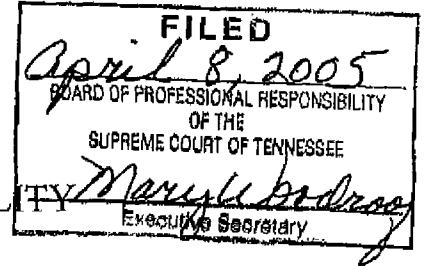


IN DISCIPLINARY DISTRICT V
FOR THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE



IN THE MATTER OF LEROY CAIN, Jr., BPR No. 6510

Respondent, An Attorney Licensed and Admitted to the Practice of Law in Tennessee

Case No. 2003-1396-5-SG
Filed April 8, 2005

A disciplinary hearing was held on January 20, 2005 involving the summary suspension of the respondent for failure to complete the required continuing legal education and the subsequent practice of law by the respondent during the period of suspension. The hearing was held pursuant to Rule 9, Rules of the Tennessee Supreme Court. For the reasons stated in this opinion, the hearing panel finds that Respondent continued to practice law after his suspension, made misleading statements to his clients, the courts and opposing counsel about his suspension, was untruthful to disciplinary counsel during the proceedings, knowingly failed to refund retainers received during the period of suspension, disclosed client information without consent, and neglected client matters.

William Barry Turner, Esq., Chair, Julie Neal Jones, Esq., and Jerry Gonzalez, Esq.,
Disciplinary Panel Members.

Newton S. Holiday, III (12990), Nashville, TN, for Respondent

Sandy Garrett (13863), Disciplinary Counsel, Nashville, TN, for Board of Professional
Responsibility of the Supreme Court of Tennessee, Petitioner

JUDGMENT OF THE HEARING COMMITTEE

Statement of the Case

1. On September 24, 2003, a Petition for Discipline was filed with the Board of Professional Responsibility of the Supreme Court of Tennessee and assigned Case No. 2003-1396-5-SG. The petition alleged that Respondent, Leroy Cain, Jr., violated the Code of

Professional Responsibility in File No. 26079-5-SG (complaint of W. Scott Sims, Esq.) and in File No. 26296-5-SG (complaint of Julie L. Ottman, Esq.). On October 10, 2003, Mr. Cain filed an answer to the petition.

2. On December 18, 2003, a Supplemental Petition for Discipline was filed alleging that Respondent violated the Rules of Professional Conduct in File No. 26502-5-SG (complaint of Hon. Sophia Brown Crawford). On January 28, 2004, a motion for default judgment was filed on the basis that no answer had been filed by Respondent Cain to the supplemental petition. On February 6, 2004, Mr. Cain filed a "Supplemental Answer to Petition for Discipline."

3. A Request for Hearing Panel was filed on January 28, 2004. And on February 19, 2004 a Notice of Appointment of Hearing Panel was issued.

4. On March 24, 2004, a Second Supplemental Petition for Discipline was filed in this case. The petition alleged violations of the Code of Professional Responsibility in File No. 26531-5-SG (complaint of Mark Wayne Dodd), alleged additional Code violations in File No. 26296-5-SG (complaint of Julie L. Ottman, Esq.), and alleged violations of the Rules of Professional Conduct in File No. 26644-5-SG (complaint of Nichelle Williams). An Answer to Second Supplemental Petition for Discipline was filed on April 21, 2004.

5. A Motion to Set was filed on November 5, 2004 and on December 18, 2004 a Notice of Hearing was issued setting a hearing date of January 20, 2005. The hearing was held on January 20, 2005 at the offices of the Board of Professional Responsibility. At the conclusion of the hearing, the panel directed the parties to submit proposed findings of fact and conclusions of law by February 9, 2005.

6. On January 31, 2005, Disciplinary Counsel filed a Motion for Leave to Amend to Conform to Evidence. The motion sought to amend paragraph 12 of the Second Supplemental Petition for Discipline on the basis that the evidence adduced at the hearing established additional alleged violations of the Code of Professional Responsibility and the Rules of Professional Conduct. In order to allow time for a response to and consideration of the motion, the hearing panel in an Order entered February 5, 2005 gave the Respondent until February 10, 2005 in which to file a response, and extended to February 21, 2005 the time for the parties to submit proposed findings of fact and conclusions of law. On February 9, 2005, Mr. Cain filed

his response to the motion.

7. The panel concluded that Respondent would not be prejudiced by the amendment. The panel also noted that during the hearing Respondent had not objected to any of the evidence on the ground that it was not within the issues made by the pleadings. Accordingly, the panel's Order granting Motion for Leave to Amend to Conform to Evidence was entered on February 22, 2005.

8. The Disciplinary Counsel's filed proposed findings of fact and conclusions of law already addressed these additional alleged violations. Respondent's filed proposed findings of fact and conclusions of law did not. Therefore, the panel's February 22 Order also granted Mr. Cain additional time, until February 28, 2005, to submit supplemental proposed findings of fact and conclusions of law addressing the additional alleged violations.

9. On March 2, 2005, Disciplinary Counsel filed a Corrected Motion for Leave to Amend to Conform to Evidence. The original motion sought amendment of the Second Supplemental Petition for Discipline when it should have sought amendment of the Supplemental Petition for Discipline. The panel's Order granting the corrected motion was entered on March 14, 2005.

Findings of Fact

10. Leroy Cain, Jr. was first licensed to practice law in 1979 and has been in private practice in Tennessee since March, 1982. Mr. Cain had no history of failing to complete his continuing legal education (CLE) requirements until 2001. (Testimony of Leroy Cain, Jr.)

11. Under Tennessee Supreme Court Rule 21, Section 3, each year attorneys admitted to practice law in Tennessee must complete a minimum of 12 hours of approved general CLE and 3 hours of approved ethics CLE. Tenn.Sup.Ct.R. 21, § 3.01. Consistent with Rule 21, Section 6.01, the Commission on Continuing Legal Education sent a notice to Mr. Cain sometime in January or February 2002 showing a delinquency for 2001 of 2 hours of ethics and 7.50 hours of general credit hours. (Annual Report Statement for 2001, Collective Exhibit 16.)

12. A Notice of Non-completion was also sent to Mr. Cain, via certified mail, return

receipt requested.¹ Rule 21, Section 7.02, provides that “[o]n March 31 of each year, the Commission shall serve each attorney [with a CLE deficiency] a Notice of Non-completion requiring the attorney to remedy his/her deficiencies on or before May 31 of that year.”

Tenn.Sup.Ct.R. 21, § 7.02. According to Mr. Cain, however, he did not receive notice of his delinquency until some time in October of 2002. (Cain Testimony.)

13. On December 17, 2002, the Tennessee Supreme Court issued an order summarily suspending the license to practice law of Mr. Cain on the basis that the “Tennessee Commission on Continuing Legal Education and Specialization” has “represented to the Court” that the listed attorneys, including Mr. Cain and his partner, Newton S. Holiday, III, have “failed to comply with the requirements of Rule 21, and the notice required by Section 7.02 of said Rule has been given to said attorneys by certified mail, return receipt requested . . . and that more than 90 days have expired since such notice was given” (Order of Summary Suspension for Failure to Comply with Rule for Mandatory Continuing Legal Education, Exhibit 13.)

14. Due to an apparent “crisis” in December of 2001, Mr. Cain fell behind and had planned to attend a CLE course in December of 2002 when another family emergency involving his mother occurred and he had to leave town. (Cain Testimony.)

15. Mr. Cain does not dispute that he was well aware of his 2001 CLE delinquency at the time he left on his family emergency in December, 2002. As a back up, Mr. Cain relied on his partner, Mr. Holiday, although Mr. Cain admitted at the hearing that he never sat down with Mr. Holiday to review his calendar or any pending matters that would need to be attended to in his absence. Unbeknownst to Mr. Cain, Mr. Holiday was also suspended in December, 2002 for CLE non-compliance. (*Id.*)

16. Mr. Cain returned from out of town sometime in middle to late January, 2003 and was made aware of his suspension, constructively, by U.S. mail, which he did not open

¹ Disciplinary Counsel never filed a copy of the Notice of Non-compliance as an exhibit to any pleadings nor at the hearing. A Notice of Petition for Summary Suspension was attached as an exhibit to Disciplinary Counsel’s Second Supplemental Petition for Discipline but was not introduced or offered as an exhibit at the hearing. This panel expressly rejects any facts derived from documents in the technical record but not introduced as an exhibit at the hearing. Nevertheless, the Supreme Court’s order expressly refers to notice given pursuant to Rule 21, Section 7.02 and this panel accepts that at least the Notice of Non-completion required by Section 7.02 was sent to Mr. Cain.

immediately because of re-acclimation of his duties upon return from out of town. (*Id.*)

File No. 26079-5-SG (Complaint of W. Scott Sims, Esq.):

17. While still out of town, however, Mr. Cain became aware that a deadline for refiling the previously non-suited case of *Eubanks v Vanderbilt University* was due on January 20, 2003, and he authorized the refiling of the case. (*Id.*) In the *Eubanks* case, Vanderbilt was represented by attorney W. Scott Sims. After the case was refiled by Mr. Cain in January, 2003, Mr. Sims was told by another attorney that Mr. Cain was suspended. This was confirmed to Mr. Sims by the Board of Professional Responsibility. (Testimony of W. Scott Sims, Esq.)

18. Mr. Sims called Mr. Cain who also confirmed that he was suspended. That same day, February 26, 2003, Mr. Sims wrote Mr. Cain a letter reminding him of his obligation to inform Judge Kurtz, the judge assigned to the case, of his suspension and asked him to do so before March 4. (Sims Testimony; Sims' Feb. 26, 2003 Ltr. To Cain, Collective Exhibit 6.)

19. Mr. Cain claims he did not receive this letter "when he should have." (Cain Testimony.) When no such notice was presented to the court by that deadline, Mr. Sims, after once again confirming the suspension with the BPR, wrote a letter to Judge Kurtz on March 27, 2003 informing him of Mr. Cain's suspension. (Sims Testimony; Sims' Mar. 27, 2003 Ltr. To Judge Kurtz, Collective Exhibit 6.)

20. On April 1, 2003, Judge Kurtz set a hearing for May 2, 2003. The order setting the hearing specifically states that Mr. Cain "failed to notify this Court." (April 1, 2003 Order, Exhibit 7.) According to testimony from Mr. Sims, Judge Kurtz directly asked Mr. Cain at the May 2 hearing if the letter by Mr. Sims was accurate. Mr. Cain indicated that his license was suspended but that it had been corrected and he "was ready to move forward." (Sims Testimony.) According to Mr. Cain, Judge Kurtz asked him if he had taken care of his CLE to which Mr. Cain responded "I have taken care of everything." (Cain Testimony.)

21. The record in the *Eubanks* case, submitted in part as Collective Exhibit 7, is replete with court filings bearing Mr. Cain's signature as counsel of record, including an Agreed Scheduling Order dated June 10, 2003. After a scheduling conference on August 27, 2003, which Mr. Cain failed to attend, a Case Management Order was drafted and mailed to Mr. Cain

on August 28, 2003 by Mr. Sims revealing that on that date, counsel representing Vanderbilt was still under the impression that Mr. Cain was counsel of record, a date on which Mr. Cain, by his own admission at the disciplinary hearing, was still suspended. (June 10, 2003 Agreed Scheduling Order, Collective Exhibit 7; Cain Testimony.)

22. It is unclear exactly at what point in time Mr. Cain became aware of his suspension and the relation in time of this awareness to his authorization of the refile of the *Eubanks* case. But Mr. Cain admitted at the disciplinary hearing that the case was refiled while he knew he was suspended but argued that this was done to prevent the "total prejudice" of his client were the case not refiled. (Cain Testimony.)

23. On March 5, 2003, Sandy Garrett, Disciplinary Counsel, sent Mr. Cain a letter asking him to respond to a complaint filed by attorney Scott Sims and assigned Case No. 26079-5-SG. On April 7, 2003, Ms. Garrett sent a follow up letter requesting a response because Mr. Cain had not replied to the March 5 letter. By letter dated April 3, 2003, however, Mr. Cain gave a relatively short response to the Sims complaint admitting that he filed the complaint in the *Eubanks v Vanderbilt* case and claiming that he was not fully aware of his suspension until he got back in town. (*Id.*)

24. On April 10, 2003, Mr. Cain sent a more detailed "supplemental response" to the Sims complaint. In that letter, Mr. Cain admits that he "was aware that the Summary Suspension Order had been submitted to the Supreme Court" but that he did not "know of the December 17, 2002 effective date until your letter." (Cain April 10, 2005 Ltr. To Garrett, Exhibit 14.)

25. In that April 10 letter, Mr. Cain also asserts that "I am not currently practicing law nor have I been doing so since learning of my suspension. I have been doing ministerial chores in the Office [sic] as well as setting up the office computer with Quick Books and a Time Billing software system in anticipation of starting up an active practice again. My clients have been notified of my plight, and the Federal as well as some State Courts have notified me of the Notice from the Supreme Court of my suspension."² (Exhibit 14.)

26. At the disciplinary hearing, Mr. Cain admitted that the statement in his April 10

² It is important to note, here, that Mr. Cain failed to introduce any documentary evidence supporting his statement in this letter that he notified his clients of his "plight."

letter that he is "not currently practicing law nor have I been doing so since learning of my suspension" was false. (Cain Testimony.)

File No. 26296-5-SG (Complaint of Julie L. Ottman, Esq.) and
File No. 26531-5-SG (Complaint of Mark Wayne Dodd):

27. On January 21, 2003, Mr. Cain failed to appear at a scheduled hearing in Davidson County Juvenile Court for his client Mark Wayne Dodd. As a result, his client's visitation with one of his daughters was suspended. (Testimony of Mark Wayne Dodd.)

28. A second motion was filed to suspend visitation with Mr. Dodd's other daughter by one of the guardians ad litem and scheduled for February 11, 2003. (Dodd Testimony; Feb. 2, 2003 Order, Collective Exhibit 1.) Again, Mr. Cain failed to appear even though Mark Chen, the guardian ad litem, informed the court that Mr. Cain had received notice of the hearing. (Collective Exhibit 1.) In his defense, Mr. Cain argues that he did not receive this second motion and so was unaware of the hearing a week later. (Cain Testimony.)

29. On March 14, 2003, Mr. Cain signed and filed a motion to set aside the suspension of visitation in spite of the suspension of his law license because Mr. Dodd's mother advised that he could not afford to get another attorney. Mr. Cain asserts that he advised Mr. Dodd's mother of his suspension but that he acted improperly not to advance his own cause, but so as not to unduly prejudice the rights of his client. (*Id.*)

30. Julie Lynn Ottman was the attorney for the state Department of Childrens Services in the *Dodd* case. Mr. Cain's motion was originally set to be heard on March 25, 2003. (Testimony of Julie Lynn Ottman, Esq.) On March 25, 2003, Mr. Cain arrived to court late after the judge had dismissed the motion for failure to prosecute. (Testimony of Hon. Andrei Ellen Lee; Cain Testimony; March 25, 2003 Order, Exhibit 4.) According to Ms. Ottman, Judge Lee directed Mr. Cain to refile his motion which he did that same day and it was reset for hearing on April 1, 2003. (Ottman Testimony.)

31. On April 1, 2003, according to Ms. Ottman, Mr. Cain informed the court that he was suspended and asked to reset the motion. The motion to set aside was reset for April 22, 2003. (Ottman Testimony.)

32. On April 22, 2003, Mr. Cain arrived late but he had instructed his secretary to call him in late, which she did. (Cain Testimony; Testimony of Hon. Sophia Brown Crawford.) Referee Sophia Brown Crawford was hearing the *Dodd* case that day for Referee Lee. (Crawford Testimony.) According to testimony by Ms. Ottman, on that day, Mr. Cain informed Referee Crawford that his suspension was "December or January" to "mid-April". When Referee Crawford specifically asked Mr. Cain when he was "reinstated," Mr. Cain replied "last week." (Ottman Testimony.)

33. According to testimony by Referee Crawford, Mr. Cain responded that he was "reinstated early in April." Referee Crawford then denied the motion to set aside because the motion had been filed while Mr. Cain was suspended. (Crawford Testimony.)

34. A handwritten narrative on page two of the order denying the motion states "Mr. Cain no longer suspended and accepted service and petition on behalf of his client."³ (April 22, 2002 Order, Collective Exhibit 2.) Clearly, the referee was under the impression that Mr. Cain was no longer suspended. The matter was set for a settlement/pretrial conference to be held on June 5, 2003. (Crawford Testimony.)

35. On June 5, 2003, Mr. Cain filed a motion to withdraw in the case of Mr. Dodd. (June 5, 2003 Motion to be Relieved as Counsel, Exhibit 3.) As grounds, he informed the court that his client had not been "cooperative, and has adopted quite an apathetic position towards his case. Without the full cooperation of Respondent [Dodd], counsel cannot proceed to represent his best interest." (Exhibit 3.)

36. The motion did not mention anything about Mr. Cain's ongoing suspension. According to testimony by Mr. Dodd, Mr. Cain had informed him once that he could not represent him "that day" due to CLE but never used the word suspension. The motion to withdraw was granted on June 25, 2003 by Referee Lee citing as grounds that the "party has chosen to acquire other counsel." (Exhibit 3.)

37. On August 28, 2003, according to the testimony of Ms. Ottman, Mr. Cain arrived

³ The second page of the order denying the motion to set aside and signed by Referee Crawford is dated August 22, 2003. However, is it part of collective exhibit 2 and attached to the first page of the order dated April 22, 2003. We assume that the date on the second page was entered as August in error.

at the child support offices representing a client, Reginald Goodlow. Ms. Ottman explained that the standard procedure in these cases is for the parties to meet in the morning to try and negotiate a settlement. If they are unsuccessful in resolving the matter, then they will appear that afternoon in court. (Ottman Testimony.)

38. Ms. Ottman testified that at the meeting on August 28, Mr. Cain told her that he could not be at the hearing that afternoon but he did not explain why. Mr. Cain was not at the hearing the afternoon of August 28 and the hearing was reset for October. (*Id.*)

39. In his testimony in the disciplinary hearing, Mr. Cain claimed that he was not “representing” Mr. Goodlow in the negotiations with Ms. Ottman. Mr. Cain did admit at the hearing, however, that he was at the meeting to deliver papers and pay a fee “on behalf of” Mr. Goodlow and said “I guess that is practicing.” Mr. Cain also admitted that it was “wrong” for him to be at the meeting on Mr. Goodlow’s behalf while suspended. (Cain Testimony.)

File No. 26502-5-SG (Complaint of Hon. Sophia Brown Crawford):

40. In July, 2003, Ms. Belinda McLin hired Mr. Cain to represent her son in a child support case and paid him \$750. Mr. Cain then failed to appear at a hearing on July 21, 2003 related to that case. (Testimony of Belinda McLin.)

41. The July 21, 2003 hearing was before Referee Crawford. When at the hearing Referee Crawford offered to appoint counsel for Mr. McLin he told her he already had an attorney, Mr. Cain. (Crawford Testimony.)

42. After the hearing, Referee Crawford contacted the Board to inquire about Mr. Cain’s status to practice. Upon being informed that Mr. Cain was still suspended, Referee Crawford subsequently appointed a lawyer for Mr. McLin. (Crawford Testimony.)

43. At some point, according to testimony by Ms. McLin, she learned from her son that Mr. Cain was suspended. She testified that Mr. Cain, however, called her and told her that he was not suspended, a fact admitted to by Mr. Cain at the disciplinary hearing.⁴ (McLin Testimony; Cain Testimony.)

44. Ms. McLin testified that she asked Mr. Cain for a refund of her \$750 because he

⁴ Prior to the hearing, Mr. Cain admitted, via his response to Request for Admissions, that he “failed to inform Belinda McLin of his suspension.” (§11, Request for Admissions and corresponding Response.)

had not attended the court hearing for her son. (McLin Testimony.) Mr. Cain refunded Ms. McLin \$600 but kept \$150 as a "retainer fee." Cain testified that \$75 of the \$150 he kept was for consultation and the other \$75 had been spent to pull the file from Juvenile Court and make copies. (Cain Testimony.)

File No. 26644-5-SG (complaint of Nichelle Denise Williams):

45. Nichelle Denise Williams testified that on June 2, 2003, she hired Mr. Cain to represent her on a child custody issue and paid him a \$415 retainer. (Testimony of Nichelle Denise Williams; Receipt from Cain to Williams for \$415, Exhibit 8.) Mr. Cain said that he was retained by Ms. Williams when they had a consultation meeting on May 26, 2003. (Cain Testimony.) He did not tell her he was suspended, a fact admitted to by Mr. Cain at the disciplinary hearing.⁵ (Williams Testimony; Cain Testimony.)

46. Ms. Williams understood that out of this \$415, \$100 was for an "increment fee" and \$75 was for a "consultation fee" from the previous consultation on May 26, 2003. (Williams Testimony.) Mr. Cain testified that the fee payment was in "installments" not "increments" because Ms. Williams could not afford to pay all of the fee up-front. (Cain Testimony.)

47. Mr. Cain appeared in court for her on three occasions, on June 4, June 10, and September 9, 2003. (Williams Testimony.) At none of these court appearances did Mr. Cain inform the court or opposing counsel that he was suspended, also admitted to by Mr. Cain at the disciplinary hearing. (Williams Testimony; Cain Testimony.)

48. Ms. Williams learned on September 5, 2003 that Mr. Cain was suspended but Mr. Cain told her that he was not suspended and that it was "taken care of." (Williams Testimony.) An order entered on September 12, 2003 by Referee Michael O'Neil indicates that Mr. Cain's suspension was "confirmed via telephone on this date, that Mr. Leroy Cain, counsel of record for the petitioner, is not a lawyer in good standing in the State of Tennessee." (Sept. 12, 2003 Order,

⁵ In his answer to the second supplemental petition for discipline, Mr. Cain previously admitted that Ms. Williams was not informed of his license suspension. (¶24, April 21, 2004 Answer to Second Supplemental Petition.)

Exhibit 11.)⁶

49. Mr. Cain then filed a "Notice and Order of Withdrawal" on September 18, 2003, the day of the scheduled trial, stating that the "party [Ms. Williams] has chosen to acquire other counsel." (Sept. 18, 2003 Notice and Order of Withdrawal, Exhibit 10.) Because of the withdrawal, Ms. Williams' day in court was continued to November 20, 2003 and she ultimately lost her battle for custody. Ms. Williams has requested a refund through her complaint with the Board but to-date has not received any of her money back. (Williams Testimony.)

50. In the disciplinary hearing, Mr. Cain testified that to address his 2001 deficiency he completed CLE courses on February 28, April 11, and April 16, 2003. Mr. Cain said that he paid a late fee to the CLE Commission on April 16, 2003. Mr. Cain testified that he initially thought he could resume practicing law as of April 16, 2003. Mr. Cain subsequently learned that he needed to execute and submit an Affidavit of Compliance to the CLE Commission and he did so on April 23, 2003. (Cain Testimony.)

51. Although Mr. Cain testified that he thought he had read Supreme Court Rule 21, he believed he could resume practicing law as of April 23, 2003 when he sent his Affidavit of Compliance to the CLE Commission. He also testified that he thought he would receive some type of documentation from the CLE Commission that he was reinstated. (*Id.*)

52. Mr. Cain said that he did not receive any documentation that he was reinstated, then sometime in July of 2003 he was informed by telephone by Ms. McLin that Referee Crawford had confirmed with the Board that he was still suspended. Mr. Cain then called and spoke with Mr. David Shearon of the CLE Commission. Mr. Cain testified that Mr. Shearon told him that he was still suspended, that he was currently deficient for his 2002 CLE, and that he would have to remedy the 2002 deficiency before he could be reinstated. (*Id.*)

53. Mr. Cain remedied his 2002 CLE deficiency by completing courses in September, 2003. (*Id.*) On September 16, 2003, the Supreme Court issued an order reinstating Mr. Cain's license to practice law. (Sept. 16, 2003 Order, Exhibit 18.) The original September 16, 2003 order had a typographical error and a corrected order reinstating Mr. Cain was subsequently

⁶ The order was evidently entered as a result of a "Motion for Immediate Review" concerning Mr. Cain's suspension that was filed by opposing counsel and the guardian ad litem. (Exhibit 9.) There is no date stamp indicating when the motion was filed and the certificate of service indicates that the motion was faxed to Mr. Cain on September 12, 2003 and the motion was expected to be heard on September 12, 2003.

issued on September 16, 2003. (Sept. 16, 2003 Corrected Order, Exhibit 15.)

Conclusions of Law

On March 1, 2003, the Rules of Professional Conduct went into effect. Prior to that date the Code of Professional Responsibility governed lawyer conduct. The Supreme Court addressed the transition from the Code to the Rules by providing that the Rules "shall have prospective application only, applying to all relationships existing on, and conduct taken from, [March 1, 2003] forward." Tenn.Sup.Ct.R. 8, Transition Rules Governing the Implementation of the Tennessee Rules of Professional Conduct.

The conduct involved in this matter occurred both before and after March 1, 2003. Thus, the panel has found violations of both the Code of Professional Responsibility and the Rules of Professional Conduct

Continued Practice of Law While Suspended.

At the disciplinary hearing, Mr. Cain admitted that he refiled the complaint in *Eubanks v. Vanderbilt University* on January 20, 2003 at a time when he knew his license to practice law had been suspended by order of the Supreme Court. In doing so, Mr. Cain violated the Code of Professional Responsibility, Tenn.Sup.Ct.R. 8, DR 102(A)(1), (4) and (5), and 7-106(A), which provide:

DR 1-102. Misconduct.

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule. . . .
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.

DR 7-106. Trial Conduct.

(A) A lawyer shall not disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but may take appropriate steps in good faith to test the validity of such rule or ruling.

Mr. Cain also admitted to filing in the *Dodd* case a Motion to Set Aside on March 14, 2003 at a time when he knew his license was suspended. Mr. Cain also appeared in court on the

motion, although late, on March 25, 2003. In practicing law in contravention of the Supreme Court's suspension order, Mr. Cain violated the Rules of Professional Conduct, Tenn.Sup.Ct.R. 8, RPC 3.4(c), 5.5(a), and 8.4(a), (c) and (d), which provide:

Rule 3.4. Fairness to the Opposing Party and Counsel.

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

Rule 5.5. Unauthorized Practice of Law.

A lawyer shall not:

(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction. . . .

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, . . .

(c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

Mr. Cain testified that he believed he could resume practice initially on April 16, 2003 when he completed the CLE courses needed for his 2001 deficiency. He said that he later thought he could resume practice on April 23, 2003 when he filed his Affidavit of Compliance with the CLE Commission. Mr. Cain further testified that he believed he could practice law from April 23 until his telephone conversation with David Shearon at the CLE Commission sometime in July of 2003 when he was informed he was still suspended.

The Supreme Court's December 17, 2002 Order suspending Mr. Cain's law license cites to Supreme Court Rule 21. Mr. Cain testified that he thought he may have read Rule 21. The panel concludes that Mr. Cain had an obligation to read and follow Rule 21, which addresses the procedure by which an attorney may be reinstated.

Rule 21, Section 7.10, provides that "[a]n attorney suspended or made ineligible for reactivation by the Commission pursuant to this rule may file with the Commission an application for reinstatement demonstrating compliance with this rule. If the application is satisfactory to the Commission, and if the attorney has paid all fees due under this rule, the

Commission will recommend to the Supreme Court that the Court reinstate the attorney's law license." Tenn.Sup.Ct.R. 21, § 7.10.

Nowhere does this rule indicate that reinstatement is automatic upon the suspended attorney filing an application for reinstatement with the CLE Commission. Even accepting that the Affidavit of Compliance required by the CLE Commission may also serve as an application for reinstatement under Rule 21, Section 7.10, this rule clearly establishes that the reinstatement is not automatic. It first requires a recommendation from the CLE Commission with the final decision being made by the Supreme Court. Just as the Court suspends a law license through an order, the Court also acts through an order to reinstate a license. Mr. Cain's license was reinstated by a September 16, 2004 order of the Court.

Thus, the panel concludes that Mr. Cain practiced law without a license when he continued in the *Eubanks* case as counsel of record in May, June, and August of 2003. Mr. Cain also practiced law without a license when he appeared in court in the *Dodd* case on April 22, 2003; in accepting representation of Nichelle Williams in May, 2003 and in appearing in court on her behalf in June and September, 2003; in accepting representation in the *McLin* case in July, 2003; and in acting on behalf of Reginald Goodlow in a negotiations meeting with attorney Julie Ottman on August 28, 2003. Mr. Cain's actions violate the Rules of Professional Conduct, Tenn.Sup.Ct.R. 8, RPC 3.4(c), 5.5(a), and 8.4(a), (c) and (d), which are set out above.

Failure to Withdraw After Being Suspended.

After his law license was suspended, Mr. Cain failed to withdraw in January 2003 from representation in the *Eubanks* and *Dodd* cases. This failure violates the Code of Professional Responsibility, Tenn.Sup.Ct.R. 8, DR 1-102(A)(6), and 2-110(B)(2), which provide:

DR 1-102. Misconduct.

(A) A lawyer shall not:

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 2-110. Withdrawal From Employment.

(B) Mandatory withdrawal. A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if: . . .

(2) The lawyer knows or it is obvious that continued

employment will result in violation of a Disciplinary Rule.

Mr. Cain's failure to withdraw from representation in the *Eubanks* and *Dodd* cases continued after March 1, 2003. This violates the Rules of Professional Conduct, Tenn.Sup.Ct.R. 8, RPC 1.16(a)(1), and 8.4(a), (c) and (d). RPC 8.4(a), (c) and (d) are set out above; the remaining provisions provide:

Rule 1.16. Declining and Terminating Representation.

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from representation of the client if:
 - (1) The representation will result in a violation of the Rules of Professional Conduct or other law;

Misrepresentations and Failure to Adequately Communicate With Clients About Suspension.

The panel concludes that after Mr. Cain's law license was suspended, he made misrepresentations to clients about his suspension or failed to adequately communicate his suspension to his clients. Beginning in January, 2003, Mr. Cain never clearly informed Mr. Dodd of his suspension. This continued through June, 2003 when Mr. Cain withdrew as counsel, although not on the grounds that he was suspended. Mr. Cain's conduct prior to March 1, 2003 violates the Code of Professional Responsibility, Tenn.Sup.Ct.R. 8, DR 1-102(A)(1), (4), (5) and (6), 7-101(A)(2) and (3), and 7-102(A)(3) and (8). DR 1-102(A)(1), (4), (5) and (6) are set out above; the remaining provisions provide:

DR 7-101. Representing a Client Zealously.

- (A)
 - (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.

DR 7-102. Representing A Client Within the Bounds of the Law.

- (A) In the representation of a client, a lawyer shall not:
 - (3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal. . . .
 - (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

Mr. Cain also specifically told Ms. McLin in July, 2003 and Ms. Williams in September, 2003 that he was not suspended when, in fact, he was. Mr. Cain also failed to clearly inform Mr. Dodd of his suspension after March 1, 2003. These actions violate the Rules of Professional Conduct, Tenn.Sup.Ct.R. 8, RPC 1.4(a) and (b), and 8.4(a), (c) and (d). RPC 8.4(a), (c) and (d) are set out above; the remaining provisions provide:

Rule 1.4. Communication.

- (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.

Misrepresentations About Suspension to Courts and Opposing Counsel.

Mr. Cain made misrepresentations about his suspension in the *Dodd* case on March 25, 2003 when he failed to mention his suspension to Referee Lee; on April 22, 2003 in his comments to Referee Crawford; and in filing on June 5, 2003 a motion to withdraw without mentioning his suspension. Mr. Cain also misrepresented his suspension on May 2, 2003 in his comments to Judge Kurtz in the *Eubanks* case. In the *Williams* case, Mr. Cain failed to disclose his suspension to the court and opposing counsel in hearings on June 4, June 10, and September 9, 2003. Mr. Cain also failed to disclose his suspension when he met with opposing counsel Julie Ottman on August 28, 2003 in the *Goodlow* case. Mr. Cain's conduct violates the Rules of Professional Conduct, Tenn.Sup.Ct.R. 8, RPC 8.4 (c) and (d), which are set out above.

Misrepresentations to the Board of Professional Responsibility.

During the Board of Professional Responsibility's investigation in this matter, Mr. Cain sent an April 10, 2003 letter to Disciplinary Counsel Sandy Garrett in which he wrote that "I am not currently practicing law nor have I been doing so since learning of my suspension." At the disciplinary hearing, Mr. Cain admitted that this was a false statement. Mr. Cain also wrote in this letter that "[m]y clients have been notified of my plight." Mr. Cain never produced any evidence at the hearing that he had contacted his clients about his suspension. And the testimony of Mr. Dodd established that he had not been made aware of Mr. Cain's suspension by April 10,

2003. Mr. Cain's misrepresentations to the Board violate the Rules of Professional Conduct, Tenn.Sup.Ct.R. 8, RPC 8.4(c) and (d), which are set out above.

Accepting Fees While Suspended.

Mr. Cain accepted representation fees from Nichelle Williams and Belinda McLin in June and July, 2003 while his law license was suspended. Mr. Cain only refunded \$600 of the \$750 paid by Ms. Mc Lin and did not refund any of the \$415 paid by Ms. Williams. It is unreasonable for a lawyer who is suspended to accept a fee. This conduct violates the Rules of Professional Conduct, Tenn.Sup.Ct.R. 8, RPC 1.5(a), and 8.4(a), (c) and (d). RPC 8.4(a), (c) and (d) are set out above; the remaining provision provides:

Rule 1.5. Fees.

(a) A lawyer's fee and charges for expenses shall be reasonable.

Disclosure of Client Information.

In withdrawing from the *Dodd* case on June 5, 2003, not only did Mr. Cain fail to disclose his suspension, the grounds in his motion were that Mr. Dodd "has adopted quite an apathetic position towards his case." The panel concludes that in the context of Mr. Dodd's case seeking custody of his daughters Mr. Cain's disclosure of this client information without the client's consent had a material adverse effect on the client's interests. In so concluding, the panel is not suggesting that this disclosure would necessarily have a material adverse effect in other contexts. Mr. Cain's disclosure in the *Dodd* case violated the Rules of Professional Conduct, Tenn.Sup.Ct.R. 8, RPC 1.6(a), 1.16(b), and 8.4(a). RPC 8.4(a) is set out above; the remaining provisions provide:

Rule 1.6. Confidentiality.

(a) Except as provided below, a lawyer shall not reveal information relating to a client unless the client consent after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.

Rule 1.16. Declining and Terminating Representation.

(b) Except as stated in paragraph (c), a lawyer may withdraw from the representation of a client if the withdrawal can be

accomplished without material adverse effect on the interest of the client

Neglect of Matters for Eubanks, Dodd, McLin, Williams and Goodlow.

Mr. Cain not only continued to practice law after his license was suspended but in so doing he neglected his clients. In the *Dodd* case, he failed to appear at hearings on January 21 and February 11, 2003; he was late for a hearing on March 25, 2003 resulting in the dismissal of his motion; and he was late for a hearing on April 22, 2003. In the *McLin* case, he failed to appear for a hearing on July 21, 2003. Mr. Cain also failed to appear in court on August 28, 2003 on behalf of Reginald Goodlow. Mr. Cain did not appear at a scheduling conference in the *Eubanks* case on August 27, 2003. Mr. Cain also did not appear at a September 12, 2003 hearing in the *Williams* case. When Mr. Cain finally did move to withdraw from the *Williams* case, he did so on September 18, 2003 the day trial was set to begin.

Mr. Cain's neglect of his clients prior to March 1, 2003 violates the Code of Professional Responsibility, Tenn.Sup.Ct.R. 8, DR 6-101(A)(3), which provides:

DR 6-101. Failing to Act Competently.

(A) A lawyer shall not:

(3) Neglect a legal matter entrusted to the lawyer.

Mr. Cain's conduct after March 1, 2003 violates the Rules of Professional Conduct, Tenn.Sup.Ct.R. 8, RPC 1.3, which provides:

Rule 1.3. Diligence.

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

Discipline to be Imposed

Analysis:

1. Supreme Court Rule 9, Section 4, establishes the types of discipline that may be imposed for attorney misconduct. Tenn.Sup.Ct.R. 9, § 4. The Disciplinary Counsel has asked for suspension. Mr. Cain has requested a public censure. The panel concludes that the appropriate discipline for Mr. Cain's ethical violations is "[s]uspension . . . for an appropriate fixed period of time and an indefinite period concurrently . . . to be determined by the conditions imposed by the judgment." Tenn.Sup.Ct.R. 9, § 4.2.

2. In considering the appropriate fixed period of time for suspension, the panel has referenced the standards set forth by the American Bar Association (ABA). *See* ABA's Standards for Imposing Lawyer Sanctions (1986, as amended 1992) (ABA Standards). The ABA Standards provide that "[g]enerally, suspension should be for a period of time equal to or greater than six months, but in no event should the period of time prior to application for reinstatement be more than three years." ABA Standards, § 2.4.

3. In addition to suspension for a fixed period of time, the panel thinks that other remedies are appropriate. These other remedies will be required as "conditions imposed by the judgment." Tenn.Sup.Ct.R. 9, § 4.2. Looking to the ABA Standards, the panel has concluded that the appropriate remedies should include: (1) restitution, (2) assessment of costs, (3) requirement that the lawyer attend a continuing education course, and (4) other requirements that seem consistent with the purposes of lawyer sanctions. ABA Standards, § 2.8(a), (b), (f) and (g).

4. The panel has also considered whether there are aggravating and mitigating circumstances. Again referencing the ABA Standards, the panel concludes that there are aggravating circumstances: (1) a pattern of misconduct, (2) multiple offenses, and (3) substantial experience in the practice of law. ABA Standards, § 9.22(c), (d) and (i).

5. The most egregious aggravating factor in the panel's view is the repeated and deliberate misrepresentations by Mr. Cain regarding his suspension to his clients, various courts and to this Board. By his own admission at the hearing, Mr. Cain was untruthful when he represented in his letter to Disciplinary Counsel that he had not been practicing law since his suspension. This clearly is not true. Our system of justice revolves around truthfulness to tribunals, especially from individuals who are themselves officers of the court. Ambiguous statements, such as "it has been taken care of" or the like, clearly intended to be vague and thus misrepresenting facts, cannot be tolerated by the Bar. Not only are clients harmed by attorneys who are untruthful to the courts, but the entire system of justice is harmed. This misconduct is compounded when one considers that Mr. Cain has been practicing law for more than 20 years.

6. The panel has identified two possibly mitigating circumstances: (1) personal problems and (2) absence of a selfish motive. ABA Standards, § 9.32(b) and (c). Mr. Cain's "family emergency" with his mother may explain somewhat his failure to plan for the suspension he knew was imminent in December, 2002. But it does not explain Mr. Cain's continuing ethical

lapses throughout 2003.

7. On several occasions, Mr. Cain claims to have “fallen on his sword” for the benefit of his clients, often excusing his acts by arguing that his clients had no money with which to hire another attorney. The panel believes that in many instances Mr. Cain’s actions were not the result of a selfish motive. But the remedy, in our view, should not have been the wanton and deliberate disobedience of a Supreme Court order but rather his withdrawal as counsel and the refund of his attorney fees, unlawfully obtained to begin with in the McLin and Williams matters, so that the clients would have the funds to find alternate counsel.

8. The panel also notes that throughout the proceedings, Mr. Cain has consistently claimed that he did not receive letters, that he did not open his mail, or that he was not otherwise notified of events. An occasional lost letter is understandable but the frequency with which Mr. Cain claims not to receive mail or notices on a timely basis leads the panel to believe that the problem is not with the U.S. mail but rather with Mr. Cain’s internal procedures for processing correspondence.

Discipline Imposed:

9. The panel concludes that the appropriate fixed period of time for suspension in this matter is nine (9) months. The panel also imposes as conditions of this judgment that within 30 days of the effective date of the judgment Mr Cain make restitution of \$150 to Belinda McLin and \$415 to Nichelle Williams, and pay the costs of the disciplinary process.

10. The panel imposes as further conditions of this judgment that within nine (9) months of the effective date of the judgment Mr. Cain must submit to the Board: (1) an affidavit from a licensed attorney who has agreed to serve as a back up should Mr. Cain ever need to leave his practice for any period greater than one week, and (2) an affidavit from Mr. Cain that he has completed a CLE course on law office management, preferably, with a specific emphasis on processing correspondence and calendaring.

11. The panel directs Mr. Cain to read and follow Supreme Court Rule 9, Section 18, which prescribes the procedures to be followed when discipline is imposed regarding notice to clients, adverse parties, and other counsel. Tenn.Sup.Ct.R. 9, § 18. The panel also directs Mr. Cain to read and follow Rule 9, Section 19, whic addresses the procedures for reinstatement. Tenn.Sup.Ct.R. 9, § 19.

This 8th day of April, 2005.

William Barry Turner by JG w/perm.
William Barry Turner, Esq., Hearing Panel Chair

Julie Neal Jones by JG w/perm.
Julie Neal Jones, Esq., Hearing Panel Member

JG
Jerry Gonzalez, Esq., Hearing Panel Member