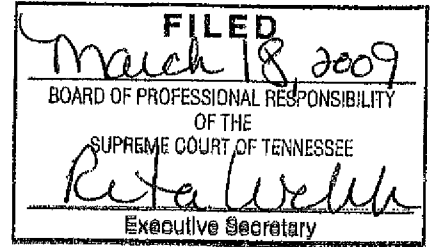


IN THE DISCIPLINARY DISTRICT IV
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE



In re: Mark W. Henderson, BPR #11525
Respondent, an attorney licensed
to practice law in Tennessee (Wilson County)

Docket #2007-1666-4-JV

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A complaint has been filed against Mark Wesley Henderson alleging certain acts of misconduct. Pursuant to Supreme Court Rule 9, a hearing panel of the Board of Professional Responsibility (consisting of Richard W. Rucker, R. Steven Waldron, and Matt B. Murfree) heard witnesses, examined exhibits, and heard argument of counsel regarding this matter on September 25, 2008. The following facts and conclusions of law were determined:

File # 29460-4-JV Complainant: Buddy L. Bruner

From the records contained in the exhibits it appears that on 9-2-05 Mr. Bruner met initially with Mr. Henderson and Mr. Stallings. This was an initial consultation during which the history of the marriage and the complex finances of Bruner were discussed. Mr. Bruner understood that Mr. Henderson would be representing him and that Stallings might do something, but would not be a major participant in his representation.

The next meeting was on 9-6-05, although this was not recorded in Exhibit 2. The Contract of Employment, Exhibit 4, was signed. From a review of the various entries of Exhibit 2, it appears that Mr. Henderson continued to be in the office of Mr. Stallings during the year 2006 and that if he "left the Stallings firm", it would have been 1-1-07 as opposed to 1-1-06 (Henderson was not clear on which day he "left the Stallings firm").

The next meeting appearing in the records from Exhibit 1 and 2 occurred on 10-18-05 to discuss a motion for default judgment on the counter claims contained in the answer filed on behalf of Mr. Bruner.

On 12-9-05 Mr. Henderson appeared in court in Nashville on Mr. Bruner's motion for default. From Exhibit 2 it appears that Mr. Henderson was out of office from 8 a.m. and in court through 2 p.m. on the motion in Mr. Bruner's case and that during this time he continued another case involving "Samson". It appears that he was out of the courthouse between 2:00 p.m. and 3:00 p.m. in order to "pick up Bailey".

According to Mr. Bruner, on 1-11-06 he was informed of the results of the motion hearing which occurred on 12-9-05.

Exhibit 7 is a letter dated 3-3-06 requesting additional time to return the answers to the first set of interrogatories and advising that his wife would be giving birth on March 6 and that he would not be back in the office until March 13. Exhibit 1 shows billing entries on March 6 (file review), 8 (review e-mail from client) and 13 (file review).

On 3-14-06 Exhibits 1 and 2 show an office conference involving interrogatories.

On 5-3-06 Exhibits 1 and 2 show an office visit and a review of interrogatory answers.

On 5-10-06 Exhibit 23 is the letter to Mr. Stallings wherein Mr. Bruner expresses a loss of confidence in Mr. Henderson and dismisses him, provides reasons, requests a meeting to review the billings and says he wants to obtain the files and records of his case. Exhibit 2 indicates a meeting on 5-19-06 and Exhibit 1 indicates a billing charge of one hour.

Rather than provide Mr. Bruner with his file, apparently contact was made with Mr. Robert Jackson, Mr. Bruner's successor attorney, for the purpose of transferring the file directly to him. It appears from Exhibit 1 that on 5-23-06 Mr. Jackson sent a fax to Mr. Henderson, but the substance of the fax is not in the record. Exhibit 22 indicates an acknowledgment that Mr. Jackson is the successor attorney. It does not appear that Mr. Henderson was making an effort to get Mr. Bruner's file to Mr. Jackson, but instead was expecting Mr. Jackson to come to Mr. Henderson's office in order to pick it up. It also appears that no effort was made by Mr. Henderson to send the file directly to Mr. Bruner, nor to send the file to Mr. Jackson.

Exhibit 24, Mr. Bruner's letter of 7-14-06 to Mr. Stallings, indicates that it was in mid-May of 2006 that the decision of Mr. Bruner to change attorneys was made clearly to Mr. Stallings and

to Mr. Henderson. It indicates that Mr. Bruner was expecting Mr. Henderson to "provide Bobby Jackson's office with a complete copy of [his] file". There's nothing in the record to indicate that Mr. Henderson attempted to correct Mr. Bruner's expectation that Mr. Henderson would take the action of getting the file to Mr. Jackson as opposed to expecting Mr. Jackson to take the action of coming to get the file. There's also a reference to the expected accounting for billings made by Mr. Henderson.

Exhibit 8 shows the memorandum of complaint filed August 22, 2006 with the Board of Professional Responsibility. Mr. Henderson responded by facts on 9-21-06, per Exhibit 9. Exhibit 10 is a series of 7 letters from James Vick, Disciplinary Counsel for the Board, to Mr. Henderson requesting various documents including the entire contents of the file of Mr. Bruner and an "itemized statement of time". These letters were dated from 9-28-06 through 1-23-07.

Mr. Henderson acknowledges that he failed to provide Mr. Bruner his records in a timely fashion and likewise failed to respond to Mr. Vick in a timely fashion. Mr. Henderson asserts that he has fully earned the \$10,000 fee as indicated by Exhibit 1.

Mr. Henderson is charged with violating the following Rules of Professional Conduct:

Rule 1.1 Competence.

There does not appear to be sufficient evidence presented at the hearing to establish that Mr. Henderson failed to exercise competence in his representation of Mr. Bruner.

Rule 1.2 (a) Scope of Representation.

In continuing to bill for work on behalf of Mr. Bruner after the 5-10-06 letter and the 5-19-06 conference which terminated Mr. Henderson's representation of Mr. Bruner, the Panel concludes Mr. Henderson has violated this rule.

Rule 1.3 Diligence.

There does not appear to be sufficient evidence presented at the hearing to establish Mr. Henderson failed to act with reasonable diligence and promptness in the actions that he took to represent Mr. Bruner in the divorce action before the court. This conclusion does not address the behavior of Mr. Henderson in failing to provide documents upon his termination as attorney for Mr. Bruner or his behavior in failing to provide documents to Mr. Vick.

Rule 1.4 Communication.

In failing to comply with the reasonable requests of Mr. Bruner for billing statements, failing to discuss multiple charges for file review, failing to provide copies of key pleadings and the completed interrogatory answers to Mr. Bruner, the Panel concludes that Mr. Henderson has violated this rule.

Rule 1.5 Fees.

As a result of (1) charging .2 or .5 hours for briefly looking at a file without performing work or noting the purpose in time records, (2) charging for the initial consultation without making clear that the client would be charged for anything beyond a brief discussion of what the case was about, and (3) charging client after it was clear from the letter dated 5-10-06 that the client desired to discharge Henderson as his attorney, the Panel concludes that Mr. Henderson has violated this rule.

There are 26 charges of .2 hour for file review for a subtotal of 5.2 hours. There are five charges of .5 hour for file review for subtotal of 2.5 hours. There is the initial consultation constituting a subtotal of 2 hours (excluded is the one hour for review of pleadings and letter). There are 2.5 hours of charges after 5-10-06. This makes a total of 12.2 hours that are found to be unreasonable by the Panel for a total charge of \$3050 which should be reimbursed by Mr. Henderson to Mr. Bruner. Since the fee was shared with Mr. Stallings, Mr. Stallings should return his proportionate amount to Mr. Bruner. The evidence indicates a 50-50 sharing so Mr. Henderson is obligated for \$3050 and Mr. Stallings should reimburse Mr. Henderson \$1525 in order to display proper professional conduct. Mr. Stallings and Mr. Henderson may work out a different arrangement between them, but \$3050 should be sent to Mr. Bruner.

Rule 1.15 Safekeeping Property.

There does not appear to be sufficient evidence presented at the hearing to establish Mr. Henderson failed to abide by this rule.

Rule 1.16 Declining and Terminating Representation.

Mr. Henderson acknowledges that he has violated this rule by failing to promptly return Mr. Bruner's file to him or to forward it to Mr. Jackson.

Rule 8.4 Misconduct.

Mr. Henderson acknowledges that he has violated this rule by failing to promptly respond to the requests of Mr. Vick for information regarding his representation of Mr. Bruner.

File #29732-4-JV Complainants: Vernon and Michelle Raines

From Exhibit 14 it appears that on 6-26-06 a check from the joint account of Vernon or Michelle Raines, in the amount of \$3000, was signed by Michelle Raines and made payable to the Stallings law firm. It further appears that this was negotiated. The notation on the check is that this was for "fees". Filed with the juvenile court clerk in Wilson County, on the same day, was a Petition for Emergency Custody for Jimmy Vernon Raines, Plaintiff, against Melissa Dawn Jennings, Defendant. Vernon Raines signature on this document was notarized on 6-23-06 (Exhibit 15).

Exhibit 16 shows that the Order for Emergency Custody was lodged also on 6-26-06 and that it was signed by Judge Barry Tatum on 6-27-06. Exhibit 17 shows a judgment, based on a court appearance occurring on 10-23-06 and signed by Judge Barry Tatum on 11-1-06, was filed on the same day. This exhibit also recites that service upon the mother occurred on 9-21-06.

Exhibit 11 is a request for assistance and contains a time line. It is signed by Michelle Raines. It appears that the major bone of contention in this complaint is the attorney's fee, although there are additional complaints made by the Raines.

Mr. Henderson is charged with violating the following Rules of Professional Conduct:

Rule 1.1 Competence.

There does not appear to be sufficient evidence presented at the hearing to establish that Mr. Henderson failed to exercise competence in his representation of Vernon and Michelle Raines. The initial meeting occurred on 6-21 and a petition was filed on 6-26. There is insufficient evidence to conclude that the threat of the mother leaving was imminent enough to make a five day delay in filing the petition a lack of competence. There's likewise insufficient evidence to conclude that an eight-day delay between the court hearing on 10-23 and filing the order on 11-1 represents lack of competence. It certainly appears that the result desired by the Raines was granted by the Court. Forgetting about a court hearing on 10-23 and the struggles

to serve the mother reflect poorly on Mr. Henderson, but are not enough to support a conclusion of a violation of this rule.

Rule 1.2 (a) Scope of Representation.

The inclusion in the final order of the award of \$35 per week as child support is something that would have been included by the judge even if Mr. Henderson had deliberately left it out. Each member of the panel can draw on his own experience in the practice of law (over 30 years for each panel member) and each is well aware of the diligence and thought that is customary for judges to give in approving attorney's fees. The inclusion of each of these in the order, whether discussed or not with the Raines, is not sufficient to be a violation of this rule. The approval of the judge is only as to the amount and is not a ruling between Mr. Henderson and the Raines as to the amount of the fee agreed to between them.

Rule 1.3 Diligence.

There does not appear to be sufficient evidence presented at the hearing to establish Mr. Henderson failed to act with reasonable diligence and promptness in the actions that he took to represent Vernon and Michelle Raines. This conclusion does not address the behavior of Mr. Henderson in failing to provide documents upon the request of Michelle Raines or his behavior in failing to provide documents to Mr. Vick.

Rule 1.4 Communication.

In failing to comply with the reasonable requests of Michelle Raines for billing statements and the request of Mr. Vick for additional information on this matter (Exhibit 13), the Panel concludes that Mr. Henderson has violated this rule. Not having a final order delivered to the court until eight days after the hearing is not sufficient to be a violation of any of the rules professional conduct. However, inviting the series of calls about the final order by stating to the client that the order would be filed on 10-24-06 (the day after the hearing in court) and faxed to Michelle Raines at work was not an optimum choice. Failing to respond by phone or letter to any of the calls made by Michelle Raines on the first, third, fourth, seventh and eighth days after the court hearing does represent a violation of this rule.

In favor of Mr. Henderson is Exhibit 17 showing that despite what the employee in the Clerk's said (see Exhibit 11, second page, entry labeled 11-1-06), the final order was signed and filed on 11-1-06. The argument of Mr. Henderson (that he was not representing Michelle Raines and

therefore failing to respond to her was not a violation of this rule) is not persuasive. Her level of involvement from the very beginning, especially including the writing of the check, made it clear that she was fully involved. If he wanted to establish this distinction, it was incumbent upon Mr. Henderson to make this abundantly clear from the beginning and in writing.

Rule 1.5 Fees.

The issue of the fee to be charged is based exclusively upon the memory of the parties. The failure of having anything in writing is the fault of Mr. Henderson. Mr. Henderson remembers a charge of \$6,000 discounted to \$3000, flat fee. The Raines remember a \$3000 fee to be reduced to \$1500 if the defendant did not contest the petition (the defendant did not contest the petition).

The testimony of James Stallings, for whom Mr. Henderson worked at one time and with whom he was associated at another time appears to support Mr. Henderson's memory. Mr. Stallings remembered that Mr. Henderson gave a discount to the father of Vernon Raines (an entirely separate matter which is not before the panel) and remembered that there was a flat fee quoted to Vernon and Michelle Raines in the amount of \$3000.

The failure of Mr. Henderson to dispute, or explain, to Michelle Raines the distinction between the billing statement and a flat fee appears to be a violation of Rule 1.4. However, the same failure also suggests that the fee was not an absolutely flat fee of \$3000. An absolutely flat fee does not require checking with a bookkeeper or secretary.

In listening to the witnesses and observing their demeanor, it appears to the Panel that the testimony of Mr. Stallings was not "clearly remembered" in contrast to the testimony of the Raines and Mr. Henderson which was "clearly remembered". The failure of Mr. Henderson to promptly respond to the phone calls regarding billing statements (could have been sent to Mr. Raines) weighs against Mr. Henderson's memory. The weight of the testimony favors the Raines. The failure to return \$1500 constitutes a violation of this rule. The \$1500 should be returned to the Raines. If this fee was shared with Mr. Stallings, then Mr. Stallings should return his proportionate amount of the \$1500 to Mr. Henderson.

Rule 1.15 (a) Safekeeping Property.

There does not appear to be sufficient evidence presented at the hearing to establish Mr. Henderson failed to abide by this rule.

Rule 1.16 Declining and Terminating Representation.

Mr. Henderson's actions appear to be a violation of Rule 1.4, not a violation of this rule.

Rule 8.4 Misconduct.

Mr. Henderson violated this rule by failing to promptly respond to the requests of Mr. Vick for information regarding his representation of Mr. and Mrs. Raines.

Recommended Penalty:

Mr. Henderson has previously received both public censure and a six-month suspension as penalties for previous violations of rules prohibiting ethical misconduct. In response to one of these he attended and completed the Board of Professional Responsibility's Ethics School seminar (Exhibit 18). He displays a persistent, insistent and consistent pattern of failing to respond to the Board's requests for information and this pattern, for some reason, just does not change.

The Hearing Panel concludes a six-month suspension and return of the fees as indicated is appropriate in this cause.

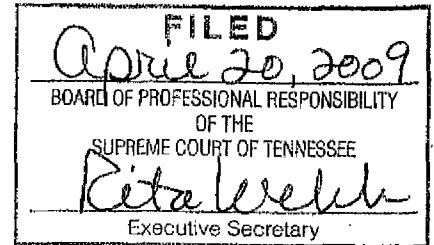
DATED: March 13, 2009.


Richard W. Rucker, Chairman


Matt B. Murfree, Panel Member


R. Steven Waldron, Panel Member

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AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Motion to Alter or Amend submitted by counsel for the Board of Professional Responsibility has been considered by the Panel and the following amendments have been made:

The Army aphorism, "If an order can be misunderstood, it has been misunderstood", is not limited to the Army, and the Panel appreciates the action of counsel for the Board of Professional Responsibility calling the poorly worded portions to our attention.

It was not the intention of the Panel to attempt to take jurisdiction over Mr. Stallings. This is why the word "should" was used. The fee was charged by Mr. Henderson, and therefore, Mr. Henderson is obligated (must, is ordered to) return \$3050. It is the belief of the Panel that Mr. Stallings will act consistently with the standards of behavior that are expected of persons who have entered the august calling of "attorney", and Mr. Stallings will recognize that the Panel ruled that \$3050 was not earned. We believe that if he shared (as the testimony indicated) in a fee that was not earned, he would want to return that portion which was shared with him. In order to reverse the flow of the fee from Bruner to Henderson to Stallings, it should (ought to, not required) move from Stallings to Henderson to Bruner. This would be proper professional conduct.

The Panel recognized that there may be agreements (written or oral, contract of employment or fee sharing) between Henderson and Stallings that might affect whether and how shared fees are returned. If any such agreements exist between Mr. Henderson and Mr. Stallings, then the agreements would control whether or how the shared fee would be refunded. Also, Mr. Stallings might prefer to send the part of the fee that was shared with him directly to Mr. Bruner.

These are the reasons for the expression "Mr. Stallings and Mr. Henderson may work out a different arrangement between them..."

In light of the foregoing observations by the Panel, the last sentence under the heading "Rule 1.5 Fees" found on the fourth page of the ruling by the Panel is revised to read:

Mr. Stallings and Mr. Henderson may work out a different arrangement between them, but \$3050 shall be sent to Mr. Bruner and Mr. Henderson is ultimately responsible for returning this amount to Mr. Bruner.

Likewise, on page 7 of the ruling of the Panel under the heading "Rule 1.5 Fees", the last sentence is amended to read:

Mr. Stallings and Mr. Henderson may work out a different arrangement between them, but \$1500 shall be sent to the Raines and Mr. Henderson is ultimately responsible for returning this amount to the Raines.

DATED: April 2, 2009.



Richard W. Rucker, Chairman



Matt B. Murfree, Panel Member



R. Steven Waldron, Panel Member