



application. The Board contends these actions are in violation of Tennessee Rules of Professional Conduct 3.3(a)(1), 3.4(b), 8.4(a), and 8.4(c). Finally, the Board alleges that fees requested by Justice in the *Thomas* fee application were unreasonable because they greatly exceeded the scope of the court's order that awarded fees as a discovery sanction. The Board alleges this claim for fees constitutes a violation of Tennessee Rules of Professional Conduct 1.5(a) and 8.4(a).

#### **I. STATEMENT OF THE CASE**

1. The Petition for Discipline was filed in this matter on September 25, 2013.
2. Respondent, through his counsel, timely filed a Motion for Extension to Respond or for Alternative Relief on October 15, 2013. Petitioner filed a response to this Motion on October 15, 2013 and the Motion was granted by the Chair of the Board of Professional Responsibility on the same date permitting the Respondent up and through November 29, 2013 to file a response.
3. The Respondent filed an Answer/Response to the Petition and a Motion to Dismiss or in the Alternative to Stay the Proceedings on December 3, 2013. The Board filed a response to the Respondent's Motion to Dismiss or in the Alternative to Stay on December 9, 2013. The Panel denied Respondent's Motion to Dismiss or in the Alternative to Stay.
4. On June 6, 2014 the Petitioner filed a Motion to Dismiss Petition for Discipline or, in the Alternative, for a More Definite Statement and to Compel and for Protective Order. On June 16, 2014 the Board filed a Response to said Motion. The Panel denied the Motion to Dismiss, Motion for More Definite Statement and Motion for Protective Order. The Panel granted Respondent's Motion to Compel in part and ordered the Board to supplement its

Response to Respondent's Interrogatory No. 6 by October 15, 2014 specifying the time entries it contended were false entries.

5. On November 19, 2014 Benjamin Kerschberg, a witness in the case filed a Motion for Protective Order with the Panel. The Panel denied the motion by stating it did not have jurisdiction to rule on the request and informed the attorney for the witness and the parties that such a motion needed to be filed with the appropriate Court. The witness refiled the Motion for Protective Order, with the Knox County Chancery Court. The Chancery Court granted the motion in part and denied the motion in part.

6. On December 11, 2014 the Board filed a Motion to Compel Respondent to give a deposition after Respondent informed the Board that he intended not to testify and exercise his right against self-incrimination. On December 22, 2015 Respondent filed a Response to the Motion to Compel and Motion to Dismiss on the grounds that the Board violated Respondent's rights under the United States and Tennessee Constitutions due to improper commentary by the Board to the Panel concerning Respondent's exercise of his right against self-incrimination. On January 5, 2015 the Panel granted the Motion of the Board to compel Respondent to give his deposition. The Respondent's Motion to Dismiss was denied.

7. Both the Board and the Respondent filed various Motions in Limine regarding the introduction of testimony and exhibits. The rulings on those Motions are found in the Record.

8. The case was tried before the hearing Panel commencing on January 20, 2015 and adjourning on January 23, 2015. The parties were directed to submit proposed findings of fact and conclusions of law by not later than February 20, 2015.

## II. FACTS

### A. BACKGROUND

9. Justice is an attorney licensed to practice law in Tennessee since 1998. At all times material hereto, Justice practiced law as Loring Justice, PLLC. Justice employed Benjamin Kerschberg as a contract paralegal between May and September of 2009. Kerschberg submitted bi-weekly invoices from BK Advisory Group, LLC to Loring Justice, PLLC for his work on behalf of Justice.

10. Justice represented the plaintiff, Scotty Thomas ("Thomas") in the case of *Thomas v. Lowe's, Inc.* in the United States District Court for the Eastern District of Tennessee. Justice was representing the plaintiff for a contingency fee. On June 21, 2005, Thomas was employed by a contractor and was working on the premises of a Lowe's, Inc. ("Lowe's") store, when a large bay of metal roofing sheets collapsed on his head, causing various injuries. Lowe's denied liability. In addition, Lowe's denied any knowledge of Thomas' presence in the store, denied having any knowledge or records regarding the incident on its premises, and denied knowledge of the remerchandising project on which Thomas was working. Three years into the litigation, Justice and his staff found a former Lowe's Human Resources Manager, Mary Sonner, who was present when the incident occurred. She remembered the incident, confirmed that it occurred, remembered Thomas and his injuries, and remembered that she transported him to an urgent-care clinic.

11. Justice filed a motion for sanctions asserting that Lowe's had engaged in misconduct regarding its discovery obligations. A memorandum and order was entered by Judge Thomas W. Phillips on March 15, 2011 which provided that Lowe's would pay the plaintiff all

reasonable attorney's fees and expenses incurred in locating and deposing Mary Sonner.

Specifically, the Order provided:

Defendant shall pay Plaintiff all reasonable attorney's fees and expenses incurred in locating and deposing Ms. Sonner, including attorney's fees, transcription costs, court reporter fees, and other costs.

Plaintiff must provide documentation evidencing the fees, expenses, and costs incurred, associated with the discovery of Ms. Sonner.

12. On April 11, 2011 Justice submitted a preliminary fee petition to the Court. Included with the fee petition was an Itemized Accounting of Services wherein he set out, under penalty of perjury, the fees and expenses being sought by Loring Justice, PLLC.

13. On April 22, 2011, Justice submitted the final version of the fee petition which included an Itemized Accounting of Services wherein he set out in amended fashion, and again under penalty of perjury, the fees and expenses being sought by Loring Justice, PLLC.

14. Justice sought an award in the amount of \$106,302.00 for fees and expenses. The fee petition included 325.5 hours at the rate of \$300 per hour for the services of Justice and 11.3 hours at the rate of \$90 per hour for the services of Kerschberg.

15. With respect to both the original April 11, 2011 fee petition and the revised April 22, 2011 fee petition, Justice asserted to the Federal Court, under oath, that he maintained records for the work performed on behalf of the plaintiff.

16. As a result of Mr. Justice's fee petition, a show cause hearing was held before the Hon. Curtis Collier, Chief Judge of the United States District Court for the Eastern District of Tennessee, beginning on February 17, 2012. Mr. Justice testified at that hearing under oath. During the hearing, Justice claimed he did not wrongly attribute work done by Kerschberg to himself, he made no false certifications or false statements in the fee petition; he personally

worked the time attributed to him in the fee petition; he recorded his time and activities in a Microsoft Word document or on a notepad from which they were subsequently recorded in that Microsoft Word document; and that he recorded his time and activities within approximately one week of the time the work was performed.

**B. TIME RECORDING PRACTICES AT LORING JUSTICE, PLLC**

17. Loring Justice, PLLC does almost all contingency fee work, rarely bills hourly, and does not employ a more formal legal billing or timekeeping program.

18. Justice testified that at approximately the time of the Rule 26(f) discovery conference on December 10, 2008 he began keeping a record of his time and activities in the *Thomas* case.<sup>1</sup> Justice testified he sometimes wrote the entries on paper and later put them into the Word document. Justice did not produce any of the hand-written time records he purports to have made.

19. Justice testified that around the time of the Rule 26(f) conference, he directed all employees of Loring Justice, PLLC to maintain a record of their time and activities performed in *Thomas*.

20. Justice testified that he maintained his time in a Word document. Justice does not recall the name of the document.

21. Justice testified that Microsoft Word was also used to record time and activities of other employees of Loring Justice, PLLC.

22. In responding to the show cause order, Justice caused his office computers to be searched for earlier versions of the fee petition. One version of the document was located by Mr. Justice which originated in April of 2011. (Exhibit 7) Three additional versions were located by

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<sup>1</sup> The references to Justice's testimony come from his testimony at the hearing before the panel on January 23, 2015 unless otherwise noted.

an outside computer consultant. These three versions also originated in April of 2011. (Exhibits 8-10) No version of the Microsoft Word document existing before Judge Phillips' March 15, 2011 memorandum and order was produced.

**C. COMPARISON OF FEE PETITION AND KERSCHBERG INVOICES**

23. The Board alleged that seventeen specific time entries contained on Justice's fee petition were false. The Board asserts that on the specified entries, Justice claimed work performed by his paralegal Kerschberg as his own. The 17 entries on the fee petition where Justice claims to have performed the work are identical or nearly identical to the entries on the bills submitted by Kerschberg to Justice for work Kerschberg performed:

24. June 13, 2009:

- a. Kerschberg billed Justice for 1.25 hours for "Revision of Motion to Have Requests for Admission Deemed Admitted."
- b. Justice's Itemized Accounting of Services contains a billing entry for Justice for 1.2 hours for "Revision of Motion to Have Requests for Admission Deemed Admitted."

25. June 14, 2009:

- a. Kerschberg billed Justice for 2.25 hours for "Added Loring edits to Motion to Deem Requests for Admissions admitted. Added section about Letter to Clint Woodfin and Motion to Supplement. Researched electronic filing rules for the E.D. Tenn. Researched proper procedure for filing Amended Complaint (Local Rules; Scheduling Order; FRCP)."
- b. Justice's Itemized Accounting of Services contains a billing entry for Justice for 2.2 hours for "Edits to Motion to Deem Requests for

Admissions admitted. Added section about Letter to Clint Woodfin and Motion to Supplement. Researched electronic filing rules for the E.D.”

26. June 16, 2009:

- a. Kerschberg billed Justice for 2.5 hours for “All final preparations of Amended Complaint and Motion to Deem Requests for Admissions Deemed Admitted. Preparation of all PDF exhibits. Compilation of files. Filing with E.D. Tenn. via ECF. Hard copies of everything for file.”
- b. Justice’s Itemized Accounting of Services contains a billing entry for Justice for 2.5 hours for “All final preparations of Amended Complaint and Motion to Deem Requests for Admissions Deemed Admitted. Preparation of all PDF exhibits. Compilation of files. Filing with E.D. Tenn. via ECF. Hard copies of everything for file.”

27. June 16, 2009:

- a. Kerschberg billed Justice for 3.0 hours for “Edited Motion to Compel Discovery and Memorandum in Support thereof prepared by Juliane Moore.”
- b. Justice’s Itemized Accounting of Services contains a billing entry for Justice for 3.0 hours for “Preparation and editing of Motion to Compel Discovery and Memorandum in Support partially prepared by legal assistant.”

28. June 17, 2009:

- a. Kerschberg billed Justice for 4.0 hours for “Continued to revise and rewrite Motion to Compel Discovery.”



- b. Justice's Itemized Accounting of Services contains an entry for Justice for 4.0 hours for "Continued to research, revise and rewrite Motion to Compel Discovery."
29. June 17, 2009:
- a. Kerschberg billed Justice for 1.0 hours for "Talked to Angela Brush at district court to correct misunderstandings re our filings. Second conversation with LJ about Consent Motion to Amend with Clint Woodfin. Drafted Consent Motion for review by Clint Woodfin."
  - b. Justice's Itemized Accounting of Services contains an entry for Justice for 1.0 hours for "Talked to Angela Brush at district court to correct misunderstandings re our filings."
30. June 18, 2009:
- a. Kerschberg billed Justice for 4.5 hours for "Motion to Compel Discovery."
  - b. Justice's Itemized Accounting of Services contains an entry for Justice for 4.5 hours for "Continued research, revision and refinement of Motion to Compel Discovery."
31. June 19, 2009:
- a. Kerschberg billed Justice for .5 hours for "Letter to Bob Davies regarding additional materials needed from MSG."
  - b. Justice's Itemized Accounting of Services contains an entry for Justice for .5 hours for "Letter to Bob Davies regarding additional materials needed from MSG about the project."
32. July 16, 2009:

- a. Kerschberg billed Justice for .25 hours for "Reviewed Loring's notes from meeting with Clint Woodfina (sic) and calendared follow-up call to Cory re: Clint's call."
  - b. Justice's Itemized Accounting of Services contains an entry for Justice for .2 hours for "Reviewed notes from meeting with Clint Woodfin and calendared follow-up call to Cory Kitchen re: Clint's call."
33. July 22, 2009:
- a. Kerschberg billed Justice for July 22, 2009 for 5.0 hours for "Drafted and typed memo for trip to Alabama."
  - b. Justice's Itemized Accounting of Services contains an entry for Justice for 5.0 hours for "Drafted and typed memo for trip to Florence, Alabama to meet with Plaintiff's MSG co-workers. This memo summarized the liability issues in the case and listed important questions to ask to try to understand whether it was plausible Lowe's could lack notice and to prove Lowe's indeed had notice and to gain physical descriptions of individuals of interest."
34. July 27, 2009:
- a. Kerschberg billed Justice for 4.5 hours for "Reviewed all notes from our trip to Alabama and compiled Master To-Do List for Loring and BG. Drafted Affidavits of Kitchen, Yeates, and McBride. Online research re: Teresa Beavers (Lowe's Manager)."
  - b. Justice's preliminary Itemized Accounting of Services contains an entry for Justice for 4.5 hours for "Reviewed all notes from our trip to Alabama

to meet with the MSG witnesses and compiled Master To-Do List for Loring and B. Griffith, summer clerk. Drafted Affidavits of Kitchen, Yeates, and McBride. Online research re: Teresa Beavers (Lowe's Manager)."

- c. Justice's final Itemized Accounting of Services contains an entry for Justice for 4.5 hours for "Reviewed all notes from our trip to Alabama to meet with the MSG witnesses and compiled Master To-Do List. Drafted Affidavits of Kitchen, Yeates, and McBride. Online research re: Teresa Beavers (Lowe's Manager)," and deleting "for Loring and B. Griffith, summer clerk."

35. July 29, 2009:

- a. Kerschberg billed Justice for .25 hours for "Revisions of Affidavits of Kitchen, Yeates, and McBride."
- b. Justice's Itemized Accounting of Services contains an entry for Justice for .2 hours for "Revisions of Affidavits of Kitchen, Yeates, and McBride."

36. August 8, 2009:

- a. Kerschberg billed Justice for 4.0 hours for "Coordinated with Debi Dean to make sure that Randy, Bradley, and Corey will sign Affidavits and get them back to us notarized. Prepared final versions with LJ edits. Two versions for Bradley and Cory—one with and one without Teresa Beavers. Researched FRCP and EDTN Rules re; timeliness of Notice of Filing with respect to Hearing Date. Drafted Notice of Filing. Drafted Memorandum to accompany Notice of Filing with the court this week."

- b. Justice's Itemized Accounting of Services contains an entry for Justice for 3.0 hours for "Coordinated with Debi Dean of Alabama Head Injury Foundation to make sure that Randy, Bradley, and Corey will sign Affidavits and get them back to us notarized. Reviewed FRCP and EDTN Rules re; timeliness of Notice of Filing with respect to Hearing Date. Drafted Notice of Filing. Drafted Memorandum to accompany Notice of Filing with the court this week."
- 37. August 10, 2009:
  - a. Kerschberg billed Justice for .5 hours for "Coordination of all Affidavit signings, etc. with Debi Dean."
  - b. Justice's Itemized Accounting of Services contains an entry for Justice for .5 hours for "Coordination of all Affidavit signings, etc. with Debi Dean."
- 38. August 27, 2009:
  - a. Kerschberg billed Justice for 5.0 hours for "Reviewed file and all FRCP related to discovery to look at options and obligations for supplementation before the September 14 hearing, as well as the possibility of fee shifting."
  - b. Justice's Itemized Accounting of Services contains an entry for Justice for 5.0 hours for "Reviewed file and all FRCP related to discovery to look at options and obligations for supplementation before the September 14 hearing, as well as the possibility of fee shifting and sanctions."
- 39. August 31, 2009:
  - a. Kerschberg billed Justice for 2.0 hours for "Prepared outline for Loring as to action plan before September 14 hearing. Researched Lowe's

Loss/Safety Prevention Manager. Drafted proposed Interrogatory re: information (sic) on who held that position at the time of the accident. Revised and prepared cover letters to Clint Woodfin and Clerk's office."

- b. Justice's Itemized Accounting of Services contains an entry for Justice for 2.0 hours for "Prepared outline as to action plan before September 14 hearing. Researched Lowe's Loss/Safety Prevention Manager. Drafted proposed Interrogatory re: information on who held that position at the time of the accident. Revised and prepared cover letters to Clint Woodfin and Clerk's office."

40. September 9, 2009:

- a. Kerschberg billed Justice for 1.25 hours for "Reviewed our initial disclosures and discovery responses to see what needs to be supplemented. Reviewed all supplemental materials provided by Clint Woodfin. Detailed email to Loring reviewing thoughts on the supplemental documents and possible RFPs."
- b. Justice's Itemized Accounting of Services contains an entry for Justice for 1.2 hours for "Detailed email to file and staff after reviewing supplemental documents of defendant and possible RFPs. Google search for the two other female managers mentioned by Clint Woodfin."

41. Justice testified that on the 17 time entries at issue, he personally worked the time reflected in those entries and he did the work reflected in those time entries. Justice testified that he typically documented his time within seven to ten days of the work being performed.

**D. JUSTICE'S TESTIMONY REGARDING THE TIME ENTRIES IS NOT CREDIBLE**

42. With respect to each of the seventeen entries, Justice claimed he worked the amount of time reflected on the fee petition or more. The Panel finds his testimony in this regard is not credible.

43. Justice wrote Kerschberg acknowledging he had claimed time on the fee petition for himself that was work Kerschberg had actually done. Specifically, on April 11, 2011, Justice wrote an email to Kerschberg, that stated, "I billed a lot of the time for my reading your work rather than you doing it so you won't have to testify if it comes to that." (Exhibit 23). None of the time entries on the fee petition describe activities where Justice "read" Kerschberg's work.

44. Justice testified that the email to Kerschberg reflects the "Chamberlain" principle that Justice applied to entries on the fee petition where multiple attorneys or paralegals worked on the same task. For the most part, where two or more persons performed the same task, Justice claimed the amount placed on the fee petition was based on the "highest billing attorney, lowest amount spent by anyone on a duplicative project." Justice's claim that this email was his way of telling Kerschberg that he was applying the "Chamberlain" principle is not plausible.

45. The email contains no acknowledgement that Justice had performed the work. The email did not reference Chamberlain. Kerschberg had graduated from Yale Law School with Justice and clerked for Judge Gilbert Meritt on the Sixth Circuit Court of Appeals. Time entries reference Kerschberg spent time to "moot" Justice in preparation for hearings and performing complicated legal work. If Justice intended to communicate to Kerschberg, a knowledgeable and well-trained paralegal an intention to apply a legal principle such as "Chamberlain", he would not have told Kerschberg that Justice billed for "reading" Kerschberg's work.

46. Justice provides different and contradictory reasons why the entries on the fee petition and Kerschberg bills were identical. He asserts that Kerschberg may have copied Justice's entries. He asserts that his staff may have mistakenly entered the time. He asserts that the persons assisting in preparing the fee petition made mistakes, including his associate, Chad Rickman. ("Rickman") He asserts that errors on the petition may have resulted from inadvertent computer errors. In short, while offering numerous theories, Justice cannot provide any definitive explanation as to why entries attributed to him are identical (or nearly identical) to the entries on Kerschberg's time records.

47. Justice claims that it was not improper for his office to copy Kerschberg's language from the Kerschberg invoices on to the fee petition. Specifically, Justice argues if the time in Justice's entries was worked by Justice and the tasks described in them were performed by Justice, then similarity of language is no ethics violation. Justice further asserts if a lawyer in Justice's position had intentionally copied another timekeeper's language used in time entries (and Justice has testified that he did not), that conduct would violate no ethics rule, if the copying lawyer worked the time and did that task described. The panel agrees with these assertions.

48. However, Kerschberg's billing records were sent to Loring Justice PLLC at or near the time Kerschberg's time was recorded. Loring Justice PLLC paid the invoices. At the time the invoices were paid, Justice did not question whether Kerschberg performed the work. The Panel finds that based on the evidence presented, Kerschberg actually performed the work set forth on his invoices.

49. With respect to the same descriptions and time entries being placed on the fee petition and credited to Justice, there is no independent proof that Justice also performed the same work for the same amount for time.

50. Justice was asked whether any of the 17 identical or nearly identical entries on the Kerschberg bills were incorrect or inaccurate. With minor exceptions, Justice did not find Kerschberg's entries were incorrect or inaccurate. Instead, Justice asserted he and Kerschberg were performing the same or similar work at the same time including clerical tasks such as making copies. This explanation is also not plausible.

51. Justice testified that Rickman was "primarily" responsible for the itemization of entries on the fee petition. Given that Rickman was not working at Loring Justice, PLLC in 2009 and there were no independent records of Justice's time available at the time the fee petition was drafted, Rickman could not determine the accuracy of Justice's entries. Moreover, entries on the fee petition itself claim Justice worked on the itemizations on the fee petition. There is not a single entry claiming Rickman actually worked on the itemized fees and expenses submitted with the fee petition.

52. Justice testified the document that later became the fee petition evolved over time and that various timekeepers input their time into the document. Rickman testified that while Justice told him that Justice was keeping time, the first time Rickman saw the document that later became the fee petition was after the order from the Court awarding fees was issued in March 2011.

53. The credibility of Justice's testimony regarding his work is further called into question by his demeanor on the witness stand. Questions from the panel to Justice were often met with lengthy periods of silence prior to answering the question. Justice's answers to other questions posed by the Panel regarding the fee petition were often evasive.



**E. MANY OF THE ENTRIES ON THE FEE PETITION DO NOT RELATE TO THE FEES APPROVED IN THE COURT'S ORDER.**

54. Judge Phillips' order provided the basis for the recovery of fees against Lowe's due to discovery abuse. The Order permitted plaintiff to recover "all reasonable attorney's fees and expenses incurred in locating and deposing Ms. Sonner..." and required Plaintiff "provide documentation evidencing the fees, expenses, and costs incurred, associated with the discovery of Ms. Sonner."

55. The Panel finds the Order was specific and clear regarding the fees, costs, and expenses that should be submitted by Justice. Only fees, costs, and expenses that could be shown to relate to locating and deposing of Ms. Sonner should have been submitted. Even the most liberal reading of the Order required that any fees, costs, and expenses submitted on the fee petition must bear a relationship to the task of finding Ms. Sonner and deposing her.

56. Justice's Itemized Accounting of Services contains numerous entries that did not relate to locating or deposing the witness Mary Sonner. Numerous additional entries do not explain how they relate to locating or deposing Mary Sonner.

57. Justice asserts that Justice and Rickman each interpreted Judge Philips' order to encompass more than just physically locating Ms. Sonner and this interpretation was a reasonable one, even if ultimately rejected by the court. Justice points to the language of Magistrate Judge Guyton's Report and Recommendation that states, "The court finds that the plaintiff should be compensated for the labor and costs incurred in finding Ms. Sonner, because these costs are necessitated by the defendant's failure to properly investigate the allegations of the suit." Both Justice and Rickman testified that when reviewing both Judge Guyton's Report and Recommendation and Judge Phillips' Order together, they were permitted to submit fees beyond time spent locating and deposing Ms. Sonner.

58. The Panel does not find that Judge Guyton's Report and Recommendation changed, modified or added anything to Judge Phillips' Order. Moreover, nothing contained in Judge Guyton's Report and Recommendation would lead a reasonable attorney to believe that they were entitled to request Lowe's pay for tasks such as attending Rule 26 conferences, drafting initial discovery, amending the complaint or reviewing hotel reservations.

59. The Panel finds that the submission of 371.50 hours of time and \$106,302.00 of fees goes well beyond the scope of the order and that Justice knew he was requesting compensation for time not related to "locating and deposing Mary Sonner."

60. The Panel further finds that with respect to the 17 entries at issue, Justice knew that he was representing to the Court that he had performed work that was in fact performed in whole or in part by other individuals and that he (a) did not perform the work or (b) did not work the time that was set forth on the fee petition.

61. In the fee petition, Justice attributed work to himself that had actually been performed by Kerschberg resulting in Justice requesting compensation at the rate of \$300 per hour instead of \$90 per hour.

62. Justice gave a false statement under oath in the fee petition in *Thomas v. Lowe's, Inc.* by claiming that work actually performed by Kerschberg was performed by himself.

63. Justice claims he intended to give their client, Thomas, any fee awarded by the Court as a result of the sanction motion. Justice provides two reasons for giving any fee awarded to Thomas. First, Justice testified case law prohibits him from collecting a contingency fee and the fees awarded by the Court as a result of the discovery sanction. Second, Thomas needed it more.

64. Rickman claimed that the Court's order required that any fee awarded was required to be paid to Thomas.

65. The Panel finds this post-conduct rationale that Thomas was to receive any fee award as a basis for requesting in excess of \$100,000 for locating and deposing Ms. Sonner unbelievable. The Order awarded Plaintiff "all reasonable attorney's fees and expenses incurred." If the Order was to be read literally (as Rickman purports to do), Thomas would not be entitled to any attorney fees. Because the case was being handled on a contingent fee, Justice recovered no fees unless he prevailed or settled the case. At the time of the fee petition, Justice had neither prevailed nor settled the case. Accordingly, Thomas had not *incurred* any attorney fees.<sup>2</sup>

66. Justice's assertion that he could not keep any fees awarded by the Court because he was working for Thomas pursuant to a contingency fee contract is illogical. Nothing prevented Justice from deducting the fees awarded by the Court from any fee Justice collected if he prevailed or settled the matter.

67. Justice provided no proof (other than the post-conduct testimony of Justice and Rickman) evidencing an agreement or intent to give the fee awarded by the Court to Thomas.

68. For the same reasons set forth *supra*, Justice's testimony regarding his intent to give the fee award to Thomas is not credible.

69. As a result of Justice's fee petition, a show cause hearing was held before the Hon. Curtis Collier, Chief Judge of the United States District Court for the Eastern District of Tennessee, beginning on February 17, 2012. Justice testified at that hearing under oath.

70. Justice testified at that hearing to the following:

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<sup>2</sup> The Panel acknowledges that Justice had advanced expenses on behalf of Thomas. Justice testified that he intended to keep any expenses awarded.

- a. He did not wrongly attribute any work to himself in the fee petition that had actually been performed by Kerschberg.
- b. He made no false certifications or false statements in the fee petition.
- c. He personally worked the time attributed to him in the fee petition.
- d. He recorded his time and activities in a Microsoft Word document or on a notepad from which they were recorded in that Microsoft Word document later.
- e. He recorded his time and activities within approximately one week.

71. The Panel finds these statements made to Judge Collier in the federal court proceeding were false and that Justice knew they were false.

### III. CONCLUSIONS OF LAW

Pursuant to Tenn. S. Ct. R. 9, Section 3, the license to practice law in this state is a privilege and it is the duty of every recipient of that privilege to conduct himself at all times in conformity with the standards imposed upon members of the Bar as conditions for the privilege to practice law. Acts or omissions by an attorney which violate the Rules of Professional Conduct ("RPC") of the State of Tennessee shall constitute misconduct and be grounds for discipline. The Board must prove the allegations against Justice by a preponderance of the evidence. Tenn. S. Ct. R. 9, Section 15.2(h).

The Board alleges the fees requested by Justice in the fee application were unreasonable because they greatly exceeded the scope of the court's order in violation of Tennessee Rule of Professional Conduct 1.5(a) and 8.4(a). The Board claims the submission of false entries in the fee petition constitutes violations of Tennessee Rules of Professional Conduct 3.3(a)(1), 3.4(b), 8.4(a), and 8.4(c). The Board also alleges that Justice made a false written representation to the

court in *Thomas* concerning the time records kept by his firm and that Justice falsely testified in a federal lawyer disciplinary proceeding arising out of the fee application. The Board contends these actions violate Tennessee Rules of Professional Conduct 3.3(a)(1), 3.4(b), 8.4(a), and 8.4(c).

**A. RULE 1.5: FEES**

- a. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

The Panel finds that the Board has proven by a preponderance of the evidence that the fee petition submitted by Justice to the District Court requested an unreasonable fee. The fee sought greatly exceeded the time and labor required to locate and depose Ms. Sonner. By including numerous items in the fee petition that far exceeded the scope of the order awarding fees reasonably incurred in locating and deposing Mary Sonner, Justice charged an unreasonable fee in violation of RPC 1.5(a), Fees.

**B. RULE 3.3: CANDOR TOWARD THE TRIBUNAL**

- a. A lawyer shall not knowingly:
- (1) Make a false statement of fact or law to a tribunal...

The Panel finds that the Board has proven by a preponderance of the evidence that Justice's actions, including adopting work actually performed by Kerschberg as work performed by himself as set forth in the fee petition that was submitted to the federal court under oath, constitutes making a false statement of fact to a tribunal in violation of RPC 3.3(a)(1), Candor Toward the Tribunal.

In addition, by testifying falsely in the show case hearing before Judge Collier that he made no false certifications or false statements in the Fee Petition, personally worked the time

attributed to him in the Fee Petition, recorded his time activities in a Microsoft Word document or on a notepad from which they were recorded in the Microsoft Word document later and that he recorded his time and activities within approximately one week of the work being performed constitute false statements of fact to a tribunal in violation of RPC 3.3(a)(1), Candor Toward the Tribunal.

**C. RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

- a. Falsify evidence, counsel or assist a witness to offer a false or misleading testimony...

The Panel finds that Board has proven by a preponderance of the evidence that Justice's actions in adopting work actually performed by Kerschberg as work performed by himself was the falsification of evidence and constitutes a violation of RPC 3.4(b), Fairness to Opposing Party and Counsel.

**D. RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to:

- a. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- c. engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The Panel finds the Board has proven by a preponderance of the evidence that Justice's actions including adopting work actually performed by Kerschberg as work performed by himself, making false statements in the fee petition, testifying falsely at the show cause hearing

and including numerous items in the fee petition that far exceeded the scope of Judge Phillip's order constitute violations of RPC 8.4(a) and (c), Misconduct.

**E. ADVERSE INFERENCE**

The Board requested the Panel take an adverse inference against Justice due to his assertion of his right not to testify pursuant to the 5<sup>th</sup> Amendment of the United States Constitution during his deposition. Justice objected to both the Panel being informed that Justice was exercising his 5<sup>th</sup> Amendment rights and the Board's request that the Panel take an adverse inference.

While recognizing that the Tennessee Supreme Court had called attorney disciplinary proceedings "quasi-criminal" in nature, the Tennessee Supreme Court and Tennessee Supreme Court Rule 9 recognize that these proceedings are civil cases. The Tennessee Supreme Court outlined the parameters for when the trier of fact may draw an adverse inference from a party's invocation of his Fifth Amendment privilege in civil cases. In *Akers v. Prime Succession of Tennessee, Inc.*, 387 S.W.3d 495 (Tenn. 2012) the Court held:

[T]he trier of fact may draw a negative inference from a party's invocation of the Fifth Amendment privilege in a civil case only when there is independent evidence of the fact to which a party refuses to answer by invoking his or her Fifth Amendment privilege. In instances when there is no corroborating evidence to support the fact under inquiry, no negative inference is permitted.

In this case, the Board met its burden under *Akers* that would have permitted the Panel to take an adverse inference with respect to the questions asked during the deposition. Nevertheless, the Panel declines to take the adverse inference requested by the Board. The Panel finds the Board met its burden of proof based upon the exhibits, the testimony of Justice and Rickman at the hearing before the Panel, the testimony of Justice during the federal show cause hearing and Kerschberg's deposition.

## **F. AGGRAVATING AND MITIGATING CIRCUMSTANCES**

When disciplinary violations are established by a preponderance of the evidence, the appropriate discipline is to be determined 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. The Panel finds the following aggravating factors are present in this case:

1. A dishonest or selfish motive;
2. Pattern of Misconduct;
3. Multiple offenses;
4. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
5. Refusal to acknowledge wrongful nature of conduct; and
6. Substantial experience in the practice of law.

The Panel finds the following factors in mitigation are present:

1. Absence of a prior disciplinary record; and
2. The imposition of other penalties or sanctions, in the form of Chief District Court Judge Collier's Order in the case of *In re: Loring Justice* which suspended Respondent from the practice of law in the United States District Court for the Eastern District of Tennessee for a period of six (6) months.

## **G. SPECIFICATION OF DISCIPLINE**

Pursuant to Rule 9, §8.4 of the Rules of the Supreme Court of Tennessee, having found one or more grounds for discipline of the Respondent, the Hearing Panel specifies the following discipline as appropriate:



1. That the Respondent, Loring Edwin Justice, be suspended from the practice of law for a period of one (1) year with proof of rehabilitation to be demonstrated in a reinstatement proceeding pursuant to Rule 9, §4.2 of the Rules of the Supreme Court of Tennessee.

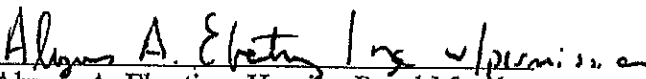
2. That the Respondent, Loring Edwin Justice, be required to complete twelve (12) hours of continuing legal education approved for ethics, in addition to any other continuing legal education requirements, prior to reinstatement.

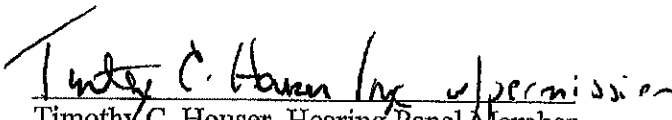
3. That the costs of these proceedings be taxed to the Respondent, Loring Edwin Justice.

**IT IS SO ORDERED.**

ENTER on this the 9<sup>th</sup> day of March, 2015.

  
Michael J. King, Hearing Panel Chair

  
Alyson A. Eberting, Hearing Panel Member

  
Timothy C. Houser, Hearing Panel Member

**NOTICE**

The judgment of the Hearing Panel herein may be appealed pursuant to Section 1.3 of Rule 9 of the Rules of the Supreme Court of Tennessee by filing a petition for writ of certiorari, which petition shall be made under oath or affirmation and shall state that it is the first application for the writ. See Tenn. Code Ann. §27-8-104(a) and §27-8-106.