

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

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BOARD OF PROFESSIONAL  
RESPONSIBILITY  
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EXEC. SEC.

IN RE: GERALD STANLEY GREEN,  
BPR #9470, Respondent,  
An Attorney Licensed to Practice  
Law in Tennessee  
(Shelby County)

DOCKET NO. 2015-2442-9-AJ

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FINDINGS AND JUDGMENT OF THE HEARING PANEL

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This matter came to be heard upon a Petition for Discipline filed on April 15, 2015, response to the petition filed on May 8, 2015, a supplemental petition for discipline filed on March 22, 2016, a response to the supplemental petition filed on April 15, 2016, a hearing on this matter which took place on October 6, 2016, a joint stipulation of facts introduced (which was introduced as Exhibit 1 to the final hearing) and the entire record of this cause, and it appears to the Hearing Panel as follows:

I. SUMMARY OF PROCEEDINGS

1. The petition for discipline was filed by the Board of Professional Responsibility of the Supreme Court of Tennessee (hereinafter "the Board") pursuant to Rule 9 of the Rules of the Supreme Court on April 15, 2015. The petition identified three complainants as follows:

FILE NO. 366166-9-KB-COMPLAINANT-JOHNNY KIZER

FILE NO. 37474c-9-KB-COMPLAINANT-WILLIE ANN HUGHES

FILE NO. 37516-9-KB-COMPLAINANT- BOARD (Mississippi matter)

The respondent, Gerald Stanley Green (hereinafter “Mr. Green”) filed a response to petition for discipline May 8, 2015.

2. On September 21, 2015, Mr. Green filed a Motion for Summary Judgment on the Kizer matter, along with his Memorandum in Support of Summary Judgment, Statement of Material Facts and a supporting affidavit. On February 17, 2016, the Board filed a response to the Motion for Summary Judgment along with its Response to Statement of Undisputed Facts.<sup>1</sup> Mr. Green filed a Reply to the Board’s Response to Motion for Summary Judgment. On April 18, 2016, this Hearing Panel entered an Order Partially Granting and Partially Denying Mr. Green’s Motion for Summary Judgment.
3. On March 22, 2016 the Board filed a Supplemental Petition for discipline regarding the following complaint:

**File No. 41494-9-KB-Complainant- Augusta McKinney**

4. On April 14, 2016 Mr. Green filed a Response to Supplemental Petition for discipline.
5. On April 8, 2016 Mr. Green filed a Motion for Summary Judgment on the Board’s complaint (the Mississippi matter) along with his Memorandum in Support of Motion for Summary Judgment, Statement of Material Facts and supporting affidavit. On May 6, 2016, the Board filed a Response to the Motion for Summary Judgment and a Response to Statement of Material Facts. On May 13, 2016, Mr. Green filed a reply to the Board’s

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<sup>1</sup> The reason for the length of time between the Motion for Summary Judgment and the Board’s response is that in the interim, the parties entered into a conditional plea agreement which was ultimately rejected by the Tennessee Supreme Court on January 20, 2016. The Supreme Court referred the matter back to the Board for further proceedings. On February 28, 2016, Mr. Green corresponded with the Hearing Panel members, disciplinary counsel and executive secretary for the Tennessee Board of Professional Responsibility stating, “After extended deliberation, the respondent will not file a motion to recuse the Hearing Panel as it is presently constituted.” The proceedings continued as though no conditional guilty plea had been entered.

response. On July 18, 2016, the Hearing Panel entered an Order Denying Motion for Summary Judgment.

6. On April 8, 2016, Mr. Green filed a Motion for Summary Judgment regarding the Hughes complaint along with a memorandum in support of Motion for Summary Judgment and statement of material facts. On May 6, 2016, the Board filed a Response to Motion for Summary Judgment along with a Response to Statement of Material Facts. On May 13, 2016, Mr. Green filed a Reply to the Board's response to Motion for Summary Judgment. On July 8, 2016, this Hearing Panel entered an Order Partially Granting and Partially Denying Motion for Summary Judgment regarding the Willie Ann Hughes matter.
7. On June 20, 2016, Mr. Green filed a Motion for Summary Judgment regarding the Augusta McKinney complaint along with a Memorandum in Support of Motion for Summary Judgment, Statement of Undisputed Material Facts, and affidavit in support of the motion. On July 15, 2016, the Board filed a Response to the Motion for Summary Judgment along with a Response to Statement of Undisputed Material Facts. On July 22, 2016, Mr. Green filed a Reply to the Board's Response to Motion for Summary Judgment. On August 31, 2016 this Hearing Panel entered an Order Denying Mr. Green's Motion for Summary Judgment regarding complainant Augusta McKinney.
8. On or about September 19, 2016, both parties filed and submitted pre-trial briefs and witness and exhibit lists.
9. On September 16, 2016, the parties filed a Joint Stipulation of Facts which was also made an exhibit to the final hearing in this matter and is incorporated into this judgment by reference.

10. A hearing on this matter was conducted at the Shelby County, Tennessee courthouse on October 6, 2016 at which time the following individuals testified: Gerald Stanley Green, Augusta McKinney, Johnny Kizer and attorney George Higgs. Testimony of attorney Steven Jubera was introduced through stipulation.
11. The hearing was adjourned but not concluded until both parties submitted their proposed findings of fact and conclusions of law on November 7, 2016.

## II. FINDINGS<sup>2</sup>

A hearing was held in this matter on all claims not otherwise disposed of by pre-hearing motion. In hearings on formal charges of misconduct, disciplinary counsel must prove the case by a preponderance of the evidence, (Tenn. Sup.Ct. Rule 9 §15.2(h) (2014). *See also* (Tenn. Sup.Ct. Rule 9 §8.2 (2006); *Flowers v. Board of Professional Responsibility*, 314 S.W.3d. 882 (Tenn. 2010). After consideration of the entirety of the evidence presented by the Board and Mr. Green including their pre-trial memoranda, the evidence presented at the hearing, arguments made at the hearing, the post-hearing submissions and the entire record in this cause the Hearing Panel finds as follows:

### A. Complainant – Willie Ann Hughes

In its petition regarding the Hughes matter, the Board alleged (1) Mr. Green failed to diligently represent or adequately communicate with complainant and (2) failed to provide

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<sup>2</sup> The Tennessee Supreme Court Rule 9 sets out rules governing disciplinary enforcement with respect to attorneys. By order of the Tennessee Supreme Court dated August 30, 2013, Rule 9 was revised effective January 1, 2014 and the revised rule applies “to all matters filed with or initiated before the Board of Professional Responsibility on or after that date.” In Re: The Adoption of Amended Tennessee Supreme Court Rule No. M2012-0648-SC-RL2-RL, No. M2009-02505-SC-RL2-RL (TN S. Ct. August 30, 2013). The Kizer matter was initiated before 2014 and is governed by the previous version of Rule 9. The remaining complaints were initiated after January 1, 2014 and are governed by the 2014 (current) version of Rule 9. The parties are in agreement with this as indicated in the original petition for discipline (¶ 2) and Mr. Green’s response to petition for discipline (¶ 2).

complainant with her client file upon termination of the representation in violation of Tennessee Rule of Professional Conduct (hereinafter “RPC”) 1.3 (diligence), 1.4 (communication), and 1.16 (terminating representation). Mr. Green filed a Motion for Summary Judgment regarding this complainant, and in response, the Board did not contest Mr. Green’s motion as it relates to alleged violations of RPC 1.3 and 1.4, but continued to allege that Mr. Green failed to return the entirety of the client’s file to his client and/or the client’s new attorney when his representation was concluded. This Hearing Panel entered an Order granting Mr. Green’s motion for summary judgment with regard to RPC 1.3 and 1.4 and denied the remaining portion of his motion for summary judgment finding that a factual dispute remained.

Mrs. Hughes’ home was damaged by fire in June of 2011, and her insurance company paid a claim for property damage. Mrs. Hughes did not believe she was adequately compensated for her household furnishings. She hired Mr. Green in August of 2012 to assist her in obtaining additional compensation from her insurance company. On April 30, 2013, Mr. Green received a letter from another attorney who stated that he would be taking over Mrs. Hughes’ representation. Mrs. Hughes’ new counsel requested that Mr. Green provide him with Mrs. Hughes’ file. Mrs. Hughes alleged that her lawyer never received the totality of the file and it is that allegation that was addressed at the hearing in this matter. Mr. Green testified that despite doing a significant amount of work on Mrs. Hughes’ case, he refunded her fee of \$500.00. He testified that it was his understanding that he complied with substitute counsel’s request to return the entirety of the Hughes file and the other attorney never told Mr. Green that it wasn’t received. Neither Mrs. Hughes nor substitute counsel testified at the hearing in this matter. Thus, there is no evidence that Mr. Green failed to return Mrs. Hughes’ file to her or her counsel as required by RPC 1.6(d).

The Hearing Panel finds that there is no evidence showing that Mr. Green failed to provide Mrs. Hughes' file to her or her new lawyer and, there is no evidence that he violated RPC 1.6 or any other Rule of Professional Conduct with regard to File no. 3747c-9-KB-Complainant- Willie Ann Hughes. Accordingly, the portion of the Petition for Discipline relating solely to the Hughes matter is dismissed with prejudice.

B. Complainant – Johnny Kizer

Mr. Kizer had extensive plumbing work performed by Roto-Rooter, and Mr. Kizer financed part or all of the bill for such services through Springleaf Financial Services<sup>3</sup> which apparently regularly provided such financing services to Roto-Rooter customers. The extent of the relationship between Springleaf and Roto-Rooter was not made clear at the hearing, but Mr. Green testified that it is a third party rather than a division of Roto-Rooter. Attorney George Higgs, who represented Springleaf in the underlying action, also testified that Springleaf and Roto-Rooter were separate entities. Mr. Higgs did not represent Roto-Rooter. In fact, Mr. Higgs had to subpoena a Roto-Rooter representative to appear at trial. The contract which created the indebtedness was not introduced as an exhibit during the disciplinary hearing, but it appears from Mr. Higgs' testimony that the debt was originally owed to Roto-Rooter, and the loan was transferred or purchased by Springleaf through an assignment. The evidence indicates that the job was financed through a non-recourse loan.

Springleaf sued Mr. Kizer in General Sessions Court for non-payment, and Mr. Kizer hired Mr. Green to represent him. Mr. Kizer paid Mr. Green \$750 to represent him in General Sessions Court. While actually in court, Mr. Green announced to the judge that the matter had been resolved to the parties' mutual satisfaction, and the Judge entered an agreed Order. As far

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<sup>3</sup> The Petition for Discipline alleges that Springleaf is the financial division of Roto-Rooter, which, as it turns out, appears to be incorrect.

as Mr. Green was concerned, the case had been concluded. However, without alerting Mr. Green, Mr. Kizer unilaterally appealed the judgment to circuit court identifying Mr. Green as his attorney. Mr. Green only learned later that the case had been appealed when he received correspondence from the court; and he contacted Mr. Kizer to discuss the matter with him. At Mr. Kizer's request, Mr. Green remained on the case, and because Mr. Kizer was a man of very limited means, Mr. Green agreed to handle the circuit court matter for only \$250, an amount which was never paid by Mr. Kizer.

There was no dispute that Mr. Kizer had failed to pay what was owed to Springleaf under the contract. It was his position, however, that he should not be required to pay Springleaf because of Roto-Rooter's poor workmanship even though Springleaf and Roto-Rooter were two different entities. The case ultimately went to trial in the Circuit Court of Shelby County, Tennessee, and the Court entered a judgment in the favor of the finance company.

The Board's petition essentially alleged two separate violations. First, the Board alleged that (1) Mr. Green failed to obtain the authority to settle the complainant's case through judgment in General Sessions and (2) Mr. Green failed to adequately represent the complainant at trial. The Board alleged violations under RPC 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), and 1.4 (Communication). The first issue was disposed of on summary judgment. In support of his motion for summary judgment, Mr. Green submitted the affidavit of attorney Brett Stein who stated under oath that he was present at the trial in General Sessions with Mr. Kizer and Mr. Green at which time Mr. Kizer "gave his permission and entered into an agreed judgment with Springleaf Financial Services." There was no countervailing evidence, and this Hearing Panel agreed that summary judgment should be

entered on that particular issue leaving the remaining issue(s) to be resolved at the final hearing in this matter.

Much of the dispute as to whether Mr. Green provided competent representation to Mr. Kizer centers on the question of whether Roto-Rooter's alleged poor workmanship had anything whatsoever to do with the lawsuit filed by Springleaf. On the other hand, was this a suit for collection of a debt with the only issue being whether Mr. Kizer paid what he owed under contract? The reason that legal issue is important is because, other than his own client's testimony, Mr. Green did not introduce any evidence by way of witnesses or exhibits at the circuit court trial. While it is very much in dispute as to whether Roto-Rooter did anything wrong with regard to Mr. Kizer's plumbing work, there is no question that Mr. Kizer had an extremely serious plumbing problem. Following the work performed by Roto-Rooter, raw sewage was flowing underneath Mr. Kizer's home and Mr. Kizer was issued a notice of violation by the Shelby County Health Department due to defective plumbing.

Mr. Green's legal opinion was that the Springleaf lawsuit was a collection matter only and was separate and apart from any allegation that Roto-Rooter had failed to provide services as agreed. The question, according to Mr. Green, was whether Mr. Kizer had complied with his obligation to Springleaf Financial. While it is not completely clear from the testimony of the parties or their witnesses, it does appear that the Circuit Court judge was also of the opinion that Mr. Kizer owed the obligation despite the workmanship or warranties of Roto-Rooter. Because that issue is unsettled, it is unclear whether Mr. Green should have put on evidence of the alleged poor workmanship. Accordingly, this Hearing Panel is of the opinion that the Board has not met its burden of proving that Mr. Green was less than competent in his representation of his client. "Competent representation requires the legal knowledge, skill, thoroughness and preparation



reasonably necessary for the representation.” *Id.* RPC 1.1. The Hearing Panel does not find that Mr. Green failed to meet the standard.

Despite Mr. Green’s legal opinion that this was a collection matter only, Mr. Green did attempt to assist Mr. Kizer with his extremely unfortunate predicament. It seems that Mr. Green really was trying to help Mr. Kizer with his plumbing issue. He sent a plumber to Mr. Kizer’s home at no expense to Mr. Kizer, to inspect the plumbing work. He had numerous conversations with attorney George Higgs and, working together, they convinced Roto-Rooter to extend the already expired warranty. However, when Roto-Rooter returned to his home, Mr. Kizer removed the workers from his property because he did not feel they were going to repair the problem the way he wanted it repaired. It appears that the workers initially were going to try to repair the pipes, and Mr. Kizer was insistent upon the plumbing being replaced. During the disciplinary hearing, Mr. Higgs was complimentary of Mr. Green’s representation:

Q: [By Mr. Green] And throughout the litigation we [Mr. Green and Mr. Higgs] communicated, and you agreed to have Roto-Rooter inspect the property, correct?

A: [By Mr. Higgs] Yes.

Q: And Mr. Kizer wouldn’t let them; is that correct?

A: He agreed to allow them to inspect the property while we were in court as a way to satisfy all the controversies. We were going to allow Roto-Rooter to go out there, inspect it, make any repairs, because they wanted their customer to be satisfied, and Mr. Kizer agreed to that. When they went out there, Mr. Kizer would not allow them on the property and threatened them as I recall.

Q: And you extended the warranty. The work was warranted, wasn't it?

A: It was long past the warranty, but they were willing to make the repairs. You know, and this has been so long ago, and I apologize that I don't remember, and I tried to look at my notes, but I didn't really have time, and I apologize for that, to try to put everything

together. But we had so many settings on this, and there were so many times that you appeared and there were a few times when Mr. Kizer appeared, and there were so many conversations about what could be done to try to resolve the issues; and, I thought you did a good job of trying to work out something frankly, for his benefit, I mean because the bottom line is he was saying the work wasn't done properly, and Roto-Rooter, which is a nationally recognized chain and been in business I think for about 75 years, claimed yes, the work was done.

I recall that we started a trial but maybe didn't conclude it or that may have led to one of the earlier settlement proposals being heard in General Sessions Court by Judge Gardner if my memory serves me correctly, where she relied not on the law, as Judge Childers did, but on the facts after hearing some testimony, and did not believe Mr. Kizer's version of the events. I don't know if you remember that, but I remember that about this case. But there are so many times where we started and then stopped to try to bend over backwards, everybody involved did, for Mr. Kizer. (emphasis added)

Regardless of whether Mr. Green was correct or incorrect with regard to the question of whether Roto-Rooter's alleged poor workmanship was relevant to the collection matter, there is no doubt that Mr. Kizer clearly understood that to be the case. In other words, Mr. Kizer unwaveringly believed that if he and his attorney could prove that Roto-Rooter did not do what they were supposed to do, he would not be required to pay this financial obligation. It appears from the record that the vast majority of the communication between Mr. Green and Mr. Kizer dealt with the question of whether the plumbing work was done properly. Mr. Green sent an expert to inspect it, and Mr. Kizer testified that he also had an independent plumber inspect the work. It appears from Mr. Higgs' testimony that the General Sessions court judge believed that to be relevant and that Mr. Higgs himself believed it to be relevant. Shortly before the circuit court trial took place, Mr. Kizer wrote a letter to Mr. Green stating: "The purpose of this letter is to formerly [*sic*: formally] inform you that I wish to move forward with the case against Roto-

Rooter. Time is of the essence and I don't want any delays on my behalf.”<sup>4</sup> Mr. Kizer provided Mr. Green 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 Mr. Green 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.

While Mr. Kizer testified that Mr. Green “wouldn't half return my calls when I called him,” the problem this Hearing Panel has is not so much with the amount of communication, but the quality and type of the communication between Mr. Green and Mr. Kizer. Although, as explained above, this Hearing Panel is not critical of Mr. Green with regard to his legal analysis of the lawsuit, the Hearing Panel is concerned that he went to trial on this matter without adequately informing Mr. Kizer as to the issues he planned to address. 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. While Mr. Green contends that he informed Mr. Kizer that he should file a separate lawsuit against Roto-Rooter, Mr. Kizer testified that he was given this information after he lost in circuit court. This Hearing Panel is of the considered opinion that even though Mr. Green did diligently attempt to assist Mr. Kizer in getting Roto-Rooter to correct any improper plumbing work (if any improper plumbing work even existed) he failed to adequately explain to Mr. Kizer that none of that, in Mr. Green's

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<sup>4</sup> At one point disciplinary counsel believed that to be a request to file a cross-claim or countersuit against Roto-Rooter. However, Mr. Kizer testified at trial that he did not ask Mr. Green to file a countersuit or separate lawsuit on his behalf. It seems clear Mr. Kizer was simply referring to the underlying lawsuit that had been filed against him, and was insisting that case be tried and disposed of.

opinion, had anything whatsoever to do with the collection matter. There is no correspondence in the record to indicate that this information was provided to Mr. Kizer and the Board has met its burden of proving that Mr. Green did not fully comply with RPC 1.3 and 1.4.<sup>5</sup> 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.

The Hearing Panel is not certain as to how the Board believes Mr. Green violated RPC 1.2 (Scope of Representation). The aspects of this particular rule were not developed at the hearing in this matter and it appears to the Hearing Panel that the disciplinary counsel was ultimately proceeding on other allegations.<sup>6</sup> Accordingly, the Board's petition against Mr. Green (regarding the Kizer matter) alleging violation of RPC 1.2 is denied with prejudice.

#### C. Complainant – McKinney

On September 19, 2014, Mr. McKinney filed a pro se civil warrant in the General Sessions Court of Shelby County, Tennessee, against Kerwin Lockett in an action to recover personal property. Mr. McKinney had purchased a preschool van from a Vivian and/or Otis Braxton (hereinafter "Braxton"), but the van was in possession of Mr. Lockett who claimed a possessory lien for work performed and money owed upon the vehicle. Mr. Lockett retained counsel and filed a counterclaim against Mr. McKinney at which time Mr. McKinney hired Mr. Green to represent his interest in the case. Mr. McKinney wanted to proceed to trial and became frustrated with Mr. Green after the case was continued a number of times. Mr. McKinney understood that there was a dispute between Braxton and Mr. Lockett as to payment for a

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<sup>5</sup> Mr. Green testified that he had no engagement letter outlining the scope of his representation of Mr. Kizer and that would have gone a long way towards clarifying this matter. *See* RPC 1.5. Although that is not a rule which the Board contends Mr. Green violated, the Hearing Panel simply points this out to show that written correspondence with a client regarding representation is advisable.

<sup>6</sup> In fact, the Board's proposed findings of fact and conclusions of law makes this fairly clear.

diagnostic test on the van, but did not want to sue Braxton despite Mr. Green's advice to the contrary. Essentially, it was Mr. McKinney's position that he purchased the car, he owned the car, and had the right to possession of the car regardless of any financial dispute between Mr. Lockett and the former owner.

An evidentiary hearing did begin in General Sessions Court. However, the case was not concluded, apparently because it was determined that an indispensable party, the seller of the vehicle, was not present.<sup>7</sup> The matter was adjourned and continued to another date. Mr. McKinney was displeased that the matter did not conclude on that date, and he contends that he verbally fired Mr. Green from any further representation. Mr. Green agrees that Mr. McKinney was unhappy, but he disputes that his employment was terminated at that time. In any event, following the above described continuance, the case was again continued.<sup>8</sup> Ultimately, Mr. McKinney appeared in court on February 18, 2015, but neither Mr. Green nor opposing counsel appeared. Mr. McKinney testified that after sitting in court for about an hour and a half, the trial judge entered a judgment in Mr. McKinney's favor for possession of the vehicle. Mr. McKinney did not inform Mr. Green of this fact, nor did Mr. McKinney inform opposing counsel of this fact. He simply took the judgment and began the process of obtaining possession of the van he had purchased.

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<sup>7</sup> It is not clear from the testimony in this matter as to whether the judge made that determination or Mr. Green and opposing counsel made that determination. In his Motion for Summary Judgment, Mr. Green contended that the General Sessions judge determined that the seller was an indispensable party. However, that was not established at trial. In fact, when asked about it at the hearing in this case, Mr. McKinney denied that the judge made that determination, contending that it was Mr. Green who determined that.

<sup>8</sup> It would have been very helpful for the Hearing Panel to know the date of the hearing where some evidence was introduced as well as the date to which the hearing was continued. However, Mr. Green testified that he did not have any notes on a calendar or in his file that would assist with solidifying the timeline of events.

At some point in March of 2015 as Mr. McKinney was attempting to execute a writ of possession on the van, counsel for Mr. Lockett learned for the first time that a judgment had been taken against his client on February 18, 2016. At that point, he contacted Mr. Green and informed Mr. Green, who until then, was unaware a judgment had been entered on his client's behalf. Opposing counsel asked Mr. Green to meet him in court to address the judge later that day or the next day for the purpose of asking the judge to set the judgment aside. Opposing counsel did not testify at the disciplinary hearing. Mr. Green agreed to meet opposing counsel in court, but could not remember if he met with opposing counsel later that day or the next day. For reasons that Mr. Green 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. Mr. Green testified that he or opposing counsel explained to the judge that one of the attorneys (Mr. Green could not recall which one) sent a consent continuance by fax to the Court, but apparently that fax never made its way to the Court jacket/file. Mr. Green was not sure which court date was sought to be continued, but simply that the attorneys sought a continuance for a court date and that was apparently the reason Mr. McKinney appeared without the presence of counsel for either party. Mr. Green was certain that the consent continuance was not for the February 18<sup>th</sup> setting because Mr. Green did not even know the case was moved to February 18<sup>th</sup>. This Hearing Panel has no way of knowing when the first court hearing was held (the one where some evidence was introduced), when the faxed consent continuance was sought, who sent or tried to send the faxed consent continuance, how or when the February 18<sup>th</sup> court date was set, how Mr. McKinney learned about the February 18<sup>th</sup> setting although Mr. Green did not, or exactly why the judge entered a judgment without counsel present. What is clear is that Mr. McKinney was in court on February 18<sup>th</sup> and the attorneys

were not. During the impromptu hearing before the General Sessions judge, Mr. Green did not contest opposing counsel's request that the judgement be set aside and the judge granted opposing counsel's request to set the judgment aside.

Even after meeting with the judge, Mr. Green did not inform Mr. McKinney that he had received a call from opposing counsel and that opposing counsel had asked him to appear with him in court. He did not inform Mr. McKinney that he did not oppose the defendant's request that the judgment be set aside. He did not inform Mr. McKinney that an order was entered setting the judgment aside. Mr. McKinney first learned that his judgment for possession had been set aside when he was in the court clerk's office either filing papers or looking into paperwork regarding his judgment. Someone in the clerks' office apparently informed him that the judgement had been set aside. His testimony, while a bit confusing, indicated that he was informed by court personnel about the turn of events:

Q. [By Counsel for the Board] And how long were you in court that day?

A. [By Mr. McKinney] We stayed there -- I got there at 1:30, stayed until about quarter to 3:00, and finally the judge said, you know, this was set up -- he told the lady that was doing what she's doing. Said this was set up for 2:00 and they ain't here, so I'm going to award you -- he asked me, said are you asking for any money? I said no, I'm just asking for my possession, which I'm entitled to. He said I'm going to grant you that, okay? And you got ten. This is what the judge said, you have ten days to go pick up this bus. Ten days from today. After ten days from today, I come back or go pick the bus up. So the deputy sheriff, they had gave him the wrong VIN number on the bus. And so then he said, Mr. McKinney, you've already been awarded possession of this bus, something gone wrong because this already been crossed off by the judge, by somebody marked on there. So I [go] downstairs and ask for the jacket. Somebody crossed through the judge's -- the date and the judge's. So I never heard anything else from that. As a matter of fact, that's continued right now as a matter of fact. I haven't heard from anybody about it. Mr. Lockett still have the bus out there? Nobody has contacted me about it. As far as I'm

concerned, it's gone. So I lost something. Done put money in it, and all this time and never did anything, and he never said a thing to me. Mr. Green has never called me up and said, Mr. McKinney, do you want to set another date for so and so and so and so? All this business about the other party, that's all it's been about, the other gentleman. I wouldn't sit here and falsify anything on him. I respect him, the man. I can't say that I respect him as a lawyer because he didn't do his job, okay? So my \$500.00, I wish I could get it back, because it didn't serve me no purpose. It was all against me. (emphasis added)

Mr. McKinney was present at many if not all of the court settings and he testified that he would certainly have liked to have been at the one where his judgment was set aside. He testified that he had no idea the judge's order had been altered until after the fact when someone at the courthouse told him.

After learning that the judge's judgment had been set aside, Mr. McKinney sent a letter (or one was sent on his behalf) stating in part as follows:

Please take note that, effective upon receipt of this letter, your legal services are again terminated.

I had verbally informed you that your services were no longer needed since you continued to extend the case on multiple occasions without my consent, failed to inform me of hearings, and appeared to represent Lockett's interest rather than mine. I had to represent myself and was granted a judgment. In addition, following the verbal termination you obviously attended a hearing of which I was not informed and in which you participated to have my judgment overturned. You, knowing that your services had been terminated, falsely held yourself out as continuing to represent me.

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Obviously there was some court action taken without my knowledge where someone set the judgment aside by scratching it out. Obviously you, claiming to represent me, had to participate in some meeting or hearing for this occur.

Following that, Mr. Green filed a motion to withdraw as counsel and an order was entered granting that motion. In its supplemental petition for discipline the Board alleged that



Mr. Green's conduct violated RPC 1.2 (Scope of Representation), 1.4 (Communication), 1.16 (Declining and Terminating Representation) and RPC 8.4(a) (Misconduct). The Board contends that Mr. Green violated RPC 1.16 and perhaps other rules by appearing in court with opposing counsel after his employment had already been terminated. Mr. Green vehemently denies that he was discharged of his responsibilities, verbally or otherwise, prior to the letter dated April 13, 2015 which is quoted above; and he swiftly filed a motion to withdraw as counsel after having received that letter. After considering all of the testimony and the exhibits introduced regarding this subject matter, the Hearing Panel concludes that Mr. Green was not discharged of his responsibilities until he received the written correspondence from Mr. McKinney stating so. There is not sufficient evidence Mr. McKinney verbally terminated his employment and the Hearing Panel believes Mr. Green was being truthful in his testimony that he had an obligation to appear on Mr. McKinney's behalf if opposing counsel was going to address the court.

The Board further contends that even if Mr. Green had not been discharged of his responsibilities as alleged by Mr. McKinney, Mr. Green had an obligation to communicate with Mr. McKinney about approaching the judge with opposing counsel. The Hearing Panel agrees. Mr. Green did not testify that he had no time to give Mr. McKinney advance notice of the hearing. To the contrary, he said that he was asked to meet opposing counsel in court later in the day or the next day. Mr. Green had no idea how a judgment had been entered in this case. All he knew was that his client had obtained the relief he wanted and he was not sure how. He did not call his client to find out what transpired and, in fact, he did not even know his client had anything to do with the judgment being entered. There is no evidence that he had any way of knowing if his client was even present when the judgment was entered. All he knew is what opposing counsel told him which is that a judgment had been entered for his client and Mr.

McKinney was attempting to execute on a judgment for possession of the vehicle. Mr. Green testified that he thought that Mr. McKinney had obtained a judgment through fraudulent representation to the court. However, as stated above, Mr. Green did not have any way of knowing what representations his client made to the court if any. Moreover, Mr. McKinney said he made no representations to the court. There is no evidence that Mr. McKinney asked the court to enter a judgment without counsel present:

Q. [By Hearing Panel Member Reisman] I have one more question. When you went to court on the 18th, Mr. McKinney, did the judge ask you anything about where is your lawyer or where is the other lawyer?

A. [By Mr. McKinney] No. The judge said himself that Mr. Green and this other lawyer was supposed to show up. That's what he told me, the judge did. I'm setting [sic] in the corner by myself, just me and the judge and the lady that types the stuff up. He said Mr. Green and them ain't showed up yet. That was his statement.

Mr. Green makes a good point that as an 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, Mr. Green thought that the right thing to do was to appear with opposing counsel to address the judge. However, Mr. Green does not address the corresponding obligation to his client to communicate about this important event, that being a request to overturn a judgment on the merits. Also concerning to this Hearing Panel is that after the judge overturned his earlier judgment, Mr. Green did not communicate with Mr. McKinney. Rather, Mr. McKinney did not learn the news that his judgment had been overturned until he was trying to obtain possession of the vehicle.

Based on the foregoing, this Hearing Panel finds that the Board has not met its burden of proof in showing that Mr. Green violated RPC 1.16 (Declining and Terminating Representation) or RPC 1.2 (Scope of Representation). The Hearing Panel does believe the Board has met its burden of proving that Mr. Green violated RPC 1.4 (Communication) and RPC 8.4(a) (Misconduct).<sup>9</sup>

D. Complainant – Board (Mississippi matter)

In 2011, Weissenger Newberry was charged by the State of Mississippi, and ultimately indicted on charges of first offense DUI, possession of marijuana and cocaine, and two counts of assaulting a law enforcement officer. Mr. Newberry hired Mr. Green to represent him. Mr. Green, however, was not a licensed Mississippi attorney. The parties have stipulated that “a scheduling order filed with the trial court on May 14, 2012, listed Mr. Green as counsel of record for Mr. Newberry.” *See also Newberry v. State of Mississippi*, 145 So.3d 652, 653 (Miss. 2014). Approximately one month later, on June 15, 2012, Mr. Green submitted to the Mississippi Supreme Court a verified application and affidavit to appear *pro hac vice* which included a certificate of local counsel signed by Daniel Lofton, and verification of payment of a \$200 fee to the Mississippi Bar. This petition was filed in accordance with Mississippi Rule of Appellate Procedure 46(b)(5). Rule 46 of the Mississippi Rules of Appellate Procedure provides in part as follows:

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<sup>9</sup> RPC 8.4(a) provides that it is professional misconduct for a lawyer to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or to do so through acts of another.” With regard to the McKinney matter the Hearing Panel has been made aware of no alleged violation of the Rule of Professional Conduct other than those specifically enumerated above and, accordingly, it does not appear that the Board had met its burden of proving a violation of RPC 8.4(a) other than the Hearing Panel’s finding that Mr. Green failed to adequately communicate with his client as required under RPC 1.4.

**(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...

\* \* \*

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.

\* \* \*

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 (underlining added)

By all accounts, Mr. Green initially filed all necessary paperwork and paid all of the required fees. On the same day, however, Mr. Green filed with the trial court a motion to dismiss prosecution and a request for discovery. Mr. Green's pleadings were signed and submitted solely by Mr. Green and contained his bar number but did not indicate the state in which Mr. Green was licensed to practice law. The pleadings did not have the name of "local counsel" Daniel Lofton who was not only supposed to serve as local counsel, but was also required to serve as an associated attorney.

No written order authorizing Mr. Green to appear pro hac vice was ever entered and, accordingly, a copy of the order was never provided to the clerk of the supreme court as required by Rule 46(b)(7).

Mr. Green represented Mr. Newberry at an August 7, 2012 hearing, in which the court denied the motion to dismiss and granted the State's motion to amend the indictment charging Mr. Newberry as a habitual offender under Mississippi Code § 99-19-81. A local attorney was not present at the hearing.<sup>10</sup> The court subsequently denied an August 17, 2012 motion to continue trial filed by Mr. Green. Mr. Newberry's criminal trial occurred on August 22, 2012. Before the trial began (but perhaps after jury selection), the prosecuting attorney informed the trial court that the Mississippi Supreme Court approved Mr. Green's application to proceed *pro hac vice* in the Mississippi court. The state attorney pointed out that local counsel was not present, but stated to the court that "the state has no objection whatsoever to Mr. Green proceeding without local counsel being present." The trial court determined that Mr. Green had complied with the Mississippi rules concerning admission *pro hac vice* and verbally approved Mr. Green's application to proceed *pro hac vice* in the criminal court. The prosecuting attorney stated to the court that "the rule expressly allows ... defense counsel to proceed without local counsel if the judge expressly allows that or makes a ruling as such." The trial judge excused local counsel from participating.

After a one day trial, Mr. Newberry was convicted of possession of marijuana, possession of cocaine, and first offense DUI. *Newberry v. State* at ¶ 7.

The Mississippi Supreme Court reversed Mr. Newberry's convictions based in large part on the fact that Mr. Green did not follow the required rules for *pro hac vice* admission and due to local counsel (who was actually required to be associated counsel) being absent from the trial of this matter. *Id.* at ¶¶ 21-25. The Mississippi Supreme Court held in part as follows:

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<sup>10</sup> The parties stipulated that if attorney Steve Jubera (the prosecuting attorney) had testified, he would have testified that "the trial court admitted Gerald S. Green to practice before the court during conferences in chambers and in pre-trial proceedings." The trial court, however, never entered a written order. Presumably, the presence of local counsel was "specifically excused" from attending this hearing. MRAP 46(b)(7)

Our enforcement of Rule 46 goes not only toward protecting clients' rights, but toward enforcing both society's and the profession's respect for this Court and the processes that have been established for seeking redress. *Id.* at ¶ 24.

The court further stated, “[w]e hold that, under this set of facts, Newberry did not waive his right to challenge the Rule 46 violation, and that the seriousness of the violation in failing to have local counsel involved at all and especially at trial warrants reversal of Newberry’s convictions.” *Id.* at ¶ 25.

The Board readily acknowledges that Mr. Green did nothing to intentionally violate Rule 46 and that Mr. Green’s violation of Rule 46 is mitigated to some extent by the fact that the trial judge and the prosecuting attorney both misunderstood the requirements of the rule. However, the Board contends that despite the lack of understanding on the part of the trial judge and the prosecuting attorney, Mr. Green was obligated to read the applicable rule and understand it prior to applying to proceed *pro hac vice*, and he failed to do so.

The Board has charged Mr. Green with violating RPC 3.4(c) (Knowing Disobeyance of Obligation Under Rules of a Tribunal), RPC 5.5 (Unauthorized Practice of Law), and RPC 8.4(d) (Conduct Prejudicial to Administration of Justice).

In reversing Mr. Newberry’s convictions, the Mississippi Supreme Court addressed numerous ways that Mr. Green failed to comply with Rule 46. First, the Court noted that Mr. Green stated in his verified application and affidavit to appear *pro hac vice* that he “has associated attorney Daniel O. Lofton, member in good standing of the Mississippi Bar as local counsel in this case.” Indeed, Rule 46, as set forth above, requires local counsel to do more than simply certify that the petitioning attorney is an attorney in good standing, but rather required to actually be an associated attorney. The Court pointed out that Mr. Lofton never met or

communicated with Mr. Newberry and quoted Mr. Lofton's testimony at a post-trial motion hearing as follows:

Mr. Green is an experienced counsel, and I acted discretionarily under his advice.... I saw none of [the documents/motions filed on Mr. Newberry's behalf] nor was I aware that this matter was going to trial, nor was I aware of the seriousness with which – the charges with which Mr. Newberry faced, especially the habitual offender issue. I had no idea... I basically certified that Gerald Green was an attorney in good standing to the best of my knowledge, which I have direct knowledge of being a Tennessee attorney,<sup>11</sup> as well, no, like I said, I was not part of the contract for services with Mr. Newberry. I didn't have any arrangement with him to be compensated. *Newberry v. State*, 145 So.3d at 654-655.

The Supreme Court later noted:

Despite the submission of Lofton's "Certificate of Local Attorney" with Green's *pro hac vice* application, Newberry was, for all practical purposes, "represented only by a foreign attorney, who had not been properly admitted pro hac vice." (citation omitted).... Not only did associated local counsel not appear at trial, he was not even aware of the filings made, of the nature of the charges against Newberry (including his habitual-offender status), or even that the case was going to trial. *Id.* at 658.

Second, while it is unclear how it occurred, the Court pointed out that a scheduling order of May 14, 2012 listed Mr. Green as attorney of record. This is approximately one month prior to Mr. Green submitting his application to appear *pro hac vice*. *Id.* at 653.

Third, the Supreme Court pointed out that Mr. Green filed a motion to dismiss prosecution and a request for discovery on the same day he submitted his verified application to appear *pro hac vice*, clearly in violation of Rule 46.

Fourth, the Supreme Court pointed out that the two motions described above were signed and submitted by Mr. Green only. Rule 46 provides, "the name of the associated local attorney shall appear on all notices, orders, pleadings and other papers filed in the cause." *Id.*

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<sup>11</sup> Mr. Lofton is licensed in both Mississippi and Tennessee.



Fifth the Mississippi Supreme Court quoted Mississippi Rule of Appellate Procedure 46(b)(7):

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. *Id.* at 656

The Supreme Court stated that the trial court did not authorize Mr. Green to practice *pro hac vice* until well after Mr. Green had represented Mr. Newberry by filing motions on Mr. Newberry's behalf without listing associated counsel. Additionally, the Court found, that Mr. Green should have certified to the trial court that the Clerk of the Supreme Court had been provided a copy of the order authorizing his appearance before he acted to represent Mr. Newberry. *Id.*

Finally, the Mississippi Supreme Court addressed Mr. Green's failure to have local counsel present at trial. The Court held that while prior practice may have permitted a trial court to waive a requirement that associated local counsel be present at trial, the 2003 amendments to Rule 46 rendered local counsel's presence mandatory. *Id.* at 656. The Court quoted the entirety of Rule 46(b)(4) (see above) and then quoted the comment to Rule 46 which states in part, "the local attorney may be specifically excused by the judge from attending proceedings other than trials." *Id.* at 656-657. The Court concluded, "Green's representation did not comply with this requirement, and the trial court clearly erred in interpreting the rule to permit the waiver of local counsel at trial." *Id.* at 657.

After the reversal of Mr. Newberry's conviction, Mr. Newberry was retried and, according to Mr. Green, Mr. Newberry "was acquitted on the main count."

There is no allegation Mr. Green ever represented to anyone that he was licensed in Mississippi. The parties stipulated that "Respondent made it known at all times that he was a

Tennessee attorney.” Attorney Steven Jubera, the Assistant District Attorney who was assigned to prosecute Mr. Newberry testified through an affidavit which was submitted into evidence in this case by stipulation. He stated as follows:

Mr. Green and his client had a meeting at the District Attorney’s Office where a plea offer was extended and the video evidence was reviewed. In the course of that meeting it was clear that Mr. Green was who Mr. Newberry III wanted to represent him. Further it was made clear that Mr. Newberry III did not want a Mississippi lawyer.

Mr. Green was admitted by order of the Circuit Court of DeSoto County from the bench. Mr. Newberry III was present in the court room when this ruling was made. At no time did Mr. Newberry III object to Mr. Green representing him.

During the hearing in this matter, disciplinary counsel explained the Board’s position with regard to this matter. In doing so, stated in part as follows:

Well, I think in order to find a violation of knowingly disobeying an order or rule you have to show that he [Green] -- that would be RPC 3.4(c), knowingly disobey an obligation under the rules of a tribunal. The Board's position is that as the applicant pro hac vice admission, Mr. Green had an obligation to fully familiarize himself with the local rules and the rules governing pro hac vice. It was not incumbent upon the trial judge to make sure he was doing it right. I think it is mitigating, and I'm not going to say it's not. The trial judge made a mistake as well and perhaps misled Mr. Green unintentionally into going forward when he shouldn't have, but we do know that -- and the Board submits even if you find that he did not knowingly violate the pro hac vice admission rules of Mississippi, he did practice or engaged in unauthorized practice of law because he was not admitted; and as a result, the trial court was reversed by the Supreme Court, and that was a violation we would submit of 8.4(d), engage in conduct that is prejudicial to the administration of justice.

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The pro hac vice matter, I will reiterate what I said just a moment ago, it appears that Mr. Green attempted to comply with the rule, but he failed to do so. He should have known, reasonably known

the requirements of Rule 46, met those requirements and complied with the rule.

The parties stipulated that after Mr. Green was provided with a copy of Rule 46 from the Board's disciplinary counsel who was investigating this matter, "Mr. Green admitted that he did not follow Rule 46."

Based upon the foregoing and all evidence presented at the hearing in this matter, this Hearing Panel finds: (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 shared Mr. Green's mistaken belief that the presence of local counsel could be waived<sup>12</sup>; 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.

The Hearing Panel finds that the Board did not meet its burden of proving that Mr. Green's conduct violated RPC 3.4(c). That rule provides that "a lawyer shall not... knowingly disobey an obligation under the rules of a tribunal..." "Knowingly" is defined as "actual awareness of the fact in question. A person's knowledge may be inferred from circumstances." RPC 1.0(f). As set forth above, in closing argument, disciplinary counsel said that "it appears that

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<sup>12</sup> Mr. Green submitted excerpts from a post-trial hearing where the judge was insistent that Rule 46 permitted him to waive the requirement of local counsel's presence at trial. Obviously, as stated above, the Mississippi Supreme Court did not agree with the trial court's ruling and, in fact, referred to the trial court's reading of the rule as "untenable." *Id.* at 657

Mr. Green attempted to comply with the rule, but he failed to do so. He should have known, reasonably known the requirements of Rule 46....” The term “reasonably should know... denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.” RPC 1.0(j).

As to the Board’s position that Mr. Green reasonably should have known the requirements of the rule, the Hearing Panel agrees. While the trial judge and the two attorneys involved in the Newberry criminal matter misunderstood the rule relating to the requirement that local counsel be present at trial, it can hardly be argued that there was confusion with other aspects of the rule. Rule 46(b) states that only foreign attorneys who are familiar with the practices of the legal profession in the state of Mississippi may appear as counsel *pro hac vice* and that rule specifically requires compliance with the rule. Of necessity, Mr. Green had to be familiar with Rule 46. Indeed, Mr. Green testified that he did read Rule 46 before making an appearance.<sup>13</sup> However, it is unclear how Mr. Green could have misinterpreted the sentence “the name of the associated local attorney shall appear on all notices, orders, pleadings, and other papers filed in the cause.” M.R.A.P. 46(b)(4). Similarly, the rule clearly states “a foreign attorney shall not appear as counsel *pro hac vice* before any court... until the foreign attorney certifies to the court... 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(b)(7).

RPC 3.4(c) requires that the disobedience be knowingly and, as stated above, that has not been proven by a preponderance of the evidence. However, the Hearing Panel does find that the

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<sup>13</sup> Pursuant to Mississippi Rules of Appellate Procedure Rule 46, “appearance” is defined as “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....”

Board has met its burden of proving that Mr. Green's conduct violated RPC 5.5 and 8.4(d).

Those rules provide in part as follows:

**RULE 5.5: UNAUTHORIZED PRACTICE OF LAW;  
MULTIJURISDICTIONAL PRACTICE OF LAW**

- (a) 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.

**RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to:

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- (d) engage in conduct that is prejudicial to the administration of justice;...

E. Application of the ABA Standards for Imposing Lawyer Sanctions

Section 15.4(a) of Rule 9 of the Tennessee Supreme Court Rules provides in part as follows:

If the Hearing Panel finds one or more grounds for discipline of the respondent attorney, the Hearing Panel's judgment shall specify the type of discipline imposed.... In determining the appropriate type of discipline, the Hearing Panel shall consider the applicable provisions of the ABA Standards for Imposing Lawyer Sanctions. *See also* Rule 8.4 of the earlier version of Rule 9.

The Tennessee Supreme Court has held that the ABA Standards are "guideposts" rather than rigid rules for determining appropriate and consistent sanctions for attorney misconduct. *Bailey v. Board of Professional Responsibility*, 441 SW3d 223, 232 (Tenn. 2014).

The following sections from the ABA Standards for Imposing Lawyer Sanctions have been considered by the Hearing Panel as relevant to determining the appropriate type of discipline:

3.0 Generally

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

4.42 Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Section 9.1 of the ABA Standards for Imposing Lawyer Sanctions provides, “[a]fter misconduct has been established, aggravating and mitigating circumstances may be considered in

deciding what sanction to impose.” Pursuant to ABA Standard 9.22, the following aggravating factors are found to be present in this case:

- prior disciplinary offenses;
- a pattern of misconduct;
- multiple offenses;
- substantial experience in the practice of law (Mr. Green was admitted by the Supreme Court of Tennessee to practice law in the state of Tennessee in 1981).

Pursuant to ABA Standard 9.32, the following mitigating factors are found to be present in this case:

- 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.

The Supreme Court has held that the aggravating and mitigating factors listed in the ABA Standards are “illustrative rather than exclusive.” *Lockett v. Board of Professional Responsibility*, 380 SW3d 19, 28 (Tenn. 2012). 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.... [T]hey are not good, but lawyers make mistakes.” And, “[t]he Board submits that taken in isolation these may not be the strongest cases or the most egregious violations....” The Board’s

position, however, is that when these violations are considered along with the numerous sanctions previously imposed by the Board upon Mr. Green, these new offenses become significantly more serious.

The Board appropriately emphasizes the current violations follow 17 prior instances of the imposition of penalties or sanctions by the Board. The parties stipulated Mr. Green's disciplinary history as follows:

- Public Censure - February 27, 2015 (competence, diligence)
- Private Informal Admonition - June 29, 2006 (competence, diligence, misconduct)
- Private Informal Admonition - March 15, 2005 (neglect, communication)
- Private Informal Admonition - May 3, 2004 (neglect, communication)
- Six (6) month Suspension (all probated) - May 3, 2004 (neglect, fees, failed to withdraw and return property, competence, neglect, communication)
- Private Informal Admonition - August 3, 2000 (neglect, communication)
- Public Censure - November 19, 1999 (filed appeal brief late, neglect, communication, scope of representation)
- Private Informal Admonition - November 16, 1999 (communication, safekeeping property and funds)
- Private Reprimand - October 1, 1998 (delayed filing petition for bankruptcy)
- Private Informal Admonition - February 28, 1997 (failed to pay a medical lien or prepare a written settlement statement)
- Private Informal Admonition - October 1, 1996 (neglect, communication)
- Private Informal Admonition - August 5, 1996 (neglect, communication)
- Public Censure - May 24, 1995 (neglect, communication, misleading court)
- Private Informal Admonition - November 10, 1994 (neglect, communication)
- Private Informal Admonition - July 25, 1994 (neglect, communication)
- Private Reprimand - April 28, 1993 (fees, competence, neglect, communication)



- Informal Admonition - September 28, 1990 (neglect, communication)

In addition to the stipulation of Mr. Green's disciplinary history, the Board submitted as a collective exhibit, backup documentation for most if not all of the prior sanctions. Those records reflect that, like the instant case, some of the 17 prior disciplinary sanctions involved multiple complaints. For example, the 6 month suspension which was all probated (see above) involved 8 different complaints by at least 7 clients. While none of the prior impositions of sanctions dealt with the unauthorized practice of law, many of them concerned a deficiency in communication with his clients as has been found herein.

### **III. JUDGMENT**

The preamble to the Rules of Professional Conduct provide in part as follows:

A lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service and engaging in these pursuits as part of a common calling to promote justice and public good. Essential characteristics of the lawyer are knowledge of the law, skill in applying the applicable law to the factual context, thoroughness of preparation, practical and prudential wisdom, ethical conduct and integrity, and dedication to justice and the public good.

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In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

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In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of

Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

(Tennessee Supreme Court Rule 8 (Preamble: A Lawyer's Responsibilities). Mr. Green has efficiently and appropriately shown this Hearing Panel that he has, in many respects, fulfilled the responsibilities expected of lawyers in this state – a fact not lost on this Hearing Panel. However, after considering the entirety of the evidence presented or stipulated to by the parties, Mr. Green is clearly in violation of the Rules of Professional Conduct as set forth herein, namely RPC 1.3 (Diligence), RPC 1.4 (Communication), RPC 8.4 (Misconduct), and RPC 5.5 (Unauthorized Practice of Law). The Hearing Panel agrees with the Board that a period of suspension is the appropriate discipline although the Hearing Panel does not believe that the period of suspension should be as lengthy as the period proposed by the Board in its Proposed Findings of Fact and Conclusions of Law. It is the judgement of the Hearing Panel that Mr. Green be suspended from the practice of law for six (6) months with thirty (30) days to be served on active suspension and the remainder to be served on probation. The conditions of probation are as follows:

1. Mr. Green shall enroll in and complete a minimum of eight (8) hours of continuing legal education specifically addressing law office management, client communication and client relations. The course or courses shall be certified for credit by the Tennessee Commission on Continuing Legal Education.<sup>14</sup>

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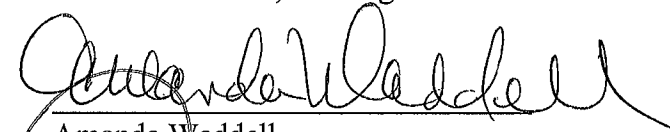
<sup>14</sup> The continuing legal education imposed by this judgment is not in addition to the fifteen (15) hours required of Tennessee attorneys. These courses may be taken as part of the standard continuing legal education requirement.

2. For all new cases, Mr. Green shall have a fee agreement or engagement letter setting forth the scope of his representation with any new client he obtains during the period of probation. Further, upon conclusion of a case or withdrawal from representation, Mr. Green shall correspond with the client memorializing that his representation has come to an end and that he will be taking no further action on the client's matter.
3. Mr. Green, at his own expense, shall retain a practice monitor pursuant to Rule 9, Section 12.9 who shall meet with him as often as the practice monitor deems appropriate, but no less than one (1) time every thirty (30) days. Mr. Green shall within fifteen (15) days of the entry of the Supreme Court's Order of Enforcement, provide to the disciplinary counsel a list of three (3) proposed practice monitors as set forth in Tennessee Supreme Court Rule 9, § 12.9(c). The duties and responsibilities of the practice monitor shall include, but not be limited to the supervision of Mr. Green's compliance with conditions of probation; supervision of office management practices and procedures; supervision of Mr. Green's calendaring of court dates and important deadlines; monitoring of attorney fee agreements and/or engagement letters with new clients; and monitoring and supervising Mr. Green regarding adequate communication with clients.
4. Mr. Green shall, as restitution, pay Mr. McKinney \$500.00 before the expiration of Mr. Green's period of probation, in accordance with Tennessee Supreme Court Rule 9 §§12.7-12.8.

Submitted this 5<sup>th</sup> day of December, 2016



Marc E. Reisman, Hearing Panel Chair



Amanda Waddell



Stuart Canale

**NOTICE**

**The findings and Judgment of the Hearing Panel may be appealed pursuant to Tenn. Sup. Ct. R. 9 § 33.<sup>15</sup> The parties are encouraged to carefully review section 33 which is incorporated herein by reference.**

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<sup>15</sup> As set forth in footnote 2, the Kizer matter was initiated prior to the effective date of the revised rules. The review/appeal process differs under the current rules. The Hearing Panel makes reference to Tenn. Sup. Ct. R. 9 Section 1.3 and 1.4 (2006) and the parties are encouraged to take all steps to protect their rights should either party seek a review or appeal of this Judgment.