

IN THE CHANCERY COURT OF TENNESSEE  
FOR THE THIRTIETH JUDICIAL DISTRICT  
AT MEMPHIS

GERALD STANLEY GREEN,  
Petitioner,

v.

BOARD OF PROFESSIONAL  
RESPONSIBILITY OF THE  
SUPREME COURT OF TENNESSEE,  
Respondent.

NO. CH-17-0341 - 1  
BPR NO. 2014-2401-9-AJ

2015-2442-9-AJ

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BOARD OF PROFESSIONAL  
RESPONSIBILITY

ORDER

Petitioner, Gerald Stanley Green, appeals the decision of the Tennessee Board of Professional Responsibility ("Board") pursuant to Tenn. Sup. Ct. R. 9, section 33. Honorable William B. Acree, Jr., Senior Judge, sitting by designation over the Chancery Court of Shelby County, reviewed the Hearing Panel transcript and the official record with exhibits and made its ruling from the same. For the reasons set forth herein, the decision of the Hearing Panel is affirmed.

DISCIPLINARY HISTORY

Petitioner practiced law in Tennessee since 1981. Since 1990, he received the following disciplinary sanctions:

1. September 28, 1990 – informal admonition;
2. April 28, 1993 – private reprimand;
3. July 25, 1994 – private informal admonition;
4. November 10, 1994 – private informal admonition;
5. May 24, 1995 – public censure;
6. August 5, 1996 – private informal admonition;
7. October 1, 1996 – private informal admonition;
8. February 28, 1997 – private informal admonition;

9. October 1, 1998 – private reprimand;
10. November 16, 1999 – private informal admonition;
11. November 19, 1999 – public censure;
12. August 3, 2000 – private informal admonition;
13. May 3, 2004 – Six (6) month suspension (all probated);
14. May 3, 2004 – private informal admonition;
15. March 15, 2005 – Private informal admonition;
16. June 29, 2006 – private informal admonition;
17. February 27, 2015 – public censure.

On April 15, 2015, the Board filed a Petition for Discipline against Petitioner. On May 8, 2015, Petitioner filed a Response to the Petition. Petitioner submitted a Conditional Guilty Plea on October 23, 2015, that was approved by the Hearing Panel and the Board of Professional Responsibility. On January 20, 2016, the Supreme Court rejected the Conditional Plea “based on concerns about [Petitioner’s] lengthy prior disciplinary record.”

On March 22, 2016 the Board filed a Supplemental Petition for Discipline which Petitioner timely answered.

On October 6, 2016, the Hearing Panel of the Board of Professional Responsibility conducted a hearing. The Panel entered its Findings of Fact, Conclusions of Law, and Judgment on December 7, 2016. The Panel found Petitioner should be suspended for six (6) months, with thirty (30) days served as active suspension and the remainder on probation with conditions.

The decision was timely appealed to the Chancery Court of Shelby County. A hearing was held on September 5, 2017.

#### FINDINGS OF FACT<sup>1</sup>

The Petition for Discipline and the Supplemental Petition for Discipline involve three complaints for this Court’s review: Johnny Kizer (File No. 366166-9-KB), Mississippi Board

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<sup>1</sup> During the hearing before the hearing panel, the parties introduced a Joint Stipulation of Facts filed September 26, 2017, as Exhibit 1 to the hearing. This stipulation is incorporated herein by reference and attached to this order.

(File No. 37516-9-KB), and Augusta McKinney (File No. 41494-9-KB).<sup>2</sup>

The proof presented during the hearing of the panel, consisted of the following:

1. Testimony of Petitioner;
2. Testimony of Complainant Augusta McKinney;
3. Testimony of Complainant Johnny Kizer;
4. Testimony of Attorney George Higgs; and
5. Testimony of Attorney Steven Jubera was introduced through stipulation.

Johnny Kizer

Johnny Kizer ("Mr. Kizer") obtained Petitioner as counsel when he was sued on a debt owed to Springleaf Financial Services. The debt derived from plumbing work Mr. Kizer had at his home. Mr. Kizer financed plumbing work done at his house by Roto-Rooter; and Roto-Rooter sold the loan to Springleaf Financial. Mr. Kizer did not pay the note for the plumbing work because he disputed the quality of Roto-Rooter's work.

The Board alleged that Petitioner violated RPC 1.1 - competence, 1.2 - scope of representation, 1.3 - diligence, and 1.4 - communication. The Panel dismissed allegations that Petitioner violated RPC 1.1 finding that Petitioner met the standard necessary for competent representation. The Panel also dismissed allegations that Petitioner violated RPC 1.2 finding that the Board did not develop this argument during the hearing.

The Panel found that Petitioner violated RPC 1.3 and 1.4. The Panel focused on the evidence Mr. Kizer sought to have presented at trial that demonstrated the poor workmanship of Roto-Rooter. The crux of the Board's allegation is that Petitioner should have sued Roto-Rooter

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<sup>2</sup> The Petition for Discipline as supplemented identified complaints from Augusta McKinney, Johnny Kizer, Willie Ann Hughes, and the Mississippi Board of Professional Responsibility. The Panel dismissed the Willie Ann Hughes (File No. 37474c-9-KB) complaint.

as Mr. Kizer's complaint was based on the quality of their work. The Panel found that "Mr. Kizer had a right to know in advance of trial that his lawyer was not going to introduce any witnesses or evidence (other than the testimony of his own client), as well as the reason for that decision."

#### Mississippi Board

Petitioner represented Mr. Weissenger Newberry, III, in a criminal matter in Mississippi. On June 15, 2012, Petitioner applied for *pro hac vice* admission to the Mississippi Bar and paid all of the required fees. On that same day, Petitioner also filed a Motion to Dismiss and a Request for Discovery. The Mississippi Supreme Court granted the application, but the trial court failed to enter a written order stating Petitioner complied with the requirements.<sup>3</sup> Accordingly, Petitioner did not present that order to the clerk of the Mississippi Supreme Court prior to representing Petitioner.

Mr. Newberry was ultimately convicted at trial. On appeal, the Mississippi Supreme Court reversed the conviction in part because Petitioner failed to comply with Mississippi's rules for *pro hac vice* admission. *See Newberry v. State of Mississippi*, 145 So.3d 652, 659 (Miss. 2014).

The board alleged that Petitioner violated RPC 3.4(c) - knowing disobedience of obligation under rules of tribunal; RPC 5.5 - unauthorized practice of law; and RPC 8.4(d) - conduct prejudicial to the administration of justice. The Panel found that Petitioner did not violate RPC 3.4(c) because he attempted to comply with the Mississippi rules for *pro hac vice* admission, and he failed.

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<sup>3</sup> The precise date when the trial court admitted Petitioner to practice *pro hac vice* is unclear, however, at trial the parties stipulated that Mr. Steven Jubera (the prosecuting attorney) would have testified that "the trial court admitted Gerald S. Green to practice . . . during conferences in chambers and in pre-trial proceedings." *See Findings and Judgment of the Hearing Panel*, Filed December 7, 2016, p. 22, fn. 10.

The Panel found Petitioner's conduct violated RPC 5.5 and 8.4(d). The Panel enumerated its findings as follows:

- (1) Mr. Green did not intend to mislead anyone about his status as a Tennessee attorney or his *pro hac vice* admission to appear in the Mississippi court;
- (2) Mr. Newberry knew that Mr. Green was not licensed to practice law in Mississippi;
- (3) Mr. Newberry did not wish to have a Mississippi attorney but, wanted Mr. Green to represent him;
- (4) Mr. Green failed to comply with Mississippi Rule of Appellate Procedure 46 in several respects;
- (5) Mr. Green's failure to have local counsel present at the trial of this matter, as required by Rule 46, is mitigated to some extent by the fact that the trial judge and prosecutor share Mr. Green's mistaken belief that the presence of local counsel could be waived; and
- (6) Mr. Green violated Rule 46 in other ways, as set forth above, which had nothing to do with the trial judge or prosecutor's misunderstanding of the rule.

See Findings and Judgment of the Hearing Panel, Filed December 7, 2016, p. 27.

Augusta McKinney

Augusta McKinney ("Mr. McKinney") purchased a van from Mr. and/or Mrs. Braxton. The van was in possession of a mechanic, Mr. Lockett, who claimed a possessory lien for work performed and money owed on the vehicle. Mr. McKinney filed a *pro se* civil suit against Mr. Lockett to recover the van. Mr. Lockett filed a counterclaim against Mr. McKinney at which time Mr. McKinney retained Petitioner as counsel for his interests in the matter.

The case was continued several times. Mr. McKinney became frustrated with Petitioner. On February 4, 2015, Mr. McKinney, Petitioner, and opposing counsel appeared in court. Either the court determined or the parties agreed that the case should be continued again.

On February 18, 2015, Mr. McKinney appeared in court alone absent Petitioner and opposing counsel. Mr. McKinney did not advise Petitioner that he appeared or was going to appear in court on February 18, 2015. Mr. McKinney obtained a default judgment based on the ground that Defendant failed to appear.

Opposing counsel discovered the judgment against his client and requested that Petitioner appear in court with him to remedy the matter. At court, opposing counsel announced that he and Petitioner agreed to continue the case and forwarded a Consent Announcement to the court via facsimile. However, the announcement did not make it to the court file. The Court set aside the default judgment.

Petitioner did not contact Mr. McKinney to find out what took place on February 18, 2017; he did not advise Mr. McKinney that he would appear in court; and Petitioner did not contact his client to inform him that the default judgment was set aside. Mr. McKinney learned that the judgment was set aside approximately one week after the court made the decision when he appeared in the clerk's office to obtain possession of the van.

Mr. McKinney testified that he verbally terminated Petitioner as counsel prior to the February 18, 2017, appearance. On April 13, 2015, Mr. McKinney sent Petitioner written correspondence dismissing Petitioner as counsel.

The Board alleged Petitioner's conduct violated RPC 1.2 - Scope of Representation, RPC 1.4 - Communication, RPC 1.16 Declining and Terminating Representation, and RPC 8.4(a) - misconduct. The Panel found that the Board did not meet its burden of proof in showing that Petitioner violated RPC 1.2 and 1.16 as Petitioner was not discharged of his responsibilities until he received the written correspondence from Mr. McKinney and there was not sufficient evidence that Mr. McKinney verbally terminated his employment.

The panel found Petitioner's conduct violated RPC 1.4 8.4(a) primarily asserting that Petitioner should have contacted his client before, during, and/or after he appeared in court to have the default judgment set aside.<sup>4</sup>

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<sup>4</sup> The Panel found that Petitioner violated RPC 8.4(a) because he violated RPC 1.4.

## STANDARD OF REVIEW

The standard of review for appeals of the Board is set out in Tennessee Supreme Court Rule 9, § 33.1(b), which provides,

The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the hearing panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The trial court may, in its discretion, permit discovery on appeals limited only to allegations of irregularities in the proceeding. The court may affirm the decision of the hearing panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the party filing the Petition for Review have been prejudiced because the hearing panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the hearing panels jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record. In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the hearing panel as to the weight of the evidence on questions of fact.

Further, “[a]lthough the trial court may affirm, remand, reverse, or modify a Hearing Panel decision; the trial court may not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.” *Board of Professional Responsibility v. Allison*, 284 S.W.3d 316, 322 (Tenn. 2009). This Court will not reverse the decision of a Hearing Panel so long as the evidence “furnishes a reasonably sound factual basis for the decision being reviewed.” *Hughes v. Board of Professional Responsibility*, 259 S.W.3d 631, 641 (Tenn. 2008) (quoting *Jackson Mobilphone Co. v. Tennessee Public Service Commission*, 876 S.W.2d 106, 111 (Tenn.Ct.App. 1993)).

“When none of the first three grounds for reversal are present, as is the case here, the hearing panel should be upheld unless the decision was either arbitrary or capricious, “characterized by an abuse, or clearly unwarranted exercise, of discretion” or lacking in support by substantial and material evidence.” *Hughes* at 641 (citing *CF Indus. V. Tenn. Pub. Serv.*

*Comm'n.*, 599 S.W.2d 536, 540 (Tenn. 1980)). "An arbitrary [or capricious] decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Id.* at 641.

Likewise, a reviewing court should not apply Tenn. Code Ann. § 4-5-322(h)(5)'s "substantial and material evidence" test mechanically. Instead, the court should review the record carefully to determine whether the administrative agencies decision is supported by "such relevant evidence as a rational mind might except to support a rational conclusion."... The evidence will be sufficient if it furnishes a reasonably sound factual basis for the decision being reviewed.

*Id.* (citing *Jackson Mobilphone Co. v. Tennessee Public Service Commission*, 876 S.W.2d 106 (Tenn.Ct.App. 1993)).

#### RULING

Petitioner alleges error in the Panel's findings on the individual matters, Johnny Kizer, Mississippi Board, and Augusta McKinney. Petitioner also alleges that the Panel erred in determining the appropriate sanction for Petitioner's conduct. In sum, Petitioner does not contend and there is no evidence that the decision of the panel was in violation of constitutional or statutory provisions, in excess of the panel's jurisdiction, or made upon unlawful procedure. The petitioner contends the decision was arbitrary and capricious and unsupported by the evidence.

#### Johnny Kizer

The petitioner contends the panel erred for the following reasons:

1. The Panel erred when it found Petitioner violated the Rules of Professional Conduct because that finding was unsupported by evidence that is both substantial and material in light of the record.
2. The Panel's decision was arbitrary and capricious or characterized by abuse of discretion

or clearly unwarranted exercise of discretion because the judgement was not based on substantial and material evidence.

3. The Panel erred when it did not find certain facts and credit Petitioner's testimony and pleadings although there was substantial and material evidence of those facts contained in the record.
4. The Panel erred by entering a judgment of suspension without finding any harm.

The Panel found that Petitioner violated RPC 1.3 Diligence and RPC 1.4 Communication. RPC 1.3 states, "A lawyer shall act with reasonable diligence and promptness in representing a client." RPC 1.4 states:

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

This Court finds that the Panel's decision is supported by substantial and material evidence, and the decision was not arbitrary and capricious. Although Petitioner attempted to assist Mr. Kizer with his plumbing issue,<sup>5</sup> the record reflects that during the circuit court trial, Petitioner did not present evidence regarding Roto-Rooter's workmanship. Petitioner's legal opinion was that this was a collection matter, thus, Roto-Rooter was immaterial. However, there

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<sup>5</sup> Petitioner sent a plumber to Mr. Kizer's home to inspect the plumbing work. Petitioner also worked with opposing counsel to extend Roto-Rooter's expired warranty, however, Mr. Kizer refused Roto-Rooter's service when they returned to his home to inspect and repair the problem.

is evidence that Mr. Kizer disputed Roto Rooter's workmanship and intended to present evidence regarding the quality of their work. For example:

Mr. Kizer provided [Petitioner] documentation that no permit had been pulled for the original plumbing job, and documentation that Mr. Kizer had been cited with plumbing violations by the health department. Photographs of the sewage problem were provided to [Petitioner] or made available to him. Mr. Kizer clearly thought Mr. Green was going to introduce this evidence at trial indicating his understanding and belief that Roto-Rooter's workmanship was an issue to be decided by the trial judge.

*See Findings and Judgment of the Hearing Panel, Filed December 7, 2016, p. 11.*

In addition, the vast majority of Petitioner's communication with Mr. Kizer involved Mr. Kizer's allegations that Roto-Rooter's workmanship was poor. Mr. Kizer believed that if he could prove that Roto-Rooter's performed inadequately he would not have to pay the loan owed to Springleaf. The Panel found that Petitioner never adequately explained that a separate lawsuit against Roto-Rooter was necessary to achieve that objective; and "[Petitioner] went to trial on this matter without adequately informing Mr. Kizer as to the issues he planned to address."<sup>6</sup> *Id.* "Mr. Kizer had a right to know in advance of trial that his lawyer was not going to introduce any witnesses or evidence (other than the testimony of his own client), as well as the reason for that decision." *Id.* at 12. Considering the Petitioner's testimony, Mr. Kizer's testimony, the Panel's trial transcript and exhibits, and the Panel's Findings, "it is certainly understandable why Mr. Kizer was led to believe that his attorney would introduce evidence regarding the alleged poor workmanship of the Roto-Rooter plumbing job." *Id.* at 11. Therefore, the Panel's decision regarding Johnny Kizer is AFFIRMED.

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<sup>6</sup> While the Panel did not find that Petitioner violated RPC 1.5, the Panel made clear that some correspondence or record to indicate the scope of representation would have "gone a long way towards clarifying the matter." *See Findings and Judgment of the Hearing Panel, Filed December 7, 2016, p. 12, fn. 5.*

Mississippi Board

The petitioner contends the panel erred for the following reasons:

1. The Panel erred when it found misconduct event though the Board did not prove a violation of the Rules of Professional Conduct with substantial and material evidence; and
2. The Panel erred when it found misconduct event though the Board did not prove and the Panel did not find that Petitioner possessed a culpable mental state.

The Panel found that Petitioner's conduct violated Rules of Professional Conduct 5.5(a) unauthorized practice of law which states, "a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." The Panel also found that Petitioner violated RPC 8.4(d) which states, in part: "it is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice...."

Petitioner's conduct is clearly a violation of Rule 46 the Mississippi Rules of Appellate Procedure ("Rule 46"). Rule 46 states, in part:

**(b) Admission of Foreign Attorneys Pro Hac Vice.**

*(1) Terminology*

\* \* \*

ii. "Appearance" shall include the appending or allowing the appending of the foreign attorney's name on any pleading or other paper filed or served, or appearing personally before a court or administrative agency or participating in a deposition or other proceeding in which testimony is given. Presentation of uncontested matters to administrative agencies does not constitute appearance as the term is used in this Rule 46(b). Appearance of a foreign attorney shall commence with the first appearance and continue until final determination or until an order permitting the foreign attorney to withdraw has been issued.

iii. "General practice of law" shall be deemed to include, when applied to a foreign attorney, appearances by the foreign attorney in more than five (5) separate unrelated causes or other

matters before the courts or administrative agencies of this state within the twelve (12) months immediately preceding the appearance in question.

iv. "Foreign attorney" shall mean an attorney licensed to practice law and in good standing in another state, the District of Columbia, or other American jurisdiction, but not licensed and in good standing to practice law in Mississippi.

v. "Local attorney" shall mean an attorney who is licensed and in good standing to practice law in Mississippi.

(2) *Appearance of a Foreign Attorney Pro Hac Vice Permitted.* A foreign attorney shall not appear in any cause except as allowed pro hac vice under this Rule 46(b). A foreign attorney who is of good moral character and familiar with the ethics, principles, practices, customs, and usages of the legal profession in this state, may, subject to the provisions of this Rule 46(b), appear as counsel pro hac vice in a particular cause before any court or administrative agency in this state upon compliance with the conditions stated in this subdivision.

\* \* \*

(4) *Association of Local Attorney.* No foreign attorney may appear pro hac vice before any court or administrative agency of this state unless the foreign attorney has associated in that cause a local attorney. The name of the associated local attorney shall appear on all notices, orders, pleadings, and other papers filed in the cause. The local attorney shall personally appear and participate in all trials, and, unless specifically excused from such appearance by the court or administrative agency, in all pretrial conferences, hearings, other proceedings conducted in open court and all depositions or other proceedings in which testimony is given in this state. By associating with a foreign attorney in a particular cause, the local counsel accepts joint and several responsibility with such foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause.

(5) *Verified Application, Clerk's Statement and Filing Fees.* A foreign attorney desiring to appear pro hac vice before any court or administrative agency of this state shall file with the subject court or administrative agency and with the Clerk of the Supreme Court (1) a verified application and (2) a statement obtained from the Clerk of the Supreme Court indicating all causes or other matters in which the foreign attorney previously requested leave to appear as counsel pro hac vice showing the date and disposition of each request. Such application and statement shall be accompanied by a certificate of service on all parties in accordance with the Mississippi Rules of Civil Procedure.

The verified application shall contain the following information:

\* \* \*

Simultaneously with the filing of the application, the foreign attorney shall pay to The Mississippi Bar the sum of \$200 ....

\* \* \*

(7) *Order Authorizing Appearance.* A foreign attorney shall not appear as counsel pro hac vice before any court or administrative agency until the foreign attorney certifies to the court or administrative agency that the foreign attorney has provided a copy of the order authorizing such appearance to the Clerk of the Supreme Court.

M.R.A.P. § 46.

Although Petitioner met some of the admission requirements, Petitioner clearly violated several aspects of Rule 46. The evidence shows that Petitioner filed a *pro hac vice* application on the same day that he filed two pleadings in the underlying matter. Petitioner clearly violated the rule by simply filing the pleadings, thus entering an appearance, on the same day that he filed the application because he had not been admitted to practice at this point. In addition, Petitioner did not list local counsel on his pleadings and local counsel was not present as associate counsel during the trial. Additionally, the trial court never entered a written order authorizing Petitioner's *pro hac vice* appearance in violation of Rule 46; consequently, a copy of the order was not submitted to the Mississippi Supreme Court clerk which is also a violation of Rule 46.

The record shows that the trial judge and opposing counsel misunderstood Rule 46(7), and the Panel correctly allocated those facts as mitigating circumstances. However, in this Court's view, Petitioner was ultimately required to read Rule 46, he testified that he did, and he unfortunately missed Rule 46's blatant requirements. Moreover, the Panel correctly credited the fact that Petitioner did not have a culpable mental state because the Panel dismissed the Board's allegation that Petitioner violated RPC 3.4 – Knowing Disobeyance of Obligation under Rules of a Tribunal. On these facts, the Panel had substantial sufficient and material evidence to support

its finding. Accordingly, the Panel's decision regarding the Mississippi Board is AFFIRMED.

Augusta McKinney

The petitioner contends the panel erred for the following reasons:

1. The Panel erred when it found Petitioner owed a duty under RPC 1.4 when the evidence showed that the Complainant committed fraud upon the court.
2. The Panel erred when it found Petitioner violated RPC 1.4 when the Board did not produce material and substantial evidence of the reasonableness or unreasonableness of the time between communications with the Complainant.
3. The Panel erred when it found Petitioner violated RPC 1.4 when the substantial and material evidence showed that Petitioner acted to preserve the integrity of the judicial system while simultaneously acting to protect his client.
4. The Panel erred when it found Petitioner violated RPC 1.4 when the Board failed to produce material and substantial evidence of the court proceeding where the Complainant obtained the default judgment.
5. The Panel erred when it found misconduct although the Panel found:

[Petitioner] makes a good point that as officer of the court he should be respectful to other lawyers and be fully honest with the court. He honestly thought that his client had inappropriately obtained a judgment and that it would be unfair for that judgment to stand. Thus, when the other lawyer called him to tell him that a judgment had been entered without either of them being present, [Petitioner] thought that the right thing to do was to appear with opposing counsel to address the judge.

*See* Brief of Plaintiff, Filed July 7, 2017, p. 20-1 (citing Findings and Judgment of the Hearing Panel, Filed December 7, 2016, p. 18).

6. The Panel erred when it failed to make a finding that Petitioner did not inform the Complainant in a timely manner or in time to retry the case.

7. The Panel erred when it entered judgment of suspension without finding any substantial and material proof of harm.

The Panel found Petitioner's conduct violated RPC 1.4 – communication which states:

- (c) A lawyer shall:
- (6) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
  - (7) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (8) Keep the client reasonably informed about the status of the matter;
  - (9) Promptly comply with reasonable requests for information; and
  - (10) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (d) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

On the whole, Petitioner does not dispute the material facts and evidence in this matter. It is clear that Mr. McKinney appeared in court alone on February 18, 2015, and he obtained a default judgment. In addition, Petitioner appeared in court after accepting opposing counsel's request to set aside the default judgment, but Petitioner did not advise his client that he agreed to go to court to get the judgment set aside. Then, the default judgment was in fact set aside, and Petitioner failed to inform his client of such.

The Panel found that, "for reasons that [Petitioner] never explained, he did not contact his client to ask him what transpired on February 18<sup>th</sup> and how a judgment was entered with the court. He simply showed up in court at the request of opposing counsel." *See Findings and Judgment of the Hearing Panel, Filed December 7, 2016, p. 14.* Petitioner testified that he did not inform Mr. McKinney of the call from opposing counsel and he intended to appear in court with opposing counsel because he believed Mr. McKinney wrongfully obtained the default judgment. While the Panel credited Petitioner's belief and found it truthful, the Panel did not

find evidence that Mr. McKinney wrongfully obtained the judgment. Similarly, this Court does not have sufficient evidence to support any allegation that Mr. McKinney did anything wrong. Thus, this court finds that the Panel had sufficient evidence to conclude that Petitioner did not promptly and properly communicate with his client because Petitioner did not contact his client when opposing counsel called him, before he appeared in court, or after he appeared in court and the judgment was set aside.

The Panel also found that Petitioner's conduct violated RPC 8.4(a) which states, "It is professional misconduct for a lawyer to (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." The Panel correctly found that Petitioner's violation of RPC 1.4 also amounts to a violation of RPC 8.4(a).

Therefore, the Panel's decision regarding Augusta McKinney is AFFIRMED.

#### Disciplinary Decision

The Panel ultimately found that Petitioner's conduct warranted a six (6) months suspension, with thirty (30) days served as active suspension and the remainder on probation with conditions. This Court recognizes that based solely on Petitioner's conduct in the three aforementioned matters, it seems the Panel's sanction was harsh. The Hearing Panel, the Disciplinary Counsel, and the Board acknowledge that this sanction may appear harsh:

Disciplinary Counsel readily admits with regard to the Mississippi case, the trial judge's confusion about the law should be a mitigating factor. With regard to the McKinney complaint, the Board admitted, 'clearly Mr. McKinney was a difficult client.' Along those lines, Mr. Kizer was a challenging client as well. The Board also admits that 'if you look at these complaints individually, they don't seem like that much.... They are not good, but lawyers make mistakes.' And, 'the board submits that taken in isolation these may not be the strongest cases or the most egregious violations.'

*See Findings and Judgment of the Hearing Panel, Filed December 7, 2016, p. 31.*

However, the Panel's decision correctly weighed the ABA standards articulated in Section 15.4(a) of Rule 9 of the Tennessee Supreme Court Rules,<sup>7</sup> and the Panel correctly used the standards as guideposts rather than rigid rules for determining appropriate and consistent sanctions for attorney misconduct. *See Bailey v. Board of Professional Responsibility*, 441 S.W.3d 223, 232 (Tenn. 2014). The Panel also considered aggravating and mitigating factors. *See Lockett v. Board of Professional Responsibility*, 380 S.W.3d 19, 28 (Tenn. 2012) (finding the aggravating and mitigating factors listed in the ABA Standards are illustrative rather than exclusive). The Panel acknowledged aggravating factors, including: prior disciplinary offenses; a pattern of misconduct; multiple offenses; and substantial experience in the practice of law. *See Findings and Judgment of the Hearing Panel*, Filed December 7, 2016, p. 31. The Panel also found the following mitigating factors relevant: absence of a dishonest or selfish motive; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; remorse; remoteness of (a number of) the prior offenses. *Id.*

The present violations along with the Petitioner's seventeen prior instances support the Panel's findings and sanction. The Panel relied on the fact that Petitioner's disciplinary history involved issues similar to the present issues, for example, communication. Altogether, the evidence furnishes a reasonably sound factual basis for the decision being reviewed. The disciplinary decision of the Panel is AFFIRMED.

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<sup>7</sup> The Panel considered sections 3.0, 4.42(a) and (b), 6.23, 7.2, 8.2, 9.1, 9.22, and 9.32 of the ABA Standards for Imposing Lawyer Sanctions.

It is so ORDERED this the 20 day of Oct, 2017.

Nunc Pro Tunc to the 27 day of Sept, 2017.

**A TRUE COPY-ATTEST**

Donna L. Russell, Clerk & Master

By [Signature] D.C. & M.

[Signature]

WILLIAM B. ACREE, JR.

Senior Judge

CERTIFICATE OF SERVICE

I hereby certify that I will dispatch a true and correct copy of the foregoing Judgment to the following at their respective addresses on this 24 day of October, 2017:

- *Petitioner, pro se*  
Gerald Stanley Green, Esq.  
P.O. Box 264  
Memphis, TN 38101  
(901) 305-6300

- *Attorney for the Board of Professional Responsibility*  
Alan D. Johnson, Esq.  
Disciplinary Counsel – Litigation  
10 Cadillac Drive, Suite 220  
Brentwood, TN 37027  
(615) 361-7500

[Signature]  
CLERK