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2011 JAN 31 PM 5:00

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

BOARD OF PROFESSIONAL  
RESPONSIBILITY  
*rw*  
EXEC. SEC'Y

In Re: **MARK W. HENDERSON, BOPR #11525**  
**Respondent, An Attorney Licensed**  
**To Practice Law in Tennessee**  
**(Wilson County)**

Docket No. 2010-1877-4-KH

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**

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This matter came to be heard before a designated Hearing Panel on October 25<sup>th</sup>, 2010, in Nashville, Tennessee. Present before the Hearing Panel were Krisann Hodges, Disciplinary Counsel for the Board of Professional Responsibility and Mark Henderson, Respondent. Based upon the pleadings filed in this cause, the testimony of witnesses, the evidence submitted, statements of counsel and the entire record in this cause, the Panel makes the following findings of fact, conclusions of law, and judgment.

**FINDINGS OF FACTS**

1. On March 2, 2009, a complaint was filed by Cassie King alleging ethical misconduct by Respondent.
2. On March 4, 2009, the Board sent a copy of the complaint to Respondent requesting a response within ten (10) days.
3. Having received no response, the Board sent a Notice of Petition for Temporary Suspension on March 19, 2009 to Respondent alerting him that the Board intended to file a Petition for Temporary Suspension in the event he did not respond to the complaint within ten (10) days.

4. On March 30, 2009, Respondent sent a response to the complaint.
5. Respondent represented Ms. King in a lawsuit concerning the dissolution of her business with her business partner, Judith Randall. Ms. King, along with two other persons (Jeffrey King and Danny Roark) is the plaintiff. Ms. Randall filed a counter-suit against Ms. King. The case is styled Cassie Roark King, Jeffery King, and Danny Roark v. Judith Randall and Randall Roark, LLC, Davidson County Chancery Court, No. 08-518-IV.
6. On April 17, 2008, Todd Panther, counsel for Ms. Randall, propounded the First Set of Interrogatories and Request for Production of Documents to the plaintiffs. When Respondent failed to provide responses, Mr. Panther wrote to Respondent requesting that the delinquent discovery responses be provided by June 9, 2008.
7. Respondent faxed a letter to Mr. Panther on June 13, 2008 stating that the discovery responses were mailed on that date.
8. On June 30, 2008, Mr. Panther had still not received the discovery responses despite Respondent's representation that they had been mailed. Mr. Panther wrote Respondent again in an effort to informally resolve the outstanding discovery issues.
9. However, despite Respondent's assurances that the responses would be provided, none were forthcoming.
10. On August 1, 2008, Mr. Panther filed a Verified Motion to Compel setting forth these facts.
11. Respondent filed a response to the Verified Motion to Compel, and to various other motions, on or about August 18, 2008. In the response, Respondent states "Defendant Randall shall have her answers to discovery prior to the hearing of this motion. They have not been served before now do (sic) to inadvertence of Plaintiffs' counsel and not the Plaintiffs themselves. The fault is entirely that of undersigned."

12. The Chancery Court of Davidson County entered an Order on September 2, 2008 granting the motion and ordering the plaintiffs to submit discovery responses by September 4, 2008.

13. The Court further ordered plaintiffs "or their counsel" to pay monetary sanctions. The exact amount was determined in a later Order to be \$950.00.

14. According to Ms. King and Respondent, Respondent agreed to pay the sanctions.

15. On September 5, 2008, Mr. Panther filed another Motion for Sanctions because the discovery that had been provided following the September 2, 2008 Order was not complete.

16. This motion was granted on September 24, 2008.

17. Mr. Panther was compelled to file another motion on October 16, 2008 because complete discovery had still not been provided.

18. Ms. King terminated Respondent's representation and hired David Ridings, Esquire, on December 17, 2008.

19. Mr. Ridings and his associate, Jason Elliot, discovered that Respondent had failed to file an answer to the defendant's counter-complaint.

20. They filed a Response to Motion for Default on January 15, 2009 along with an answer to the counter-complaint.

21. Further, the monetary sanction imposed by the Court in the amount of \$950.00 was not paid by Respondent despite his admission that the failure to provide discovery was entirely his fault.

22. Ultimately, Ms. King was forced to pay the monetary sanction imposed by the Court.

23. Ms. King testified that she was not aware that Respondent had decided to "pay" the sanction by giving her a credit.

24. In fact, Ms. King sought, yet was unable to obtain, an accounting from Respondent so that she could see for herself how much time and billing had occurred.

25. In this disciplinary hearing, Respondent belatedly submitted a time sheet he recreated immediately prior to the hearing which neither the Board nor Ms. King had ever seen, despite their requests for such information.

26. Ms. King paid Respondent a total of \$10,000.00 in legal fees to handle the Chancery Court case and another General Sessions case involving a suit by her homeowner's association.

27. Ms. King testified that the arrangement was not that she would pay \$5,000.00 for each case; rather, Respondent just decided to combine the cases for the purposes of a total fee due.

28. Respondent did not use a written fee agreement setting out the scope of his services.

29. Respondent did not keep contemporaneous time records.

30. In fact, the timesheet he submitted as evidence in this hearing is merely an estimated reconstruction of time spent on a case over two (2) years old.

31. Respondent did not inform Ms. King of his intention to satisfy the monetary sanction by giving her a "credit" until her husband contacted him to terminate Respondent's services.

32. This was approximately five (5) days before the sanction was due to be paid.

33. Ms. King testified that she was unaware that the Court had even entered an Order regarding the specific amount and due date until Mr. Ridings and Mr. Elliott informed her of the status of the case.

34. Mr. Elliott testified that when he took over Ms. King's case, his goal was to get the case back on even footing.

35. Mr. Elliott was concerned that his client was subject to a default for failure to answer the amended counter-complaint, a sanction for failure to pay the \$950.00, a motion for contempt, and for more outstanding discovery responses.

36. Mr. Elliott explained all of these problems to Ms. King.

37. According to his Response to Motion for Default Judgment, Ms. King was ill-informed about her case.

38. Ms. King employed Respondent to defend a suit filed in General Sessions Court by her homeowner's association. Ms. King was being sued due to alleged violations of her neighborhood covenants.

39. In or around October 2008, while Respondent was still her legal representative, the homeowner's association imposed a lien on proceeds from the sale of her home. Ms. King lost approximately \$6,000.00 due to the lien.

40. Respondent testified that he had filed an appeal of the case, but he was unable to explain why the homeowner's association was able to enforce the lien.

41. Further, Respondent testified that as recently as 2010 he had received pleadings related to the homeowner's association case appeal.

42. Ms. King was unaware that there had been any activity in the case following the enforcement of the lien.

43. Additionally, when Ms. King terminated Respondent's services in December 2009, she terminated his involvement in both cases. Inexplicably, Respondent appears to have continued as her legal representative in the homeowner's association case without her knowledge.

44. The Respondent has a prior disciplinary history. On November 24, 1998, he received a Public Censure for failing to file an appellate brief in the Court of Criminal Appeals. He was found in contempt for this failure.

45. In another circumstance, Respondent failed to properly communicate with his client.

46. On July 31, 2003, Respondent received another Public Censure for failing to adequately communicate with a client regarding a pleading that Respondent failed to timely file. After the

client notified Respondent that the representation was terminated, Respondent filed the pleading and entered into an agreement with an opposing party agreeing that the defendant did not have to file a responsive pleading so settlement negotiations could be discussed. Additionally, Respondent wrote his former client, who was then represented by new counsel, asking the client to contact him to discuss settling her case.

47. The Respondent was suspended for six (6) months on November 31, 2003 as a result of a Petition for Discipline. Respondent engaged in misrepresentation to opposing counsel and the Court related to a sanction that he was supposed to make to the Court for failure to comply with discovery. Further, he failed to adequately communicate with his client. He neglected the client's matter for over two (2) years and failed to request a hearing on his client's behalf.

48. Respondent received a private informal admonition on May 17, 2005 for violating RPC 1.3, Diligence, by failing to properly follow-up with pleadings and for not giving appropriate attention to the management of a client's file.

49. At the time of this hearing, Respondent has another disciplinary case on appeal.

#### CONCLUSIONS OF LAW

50. After considering the evidence and testimony in this matter, this Panel finds by a preponderance of the evidence that Respondent has violated Rules of Professional Conduct ("RPCs") 1.1, Competence; 1.3, Diligence; 1.4, Communication; 1.5(a), Fees; 8.1(b), Bar Admission and Disciplinary Matters; and 8.4(a)(d), Misconduct.

51. Accordingly, the appropriate discipline must be based upon application of the *ABA Standards for Imposing Lawyer Sanctions*, ("ABA Standards") pursuant to Section 8.4, Rule 9 of the Rules of the Supreme Court.

#### VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT

52. By his own admission, Respondent failed to provide Ms. King's discovery responses to

counsel for Ms. Randall. In fact, Respondent filed a pleading acknowledging that the documents were ready for delivery but that he failed to send them.

53. Respondent misled Mr. Panther by advising him that he was sending discovery responses on the same date as his fax to Mr. Panther, dated June 13, 2008. Two (2) weeks following the Respondent's fax, Respondent still had not provided the responses. More importantly, Respondent did not make any efforts to advise Mr. Panther that there was a problem. Respondent did not make any efforts to quickly remedy the problem. Rather, he waited until the actual hearing date.

54. Respondent's failure to take remedial action until the date of the hearing demonstrates his negligent approach to handling basic case responsibilities.

55. The Panel finds that Respondent's disciplinary history is replete with similar occurrences of negligent practice. In particular, Respondent was previously suspended for six (6) months for failing to respond to discovery and failing to pay sanctions in a timely manner. The evidence demonstrates that Respondent has not benefitted from the lessons of prior disciplinary sanctions.

56. By failing to respond to discovery on behalf of his client, Respondent demonstrated incompetence and lack of diligence. Respondent has been licensed to practice law since 1985. He has substantial experience in the practice of law and he is responsible for the adverse consequences that could have befallen Ms. King.

57. Respondent did not keep his client adequately informed about the monetary sanction. Respondent failed to answer the amended counter-complaint which was subject to a pending default motion.

58. Respondent failed to protect his client's interests by responding to discovery in an efficient and timely manner. Even if Respondent, on behalf of Ms. King, disagreed with the

defendant's claim that discovery had not been satisfied, Respondent should have filed an objection or other pleading providing a response.

59. The Respondent's testimony regarding Ms. King's General Sessions case conflicts with Ms. King's understanding of the status of the case. Not only was she unaware that Respondent was still receiving pleadings about the case, she was clearly not informed about the status of the case while Respondent was still representing her in October 2008.

60. Respondent's estimation of the time he spent on Ms. King's Chancery Court case is not credible. This Panel notes that the timesheet was not provided to the Board prior to the morning of the hearing. Respondent did not submit an exhibit list prior to trial. Rather, the day before this hearing, Respondent used a calendar and copies of pleadings to estimate the time he thinks he spent on the case.

61. Ms. King did not pay Respondent a nonrefundable fee. The money paid to Respondent was a retainer. Ms. King was entitled to an accounting of Respondent's billing at the time she terminated his services.

62. Respondent admits he did not keep a contemporaneous time log. Therefore, in December 2008, he merely assumed that Ms. King owed more than she originally paid.

63. He unilaterally decided to give her a credit for the \$950.00 sanction. He never advised her that payment of the \$950.00 sanction was due approximately one (1) week following his termination.

64. The testimony and evidence demonstrates that if not for Mr. Elliott's review of the record, the Kings would not have been aware that they missed a deadline imposed by the Court.

65. By his actions, Respondent has violated RPCs 1.1, 1.3, 1.4, 1.5(a), and 8.4(a)(d).

66. Further, Respondent has admitted in his answer that he failed to timely respond to the initial disciplinary complaint.



67. RPC 8.1(b) states that it is a violation for a lawyer to “knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.” Therefore, the Panel finds that Respondent also violated RPC 8.1.

#### APPLICATION OF THE ABA STANDARDS

68. The Panel finds that in light of his prior disciplinary history, the misconduct of Respondent is significant. Respondent has already been suspended and censured for lack of diligence and competence in past cases of misconduct.

69. Therefore, this Panel finds that the same rationale applied by the Tennessee Supreme Court in Sneed v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 301 SW 3d 603, 617- 618 (Tenn. 2010) applies to Respondent’s case. Respondent has not benefitted from prior disciplinary action for similar misconduct.

70. Respondent failed to ensure that he represented Ms. King in a diligent manner and failed to communicate in a manner calculated to ensure that she was adequately informed about her cases.

71. Accordingly, this Panel finds that the following ABA Standards apply in this matter:

**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.

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

72. ABA Standard 2.3 states, in part, that “[g]enerally, suspension should be for a period of time equal to or greater than six months.”

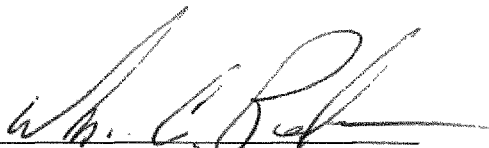
73. However, in this case, six (6) months is not an appropriate length of time for suspension. The Panel finds aggravating factors justify an increase in the level of discipline. Respondent has already been suspended for six (6) months for substantially similar misconduct as the case before this Panel. Respondent has other prior disciplinary offenses which are related to his failure to exercise diligence. The facts of this case demonstrate that Respondent has once more engaged in a pattern of misconduct with multiple offenses. Respondent failed to pay the monetary sanction imposed as a result of his negligence.

74. Respondent is guilty of a bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency in that he failed to adequately respond to the Board regarding the complaints. Further, he failed to timely provide critical documentation either in the investigation stage or in this formal proceeding.


75. The Panel finds that there are no mitigating factors.

### JUDGMENT

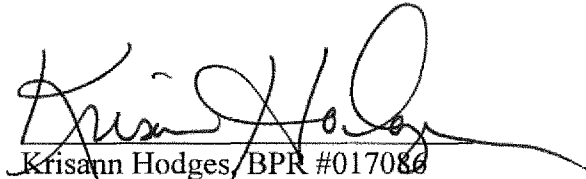
Based on the finding of facts and conclusions of law, this Panel finds that Respondent shall be suspended from the practice of law for two (2) years. Further, Respondent shall be required to provide restitution to Ms. Cassie King in the amount of \$950.00 prior to reinstatement.

  
William Reider, Panel Chair

  
Christina Duncan, Panel Member  
*by Wm. C. Reider by permission*

  
Steven Dix, Panel Member  
*by Wm. C. Reider by permission*

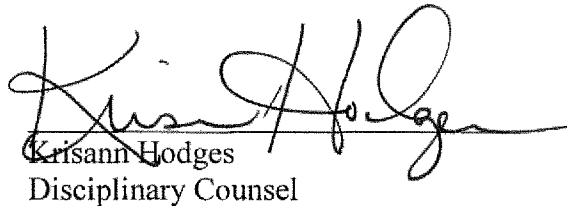
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**CERTIFICATE OF SERVICE**

I certify that a copy of the Board's Proposed Findings of Fact and Conclusions of Law has been served upon Respondent, Mark Henderson at 3735 North Mt. Juliet Road, Suite 108, Mt. Juliet, Tennessee, 37122, and to 2004 Woods Run, Mt. Juliet, Tennessee, 37122-8100 and via e-mail at [trustmeimalawyer2@yahoo.com](mailto:trustmeimalawyer2@yahoo.com) on this the 10<sup>th</sup> day of January, 2011.



Krisann Hodges  
Disciplinary Counsel