

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE
AT KNOXVILLE

ENTERED

OCT 18 2011

M. JOSIAH HOOVER, III,

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Petitioner,

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]

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vs.

]

No. 179725-3

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BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
TENNESSEE SUPREME COURT,

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]

]

Respondent.

]

]

HOWARD G. HOGAN

1202-518A

JUDGMENT

This case is before the court on a Petition for Certiorari filed by the petitioner, M. Josiah Hoover, III. The petition seeks a reversal of the judgment of the hearing panel filed December 17, 2010, in a lawyer disciplinary proceeding against Mr. Hoover. After careful review of the record in this case, for the reasons set for in a Memorandum filed simultaneously with this Judgment which is incorporated herein by reference, the court of the opinion the petition to reverse the findings and conclusions of the hearing panel should be denied and the judgment of the hearing panel filed December 17, 2010, should be affirmed in all respects.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the petition seeking reversal of the findings and conclusions of the hearing panel filed December 17, 2010, is denied and that the judgment of the hearing panel be affirmed in all respects. The costs of this cause shall be assessed against the petitioner, M. Josiah Hoover, III, and his surety, for which execution may issue, if necessary.


This 18th day of October 2011.

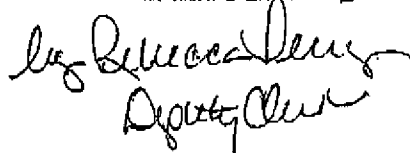
Donald P. Harris

Donald P. Harris, Senior Judge
sitting by designation of the
Tennessee Supreme Court

CERTIFICATE

The undersigned hereby certifies that a copy of the forgoing Final Decree has been forwarded to Sandy Garrett, Senior Litigation Counsel, Board of Professional Responsibility, 10 Cadillac Drive, Suite 220, Brentwood, TN 37027; and to M. Josiah Hoover, III, 7348 Toxaway Drive, Knoxville, TN 37909, this the 27th day of October, 2011.



Clerk and Master

Deputy Clerk

the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The court may affirm the decision of the panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the panel's jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.

Tenn. Sup. Ct. R. 9, §1.3 (2007).

With that standard in mind, the court has carefully reviewed the entire record. The court's findings with regard to the allegations made by Mr. Hoover in his Petition for Certiorari are set forth below.

Findings

On August 1, 2008, the Board filed a Petition for Discipline pursuant to Rule 9 of the Rules of the Supreme Court. This petition was based upon four complaints that had been filed with the Board relating to five separate cases. In his answer to the Petition for Discipline, Mr. Hoover essentially admitted all factual allegations. He either denied or stated he was without sufficient knowledge to admit or deny the allegations that he had violated the Rules of Professional Conduct or that aggravating factors existed.

File No. 30298-(K)-TH-Norman Whitton

The first of these complaints was filed by Norman Whitton. With respect to the Whitton complaint, the petition alleged violations of the Rules of Professional Conduct; 1.3, requiring an attorney to exercise reasonable diligence and promptness in representing clients; 1.4 requiring an attorney to keep the client reasonably informed about the status of the matter; 1.5, prohibiting an attorney from charging an unreasonable fee; 3.1 prohibiting a lawyer from bringing or defending a proceeding, unless after reasonable inquiry the lawyer has a basis in law and fact for doing so; 3.2 requiring a lawyer to make reasonable efforts to

expedite litigation; 8.4(a), prohibiting the violation of the Rules of Professional Conduct; 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice; and 8.4(g) which prohibits the knowing failure to comply with a final court order in a proceeding in which the lawyer is a party. With regard to this complaint, the hearing panel found the following facts:

6. On approximately January 10, 2007, the Complainant retained the [Mr. Hoover] paying \$1,000 for the [Mr. Hoover's] representation in judgment lien enforcement in the bankruptcy of debtor Samuel Burnette.
7. On December 13, 2006, an Order Discharging Debtor Samuel Burnette had been filed.
8. On January 12, 2007, after Samuel Burnette was discharged in his bankruptcy, the [Mr. Hoover] asserts he filed a Proof of Claim for the Complainant.
9. The [Mr. Hoover] did not check the status of the Burnette Bankruptcy prior to January 12, 2007.
10. The Complainant learned from the debtor Burnette's attorney and not from the [Mr. Hoover] that Burnette's Bankruptcy had been dismissed.
11. The Complainant *pro se* filed a Civil Warrant in the General Sessions Court of Loudon County, Tennessee, against the [Mr. Hoover] for legal malpractice.
12. On approximately on October 5, 2007, the Complainant obtained a General Sessions Judgment for \$1,000 plus interest against the [Mr. Hoover].
13. [Mr. Hoover] appealed the General Sessions' Judgment to the Circuit Court for Loudon County, Tennessee.
14. By Order entered approximately March 27, 2008, the Circuit Court found "[Mr. Hoover's] contract was unconscionable and cannot be enforced. The Defendant thus obtained the fee in pretence of representation which cannot benefit the Plaintiff and the fee should be returned. It is therefore Ordered that the Plaintiff have a Judgment against the Defendant for \$1,000 plus Post Judgment Interest of ten (10) percent from October 5, 2007.

15. By opinion filed November 19, 2009, the Court of Appeals of Tennessee at Knoxville reversed the Trial Judge finding that the contract was not unconscionable but concluding "that the \$1,000 under the circumstances was not a reasonable fee for the legal services rendered by the Defendant. On the facts in this case and the applicable law, we conclude that a \$500 fee would be reasonable. Accordingly, we remand for the entry of a Judgment of \$500 for Plaintiff against Defendant and in our discretion we tax the cost of the appeal onehalf to Plaintiff and one-half to Defendant."

16. [Mr. Hoover] failed to pay to the Complainant the \$500 Judgment and satisfy the court costs.

Based upon these facts, the hearing panel found Mr. Hoover violated Rules 1.5(a) by charging an unreasonable fee, 8.4(a) prohibiting a violation of the Rules of Professional Conduct and 8.4(g) prohibiting the knowing failure to comply with a final court order in a proceeding in which the lawyer is a party. Mr. Hoover alleges the complaint "has no bearing" on his maintaining a law license. Charging unreasonable fees and failing to comply with a final court order are violations of the Rules of Professional Conduct and, in the opinion of the court, any such violation is material to a lawyer's fitness to practice law. The Court of Appeals found Mr. Hoover charged an unreasonable fee. Mr. Hoover produced no evidence to controvert that finding. Moreover, Mr. Hoover admitted he had only paid \$100.00 of the \$500.00 judgment and that payment was made the day prior to the disciplinary hearing. The court finds the findings of the hearing panel were supported by substantial and material evidence.

File No. 31195c-2-TH-Ronald and Deborah Titus

The second complaint was filed by Ronald and Deborah Titus. With respect to this complaint, the Board alleged violations of the Rules of Professional Conduct 1.3; 1.4; 3.2 and 8.4(a) and (d). Relating to this complaint, the hearing panel made the following findings:

20. [Mr. Hoover] represented the Complainants in the Circuit Court for Blount County in Titus v. Dalphonso.

21. The Circuit Court granted the Defendant's Motion for Summary Judgment in Titus v. Dalphonso.

22. On approximately July 17, 2007, [Mr. Hoover] filed a Notice of Appeal on behalf of the Complainants.

23. [Mr. Hoover] failed to timely file a brief in support of the Complainants' appeal.

24. On January 11, 2008, the Court of Appeals entered an Order stating "The record on appeal was filed with the clerk of this Court on November 29, 2007. Even though Tenn. R. App. P. 29(a) requires that the Appellants' Brief be filed within thirty days after the record is filed. The Appellant has neither filed a brief nor requested an extension of time to do so. It is, therefore, Ordered that the Appellant file a brief within ten days following the entry of this Order or show cause why this appeal should not be dismissed for failure to comply with Tenn. R. App. 29(a)."

25. On February 7, 2008, the Court of Appeals entered an Order requiring Complainant's transcript be filed by February 4, 2008 and Complainant's brief be filed by February 25, 2008.

26. [Mr. Hoover] failed to timely file the Complainant's brief and transcript pursuant to the Court of Appeals' February 7, 2008 Order.

27. By Order filed March 12, 2008, the Court of Appeals denied [Mr. Hoover's] Motion to accept a late filed transcript and brief and granted Defendant/ Appellee's Motion to Dismiss appeal based upon Plaintiff/Appellant's failure to file the brief and comply with the Court's previous Orders.

28. By Order filed April 18, 2008, the Court of Appeals denied [Mr. Hoover's] untimely Petition to Re-hear.

29. [Mr. Hoover] failed to respond to the Complainants' requests for information and failed to keep the Complainants accurately informed about their case.

30. By letter dated February 15, 2008, [Mr. Hoover] erroneously advised the Complainants: "I will have the brief written on or before February 28, 2008."

31. The Complainants learned from the clerk's office and not from [Mr. Hoover] that their appeal had been dismissed.

As a result of these findings, the hearing panel found Mr. Hoover in violation of Rules 1.3; 1.4(a) requiring the attorney to keep the client reasonably informed about the status of the matter; 1.4(b) requiring an attorney to explain a matter to the extent reasonably necessary to

permit the client to make informed decisions regarding the representation; 3.2; 8.4(a) and (b).

In the opinion of the court, the hearing panel's findings are supported by substantial and material evidence. The orders from the Court of Appeals were made exhibits in the hearing. Moreover, Ms. Titus testified that, after paying Mr. Hoover several thousand dollars, he constantly sought to continue the case, failed to notify them by mail concerning the status of their case, would not return phone calls even though Ms. Titus would attempt to contact him by phone as many as 15 to 20 times a day, and, on one occasion, moved his office and failed to provide Mr. and Ms. Titus his new address.

Mr. Hoover alleges in his Petition for Writ of Certiorari that "The witness, Deborah Titus, admitted at the hearing that she was under the influence of pain medications due to a recent surgery and was incoherent during her examination." Her testimony actually was, "I just had laser surgery on Monday. Okay? I am still suffering from the pain of that and my ears are still clogged up." The court has found no reference to pain medication. Moreover, the court has reviewed her testimony and does not find her testimony to be incoherent.

File No. 32656-2-KS-Wayne LeQuire

The next complaint was filed by Wayne LeQuire. With regard to this complaint, the Board alleged violations of Rules of Professional Conduct 1.3; 1.4; and 8.4 (a) and (d). As to this complaint, the hearing panel made the following findings of fact:

34. The Complainant retained [Mr. Hoover] on September 11, 2008 to represent him in his divorce.
35. [Mr. Hoover] assured the Complainant he would file the Complainant's Answer by Monday, September 15, 2008 but [Mr. Hoover] failed to do so.
36. [Mr. Hoover] failed to accept or return the Complainant's telephone calls and failed to keep the Complainant informed about his case.
37. [Mr. Hoover] neglected the Complainant's case.

Based upon these findings, the hearing panel concluded that Mr. Hoover violated Rules of Professional Conduct 1.4 (a) and (b); and 8.4(a) and (d).

Mr. LeQuire testified before the hearing panel. He testified that he learned his wife of seven weeks had filed for a divorce. Mr. LeQuire was in Lexington, Kentucky, at the time and had plans for the weekend. Mr. Hoover told him that it was very important that an

answer to the divorce complaint be filed by Monday morning so Mr. LeQuire cancelled his plans and flew back to Tennessee. He and Mr. Hoover met on Friday, but Mr. Hoover cancelled the meeting on Saturday. They met again on Sunday. Mr. LeQuire called repeatedly on Monday but could not reach Mr. Hoover. The answer was filed on Wednesday.

Depositions were scheduled about 30 days later. Mr. Hoover told Mr. LeQuire they would meet the day before the scheduled depositions to prepare for them. Mr. LeQuire telephoned Mr. Hoover the day before the depositions and was told by Mr. Hoover they would meet the next morning. The next morning, he telephoned Mr. Hoover and was told they would meet in the parking lot outside the office where the depositions were to be held an hour prior to the depositions. Mr. LeQuire testified that Mr. Hoover did not arrive until after the time of the depositions and there was no preparation for them. According to Mr. LeQuire, Mr. Hoover did not even have his case file with him. Mr. Hoover asked nonsensical questions during the deposition and was wandering in his questioning. At one point, he made Ms. LeQuire upset and the deposition was halted. Mr. LeQuire felt the deposition was going so badly that during the recess, he made an offer of settlement to his wife's attorney in excess of what he had planned on offering. The offer was accepted and the case was settled.

The court is of the opinion there is substantial and material evidence to support the hearing panel's findings that Mr. Hoover failed to keep his client reasonably informed about the status of the matter in violation of Rule 1.4(a) of the Rules of Professional Conduct and that he failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation as required by Rule 1.4(b) of the Rules of Professional Conduct with regard to the complaint of Wayne LeQuire. It follows that Mr. Hoover also violated Rules 8.4(a) and (d).

File No. 32682-2-KS-Roy Nuenschwander

The last complaint was filed by an attorney, Roy Nuenschwander,. With regard to this complaint, the Petition for Discipline alleged violations of Rules of Professional Conduct, 1.3; 1.4; 3.2; and 8.4(a)(d) and (g). This complaint related to Mr. Hoover's handling of the case of Edwards v. Powers filed in the United States District Court for the Southern District of West Virginia and his involvement in the case Hoover v. Disney filed in the Circuit Court of Blount County, Tennessee. The findings of the hearing panel pertaining to these matters are as follows:

40. In Edwards v. Powers filed in the United States District Court for the Southern District of West Virginia, the District Court entered a June 5, 2003 Memorandum Opinion and Order finding in part the following:

The Court repeatedly has warned Plaintiffs counsel [Mr. Hoover] that he would be personally sanctioned if he continued to fail to comply with the discovery requests and orders of this court. Accordingly, the Court FINDS that it has given plaintiff's counsel more than sufficient notice of his alleged misconduct and the consequences of that misconduct. As stated in the show cause hearing, the court FINDS that Hoover has repeatedly violated the Orders of this court, the local rules and the Federal Rules of Civil Procedure. Although Mr. Hoover proffers that he did not 'intend to hinder or delay' litigation and that he 'has done the best [he] could' in this complex case, the court FINDS that these excuses are not credible and that Mr. Hoover's numerous violations of the rules were in fact made in bad faith with the intent to delay. The court thus GRANTS in part the defendant's motion for sanctions against plaintiff's counsel.

41. In its June 5, 2003 Memorandwn Opinion and Order, the District Court sanctioned [Mr. Hoover] \$12,649.58 and further Ordered:

Because of Hoover's flagrant abuse of this court's orders, the local rules and the Federal Rules of Civil Procedure, the court also ORDERS that Mr. Hoover be fined \$1,000 per week for every week that he does not pay these sanctions after they are due.

42. The District Court in its June 5, 2003 Memorandum Opinion further found in part:

Mr. Hoover has been admitted to this court *pro hac vice*. Admission *pro hac vice* is a privilege that this court grants to out-of-state counsel. In exchange, counsel is expected to abide by the rules and orders of this court, to behave in an ethical manner and to otherwise act as an officer of this court. Mr. Hoover has not met these standards. Instead, he has come perilously close to losing the case for his client and has caused undue expense and delay to the plaintiff, the defendant, defense counsel and the court. Mr. Hoover is not the type of attorney that should be practicing in this court. Following the disposition of this case, the court recommends that Mr. Hoover seriously reflect upon his misconduct in this case and review the ethical and procedural rules that govern the legal profession. Based

upon Mr. Hoover's absolute disregard for the practices and procedures of this court, the court ORDERS that M. J. Hoover, Ill's *pro hac vice* status be REVOKED and that he never again be allowed to practice before the United States District Court for the Southern District of West Virginia following the conclusion of matters in this case.

43. [Mr. Hoover] filed a Request to Alter or Amend the Judgment which was denied by the District Court by Order entered July 16,2003.

44. In State of West Virginia v. Hoover, the Knox County Chancery Court domesticated the Edwards v. Powers Judgment against [Mr. Hoover].

45. [Mr. Hoover's] Appeal of State v. West Virginia v. Hoover was dismissed by the Court of Appeals based upon [Mr. Hoover's] failure to timely file Notice of Appeal.

46. [Mr. Hoover] failed to pay this State of West Virginia v. Hoover Judgment.

47. In Hoover v. Disney, the Circuit Court of Blount County filed an Order on May 26, 2010 finding that the Complaint filed by [Mr. Hoover] violated Tennessee Rules of Civil Procedure 11.02 and on the Court's own initiative imposed sanction.

48. The Circuit Court in its Hoover v. Disney May 26, 2010 Order further found:

This Complaint and subsequent proceedings have been a waste of judicial economy and expense. The Complaint was vague; the Motion for Default was premature and Plaintiff's refusal to address a Request for Admissions in light of this demand for punitive damages is inexcusable. The Court further concludes that this proceeding is not the proper forum for the Defendant to seek further monetary damages against the Plaintiff since this matter has been decided in favor of Defendant and damages have been awarded pursuant to the Counter Complaint. Defendant has an adequate remedy at law to pursue any further relief from malicious or annoying litigation. Sanctions, however,

should be limited to such sufficient remedies as to deter further repetition as such conduct.²

49. The Circuit Court in its Hoover v. Disney May 26, 2010 Order further ordered:

That Mr. M. J. Hoover, III shall not be allowed to file any further complaints in the Circuit Court for Blount County unless these conditions are complied with:

1. The complaint may be submitted to Mr. Tom Hatcher, Circuit Court Clerk prior to filing.
2. Mr. Hatcher shall select two (2) attorneys from the local Bar that will screen the complaint in order to determine that the complaint meets the requirement of T.R.C.P. 11.02. If the screening process approves the complaint, the Clerk is to file the lawsuit.
3. The screening process will be in effect for one year from the date of this Order.
4. If a complaint is filed by Mr. Hoover pursuant to this Order, Mr. Hoover will be requested to abide by all discovery deadlines and file appropriate responses within the time prescribed by the Tenn.R.Civ.P. or the Blount County Local Rules of Practice. Failure to abide by such time periods will result in Mr. Hoover's suspension from practice in the Circuit Court of Blount County for one year.

The hearing panel found that Mr. Hoover's conduct in Edward v. Powers, based upon the findings of the United States District Court for the Southern District of West Virginia judge, violated Rules of Professional Conduct 1.3; 3.2; 8.4(a), (d) and (g). The hearing panel found Mr. Hoover's conduct in Hoover v. Disney case to have violated Rules of Professional Conduct 3.2; 8.4(a) and (d).

²This order was introduced as Exhibit 26 before the hearing panel. Exhibit 26 appears to be a five page order but pages two and four are missing. A full copy of this order, however, was attached to the Petition for Discipline in Paragraph 49 as Exhibit R. In his answer, Paragraph 49 of the Petition for Discipline was admitted by Mr. Hoover.

Rule 1.3, Rules of Professional Conduct requires an attorney to exercise reasonable diligence and promptness in representing clients. Rule 3.2 requires an attorney to make reasonable efforts to expedite litigation. In Edwards v. Powers, Judge Joseph R. Goodwin enumerated the numerous violations of the Federal Rules of Civil Procedure, the local rules of court, and orders of the court. He specifically found that "Mr. Hoover's numerous violations of the rules were in fact made in bad faith with the intent to delay." Similarly, in Hoover v. Disney, Judge Blackwood found that Mr. Hoover "failed to respond to Request for Admissions nor had [he] filed any request for relief from his obligation to respond to said request." These findings were not controverted by Mr. Hoover. In the opinion of the court, there was material and substantial evidence to support the findings of the hearing panel.

Mr. Hoover complains the Mr. Nuenschwander did not testify and was not subject to cross-examination. The hearing panel based its determinations on the findings of these two trial judges. Mr. Nuenschwander brought the existence of these cases to the attention of the Board. His testimony with regard to these matters would have been subject to an objection based on hearsay. In the opinion of the court, it was not necessary that Mr. Nuenschwander testify before the hearing panel.

Mr. Hoover, in his petition, alleges a certain witness or witnesses made misrepresentations to the hearing panel which can be refuted. He has produced no evidence, however, with regard to that allegation.

Having found each of the violations was supported by substantial and material evidence, the court next turns to whether the hearing panel's recommendation of disbarment was arbitrary or capricious or characterized by an abuse of discretion or was a clearly unwarranted exercise of discretion. After finding that Mr. Hoover had violated the Rules of Professional Conduct as outlined herein, the hearing panel considered aggravating and mitigating factors. The hearing panel found the following aggravating factors:

1. The [Mr. Hoover] has substantial experience in the practice of law, having been licensed since 1981.
2. The [Mr. Hoover] is guilty of multiple offenses of misconduct, and in violating numerous disciplinary rules.
3. [Mr. Hoover] has demonstrated a pattern of misconduct and total disregard for the Rules of Civil Procedure, ethical rules, court orders and the rights of different clients.

4. The [Mr. Hoover] has failed to acknowledge the wrongdoing and/or wrongful nature of the conduct. Except for passing statements indicating that, "I have made some mistakes," [Mr. Hoover] did not offer any excuse for his conduct, other than the assertion that he "was doing the best I could."
5. [Mr. Hoover] exhibited dishonest and selfish motives during the course of the hearing when, on the one hand, [Mr. Hoover] indicated that he would need to maintain his license so that he could generate funds to repay the obligations owed to his clients; however, except for the payment of \$5,000 between May 6, 2004 and June 30, 2004 to the Clerk of the United States District Court for the Southern District of West Virginia in partial satisfaction of the sanctions entered in that proceeding, [Mr. Hoover] has ignored his financial obligations to the Court, litigants and his clients, to include a veiled effort to satisfy his obligation to Mr. Whitton by allegedly issuing a partial payment to Mr. Whitton in the sum of \$100 the day before the Hearing Panel convened to address the Petition for Discipline.
6. The record evidence conclusively established that [Mr. Hoover] is absolutely incompetent and such incompetence has caused substantial harm to his clients and interfered with the administration of justice.

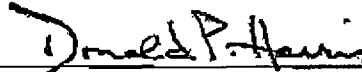
The hearing panel found no mitigating factors and noted that Mr. Hoover offered no proof of mitigating factors. It appears to the court that the hearing panel considered the ABA Standards for Imposing Lawyer Sanctions (ABA Standards) and the situations where disbarment is appropriate and where suspension is appropriate as required by Section 8.4, Rule 9, Rules of the Supreme Court. The hearing panel found that "due to the number of violations set forth in the Petition, the nature of the violations, the injuries sustained by clients and the continuing pattern of conduct on the part of [Mr. Hoover], despite numerous efforts to address and provide guidance to [Mr. Hoover], the Panel finds that disbarment is the appropriate remedy. Section 4.41 of the ABA Standards in subsections (b) and (c) provide that disbarment is appropriate where a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client. The court is of the opinion there is substantial and material evidence to support the findings of the hearing panel and that its judgment recommending the disbarment of Mr. Hoover was not arbitrary, capricious, or an unwarranted exercise of discretion.

Conclusion

For the foregoing reasons, the court is of the opinion the petition filed by Mr. Hoover seeking to overturn the action of the hearing panel should be denied and that the judgment of

the hearing panel should be affirmed in all respects. A decree will be filed simultaneously with this Memorandum denying the relief requested by Mr. Hoover, affirming the judgment of the hearing panel, and assessing costs to Mr. Hoover.

This the 18th day of October, 2011.



Donald P. Harris, Senior Judge

c: Sandy Garrett
Senior Litigation Counsel
Board of Professional Responsibility
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