

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

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BOARD OF PROFESSIONAL
RESPONSIBILITY
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IN RE: JOHNATHAN KENNETH BORSODI DOCKET No. 2013-2180-2-AW
BPR # 025892, Respondent
An Attorney Licensed and
Admitted to the Practice of
Law in Tennessee
(Knox County)

JUDGMENT OF THE HEARING PANEL

This matter came to be heard on June 20, 2013 before a Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee consisting of Jennifer Pearson Taylor, Robert Ray Davies and Michael J. King. The Panel was convened based on a Petition for Discipline filed by the Board, by and through disciplinary counsel. An Order of Default was entered in this cause on May 20, 2013. The allegations contained within the Petition for Discipline have been deemed admitted pursuant to the Order of Default. At the hearing, disciplinary counsel submitted evidence regarding the appropriate sanction and made argument. Respondent appeared for the hearing and admitted the conduct contained within the Petition for Discipline. As set forth below, Respondent also provided testimony for the Panel to consider in determining the appropriate sanction.

STATEMENT OF THE FACTS

I. Facts Deemed Admitted Pursuant to the Order of Default

On or about November 18, 2010, Richard McAfee retained Johnathan K. Borsodi to represent him in the appeal of *McAfee v. Regions Bank* in Anderson County Chancery Court and paid Mr. Borsodi a non-refundable flat fee of \$7,500.00. Prior to being retained on the appeal, Mr. Borsodi had represented Mr. McAfee in the underlying matter before the Chancery Court for Anderson County. Judgment against Mr. McAfee (plaintiff) was entered on or about November 8, 2010.

Pursuant to the Terms of Engagement and the agreement of the parties, Mr. Borsodi agreed to use his best legal efforts to appeal the grant of Defendant's Motion to Dismiss on November 8, 2010. Pursuant to the Terms of Engagement and the agreement of the parties, Mr. Borsodi received a power of attorney from Mr. McAfee to execute all documents necessary for the proper presentation of the case and possessed the authority to determine which documents were prepared and how they were to be presented in the case.

On January 25, 2011, Mr. McAfee contacted Mr. Borsodi inquiring about the progression of the appeal. Mr. Borsodi assured him that everything was progressing fine with the appeal and promised a detailed update the following day. The representation made by Mr. Borsodi on January 25, 2011, regarding the progression of the appeal was not materially true.

On April 6, 2011, Mr. McAfee again contacted Mr. Borsodi inquiring about the progress of the appeal. Mr. Borsodi represented that the appeal was "Moving along, slowly but surely." The representation made by Mr. Borsodi on April 6, 2011, regarding the progression of the appeal was not materially true. Mr. Borsodi failed to keep Mr. McAfee reasonably informed

about the status of the appeal including, but not limited to, disclosing that the appeal had not been perfected.

On September 14, 2011, Mr. McAfee emailed Mr. Borsodi on another legal matter. Mr. Borsodi failed to take this opportunity to keep Mr. McAfee reasonably informed about the status of the appeal including, but not limited to, disclosing that the appeal had not been perfected. On November 2, 2011, Mr. McAfee emailed Mr. Borsodi, at his suggestion, to check on his legal matters and see if there was anything Mr. McAfee needed to do. Mr. Borsodi failed to respond to Mr. McAfee's email of November 2, 2011.

On January 19, 2012, Mr. McAfee emailed Mr. Borsodi inquiring about the status of the appeal. Mr. Borsodi failed to respond to Mr. McAfee's email of January 19, 2012.

On February 24, 2012, Mr. McAfee sent a text message to Mr. Borsodi's cell phone inquiring about the status of the appeal and requesting an update. The text message reflects numerous attempts by Mr. McAfee over several months to contact Mr. Borsodi regarding the status and progress of the appeal and Mr. Borsodi's failure to respond.

On March 19, 2012, more than three (3) weeks later, Mr. Borsodi responded to Mr. McAfee's text and represented he would call Mr. McAfee on either March 20 or 21. Mr. McAfee requested Mr. Borsodi call anytime between 11:00 a.m. and 4:45 p.m. on March 20, 2012. Mr. Borsodi failed to call Mr. McAfee on either March 20 or 21, 2012.

On March 22, 2012, Mr. McAfee texted Mr. Borsodi that Mr. McAfee had learned that his appeal had never been filed. Mr. McAfee demanded a meeting with Mr. Borsodi but never received any communication from Mr. Borsodi.

Mr. Borsodi failed to perform the agreed-upon legal services for Mr. McAfee and failed to refund the \$7,500.00 retainer fee paid by Mr. McAfee for the agreed-upon legal services. Mr.

Borsodi has abandoned his legal practice and did so without notice to Mr. McAfee or taking the steps necessary to protect Mr. McAfee's interests.

The aforementioned acts and omissions of Mr. Borsodi constitute unethical conduct in violation of the Tennessee Rules of Professional Conduct.

II. Evidence Presented at Hearing

At the hearing, disciplinary counsel proffered Exhibits A through L that were attachments to the Petition for Discipline. These exhibits were admitted. Disciplinary counsel also introduced into evidence the General Sessions default judgment taken by Richard McAfee against Johnathan Borsodi in the Sessions Court for Anderson County. Mr. Borsodi made no effort to refund the fee paid by Mr. McAfee until the judgment was entered and Mr. McAfee began making efforts to collect of the judgment.

Mr. McAfee testified that Mr. Borsodi entered into a repayment agreement for the judgment on May 20, 2013. As of the date of the hearing, Mr. Borsodi had paid a total of \$4,500 including a \$2,500 deposit and an additional payment of \$2,000 made the day before the hearing. Prior to the repayment agreement, Mr. Borsodi made no other effort to repay Mr. McAfee.

The Panel further noted that Mr. Borsodi's appearance at the disciplinary hearing on June 20, 2013 was his first response to any of the disciplinary actions taken by the Board. Mr. Borsodi failed to respond to the initial inquiries by the Board, failed to answer the Petition for Discipline and further failed to have any communications with the Board concerning the allegations contained in the Petition for Discipline until the June 20th hearing.

Mr. Borsodi also testified at the hearing. At the time the misconduct occurred, Mr. Borsodi was a member of McGehee, Cole and Borsodi. Prior to joining that firm, he worked as an associate for three years at Wagner, Myers and Sanger, P.C. He was laid off at Wagner,

Myers and Sanger, P.C. due to the recession. He remained at McGehee, Cole and Borsodi until he withdrew from the firm in June 2011.

Mr. Borsodi testified that at the time the events occurred, he believes he was suffering from depression. His marriage fell apart in May 2011 and he was also depressed after having been let go by Wagner, Myers and Sanger, P.C. He testified that after being retained to pursue the appeal, the Chancery Court had not yet entered a final judgment in the Anderson County Chancery Court matter. Initially, he made an effort to monitor the court file awaiting the entry of the Final Order. At some point in the process, he failed to continue to check the file diligently and the Order was entered. By late 2010 or early 2011 he realized he had missed the date to perfect the appeal.

After leaving McGehee, Cole and Borsodi, he engaged in a limited law practice as a solo attorney until his license was suspended. He has been involved in non-legal work as an owner of a local brewery and as an advisor for another business where he works as a "trouble shooter." Mr. Borsodi currently performs non-legal work for these businesses.

Mr. Borsodi was asked why he had failed to respond to the Board's complaint prior to the hearing. Mr. Borsodi stated that when he received the complaint he panicked and was unable to make any decisions. He recognized he had depression and states that on two occasions he attempted to contact the Tennessee Lawyer Assistance Program ("TLAP"). Mr. Borsodi states he was told he needed to go to Nashville; however he did not do so. He has not sought any other medical assistance for his depression other than seeing a psychologist while undergoing marriage counseling. At various points in his testimony, he states he is fit to resume the practice of law immediately. At other times he concedes he may need assistance in order to return to practice.

At the conclusion of the hearing, counsel for the Board asked that the Panel consider instituting a lengthy suspension, restitution, require that the Respondent undergo TLAP and, if Mr. Borsodi returns to the practice of law, that a practice monitor be required. Disciplinary counsel also asked the Panel to consider disbarment. Mr. Borsodi stated that it was a one-time event and while making no recommendations with regard to the punishment, he stated that he trusted the judgment of the Board.

CONCLUSIONS OF LAW

Pursuant to Tenn. S. Ct. R. 9, Section 3, the license to practice law in this state is a privilege and it is the duty of every recipient of that privilege to conduct himself at all times in conformity with the standards imposed upon members of the Bar as conditions for the privilege to practice law. Acts or omissions by an attorney which violate the Rules of Professional Conduct ("RPC") of the State of Tennessee shall constitute misconduct and be grounds for discipline.

The Respondent failed to answer the Petition for Discipline. The Hearing Panel previously entered an Order of Default and, therefore, pursuant to Tenn. S. Ct. R. 9, Section 8.2, the charges are deemed admitted. Mr. Borsodi has violated the following Rules of Professional Conduct:

Rule 1.1: COMPETENCE (2010 - 2012)

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Rule 1.3: DILIGENCE (2010 - 2012)

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4: COMMUNICATION
(2010)

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and comply with reasonable requests for information within a reasonable time.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.4: COMMUNICATION
(2011 - 2012)

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Rule 1.5: FEES
(2010)

- (a) A lawyer's fee and charges for expenses shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;

- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

**RULE 1.5: FEES
(2011 - 2012)**

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (8) whether the fee is fixed or contingent;

- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.
- (f) A fee that is nonrefundable in whole or in part shall be agreed to in a writing, signed by the client, that explains the intent of the parties as to the nature and amount of the nonrefundable fee.

**Rule 3.2: EXPEDITING LITIGATION
(2010 - 2012)**

A lawyer shall make reasonable efforts to expedite litigation.

**RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS
(2010 - 2012)**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by RPC 1.6.

**Rule 8.4: MISCONDUCT
(2010)**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

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When disciplinary violations are established by a preponderance of the evidence, the appropriate discipline is to be determined upon application of the *ABA Standards for Imposing Lawyer Sanctions* (“ABA Standards”), pursuant to Section 8.4, Rule 9 of the Rules of the Supreme Court. The Panel finds the following aggravating factors are present in this case:

- A. a dishonest or selfish motive;
- B. bad faith obstruction of disciplinary proceedings by intentionally failing to comply with the rules or orders of the disciplinary agency;
- C. refusal to acknowledge the wrongful nature of the conduct; and
- D. indifference to making restitution.

The Panel finds the following factors in mitigation are present:

- A. absence of a prior disciplinary record; and
- B. personal or emotional problems.

Referrals to TLAP are governed by Section 28.1 of the Tennessee Supreme Court Rule 9.

A hearing panel may provide a written referral to TLAP if it determines the attorney:

- (1) has failed to respond to a disciplinary complaint;
- ...
- (4) has pleaded impairment or disability as a defense to a complaint.

Mr. Borsodi’s conduct throughout this matter has demonstrated that he has only been willing to make amends for his misconduct when absolutely required to do so. For over a year, Mr. Borsodi knew that he had failed to timely perfect the appeal and did not disclose this information to his client. Mr. Borsodi made no attempt to repay the amounts owed to Mr. McAfee until a judgment was entered against him and counsel for Mr. McAfee began his effort

to collect on the judgment. Mr. Borsodi did not respond to either the initial letter from the Board containing Mr. McAfee's complaint or the petition for temporary suspension. When the Petition for Discipline was filed, Mr. Borsodi made no effort to provide a response to the Board until the date of the hearing. Mr. Borsodi claims he recognizes that he is suffering from depression, but he has made no effort to treat his condition.

The Panel recognizes that at the hearing, Mr. Borsodi apologized to both his client and the Panel; however, it appears that there were numerous opportunities to rectify the situation prior to June 20, 2013. Mr. Borsodi elected not to take advantage of any of those opportunities. These factors, combined with his admitted misconduct, warrant a lengthy suspension.

Mr. Borsodi has provided a sufficient basis to refer him to TLAP. He failed to respond to the Petition for Discipline. He raised the issue of depression as a mitigating circumstance for his conduct. A referral to TLAP as a condition of the discipline imposed is warranted.

JUDGMENT

Based on the foregoing findings of fact and conclusions of law, including the aggravating factors and mitigating factors set forth herein, the Panel concludes that the established violations of the Rules of Professional Conduct justify the following discipline:

A suspension of three (3) years retroactive to July 25, 2012,
the date of Mr. Borsodi's temporary suspension order.

Respondent shall be required to complete the following conditions in order to be considered for reinstatement:

1. Restitution to Richard Todd McAfee in accordance with the judgment of the Anderson County Sessions Court and the repayment agreement between Mr. Borsodi and Mr. McAfee;

2. Entry into a Practice Monitor Agreement approved by the Board of Professional Responsibility which shall include in its terms the supervision of Mr. Borsodi for one (1) year that may be extended if recommended by the Practice Monitor;

3. Entry into the Tennessee Lawyer Assistance Program and compliance with the terms and conditions of any TLAP agreement deemed appropriate by TLAP's executive director; and

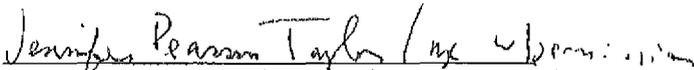
4. Payment of the costs of this proceeding.

IT IS SO ORDERED. This judgment may be appealed pursuant to Section 1.3 of Rule 9 of the Tennessee Supreme Court Rules by filing a writ for certiorari, which petition shall be made under oath or affirmation and shall state that it is the first application for the writ.

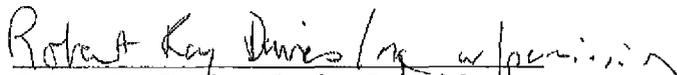
ENTER on this the 8th day of July, 2013.



Michael J. King, Hearing Panel Chair



Jennifer Pearson Taylor, Hearing Panel Member



Robert Ray Davies, Hearing Panel Member