS: Thank you, Mr. Chairman.
22 THE CHAIRMAN: We are not unmindful
23 four years is a long time again, but our job isn't
24 easy. There are a whole lot of factors we have
25 to consider, Mr. Smolka. There is no question

had you your druthers, that you wouldn't relive that particular part of that day.

Good luck to you, but we have to do what we have to do. That is the only thing we have to say. I think Mr. Harris understands that.

Thank you, again.

HEARING CONCLUDED.

STATE OF VIRGINIA,

CITY OF RICHMOND, To-wit:

I, Lynn Aligood, a Notary Public for the State of Virginia at Large, do hereby certify that I was the Notary Public at the hearing of the Virginia State Bar held on March 27, 1980.

I further certify that the hearing was taken down by me in stenotypy at the time and place herein named and was thereafter reduced to typescript under my supervision; that the hearing was faithfully reported and here accurately transcribed, and that the foregoing is a full and complete transcript of said hearing.

Given under my hand this the 31st day of April 1980.

Lynn Aligood

Lynn Aligood
Notary Public - State of Virginia at Large
My Commission Expires: June 30, 1981.

HARD H. BARRICK
HALL
RLOTTESVILLE, VA. 22901

NK C. BEDINGER, JR.
TON, VA. 23917

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Commonwealth of Virginia

VIRGINIA STATE BAR

N. SAMUEL CLIFTON, SECRETARY
MICHAEL L. RIGSBY, BAR COUNSEL
SUITE 1622
700 E. MAIN ST.
RICHMOND, VA. 23219
TELEPHONE: 786-2061

Bar Ex. No 1.
3/27/80

CLERK
SUPREME COURT OF VIRGINIA
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MAY 19 1980
RICHMOND, VIRGINIA

VIRGINIA STATE BAR
DISCIPLINARY BOARD

February 27, 1980

PERSONAL AND CONFIDENTIAL

CERTIFIED MAIL, RETURN RECEIPT REQUESTED #0637884

Stephen D. Harris, Esquire
P.O. Box 379
137 York Street
Williamsburg, VA 23185

Re: Second District Committee v. Thomas E. Smolka
Docket No. 79-32

Dear Mr. Harris:

I am writing to advise you that the above-captioned matter has been reset for hearing before the Disciplinary Board on Thursday, March 27, 1980, in Room 350 of the Virginia Employment Commission, 703 East Main Street, Richmond, Virginia. The hearing will commence at 12:00 Noon.

You have the right to have summons and/or subpoenae issued on behalf of your client subject only to the proviso that such right be exercised reasonably and promptly. Any request for the issuance of summons and/or subpoenae should be mailed to me for handling, with a copy of such request to Bar Counsel.

Sincerely,

N. SAMUEL CLIFTON
Secretary

NSC:jc

PS Form 3811 AUG. 1978 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 4.
Add your address in the "RETURN TO" space on reverse.

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2. ARTICLE ADDRESSED TO:
Stephen D. Harris, Esq.
P.O. BOX 379; 137 York St.
Williamsburg, VA 23185

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November 7, 1979

PERSONAL AND CONFIDENTIAL

Certified Mail, Return Receipt Requested

Mr. Thomas E. Smolka
1414 First Virginia Bank Building
Norfolk, VA 23510

RE: Second District Committee of the Virginia State Bar
v.
Thomas E. Smolka

Docket No. 79-32

Dear Mr. Smolka:

Pursuant to Part Six, Section IV, Paragraph 13(C)(5) of the Rules of the Supreme Court of Virginia, I am hereby serving upon you the Statement of Charges of Misconduct which have been certified against you by the Second District Committee. The procedural rules provide that you may, within 21 days from today, (A) file an original and seven copies of an Answer or (B) demand that the charges against you be heard by a 3-judge court pursuant to Section 54-74 of the Code of Virginia as amended.

Yours very truly,

MICHAEL L. RIGSBY

MLR/bbn

cc Stephen D. Harris, Esquire
P.O. Box 379
Williamsburg, VA 23185

P09 0637883

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO
Thomas E. Smolka

STREET AND NO.
1414 First Va Bk Bldg

P.O., STATE AND ZIP CODE
Norfolk, VA 23510

POSTAGE				$ .15
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE			.55 ¢
	OPTIONAL SERVICES	SPECIAL DELIVERY		¢
		RESTRICTED DELIVERY		¢
		RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
			SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	.80 ¢
			SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
			SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
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11-7-79

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November 7, 1979

PERSONAL AND CONFIDENTIAL

Certified Mail, Return Receipt Requested

RE: Second District Committee of the Virginia State Bar
v.
Thomas E. Smolka

Docket No. 79-32

STATEMENT OF CHARGES OF MISCONDUCT

1. The respondent, Thomas E. Smolka, was prior to the alleged conduct in question, acting as a sales agent for Busch Properties, Inc., the corporation which operates and is developing a subdivision in James City County, Virginia, known as Kings Mill on the James. He was not acting in any way in his capacity as an attorney, but solely in his capacity as sales agent for Busch Properties. As sales agent for Busch Properties, he had access to the Kings Mill sales center located in the development known as Kings Mill on the James in James City County, Virginia. On or about December 2, 1978, the respondent went into the sales center and removed from the same two IBM typewriters and two electric calculators having a value of approximately $2,200.00, which said pieces of equipment he transported and placed in his law offices located in the City of Norfolk, Virginia. On or about February 24, 1979, said items of equipment were discovered in his law offices located in the City of Norfolk, Virginia, and were recovered. There was no damage to the equipment in question.

2. Subsequent to the discovery of equipment in the respondent's law offices in Norfolk, two warrants were obtained for his arrest in James City County, Virginia, charging him with grand larceny of the equipment in question and the breaking and entering of the Busch

Properties sales office located in James City County, Virginia, with the intent to commit larceny therein. The respondent thereafter waived his right to a preliminary hearing, and subsequent thereto the charges in question were Certified by the grand jury in and for the County of James City, Virginia.

3. Upon trial of the certified charges in the James City County Courthouse before the Honorable Russell Carneal, Judge, a plea agreement was entered into between the respondent and the Commonwealth's Attorney wherein the respondent agreed to plead guilty of the breaking and entering of the offices of Busch Properties with the intent to commit larceny therein on the date in question in return for the nol prossing of the charge of grand larceny. The Court accepted the plea agreement, and after hearing evidence on the date in question, found the respondent to be guilty and referred the matter for a presentence report.

4. On August 9, 1979, the sentence and hearing on the criminal charge pending against him in the Circuit Court of the County of James City was heard, and after reviewing the presentence report and hearing arguments, the Court vacated its previous finding of statutory burglary and found the respondent guilty of trespass. The repondent was sentenced to twelve months in jail with all suspended save and except thirty days and placed upon probation for a period of twelve months. The thirty-day jail sentence began on September 10, 1979, and was served by the respondent.

5. Such conduct by Thomas E. Smolka constitutes Misconduct in violation of Disciplinary Rules 1-102(A)(1), (3), (5) and (6) of the Virginia Code of Professional Responsibility.

MICHAEL L. RIGSBY

COMMONWEALTH OF VIRGINIA

VIRGINIA STATE BAR

SECOND DISTRICT COMMITTEE

PLEASE REPLY TO:
W. Edward Hudgins, Jr.
Post Office Box 625
Virginia Beach, VA 23451

PERSONAL AND CONFIDENTIAL

Executive Director
Virginia State Bar
700 Bldg., Second Floor
700 E. Main Street
Richmond, Virginia

CERTIFICATION

Re: 2DC 79-363; Smolka, Thomas E.
Complaint by: Second District Committee

To the Executive Director:

Following is the Certification by the Committee of the above-referenced matters.

I. STATEMENT OF MISCONDUCT

A. That the respondent, Thomas E. Smolka, was prior to the alleged conduct in question, acting as a sales agent for Busch Properties, Inc., the corporation which operates and is developing a subdivision in James City County, Virginia known as Kings Mill on the James. That he was not acting in any way in his capacity as an attorney, but solely in his capacity as sales agent for Busch Properties. That as sales agent for Busch Properties, he had access to the Kings Mill sales center located in the development known as Kings Mill on the James in James City County, Virginia. That on or about December 2, 1978, the respondent went into the sales center and removed from the same two IBM typewriters and two electric calculators having a value of approximately $2,200.00, which said pieces of equipment he transported and placed in his law offices located in the City of Norfolk, Virginia. That on or about February 24, 1979, said items of equipment were discovered in his law offices located in the City of Norfolk, Virginia and were recovered. There was no damage to the equipment in question.

B. That subsequent to the discovery of equipment in the respondent's law offices in Norfolk, two warrants were obtained for his arrest in James City County, Virginia charging him with grand larceny of the equipment in question and the breaking and entering of the Busch Properties sales office located in James City County, Virginia with the intent to commit larceny therein. That the respondent thereafter waived his right to a preliminary hearing, and subsequent thereto the charges in question were Certified by the grand jury in and for the County of James City, Virginia.

C. That upon trial of the certified charges in the James City County Courthouse before the Honorable Russell Carneal, Judge, a plea agreement was entered into between the respondent and the Commonwealth's attorney wherein the respondent agreed to plead guilty of the breaking and entering of the offices of Busch Properties with the intent to commit larceny therein on the date in question in return for the nol prossing of the charge of grand larceny. That the Court accepted the plea agreement, and after hearing evidence on the date in question, found the respondent to be guilty and referred the matter for a pre-sentence report.

D. That on August 9, 1979, the sentence and hearing on the criminal charge pending against him in the Circuit Court of the County of James City was heard, and after reviewing the pre-sentence report and hearing arguments, the Court vacated its previous finding of statuatory burglary and found the respondent guilty of trespass. The respondent was sentenced to twelve months in jail with all suspended save and except thirty days and placed upon probation for a period of twelve months. The thirty day jail sentence began on September 10, 1979 and was served by the respondent.

E. That upon hearing before the Second District Committee in the Circuit Court of the City of Norfolk on October 25, 1979 at 1:00 P.M., the Committee determined that the charges again the respondent should be Certified as violations of DR 1-102(A), (1), (3), (5), (6).

II. TRANSCRIPT AND EVIDENCE

Enclosed herewith are all portions of the transcription and exhibits received or refused at the hearing pertaining to, or considered by the Committee in Certifying the foregoing Misconduct.

Respectfully submitted,

T. Howard Spainhour

T. Howard Spainhour, Chairman
Second District Committee

Date executed: October 31, 1979