IN THE DISCIPLINARY DISTRICT III
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF TENNESSEE

IN RE: BARBARA SIMS ARTHUR
BPR NO. 4694, an Attorney
Licensed to Practice in Tennessee
(Hamilton County)

DOCKET NO. 2013-2207-3-AJ

JUDGMENT OF THE HEARING PANEL

This matter came to be heard on June 8, 2015 before the Hearing Panel of the Board of Professional Responsibility of the Supreme Court on a Petition for Discipline filed by the Board filed on April 24, 2013 and an Answer filed by Respondent on May 16, 2013.

On June 8, 2015, a trial was held. The Board appeared through counsel, Alan D. Johnson, and Respondent, Barbara Sims Arthur, appeared in person and through counsel, Martin J. Levitt. Upon the sworn testimony of the witnesses, including Respondent, exhibits introduced into evidence during the Hearing, statements of counsel and the entire record herein, the Hearing Panel consisting of attorneys Alicia Brown Oliver, Chair; Marc H. Harwell; and Michael E. Jenne, makes the following Findings of Fact and Conclusions of Law and renders the following Judgment in this matter.

I. Findings of Fact.

1. Respondent was admitted to practice law in Tennessee in 1976.
2. Respondent is an attorney admitted to practice law in the State of Tennessee and thus subject to the disciplinary power of the Tennessee Supreme Court, the Board of Professional Responsibility and this Hearing Panel appointed pursuant to Tenn. Sup. Ct. Rule 9.

A. Board File Number 33698-3 (Smith & Henderson Bankruptcy Cases)

3. In a prior disciplinary action, Respondent was administratively suspended from the practice of law for six (6) months by the Tennessee Supreme Court effective from September 23, 2011 to March 23, 2012, accompanied by eighteen (18) months of probation with a practice monitor.

4. Under the version of Supreme Court Rule 9 in effect at that time, Respondent was automatically reinstated to practice on March 24, 2012.

5. Respondent was also suspended from practice in the Eastern District of Tennessee, including the United States Bankruptcy Court, "for the six months of her active suspension with the Tennessee Supreme Court". (Order dated Nov. 10, 2011, Exhibit G to Petition for Discipline.)

6. After her suspension from the Tennessee Supreme Court ended, Respondent was retained by Jayson Eric Smith and prepared a Chapter 13 Bankruptcy Petition on his behalf.[1] When Respondent inquired with the Bankruptcy Court regarding re-activating her Electronic System Filing ("ECF") privileges,[2] Respondent learned that she was unable to electronically file the Petition through the Court's ECF system because she had not applied for reinstatement to the Eastern District Court.

7. United States District Court Local Rule 83.71(1) provides that "[a] petitioner who has been suspended for a definite term may be automatically reinstated at the end of the period of suspension upon filing the petition for reinstatement accompanied by an affidavit showing compliance with the provisions of the order of suspension."

8. Respondent was not aware of this requirement until she learned from court staff that she could not re-activate her ECF account without filing a petition for reinstatement under Local Rule 83.71.

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[1] Respondent cannot find a written fee agreement with Mr. Smith but testified it was likely her normal fee agreement similar to the agreement used with Ms. Henderson, at Exhibit 5.

[2] All Bankruptcy practitioners are required to use an ECF account to make filings on behalf of clients. To be eligible to use ECF, an attorney must be in good standing and admitted to practice in the district court. (Bankruptcy Court Order, Exhibit K to Petition for Discipline, p, 8.)

9. Respondent explained to Mr. Smith that she would not be able to file his petition, and asked if he could wait until she was reinstated. Mr. Smith told her that he was concerned his truck was about to be repossessed, which he needed to run his business, and could not wait to file the Petition. Respondent revised the Petition to be filed "pro se"; Mr. Smith signed the Petition stating that he was not represented by an attorney, and Respondent's office manually filed the petition with the Bankruptcy Court on March 28, 2012. (Exhibit 4.)

10. Respondent subsequently applied for reinstatement pursuant to Local Rule 83.71 on April 2, 2012, which was granted without further notice or hearing on April 12, 2012. (Bankruptcy Court Order, Exhibit K to Petition for Discipline, p. 9.)

11. Respondent was retained by Elnor Henderson on April 7, 2012 to file a Chapter 13 Bankruptcy petition. Respondent knew that she could not file Ms. Henderson's Petition because she had not yet been reinstated, and explained the issue to Ms. Henderson. Ms. Henderson was concerned about repossession of her car, which was the subject of title pawn, and said she could not wait to file her petition. Respondent again prepared a "pro se" petition and had her staff file it with the Bankruptcy Court on April 12, 2012. (Exhibit 9.)

12. After her reinstatement, Respondent entered an appearance for both Smith and Henderson, responded to the Court's deficiency notices (issued as a result of the skeleton "pro se" filings), and filed the appropriate schedules on their behalf.

13. After learning of Respondent's involvement in the initial "pro se" filings, the Chapter 7 and Chapter 13 Trustees filed Motions for Sanctions against Respondent.

14. The Bankruptcy Court issued a lengthy Order on January 13, 2013 granting the Trustees' Motions in part, and denying them in part. (Exhibit K to Petition for Discipline.) The Bankruptcy Court found Respondent for breached Rules 1.2 (scope of representation), 3.3 (candor to the

tribunal), and 8.4(c) (misconduct) by making the pro se filings without disclosure that the clients were in fact were represented by an attorney. More specifically:

a. Respondent failed to effectively limit her representation of Smith and Henderson. Bankruptcy Code, 11 U.S.C. Section 528(a)(1), requires a written engagements specifying the services an attorney will perform for debtors. Respondent did have a written agreement with at least Ms. Henderson, and presumably Mr. Smith although she could not locate it, containing a merger clause and a clause requiring amendments to be in writing. Respondent did not limit the scope in writing and did not get informed consent from her clients.

b. Respondent violated her duty of candor to the court by not disclosing her participation if preparing and filing the "pro se" petitions on behalf of her clients. The Court performed an extensive analysis of the "ghost writing" rule and found no governing authority on the ability of an attorney to ghost-write bankruptcy petitions in the Sixth Circuit, noting that Tennessee prohibits only *extensive undisclosed participation*. The Court refused to find that Respondent had engaged in the unauthorized practice of law or that there was a pattern of filing ghost-written pleadings. The Court further noted that "[s]he appears to have had a good faith belief that her solution to her filing problem was within acceptable parameters of Tennessee's position on nondisclosure of her participation. She believed she would be reinstated before she needed to make a physical appearance and she was." Bankruptcy Court Order, Exhibit K to Petition for Discipline, p. 42.

15. The Bankruptcy Court further ruled that, after entry of its order, any attorney assisting a debtor in filing pleadings should effectively limit the scope of the representation in writing, obtain the client's informed consent and disclose his/her assistance to the Court because it is "material" to the proper administration of a bankruptcy case. "In the future, the requirement of disclosure

should be clear for any attorney considering whether to ghostwrite pleadings and present them to this court." Bankruptcy Court Order, Exhibit K to Petition for Discipline, p. 42.

16. Under the Order, Respondent was required to complete 6 hours of Continuing Legal Education, pay the Chapter 13 Trustee $1000, pay the Chapter 7 Trustee $1000, withdraw from representation of Smith and Henderson, and pay any expenses her clients incurred in changing representation. Respondent has complied with the Order, except she did not pay any client expenses because none were incurred.

B. Board File Number 35640-3-BG (Scott Ray Complaint)

17. On September 20, 2012, attorney Scott Ray filed a detainer warrant styled "Yes Communications, LLC v. Teddy Harold Burns, Jr." Docket No. 12-GS-10626 in the Hamilton County General Sessions Court. (Exhibit 1.)

18. At the time, Respondent had an active Chapter 13 case for Mr. Burns in Bankruptcy Court. Mr. Burns brought Ms. Arthur a copy of the civil warrant. Respondent told Mr. Burns that she would contact Mr. Ray to inform him of the ongoing Bankruptcy case and to see if it could be resolved.

19. Respondent contacted Mr. Ray and told him about the Burns Bankruptcy case including that a Stay was in effect. She also asked him if the case could be resolved.

20. Respondent did not hear back from Mr. Ray, and the October 8 hearing date, so she faxed and mailed him a Notice of Stay on October 1. (collective Exhibit 2).

21. Mr. Ray called Respondent, who told him that the Stay could be lifted but that it would involve substantial time and expense. Again she asked if the case could be resolved in more economical manner. He said he would check with his client and call her back.

22. Mr. Ray reviewed the Bankruptcy docket in PACER and found that the proposed Order imposing Stay had been denied back in July 2012, and that no Stay was in effect.

23. Respondent testified that she was unaware that there was no Stay in effect. She further testified that she should have checked her file prior to sending the notice to Mr. Ray. She has a large volume of cases, the majority of which have stays in place, and she mistakenly assumed that there was a stay in place in the Burns' case. (See also Respondent Response to Board Complaint, Exhibit 3.)

24. Mr. Ray testified that he did not contact Respondent further, even though he told her he would get back to her, because he felt that Respondent had intentionally misrepresented the existence of a stay to him. He testified that he did not think it would be an efficient use of his client's resources.

25. On October 9, 2012, Mr. Ray contacted the Board, and followed up with a written Complaint on October 16. (collective Exhibit 2.)

26. Mr. Ray appeared at trial on October 12, 2012 and took a default judgment against Mr. Burns and his co-defendant. Neither Mr. Burns nor Respondent appeared.

27. The Board seeks suspension of one (1) year for Respondent for violation the following Rules 1.1 Competence, Rule 1.2, Scope of Representation and Allowance of Authority Between Lawyer and Client, 3.1 Meritorious Claims and Defenses, 3.3 Candor Toward Tribunal, 4.1 Truthfulness and Candor in Statements to Others, 5.5. Unauthorized Practice of Law and 8.4 Misconduct.

II. Conclusions of Law.

28. The Panel finds that Respondent violated Rule 1.1 (competence) by failing to check her file and/or the Bankruptcy Court's docket system to confirm that a stay was in effect in the Burns bankruptcy case.

29. The Panel finds that Respondent violated Rule 3.1 (meritorious claims and contentions) by representing to Mr. Ray (via telephone and by serving a Notice of Stay) that a Stay was in effect in the Burns Bankruptcy case when there was no stay.

30. The Panel finds that Respondent violated Rule 8.4 (misconduct) by the actions described above.

31. The Panel finds that Respondent violated 3.3 (candor to tribunal) and 4.1 (candor in statements to others) by filing the Smith and Henderson Petitions as "pro se" without disclosing that she assisted in preparing the petitions.

32. The Panel finds that Respondent's actions also violate Rule 1.2 (scope). Although Rule 1.2 does not expressly require fee limitations in writing, Bankruptcy law and Respondent's own fee agreement required amendments to be in writing. Respondent testified that she discussed her inability to file the petitions with each client, but she failed to limit the scope of representation in her written fee agreement as required by law and by her own agreement. Furthermore, Respondent could have easily associated counsel who was admitted to practice to make the filings on behalf of her clients until her reinstatement was complete, but chose not to do so.

33. The Panel does not find that Respondent violated Rule 5.5 (unauthorized practice of law) because:

    a. attorney involvement in pro se skeleton filings in Bankruptcy Court without disclosure was case of first impression;

    b. Respondent had a good faith belief that she was complying with the applicable rules; and

    c. Respondent disclosed her involvement in the Smith and Henderson cases immediately upon her reinstatement to the Eastern District of Tennessee.

34. The Panel has reviewed the ABA Standards for Imposing Lawyer Sanctions, as set forth in *Maddux v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 409 S.W.3d 613 (Tenn. 2013) and finds the following.

    a. *What ethical duty did the lawyer violate?* The Panel finds that Respondent's conduct violated her ethical duties to her clients, the legal system and the profession.

b. *What was the lawyer's mental state?* The Panel finds that Respondent acted negligently.

c. *What was the extent of actual or potential injury caused by the lawyer's misconduct?* The Panel finds that no actual harm resulted from Respondent's conduct; however, there was a potential for harm to Mr. Ray and his client (if he had not proceeded with the detainer), as well as to Respondent's bankruptcy clients Smith and Henderson (if their cases had been dismissed).

d. *Are there any aggravating or mitigating circumstances?* Respondent's pro se filing as a "ghost writer" was a case of first impression for the Bankruptcy Court. The Panel finds that the unique nature of this case, Respondent's good faith belief that she was complying with the rules and the sanctions already imposed by the Bankruptcy Court are mitigating factors here. The Panel does not find any aggravating factors.

III. Judgment.

Based on the foregoing facts and conclusions of law, including the aggravating factors set forth, the Panel heavily considered imposing a 6 month suspension, with 1 month active suspension and the remaining 5 months on probation, but considering the sanctions previously ordered by the Bankruptcy Court, and the fact that it was an apparent case of first impression according to the Court, coupled with the fact that Respondent timely complied with all sanctions, the Panel finds that only an additional Public Censure is warranted under the facts and circumstances of this matter.

Dated this 15th day of June, 2015.

Alicia Brown Oliver, Esq., Hearing Panel Chair

Marc H. Harwell, Hearing Panel Member

Michael E. Jenne, Hearing Panel Member

NOTICE

This Judgment may be appealed pursuant to Section 1.3 of Supreme Court Rule 9 by filing a Petition for Writ of Certiorari, which petition shall be made under oath or affirmation and shall state that it is the first application for the Writ. See Tenn. Code Ann. §§ 27-8-104(a) and 27-8-106.