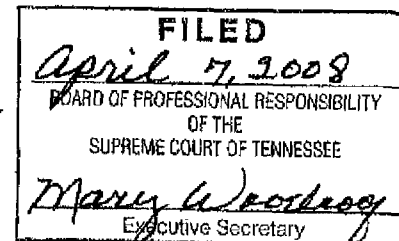


**BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE  
DISCIPLINARY DISTRICT IV**



**IN RE: TROY LEE BROOKS**

BPR No. 16424,

An Attorney Licensed to Practice Law  
in Tennessee (Wilson County)

Docket No. 2002-1307-4-JV

**JUDGMENT**

**STATEMENT OF THE CASE**

On April 3, 2002, the Board of Professional Responsibility, through Disciplinary Counsel, instituted this case by filing a Petition for Discipline. The case was assigned Docket No. 2002-1307-4-JV.

The petition alleged that Respondent, Troy Lee Brooks, was an attorney admitted to practice law in Tennessee with an office at 116 Lineberry Blvd., Mt. Juliet, Tennessee, in the IV Disciplinary District, BPR No. 16424.

A supplemental petition was filed on February 20, 2003, a second supplemental petition was filed on April 9, 2003, a third supplemental petition on September 30, 2003, a fourth on June 10, 2005, a fifth on May 24, 2006, and a sixth and final supplemental petition on July 21, 2006.<sup>1</sup>

The record shows that all petitions were answered with the exception of the Third Supplemental Petition.

On June 4, 2007, the Board filed a motion for default judgment on the grounds that Mr. Brooks had failed to respond to discovery requests. Mr. Brooks was ordered on July 3, 2007 to

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<sup>1</sup> To the extent that the Rules of Civil Procedure apply to disciplinary proceedings (Rule 9, Section 23.3), there is no rule of civil procedure that allows supplemental petitions without leave of the panel. At a minimum, no supplemental petitions should have been filed after the hearing panel was constituted on May 24, 2006 without leave of the panel as opposed to the Board. Moreover, one must wonder why a disciplinary panel was not constituted until over four years from the initial petition and corresponding answer on May 8, 2002. See Rule 9, Section 8.2 ("Following the service of the answer or upon failure to answer, the matter **shall** be assigned by the Chair to a hearing panel.") (Emphasis added).

file a response to the motion. He failed to respond and, accordingly, on September 17, 2007, default judgment was granted on all the petitions.

The panel must now decide on discipline.<sup>2</sup>

### **I. FINDINGS OF FACT**

We find it unnecessary to repeat the lengthy and complex allegations that are included in the various petitions as they are all deemed to be true through the default judgment and are a matter of record. *Adkisson v. Huffman*, 469 S.W.2d 368, 373 (Tenn. 1971). ("A judgment by default is an admission of the truth of the cause of action and of the several averments of facts in the declaration, and of the fair inferences and conclusions of fact to be drawn from the averments.")

Of particular import, however, is Mr. Brooks' plea of guilty in various criminal cases which are parallel to these proceedings. The following is a table summary of the parallel cases:

**Table 1**

<b>Complainant Name</b>	<b>BPR File No.</b>	<b>Criminal Indictment No./Charge</b>	<b>Adjudication</b>	<b>Sentence</b>
Ronnie R. and Betty Joe Smith	27866-4-JV	05-0160 Theft over \$10,000 T.C.A. 39-14-103 (C Felony)	Plea of guilty	May 30, 2007 4 yrs probation Restitution of \$47,664.12
Martin Story	27868-4-JV	05-0162 Theft over \$10,000 T.C.A. 39-14-103 (C Felony)	Plea of guilty	May 30, 2007 4 yrs probation Restitution of \$30,085.69
David J. Johnson	27994-4-JV	05-0161 Theft over \$10,000 T.C.A. 39-14-103 (C Felony)	Plea of guilty	May 30, 2007 4 yrs probation Restitution of \$22,000.00
Gary Foster	27787-4-JV	05-0164 Theft over \$1000 T.C.A. 39-14-118 (D Felony)	Dismissed	Restitution of \$2000.00

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<sup>2</sup> The order granting default judgment ordered the parties to submit position papers on the issue of discipline within 30 days. The Board filed its position on October 11, 2007 recommending disbarment. Respondent failed to file his position until filing a motion for a hearing on the issue of discipline on February 13, 2008. That motion for hearing was denied by separate order on February 21, 2008.

Barbara Taylor	27751-4-JV	05-0159 Theft over \$1000 T.C.A. 39-14-118 (D Felony)	Dismissed	n/a
David C. Smith	28241-4-JV	05-0410 Theft over \$10,000 T.C.A. 39-14-103 (C Felony)	Plca of guilty	May 30, 2007 4 yrs probation Restitution of \$22,909.99
Tanya Nix	28240-4-JV	05-0411 Theft over \$1000 T.C.A. 39-14-118 (D Felony)	Dismissed	Restitution of \$2138.00
Kroger	28824-4-JV	05-0163 Theft over \$1000 T.C.A. 39-14-118 (D Felony)	Dismissed	Restitution of \$8480.00

In court documents submitted by Mr. Brooks related to his criminal case, he claimed that his theft was not a complex and impulsive scheme but instead was "no more an impulse or a complicated theft than somebody stealing... out of a store." *State v Brooks*, 228 S.W.3d 640, 643 (Tenn. Crim. App. 2006) (affirming the district attorney's and criminal court judge's denial of pretrial diversion). Mr. Brooks attributed his misconduct to a "'get-rich-quick' scheme promising via email great investment opportunities in Nigerian oil and gas.... [Mr. Brooks] researched the offer in some depth and believed it to be a fabulous investment offer and thus 'began using clients['] money for the investment with the full assurances that [he] would have the return of the money in time to take care of all disbursements.' After [Mr. Brooks] realized that this scheme was nothing more than a 'very well designed [scam], [he] began 'on-line gambling, gambling in casinos and sports gambling through bookies.' [Mr. Brooks] stated that 'gambling became an obsession' and he continued 'under the false hope that [he] could recoup the funds until [he] was reported [to the Board of Professional Responsibility].'" <sup>3</sup>

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<sup>3</sup> A court may take judicial notice of facts "not subject to reasonable dispute" that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. Evid. 201(a). "Court records fall within the general rubric of facts readily and accurately determined." *State v. Nunley*, 22 S.W.3d 282, 288 (Tenn. Crim. App. 1999), *perm. app. denied* (Tenn. 2000). When a court intends to rely upon judicial notice principles to bring facts otherwise outside the record into play in a proceeding, T.R.E 201 provides a mechanism for hearing upon request "as to the propriety of taking judicial notice and the tenor of the matter noticed." Tenn. R. Evid. 201(e). Implicitly, the aggrieved party must register a timely objection under subsection (e); otherwise, the noticed facts are taken as given in the trial and appellate proceedings. *Nunley*, 22 S.W.3d at 28; see Neil P. Cohen, Sarah Y. Sheppard & Donald F. Payne, *Tennessee Law of Evidence* 2.01[6][b] (4th ed. 2000) ("Failure to request a hearing can bar later appellate review of judicial notice.") These judicially

Mr. Brooks has not contested the default judgment nor attempted to set it aside. Therefore, as stated above, all the facts alleged and all reasonable inferences are deemed to be true and reference is made to the petitions and exhibits for the factual details of this case. However, for purposes of discipline, it is sufficient that Mr. Brooks voluntarily pled guilty to four counts of theft over ten thousand dollars.

Thus we conclude that misconduct has been established. We now turn to aggravating and mitigating circumstances. ABA Standards for Imposing Lawyer Sanctions, §9.1 (1992) ("ABA Standards")<sup>4</sup>

**A. Aggravating or Mitigating Factors**

The Board has recommended that we adopt Mr. Brooks' substantial experience in the practice of law, the multiple offenses, and the pattern of misconduct, incompetence, or neglect as aggravating factors.

Aggravating and mitigating circumstances generally relate to the offense at issue, matters independent of the specific offense but relevant to fitness to practice, or matters arising incident to the disciplinary proceeding. ABA Standards, §9.1 Commentary. Aggravation, more specifically, are any considerations, or factors that may justify an increase in the degree of discipline to be imposed, including prior disciplinary offenses, dishonest or selfish motive, a pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, submission of false statements, refusal to acknowledge the wrongful nature of conduct, substantial experience in the practice of law, and indifference to making restitution. ABA Standards, §9.22, *H. Parker Stanley v Board of Professional Responsibility*, 640 S.W. 2d 210 (Tenn. 1982).

**1. Prior disciplinary offenses**

Mr. Brooks has admitted to a prior private, informal admonition regarding a direct mail solicitation in October, 2002. (Respondent's Answer to Second Supplemental Petition, ¶14). An

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noticed facts were taken from the reported opinion issued by the Court of Criminal Appeals after Mr. Brooks appealed his denial of a writ of certiorari to the Criminal Court judge regarding his pretrial diversion request.

<sup>4</sup> "In determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the ABA Standards for Imposing Lawyer Sanctions." Tennessee Supreme Court Rule 9, §8.4.

admonition, also known as private reprimand, is a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice. ABA Standards §2.6. It is the least serious of the formal disciplinary sanctions and is the only private sanction. *Id.*, Commentaries. Admonition is used when the lawyer is negligent, when the ethical violation results in little or no injury to a client, the public, the legal system, or the profession, and when there is little or no likelihood of repetition.

Accordingly, we find that this is not an aggravating circumstance.

## **2. Dishonest or Selfish Motive**

In the Fifth Supplemental Petition, it was alleged and subsequently accepted as true, that Mr. Brooks charged a client's credit card without authorization. (Fifth Supp. Petition, ¶34-36) It is additionally alleged and accepted as true that Mr. Brooks "converted the unauthorized funds to his own use and benefit." *Id.*, at ¶37. Additionally, the petitions are replete with instances of cases where no itemized statements were provided and fees were charged with no apparent work. A reasonable inference is that these funds were kept for personal use which constitutes selfish motive. Allegations also abound where funds transmitted to Mr. Brooks for a specific purpose such as payment to an expert (*Id.*, ¶125-127) were instead retained by Mr. Brooks. These funds were converted to his own use (*Id.*, ¶129, 294, 313, 341, 349) and thus constitute selfish motive.

Without going further into the other allegations, this is sufficient to find an aggravating circumstance of dishonesty or selfish motive.

## **3. Pattern of Misconduct**

All told, there are 37 complaints that have been incorporated into the various supplemental petitions. All of which have been deemed to be true through the default judgment. The pattern seems to be accepting retainers from clients and not performing the work promised, accepting funds to pay experts or as settlement to be disbursed to clients and not disbursing the funds but rather converting them for his own use. There also seems to be a pattern of incompetence, filing actions without required administrative exhaustion, failing to comply with discovery deadlines, not appearing for court or absence from pre-scheduled telephonic conferences.

This constitutes a pattern of misconduct and is an aggravating factor.

#### **4. Multiple Offenses**

Again, 37 charges of misconduct is a large number and clearly constitutes multiple offenses. This too is deemed an aggravating circumstance.

#### **5. Obstruction of Disciplinary Proceeding by Intentionally Failing to Comply with Orders**

As set out in detail in this Panel's order of default, Mr. Brooks has routinely failed to comply with orders of this Panel even after given multiple opportunities to participate in his defense. But rather than accept responsibility for his actions and enter into a consent agreement with the Board, he chose to deny the various allegations only to later refuse to participate in discovery. This was an obstruction of the disciplinary process and the cause, in part, of this case taking over six years to adjudicate.

#### **6. Refusal to Acknowledge Wrongful Conduct**

Of all the letters to disciplinary counsel in response to initial charges of complaint, of all the answers to petition and supplemental petitions, and in all the motions filed by Mr. Brooks, not one openly and honestly acknowledges his wrongful conduct. Indeed, in Respondent's appeal to the Court of Criminal Appeals regarding his denial of pretrial diversion, he likens his various charges of theft of his clients' money to "stealing ... out of a store." This discounts entirely the situation of Darcy K. Jorgensen (complaint no. 24088-4-SG) who was actually incarcerated as a direct result of Mr. Brooks using her trust money for personal profit. He even argued that his gambling addiction should be a mitigating factor in considering whether to grant pretrial diversion. Nothing before this panel shows that Mr. Brooks has acknowledged his wrongful conduct honestly, openly and completely. Instead, everything seems to indicate that he still blames his misconduct on his addiction or his being defrauded by a Nigerian oil investment scheme. This is deemed an aggravating factor.

#### **7. Substantial Experience in the Practice of Law**

Mr. Brooks has been licensed in Tennessee since 1994. (Board's Brief regarding discipline, pg19). In *Board of Professional Responsibility vs Charles Robert Castellaw*, the respondent, who was licensed in 1989 and disbarred in 2000, was found to have had "substantial experience" in the practice of law, a span of 11 years. By contrast, Mr. Brooks has been

practicing for approximately eight years as of the date of the first petition and approximately 10 years up to the date of his temporary suspension by the Tennessee Supreme Court on November 15, 2004. The petitions reveal that he has litigated cases in the General Sessions, Chancery, and Circuit Courts of this state as well as the U.S. District Court for the Middle District of Tennessee and the Bankruptcy Court in the Middle District.

Therefore, we find that Mr. Brooks has had substantial experience in the practice of law and this is an aggravating factor.

## **II. CONCLUSIONS OF LAW**

### **A. DR 1-102(A)**

DR 1-102(A) provides that a lawyer shall not

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

In the case of *Board of Professional Responsibility vs Robert B. Akard, Jr.*, the respondent was found guilty of violating DR 1-102(A)(3) - (6) after falsely signing the name of another attorney to a bond and stealing funds belonging to his law firm and \$485,000 from a business associate.

In *Board of Professional Responsibility v Charles C. Baker, Jr.*, the respondent was convicted of tax evasion, a felony, over a period of thirteen years, incurring a tax liability of over \$399,000. The hearing panel found Mr. Baker guilty of acts involving dishonesty, fraud, deceit, and misrepresentation and also found his illegal conduct to be one involving moral turpitude.

In *Board of Professional Responsibility v Larry M. Baker*, the respondent was charged with misappropriating approximately \$250,000 in funds entrusted to him in real estate transactions.

Consistent with these prior cases, we find that Respondent, Mr. Brooks, violated DR 1-102(A)(3)-(5) by engaging in illegal conduct involving moral turpitude which involved

dishonesty, fraud, deceit and misrepresentation. As such, this conduct also was prejudicial to the administration of justice.

**B. DR 2-106**

DR 2-106 provides that a lawyer shall not charge an illegal or clearly excessive fee. A fee is clearly excessive when a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Some of the factors to be considered are the time and labor required, the novelty and difficulty of the questions involved and the skill required to perform the legal service properly. Also to be considered is the experience, reputation, and ability of the lawyer.

Rule 1.5(a) of the Tennessee Rules of Professional Conduct provides that a "lawyer's fee and charges for expenses shall be reasonable."

We find that the fee charged in complaint number 27690-6-JV was not reasonable and therefore also excessive. (Fourth Supp. Petition, ¶25). We also find that the fee charged in complaint number 27691-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition, ¶25); the fee charged in complaint number 27835-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition, ¶44); the fee charged in complaint number 27836-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition, ¶54); the fee charged in complaint number 27865-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition, ¶100); the fee charged in complaint number 27989-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition, ¶163); the fee charged in complaint number 28004-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition, ¶179); the fee charged in complaint number 28014-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition, ¶193); the fee charged in complaint number 28024-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition, ¶203); the fee charged in complaint number 28037-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition, ¶228); the fee charged in complaint number 28053-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition, ¶246); the fee charged in complaint number 28057-4-JV was not earned and therefore unreasonable and excessive. (Fifth Supp. Petition,

¶269); and finally, the fee charged in complaint number 28992-4-JV was not earned and therefore unreasonable and excessive. (Sixth Supp. Petition, ¶17).<sup>5</sup>

**C. DR 6-101**

DR 6-101 provides that:

(A) A lawyer shall not:

- (1) Handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.
- (3) Neglect a legal matter entrusted to the lawyer.

Rule 1.1 of the Rules of Professional Responsibility provides that a "lawyer shall provide competent representation to a client."

We find that Respondent neglected legal matters entrusted to him in complaint number 24088-4-SG (Petition for Discipline) by failing to pay restitution on behalf of his client by the deadline required; in complaint number 25510-4-JV (Supplemental Petition for Discipline) by failing to file a response to a motion for summary judgment; in complaint number 25783-4-JV (Second Supplemental Petition for Discipline) by voluntarily dismissing non-diverse defendants in a federal case where only diversity jurisdiction was alleged and then moving to re-join the same parties as indispensable, thereby defeating diversity jurisdiction, (Rule 11 sanctions awarded for "clear violation" by Judge Trauger); in complaint number 26137-4-JV (Third Supplemental Petition for Discipline) by failing to file a final decree of divorce.

We find that Respondent failed to provide competent representation in complaint number 27691-4-JV (Fifth Supplemental Petition for Discipline) by failing to respond to discovery or by providing responses that were incomplete and evasive; and in complaint number 27978-4-JV (Fifth Supplemental Petition for Discipline) by failing to exhaust administrative remedies before filing a lawsuit in federal court.

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<sup>5</sup> Charges under the original petition, the supplemental petition for discipline, the second supplemental petition for discipline and the third supplemental petition for discipline are adjudicated under the previous Code of Professional Responsibility as the acts are alleged to have been committed prior to the effective date of the new Rules of Professional Conduct (March 1, 2003).

**D. DR 7-101**

DR 7-101 provides that:

- (1) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (2) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for communication or information.
- (3) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (4) A lawyer shall not intentionally:
  - (a) Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
  - (b) Fail to carry out a contract of employment entered into with a client for professional services, but a lawyer may withdraw as permitted under DR2-110, DR 5-102, and DR 5- 05.
  - (c) Prejudice or damage the client during the course of the professional relationship, except as required under DR 7-102(B).

Rule 1.3 of the Rules of Professional Conduct state that a “lawyer shall act with reasonable diligence and promptness in representing a client.” Rule 1.4 states that 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.”

We find that Respondent failed to act with reasonable diligence and promptness, failed to keep his client reasonably informed, failed to explain matters to his clients, and failed to lawfully seek the objectives of his clients in Complaint No. 24088-4-SG by failing to inform his client about the bad checks sent to pay her restitution; in Complaint No. 25510-4-JV by telling his client the case was progressing well when in fact the case had been dismissed; and in Complaint No. 26137-4-JV by failing to inform his client that a final decree of divorce had not been filed. We also find that Respondent failed to act with reasonable diligence and failed to keep his clients reasonably informed, in violation of the Rules of Professional Conduct, in Complaint No. 27868-

4-JV by failing to pursue the representation diligently (§81, Fourth Supp. Petition); in Complaint No. 27691-4-JV (Fifth Supp. Petition) by failing to respond to discovery (§81, Fourth Supp. Petition); in Complaint No. 27835-4-JV by failing to inform his client of a hearing date; in Complaint No. 27837-4-JV by abandoning his client in federal court; in Complaint No. 27835-4-JV by failing to inform his client of a hearing date; in Complaint No. 27839-4-JV by failing to file suit as contemplated by the attorney-client contract; in Complaint No. 27944-4-JV by failing to provide the services promised to his client; in Complaint No. 27978-4-JV by failing to take any action to cure the failure to exhaust administrative remedies; in Complaint No. 28004-4-JV by failing to inform his client of settlement offers that had been made; and in Complaint No. 28037-4-JV by failing to make any other filings after being retained and paid to represent his client on an appeal.

**E. DR 7-102**

DR 7-102 provides that

- (A) In the representation of a client, a lawyer shall not:
  - (5) Make a false statement of law or fact

We find that Respondent implied a false statement of law or fact when, in Complaint No. 25510-4-JV (Supp. Petition), he stated that the reason for delaying the setting of a trial date was that he wanted to get the right judge and that the one obtained was a friend.

**F. DR 9-102**

Ethical Consideration 9-5 states that “[s]eparation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.” DR 9-102 provides

- (A) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable insured depository institutions maintained in the state in which the law office is situated.

The equivalent Rule of Professional Conduct, Rule 1.15(a) provides that

A lawyer shall hold property and funds of clients or third persons that are in a lawyer’s possession in connection with a representation separate from the lawyer’s own property and funds.

- (1) Funds belonging to clients or third persons shall be kept in a separate account maintained in an insured depository institution

located in the state where the lawyer's office is situated...

The comments to Rule 1.15 state that a "lawyer should hold property of others with the care required of a professional fiduciary.... All property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts."

In each instance where Mr. Brooks charged a credit card without permission of his client, used settlement funds for his own use or otherwise failed to keep funds of clients or third persons in a separate account, he violated these provisions. More specifically, the following table summarizes the applicable incidents.

**Table 2**

<b>Complaint No. And Complainant Name</b>	<b>Allegation Deemed Admitted and Reasonable Inferences</b>	<b>Dollar Amount Involved</b>	<b>Issue of Restitution</b>
24088-4-SG Petition for Discipline <b>Darcy K. Jorgensen</b>	The trust account was less than the dollar amount tendered on behalf of the client thereby showing that the client funds were not kept in the separate account.	\$13,252.50	<b>None.</b> The funds were finally sent on behalf of the client to the Lincoln County Circuit Court Clerk.
27546-4-JV Fourth Supp. Pet. <b>Michelle Hemontolor</b>	Complainant's ex-husband tendered money for payment to client. When Respondent tendered a trust check in that amount to client, the trust fund was deficient.	\$3500.00	<b>\$3500.00</b> owed in restitution to <b>Michelle Hemontolor</b>
27690-6-JV Fourth Supp. Pet. <b>Tamara Likens</b>	Credit card of client's father, <b>Skanton McKenzie</b> , charged without authorization or in excess of reasonable fees. \$14,500 was in the form of retainer but client won case by default.	\$14,500 \$5000.00 \$2500.00 \$2500.00 \$2500.00	\$12,500 of unauthorized credit card charges. Total of <b>\$12,500</b> in restitution to <b>Skanton McKenzie</b>
27751-4-JV Fourth Supp. Pet. <b>Barbara Taylor</b>	Credit card of complaint, the client's aunt, was charged without authorization.	\$2500.00 \$5000.00 \$5000.00	Total of <b>\$12,500</b> in restitution to <b>Barbara Taylor</b> . Criminal case file shows this charge was dismissed.
27787-4-JV Fourth Supp. Pet. <b>Gary Foster</b>	Credit card of complainant, client's husband in divorce action, was charged without authorization.	\$5000.00 \$2500.00 \$1500.00 \$1000.00	Total of \$10,000 in restitution to Gary Foster. Criminal case file shows restitution of \$2000 made. <b>\$8000</b> of restitution still owed to <b>Gary Foster</b> .
27803-4-JV Fourth Supp. Pet. <b>C.J. Prichard</b>	Credit card of complainant charged without authorization.	\$1500.00 \$1500.00	Total of <b>\$3000</b> in restitution to <b>C.J. Prichard</b> .

27866-4-JV Fourth Supp. Pet. <b>Ronnie Smith</b>	Litigation resulted in sum to complainant which initially was deposited into trust account but was not kept there.	\$47,664.12	<b>None.</b> Total of \$47,664.12 in restitution owed to Ronnie Smith and Betty Jo Wheat Smith. Criminal case file shows full restitution paid.
27868-4-JV Fourth Supp. Pet. <b>Martin L. Story</b>	Sale of client's house and business in a divorce proceeding net funds initially deposited into trust account but were not kept there.	\$5284.00 \$49,603.22	Total restitution of \$54,887.22 owed to Martin Story. Criminal case file shows restitution of \$30,085.69 paid. <b>\$24,801.53</b> of restitution still owed to <b>Martin Story</b> .
27994-4-JV Fourth Supp. Pet. <b>David Joseph Johnson</b>	Complainant paid Respondent sums for settlement of finance dispute, initially deposited in trust account but not kept there.	\$20,000.00 \$2000.00	<b>None.</b> Total restitution of \$22,000 owed to David Johnson. Criminal case file shows full restitution made.
27835-4-JV Fifth Supp. Pet. <b>Craig Ramsey</b>	Credit card of complainant charged without authorization.	\$500.00 \$500.00	<b>\$1000</b> of restitution to <b>Craig Ramsey</b> .
27959-4-JV Fifth Supp. Pet. <b>Jeremy Lyell</b>	Respondent's client, Kennedy Family Homes, submitted funds to be paid to an expert (complainant) retained by Respondent. The expert was never paid. (See complaint of Charles Kennedy, No. 28054-4-JV)	\$3000.00 \$2500.00	Total restitution of <b>\$5500</b> to <b>Charles Kennedy</b> .
28053-4-JV Fifth Supp. Pet. <b>David Leech</b>	Respondent charged a credit card without authority and converted funds to his own use.	\$1000.00	Total restitution to <b>\$1000</b> to <b>David Leech</b> .
28241-4-JV Fifth Supp. Pet. <b>David C. Smith</b>	Respondent received funds from complainant's wife's retirement account in divorce action and converted to his own use, but told complainant he had never received checks.	\$8115.00 \$8115.00 \$8115.00 \$8114.99	Total restitution owed of \$32,459.99. Respondent initially made two payments of \$4500 and \$5500. Criminal case file shows \$22,909.99 restitution paid. Therefore, <b>\$450</b> in restitution still owed to <b>David C. Smith</b> .
28240-4-JV Fifth Supp. Pet. <b>Tanya Nix</b>	Respondent retained funds from settlement proceeds to pay a discounted chiropractor bill. Bill was never paid and the funds were converted for Respondent's personal use.	\$1710.40 (Undiscounted bill was \$2138)	<b>None.</b> Criminal case file shows \$2138 restitution paid.
28824-4-JV Fifth Supp. Pet. <b>Kroger</b>	Respondent obtained a double refund after a wire transfer failed.	\$8000.00	<b>None.</b> Criminal case file shows \$8480 restitution paid.

28382-4-JV Fifth Supp. Pet. <b>James D. Davis, D.C.</b>	Respondent represented Angela Lewis in personal injury action. Provided doctor's lien to complainant for services. Sent check in satisfaction from other than client's trust account which bounced.	\$2532.65	\$1300 paid to complainant. Therefore, total restitution of \$1232.65 still owed to <b>James D. Davis, D.C.</b>
28383-4-JV Fifth Supp. Pet. <b>James D. Davis, D.C.</b>	Respondent represented Chang Boze in personal injury action. Received settlement funds, part of which was to be disbursed to complainant but never was. Claimed case was still pending.	\$4359.82	Total restitution of \$4359.82 owed to <b>James D. Davis, D.C.</b>

In total, Mr. Brooks obtained \$250,794.30 of his client's or third parties' money and converted it to his own use. An astonishing amount, to say the least. Through the criminal case, he managed to pay \$160,450.30 of this amount in restitution, undoubtedly borrowing that money from someone. By our calculation, he still owes **\$90,344 in restitution.**

### **III. DISCIPLINE TO BE IMPOSED**

The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession. (ABA Standards 1.1). Along with the primary purpose of protecting the public, courts have also recognized the purpose of protecting the integrity of the legal system, to ensure the administration of justice and to deter further unethical conduct and, where appropriate, to rehabilitate the lawyer. *In re Stout*, 75 N.J. 321, 382 A.2d 630 (1978), *Matter of Rubi*, 133 Ariz. 491, 652 P.2d 1014 (1982), *In re Zderic*, 92 Wash. 2d. 77, 600 P.2d 1297 (1979), *In re Nadler*, 91 Ill. 2d. 326, 438 N.E.2d 198 (1982), *Matter of McInerney*, 389 Mass. 528, 451 N.E.2d 401 (1983), *Matter of Carroll*, 124 Ariz. 80, 602 P.2d 461 (1979), *Committee on Professional Ethics v Gross*, 326 N.W.2d 272 (Iowa 1982).

The Standards for Imposing Lawyer Sanctions (ABA Standards 1986, as amended 1992) are designed to promote consistency in the imposition of sanctions by identifying the relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. These standards have been adopted by the Board and we therefore apply these standards to this case. *Dockery v Board of Professional Responsibility*, 937 S.W.2d 863, 867 (Tenn. 1996).

In imposing sanctions after a finding of lawyer misconduct, a court should consider the following factors: 1) the duty violated, 2) the lawyer's mental state, 3) the actual or potential injury caused by the lawyer's misconduct, and 4) the existence of aggravating or mitigating factors. (ABA Standards, 3.0)

Even absent aggravating or mitigating circumstances and upon consideration of the above mentioned four factors, disbarment is generally appropriate in cases involving the failure to preserve client property. (ABA Standard 4.1) Some courts have held that disbarment is always the appropriate discipline when a lawyer knowingly converts client funds. For example, in the case of *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979), the Supreme Court of New Jersey discussed the rationale for imposing disbarment as a sanction on lawyers who misappropriate client funds. It said:

Like many rules governing the behavior of lawyers, this one has its roots in the confidence and trust which clients place in their attorneys. Having sought his advice and relying on his expertise, the client entrusts the lawyer with the transaction including the handling of the client's funds. Whether it be a real estate closing, the establishment of a trust, the purchase of a business, the investment of funds, the receipt of proceeds of litigation, or any one of a multitude of other situations, it is commonplace that the work of lawyers involves possession of their clients' funds. That possession is sometimes expedient, occasionally simply customary, but usually essential. Whatever the need may be for the lawyer's handling of clients' money, the client permits it because he trusts the lawyer.

It is a trust built on centuries of honesty and faithfulness. Sometimes it is reinforced by personal knowledge of a particular lawyer's integrity or a firm's reputation. The underlying faith, however, is in the legal profession, the bar as an institution. No other explanation can account for clients' customary willingness to entrust their funds to relative strangers simply because they are lawyers.

Abuse of this trust has always been recognized as particularly reprehensible: There are few more egregious acts of professional misconduct of which an attorney can be guilty than misappropriation of a client's funds held in trust. *In re Beckman*, 79 N.J. 402, 404-05, 400 A.2d 792, 793 (1979); *In re Miller*, 65 N.J. 580, 581, 326 A.2d 65 (1974); *In re Spielman*, 62 N.J. 432, 434, 302 A.2d 529 (1973); *In re Malanga*, 45 N.J. 580, 583, 214 A.2d 23 (1965); *In re Gavel*, 22 N.J. 248, 264, 125 A.2d 696 (1956).

Recognition of the nature and gravity of the offense suggests only one result - disbarment. "Such conduct is of so reprehensible a nature as to permit of only one form of discipline." *In re Ryan*, 60 N.J. 378, 379, 290 A.2d 140, 141 (1972).

*Id.*, 409 A.2d at 1155.

California has held that disbarment is appropriate even absent knowing conversion when a lawyer is grossly negligent in dealing with client property. As the California Supreme Court observed, “[e]ven if [the attorney’s] conduct were not wilful and dishonest, gross carelessness and negligence constitute a violation of an attorney’s oath faithfully to discharge his duties and involve moral turpitude.” *Chefsky v State Bar*, 36 Cal.3d 116, at 123, 680 P.2d 82 (1984).

Most courts, however, reserve disbarment for cases in which the lawyer uses the client’s funds for the lawyer’s own benefit. In *Carter v Ross*, 461 A.2d 675 (R.I. 1983), for example, the lawyer took money from an estate and used it to pay office and personal expenses. The Rhode Island Supreme Court cited the *Wilson* case and imposed disbarment. “We like our New Jersey colleagues, are convinced that continuing public confidence in the judicial system and the bar as a whole requires that the strictest discipline be imposed in misappropriation cases.” 461 A.2d at 676. Similarly, in *In re Freeman*, 647 P.2d 820 (Kan. App. 1982), a lawyer was disbarred who caused checks from an insurance company to be issued to fictitious payees, and then converted that money for his own use. In these types of cases, where the lawyer’s lack of integrity is clear, only the most compelling mitigating circumstances should justify a lesser sanction than disbarment.

In such cases, it may not even seem necessary to consider whether there is any injury to a client. Even though there will always be a potential injury to a client in such cases, the injury factor should still be considered. First, consideration of the extent of actual or potential injury can be important when it is especially serious. Injury should be proved up at the disciplinary proceeding in order to make a record in the event that a lawyer applies for readmission.

As above, absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, disbarment is also generally appropriate when a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or

theft. (ABA Standard 5.1) <sup>6</sup>

A lawyer who engages in any of the illegal acts listed above has violated one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity. This duty to the public is breached regardless of whether a criminal charge has been brought against the lawyer. In fact, this type of misconduct is so closely related to practice and poses such an immediate threat to the public that the lawyer should be suspended from the practice of law immediately pending a final determination of the ultimate discipline to be imposed, as is the case here.

In imposing final discipline in such cases, most courts impose disbarment on lawyers who are convicted of serious felonies. As the court noted in a case where a lawyer was convicted of two counts of federal income tax evasion and one count of subornation of perjury, "we cannot ask the public to voluntarily comply with the legal system if we, as lawyers, reject its fairness and application to ourselves." *In re Grimes*, 414 Mich. 483, 326 N.W.2d 380 (1982). See also *In re Fry*, 251 Ga. 247, 305 S.E.2d 590 (Ga. 1983) (conviction of murder), *Sixth District Committee of the Virginia State Bar v Albert C. Hodgson*, No. 80-18 (Va. Disciplinary Board, 1981) (lawyer advised a client that he could make arrangement to have her husband killed in lieu of bringing a child custody suit), *In re Stein*, 97 N.J. 550, 483 A.2d 109 (1984) (voluntary use of controlled dangerous substances).

Here in Tennessee, these standards have been applied consistently. As noted above at the beginning of Section II, cases dealing with theft have likewise resulted in disbarment.

In the case of *Board of Professional Responsibility vs Robert B. Akard, Jr.*, the respondent was found guilty of violating DR 1-102(A)(3) - (6) after falsely signing the name of another attorney to a bond and stealing funds belonging to his law firm and \$485,000 from a business associate.

In *Board of Professional Responsibility v Charles C. Baker, Jr.*, the respondent was convicted of tax evasion, a felony, over a period of thirteen years, incurring a tax liability of over

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<sup>6</sup> "The term 'serious crime' shall include any felony under the laws of Tennessee and any other crime a necessary element of which as determined by the statutory or common law definition of such crime, involve improper conduct as an attorney...[or] theft." Tennessee Supreme Court Rule 9, §14.2.

\$399,000. The hearing panel found Mr. Baker guilty of acts involving dishonesty, fraud, deceit, and misrepresentation and also found his illegal conduct to be one involving moral turpitude.

In *Board of Professional Responsibility v Larry M. Baker*, the respondent was charged with misappropriating approximately \$250,000 in funds entrusted to him in real estate transactions.

In *Memphis & Shelby County Bar Ass'n v. Sanderson*, 52 Tenn.App. 684, 378 S.W.2d 173 (1963), a case with allegations amazingly similar to the case before us, the respondent's sanction of disbarment was affirmed even where full restitution had been made.

In each of these cases, disbarment was the ultimate sanction. Indeed, disbarment is the proper sanction, it seems, even absent mitigating or aggravating factors. Whereas here, we have concluded various aggravating factors as noted in Section IA above and no mitigating factors whatsoever.<sup>7</sup>

In light of our findings that Respondent misappropriated client funds and failed to keep them in his trust account and the fact that he pled guilty to four felony counts of theft, we are compelled to find that disbarment is the only appropriate sanction. The amount of money that Respondent converted to his own use is simply astounding and the argument, put forth before the Court of Criminal Appeals, that he was somehow defrauded himself by the Nigerians and then compelled to gamble in an effort to recoup the lost money is incredulous. Respondent lied to his clients and third parties and caused incredible injury to people who trusted him as a member of this noble profession. His actions bring embarrassment to the bar and the public will surely be apprehensive about trusting attorneys with large settlement funds in the future because of this case. The damage is incalculable and far-reaching to say the least. Adding further injury is the

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<sup>7</sup> On this note, we should recognize that Respondent has filed a reply to the Board's Response to his motion for a hearing on the issue of punishment, where he asserts the serious implications to his future career. Initially, this begs the question of why Respondent did not consider the serious impact of his choices to his career, indeed his life, when he chose to convert his clients' money to his own potential gain through some get-rich-quick scheme and by gambling. But more importantly, we fail to see what factors Respondent could put forth that would overcome the strong precedent for disbarment in these types of cases. While he could point to the restitution made so far through his criminal case, this restitution was not made until after his application for pretrial diversion was denied by the district attorney. "[F]orced or compelled restitution" is neither an aggravating nor a mitigating factor. (ABA Standards §9.4) Nor do we feel his addiction to gambling can be taken as a mitigating factor of such weight as to overcome precedent. Indeed, his addiction did not take root until after he chose to use client money on some Nigerian Oil venture and not until he chose to gamble in a vain effort to recoup his losses.

apparent position of Mr. Brooks that he is himself somehow a victim and his abject refusal to accept full responsibility for his actions further supports our holding that he should be disbarred until he has completed all the required conditions for reinstatement.

**A. Disgorgement of Fees.**

In *Cohn v Board of Professional Responsibility*, W2003-01516-SC-R3-CV (2004), the Tennessee Supreme Court considered a case where an experienced bankruptcy attorney had been sanctioned by the bankruptcy court for using a system of charging fees that was not authorized. After a petition for discipline was filed, a hearing panel ruled that the attorney had violated certain ethical rules and ordered public censure, disgorgement of certain fees, and suspension until such time as the disgorgement was satisfied. Rejecting the respondent's argument that the bankruptcy court had already considered the attorney fee issue and therefore, the Tennessee Supreme Court could not order disgorgement of the same fees, the Court clearly repeated the well settled law that it has jurisdiction to regulate the practice of law, including the discipline of attorneys.

Secondly, the Court affirmed the disgorgement of more fees than had been ordered by the bankruptcy court, essentially accepting the Board's position that attorneys who are in the wrong are not entitled to *quantum meruit* compensation. See *Swafford v. Harris*, 967 S.W.2d 319, 324-25 (Tenn. 1998); *White v. McBride*, 937 S.W.2d 796, 803 (Tenn. 1996). The Court also noted that the respondent admitted to not keeping time sheets to support his hourly billing.

Similarly, Mr. Brooks charged excessive and unreasonable fees as determined in Section II B above and is therefore not entitled to *quantum meruit* fees, especially in light of his failure to keep detailed time sheets. We therefore order disgorgement of the following fees refundable to the following former clients.

**Table 3**  
**Disgorgement Schedule**

Complaint No.	Amount of Disgorged Fee	Refundable to
27690-6-JV (Fourth Supp. Petition, ¶25).	\$14,500	Skanton McKenzie
27691-4-JV (Fifth Supp. Petition, ¶25)	\$4000	Wiley E. Moore

27835-4-JV (Fifth Supp. Petition, ¶44)	\$500 \$600 \$500 \$500 \$500 <u>-\$1000 (refund paid)</u> \$1600	Craig Ramsey
27836-4-JV (Fifth Supp. Petition, ¶54)	\$14,082	George William Torre
27865-4-JV (Fifth Supp. Petition, ¶100)	\$250	James E. Elmore
27989-4-JV (Fifth Supp. Petition, ¶163)	\$5000	William L. Bruch and Sandra Bruch
28004-4-JV (Fifth Supp. Petition, ¶179)	\$1000 <u>\$1000</u> <del>\$2000</del>	Dennis Davis and Stacy Davis
28014-4-JV (Fifth Supp. Petition, ¶193)	\$2000 <u>\$3000</u> <del>\$5000</del>	Leslie Wytenbach
28024-4-JV (Fifth Supp. Petition, ¶203)	\$500	Dan Meals
28037-4-JV (Fifth Supp. Petition, ¶228)	\$2000 \$1500 <u>\$1500</u> <del>\$5000</del>	George Neal
28053-4-JV (Fifth Supp. Petition, ¶246)	\$5000 <u>\$1000</u> <del>\$6000</del>	David Leech
28057-4-JV (Fifth Supp. Petition, ¶269)	\$3000 \$2300 <u>\$300</u> <del>\$5600</del>	Dale Scheler
28992-4-JV (Sixth Supp. Petition, ¶17)	\$550	John L. Rose

#### **B. Retroactive Date of Disbarment**

Respondent has moved in the alternative that any disbarment be made retroactive to the date of his temporary suspension (November 15, 2004), presumably for the purpose of expediting the completion of the five year period before applying for reinstatement.

The Board of Professional Responsibility, its authority, and all of its functions are derived from the Supreme Court. *Fletcher v Board of Professional Responsibility*, 915 S.W.2d 448, 450 (Tenn. App. 1995). The Board is a mere agent of the Supreme Court. *Doe v Board of Professional Responsibility*, 104 S.W.3d 465, 470 (Tenn. 2003). The hearing panel shall, in every case, submit its findings and judgment, in the form of a final decree of a trial court. Rule 9, §8.3. All other decrees of hearing panels or trial courts shall be duly recorded and shall have the force and effect of an order of the Supreme Court. Rule 9, §8.4. If appealed to a circuit or chancery court, the Supreme Court “shall enter an order of enforcement of said decree.” Rule 9, §8.4. In the case of consent, the Supreme Court “shall enter an order disbarring the attorney...” Rule 9, §15.2. “A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least five years from the effective date of the disbarment.” Rule 9, §19.2.

Accordingly, we cannot find anywhere in the rules where we have the authority or discretion to make a disbarment retroactive to the date of temporary suspension. §15.2, moreover, makes it very clear that reinstatement cannot be made until five years from the “effective date of the disbarment.” It is so well settled that a court (and hence, by analogy this panel) speaks through its written orders that it needs no citation. Since we, as mere agents of the Tennessee Supreme Court, are tasked with issuing a judgment in the form of a “final decree” and this final decree is the document, or written order, that sets the “effective date” of the discipline, we are bound to follow the dictates of our principal as set out in Rule 9.

We also take note of the fact that, had Respondent timely responded to discovery requests and participated in telephone conferences of which he had full notice, this case would not have taken so long. Indeed, had Mr. Brooks chosen to accept responsibility for his actions even as of the date of his guilty pleas to four counts of theft in May 2007 and consented to disbarment, he could have started the clock towards completion of his five year period almost a year ago.

On the other hand, this panel was not constituted until over four years from the date of the first petition, a violation of Rule 9, Section 8.2. (See footnote 1 above.) The Chair of the Board of Professional Responsibility is tasked with the affirmative duty to constitute a panel upon the respondent filing an answer and there is nothing in the record that would show Mr. Brooks

contributing to this failure on the part of the Chair.

Nonetheless, we still feel we lack the authority to make this disbarment retroactive. Respondent's motion for retroactive effect of his disbarment is therefore **DENIED**.

#### IV. CONDITIONS FOR REINSTATEMENT

Disbarment terminates an individual's status as a lawyer. No application for relicensure should be considered for five years from the date of the order of disbarment and, at that time, Mr. Brooks must show by clear and convincing evidence that he has complied with the following conditions:

1. Successful completion of the Tennessee Bar Exam including the ethics portion of the exam;
2. Compliance with all applicable discipline orders or rules;
3. Rehabilitation and satisfaction of a fitness review to practice law;
4. Completion of a full ethics course at an ABA accredited law school;<sup>8</sup>
5. Full payment of any borrowed funds used to make restitution, both in the criminal case and any restitution ordered herein;
6. Full restitution as ordered herein (\$90,344, see Table 2, Section II E, *supra*);<sup>8</sup>
7. Full payment of all disgorged fees ordered herein (\$64,082, see Table 3, Disgorgement Schedule, Section III A, *supra*);
8. Participation in any recommended programs through the Tennessee Lawyer's Assistance Program for gambling addiction;
9. If Respondent should ultimately be reinstated, a prohibition against ever accepting credit card payments for any purpose;
10. If reinstated, participation in an IOLTA trust account where Respondent does not have sole access to the funds;

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<sup>8</sup> Ample precedent exists for conditioning reinstatement upon further legal education, meaning a regular curriculum course not a legal education course. *Dockery v Board of Professional Responsibility*, 937 S.W.2d 863, 865, 867 fn8 (Tenn. 1996) (upholding requirement for reinstatement that respondent successfully complete a three hour legal ethics course at an "accredited Tennessee law school").

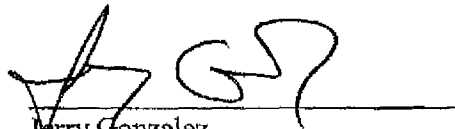
<sup>8</sup> Tennessee Supreme Court Rule 9, §8.4.

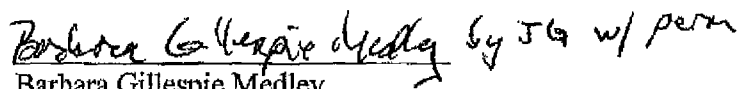
11. Full payment of costs of this proceeding. <sup>9</sup>

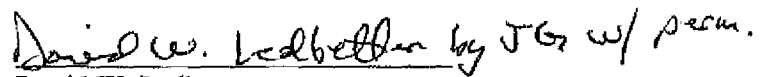
### CONCLUSION

The judgment of this panel is that Respondent be **DISBARRED** and that his reinstatement after the applicable five year period be conditioned on the factors listed above. Any petition for certiorari must be filed in the circuit or chancery court having jurisdiction within 60 days of the mailing or service of this judgment. Rule 9, §8.3.

It is so ORDERED.

  
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<sup>9</sup> Rule 9, §24.3 essentially requires the Board of Professional Responsibility to assess against a respondent attorney upon whom sanctions are imposed all costs incurred as a result of formal proceedings.