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BOARD OF PROFESSIONAL
RESPONSIBILITY

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

IN RE: JAMES LESTER KENNEDY
BPR # 5453, Respondent,
An Attorney Licensed and
Admitted to the Practice of
Law in Tennessee
(Knox County)

DOCKET NO. 2016-2618-2-AJ

ORDER

This matter came to be heard on January 11, 2017, at 1:00 p.m. for hearing on the Petition for Discipline before Joseph Ford, Hearing Panel Chair, Virginia Couch, Hearing Panel member and James O'Kane, Hearing Panel member. Respondent James Kennedy appeared *pro se*, and Alan D. Johnson appeared on behalf of the Board of Professional Responsibility. Each party was given a deadline of February 13, 2017, to file Proposed Findings of Fact and Conclusions of Law. Mr. Johnson on behalf of the Board filed his on February 10, 2017. Mr. Kennedy filed his *pro se* on February 21, 2017.

STATEMENT OF THE CASE

A Petition for Discipline was filed against Mr. Kennedy on August 18, 2016. Mr. Kennedy did not file a response or otherwise answer the Petition, and a Default Judgment was entered against him on November 9, 2016. Pursuant to the Default Judgment, all allegations contained in the Petition for Discipline are deemed admitted.

At the beginning of the hearing, Mr. Kennedy submitted a document titled "Respondent's Response to the Board." He also requested that the default judgment be set aside. After hearing

from the parties, the Hearing Panel adjourned, and returned announcing that the default judgment would not be set aside.

Disciplinary Counsel presented the Board's proof that consisted primarily of the facts in the Petition for Discipline deemed admitted. Mr. Kennedy testified thereafter.

FINDINGS OF FACTS

The Findings of Fact consist of the admitted allegations of the Petition for Discipline along with the Exhibits attached thereto, and testimony of Mr. Kennedy.

FILE NO. 44135-2-BG - COMPLAINANT - WILLIAM HARRIS

1. On February 4, 1987, Mr. William J. Harris, Sr., father of the Complainant, died leaving a will which provided for a testamentary trust for the beneficiaries.
2. Complainant and two siblings were named as beneficiaries.
3. Respondent, who had prepared the will, was named as the executor of the estate.
4. On February 11, 1987, the estate was opened.
5. On August 14, 1987, a \$105,555 claim by Harco Corporation was filed against the estate. Harco was a closely held corporation of the deceased, and the claim was based upon loans made to the deceased over a period of time.
6. Due to inaction on the case, on January 22, 1989, the Court began issuing notices to appear and settle the estate.
7. Respondent did not inform the beneficiaries and heirs of the notices.
8. In 1993, Respondent advised Complainant that the final accounting of the will was imminent.
9. On June 29, 1993, Complainant and Respondent entered into a written agreement providing in part that Complainant would withhold litigation regarding the management of the

Trust if Respondent would divide the interests in the Trust into three separate accounts as called for in the Trust document, and place \$60,000 into Complainant's portion of the Trust until an accurate accounting could be completed.

10. In 2009 (22 years after the death of the testator), a dispute arose between the beneficiaries.

11. In settling the dispute, it was discovered that the probate case had never been closed; that the Harco Corporation's \$105,555 claim against the estate had never been released; that Respondent had ignored repeated orders by the Court to appear and settle; and in 2000, the Court had retired the case due to inactivity.

12. On June 26, 2009, Complainant filed a Motion seeking Respondent's disclosure of the assets, and disposition of the estate and trust.

13. On September 8, 2010, Respondent was ordered to file annual accountings which he failed to do. (Master's Report dated August 28, 2013, page 5).

14. On October 25, 2012, the Court granted Complainant's Motion for Contempt and Other Relief.

15. The October 25, 2012 order directed that Respondent: 1) "organize and prepare annual summaries of all assets collected and preserved in this estate commencing with the inventory of the decedent's assets at his death on February 4, 1987, up to and including the period ending February 4, 2012"; 2) "that each annual summary shall contain a cover sheet itemizing the beginning and ending balance of that period organized in individual files which files shall contain the detail supporting the receipts and disbursements which would include bank, investment company or mutual fund records, receipts, vouchers cancelled checks and liens, encumbrances, carrying value, acquisition and sale by date of real property either directly or

indirectly to the estate”; 3) “that each successive annual summary shall begin with the ending balance of the prior annual period and likewise shall contain a summary which itemizes the receipts, disbursements and ending balance together with the supporting detail”; and, 4) that the “executor shall file with the court the completed annual summaries no later than February 1, 2013, and affirm that the paper copies have been delivered to the beneficiaries.”

16. Pursuant to the Report entered October 25, 2012, a status conference was held on March 22, 2013. The Court entered an order following the status conference on March 25, 2013, setting a hearing on the Complainant’s “Renewed Motion for Sanctions and Findings of Contempt” and other motions to be filed for June 21, 2013.

17. On June 21, 2013, the Clerk and Master heard the parties on the “Renewed Motion for Sanctions and Findings of Contempt”.

18. During the course of the June 21, 2013, hearing, it was established that Respondent had not complied with the previous orders to produce the accounting.

19. At one point during the June 21, 2013, hearing, the Clerk and Master stated: “Mr. Kennedy, look, we have heard this for three years now, and we just don’t have it [the records and accounting], and you have explained three years ago, in October of 2009 - we’re going on four years - I guess it’s four years - no, it will be four years in October - that you were going to get this together, that you were going to accumulate the records and financial documents and you were going to provide them to [the beneficiaries]. . .” (Transcript of June 21, 2013, hearing, page 20, lines 6-16.)

20. At the end of the June 21, 2013, hearing, the Clerk and Master adjourned the hearing to a later date and directed Respondent to produce the accounting before the hearing. (Transcript of June 21, 2013, hearing, page 25, lines 13-20).

21. Following a hearing on August 2, 2013, Respondent was ordered to “File annual accountings for the first five (5) years of his term as executor within thirty (30) days.” (Master’s Report dated August 28, 2013, pages 2-3).

22. The Clerk and Master further reported that “an Order was entered October 25, 2012, directing [Respondent] to file annual accountings . . . commencing February 4, 1987, through February 4, 2012 . . . by no later than February 1, 2013. No such annual accountings or summaries have been filed . . .” (Master’s Report dated August 28, 2013, page 2).

23. The Master concluded that “[Respondent’s] failure to file accountings, in spite of repeated assurances and contrary to the Court’s deadlines, established that he is acting in bad faith and in contempt of the court’s orders.” (Master’s Report dated August 28, 2013, page 4).

24. Ultimately, the Clerk and Master ordered that Respondent be removed as executor, replaced him with one of the beneficiaries and ordered that he file “annual accountings in the form of summaries as set out in the Order entered September 8, 2010” within thirty (30) days. (Master’s Report dated August 28, 2013, page 5).

25. On October 4, 2013, the Court entered an Order of Confirmation removing Respondent as the executor and directing Respondent to file annual accountings with documentation within thirty (30) days and to turn over all estate assets to the *administratrix*.

26. Respondent failed to file the annual accountings and turn over all estate assets to Complainant as directed by the Court.

27. During a hearing conducted on October 14, 2015, it was established that the Respondent had not transferred the assets of the estate to the *administratrix*. (Transcript of October 14, 2015, hearing, page 2, lines 17-20; p. 9, lines 13-19.)

28. At the hearing on this Petition for Discipline, Respondent testified that the estate has now been closed.

29. He testified that early in the process, two beneficiaries had agreed to a potential division of the estate assets, but the remaining beneficiary had not.

30. He also testified that he could have filed an affidavit with the court regarding the remaining beneficiaries' refusal to agree, but did not do so.

31. Respondent also testified that it was difficult to close the estate because the beneficiaries immediately began making demands for receipt of some of their inheritance.

32. Respondent argued that he should not be subject to the Rules of Professional Conduct because he was acting in the capacity as an executor of the estate and not a lawyer.

CONCLUSIONS OF LAW

The Hearing Panel will first address Respondent's position that he is not subject to the Rules of Professional Conduct because he was acting in the capacity as the executor of the estate and not as a lawyer. The Hearing Panel finds this argument to be without merit. First, a default judgment was entered which deemed the allegations of the Petition for Discipline admitted. Respondent has waived this issue.

Notwithstanding Respondent's waiver of this issue, the Hearing Panel finds that the Rules of Professional Conduct apply to Respondent's actions as executor of the estate. It has long been established that an executor of an estate occupies a fiduciary position.

An executor of an estate occupies a fiduciary position. As such, the executor must deal with the beneficiaries in utmost good faith and "exercise the same degree of diligence and caution that reasonably prudent business persons would employ in the management of their own affairs."

In addition to general fiduciary duties requiring an executor to act with diligence and prudence, an executor owes specific duties to the estate and the beneficiaries

of the estate. Most relevant to the present matter is the executor's duty to "collect and disburse the assets as *expeditiously* as possible under the circumstances"

The executor owes a duty to marshal and collect the assets of an estate within a reasonable time; discharge his statutory duties and distribute the estate in a timely manner; and close his administration as quickly as possible.

This duty arises because the law favors prompt administration of estates. An executor also has a duty to communicate with beneficiaries and the court in a professional manner.

In Re Estate of Ladd, 247 S.W.3d 628, 637 (Tenn. Ct. App. 2007) (citations omitted)

Although the Tennessee Supreme Court has not addressed this issue expressly, Tennessee lawyers have been sanctioned for actions taken as a fiduciary, even though they were not acting in the capacity as a lawyer. In *Nevin v. Board of Professional Responsibility*, 271 S.W.3d 648 (Tenn. 2008) the Supreme Court sanctioned a lawyer for actions taken in the capacity as a conservator. The Court held that he violated the Disciplinary Rules by, among other things, failing to act with reasonable diligence and promptness and neglecting a matter entrusted to him. 271 S.W.3d at 653. Like an executor, a conservator occupies a fiduciary position. *Grahal v. Davis*, 971 S.W.2d 373, 377 (Tenn. 1998) ("A conservator occupies a fiduciary position of trust of the highest and most sacred character").

In addition, the Superior Court of Connecticut in *Chief Disciplinary Counsel v. Rozbicki*, 2013 WL 1277298 (2013) addressed the issue in a disciplinary proceeding against a lawyer who served as the executor of an estate. The lawyer in that case also argued that the Rules of Professional Conduct did not apply because the actions he took were as executor and neither the complainant nor the beneficiaries were his clients. The Court rejected his argument, stating as follows:

"When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct." (Internal quotation marks omitted.) *In the Matter of George Hultman, II*, Review Department of the State Bar Court of California, Docket No. 91-O-07738 (April

28, 1995, Norian, J.) (3 Cal. State Bar Ct. Rptr. 297); see *Guzzetta v. State Bar*, 43 Cal.3d 962, 741 P.2d 172 (1987) (non-client treated as “client” for purposes of discipline where attorney assumed fiduciary responsibility with the non-client).

In the present case, Attorney Rozbicki assumed fiduciary responsibilities towards the beneficiaries when he became executor of the estate. Thus, Attorney Rozbicki may be disciplined as if the beneficiaries were his clients. See *In the Matter of George Hultman, II, supra*, 3 Cal. State Bar Ct. Rptr. 297 (respondent assumed fiduciary duties toward the beneficiaries when he became trustee of the trust and could be disciplined as if they were his clients). Moreover, Attorney Rozbicki was made executor of Kathleen Gisselbrecht’s estate with full knowledge that he was a lawyer and with an expectation that he would execute the estate as such. See *Lawyer Disciplinary Board v. Martin, supra*, 225 W. Va. 393 n. 13.

Chief Disciplinary Counsel v. Rozbicki, 2013 WL 1277298, at p. 6

Respondent also testified that he received no compensation other than \$200.00 for a trip to Nashville. Non-payment for services rendered by a lawyer is not a defense to allegations that the lawyer violated Rules of Professional Conduct. Once a lawyer assumes a fiduciary responsibility, the lawyer is subject to discipline regardless of whether the lawyer is paid.

Finally, Respondent suggested that his failure to fulfill his fiduciary obligations to the court and close the estate in a timely fashion was the result of the beneficiaries demanding money from the estate shortly after it was opened. The Hearing Panel perceives this argument as an attempt to establish mitigating circumstances; however, the ABA Standards for Imposing Lawyer Sanctions, (“ABA Standards”), provide that “agreeing to a client’s demand for certain improper behavior or result is neither a mitigating nor aggravating factor.” ABA Standard 9.4 (b).

Based upon the admitted allegations in the Petition for Discipline, and the record of this case, the Hearing Panel concludes that Respondent violated the following Rules of Professional Conduct (“RPC”):

1. Respondent failed to maintain adequate accounting and recordkeeping concerning the assets of the estate in violation of RPC 1.1 (competence).

2. Respondent engaged in egregious delay in his handling of the estate, in violation of RPC 1.3 (diligence).

3. Respondent violated the Court's orders requiring the submission of accountings and the transfer of estate assets, in violation of RPC 3.4(c) (failure to comply with orders of the tribunal).

4. Respondent violated RPC 8.4(d) (conduct prejudicial to the administration of justice), and RPC 8.4(a) (misconduct).

Pursuant to Tenn. S. Ct. R. 9, § 1, 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 of the State of Tennessee shall constitute misconduct and be grounds for discipline.

When disciplinary violations are established by a preponderance of the evidence, the appropriate discipline must be based upon application of the ABA Standards pursuant to Section 15.4, Rule 9 of the Rules of the Supreme Court.

The Hearing Panel shall now consider both Disbarment and Suspension of Mr. Kennedy's law license.

The following ABA Standards arguably could apply in this matter:

4.41 Disbarment is generally appropriate when:

- (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

- (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.
- 4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.
- 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
- 8.1 Disbarment is generally appropriate when a lawyer:
 - (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

In this case, the estate was opened on February 11, 1987. Twenty-two (22) years later, in 2009, it was discovered that the probate case had never been closed; that a claim against the estate in the amount of \$105,555.00 filed by the Harco Corporation in 1987 had never been released; that Mr. Kennedy had ignored repeated orders by the Court to appear and settle; and in 2000, the Court had retired the case due to inactivity.

Thereafter, over a period of approximately four (4) years, Respondent repeatedly failed to comply with the court's orders to file annual accountings. The court ultimately held that Respondent had acted in bad faith and in contempt of the court's orders his "failure to file accountings, in spite of repeated assurances and contrary to the Court's deadlines."

The following ABA Standards arguably could apply to this case:

- 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.
- 4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.
- 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
- 8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Aggravating Factors

Pursuant to ABA Standard 9.22, the following aggravating factors are present in this case:

- (a) prior disciplinary offenses;
- (d) multiple offenses; and
- (i) substantial experience in the practice of law.

On November 5, 1999, Mr. Kennedy received an Informal Admonition for failing to act with reasonable diligence and promptness in his representation of a client. (Trial Exhibit 3) On July 12, 2005, Mr. Kennedy was suspended from the practice of law for ninety (90) days for failing to act with reasonable diligence and promptness in representing a client with regard to an estate and failing to keep the client reasonably informed about the matter. (Trial Exhibit 4) Mr. Kennedy has substantial experience in the practice of law having been licensed to practice in 1977.

The Hearing Panel finds, however, that there are mitigating factors in this case to justify a downward departure from the baseline standard of disbarment.

Mitigating Factors

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

- (b) absence of a dishonest or selfish motive; and
- (l) remorse.

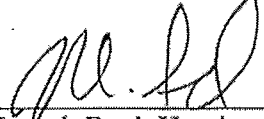
The Hearing Panel heard no proof regarding a dishonest or selfish motive and concludes this is a substantial mitigating factor. Mr. Kennedy also showed remorse for his actions at the hearing of January 11, 2017 and in his submission to the Hearing Panel of Findings of Fact and Conclusions of Law.

CONCLUSION

Pursuant to the ABA Standards, taking into account the aggravating and mitigating factors, the Hearing Panel recommends that Mr. Kennedy should be suspended from the practice of law for one year.

this the 13th day of March, 2017.

IT IS SO ORDERED,



Joseph Ford, Hearing Panel Chair

Virginia Couch by MF w/ perm.

Virginia Couch, Hearing Panel Member

James O'Kane by MF w/ perm.

James O'Kane, Hearing Panel Member

NOTICE TO RESPONDENT

This judgment may be appealed pursuant to Tenn. Sup. Ct. R. 9, § 3.3.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Order, has been sent to Respondent, James Lester Kennedy, 3100 Alcoa Drive, Knoxville, TN 37920, by U.S. First Class Mail, and hand-delivered to Alan D. Johnson, Disciplinary Counsel, on this the 13th day of March, 2017.

A handwritten signature in cursive script, appearing to read "Rita Webb", is written over a horizontal line.

Rita Webb
Executive Secretary