



CERTIFICATE

The undersigned hereby certifies that a copy of the forgoing Final Decree has been forwarded to Kevin D. Balkwill, Counsel for the Board of Professional Responsibility, 10 Cadillac Drive, Suite 220, Brentwood, TN 37027; and to W. Gerald Tidwell, 817 Broad Street, Suite 200, Chattanooga, TN 37402, this the \_\_\_\_\_ day of July, 2012.

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Clerk and Master



## STANDARD OF REVIEW

In reviewing the findings and conclusions of the hearing panel in a disciplinary proceeding, the court must be guided by Rule 9, section 1.3 of the Rules of the Supreme Court which provides in pertinent part as follows:

The Respondent-attorney (hereinafter "Respondent") or the Board may have a review of the judgment of a hearing panel in the manner provided by [Tennessee Code Annotated section] 27-9-101 et seq., except as otherwise provided herein. The review shall be on the transcript of the evidence before 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 evidence that was introduced during the evidentiary hearing on January 14, 2011, and the entire record. With regard to the issues raised by Mr. Maddux, the court finds as follows.

The facts which give rise to this disciplinary action are set out in the Petition for Discipline as follows:

14. Complainant [Attorney Barry Abbott] represented a client in a lawsuit filed by [Mr. Maddux] regarding the dissolution of business entities owned by [Mr. Maddux's] and [Mr. Abbott's] clients.

15. [Mr. Abbott] entered an appearance on November 26, 2008.

16. [Mr. Abbott] and [Mr. Maddux] began settlement discussions and exchanging records and accounting information relating to the businesses.

17. [Mr. Abbott] became aware that [Mr. Maddux] sent a letter dated October 31, 2008, to a business customer demanding that payment for services rendered be mailed to [Mr. Maddux].

18. The letter represented that [Mr. Maddux] would deposit the collected funds with the Chancery Court Clerk and Master.

19. [Mr. Maddux] mailed similar letters to other customers of the business.

20. On February 19, 2009, [Mr. Maddux] filed a motion to withdraw.

21. When [Mr. Abbott] was unsuccessful in contacting [Mr. Maddux] to request that the funds collected by [Mr. Maddux] be paid to the Clerk and Master, [Mr. Abbott] filed a motion to require [Mr. Maddux] to pay of (sic) the funds into Court.

22. [Mr. Maddux] responded that the checks were made out to the business and had been given by [Mr. Maddux] directly to his client.

23. [Mr. Maddux] advised the Court that he did not have any funds belonging to the business and had turned several checks over to his client.

24. The Court ordered [Mr. Maddux] to file an Affidavit stating the disposition of the funds which [Mr. Maddux] had received and attach copies of the checks received.

25. [Mr. Maddux] filed the Affidavit on March 5, 2009, reflecting that [Mr. Maddux] had collected in excess of \$35,000, which he had paid to his client.

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26. [Mr. Maddux] did not advise the Court or [Mr. Abbott] of his intention to deliver the funds to his client even though the funds were collected pursuant to [Mr. Maddux's] representation that the funds would be paid into Court.

A Petition for Discipline was filed on February 8, 2010. On April 28, 2010, the Board filed a motion for default judgment due to Mr. Maddux's failure to answer the petition. An order granting the motion for default judgment was entered on June 10, 2010. On the same day, Mr. Maddux filed a motion to set aside the default judgment and allow him to respond to the petition. This motion was denied by the Board Chair on July 15, 2010, for failing to support a finding of mistake, inadvertence, surprise or excusable neglect. On August 9, 2010, Mr. Maddux filed a motion to reconsider or, in the alternative, for relief from the default judgment pursuant to Rule 60.02. This motion was denied by the Board Chair on August 22, 2010. A disciplinary hearing was held on January 14, 2011, and the hearing panel rendered its decision on January 21, 2011.

In his Petition for Writ of Certiorari, Mr. Maddux raised two issues. The first is that his two motions to set aside the default judgment or, in the alternative, for relief from the judgment pursuant to Rule 60.02, Tennessee Rules of Civil Procedure, were unjustly denied. The second issue is that a suspension was not justified or was for a greater period than was justified under the facts of the case.

### **The Default Judgment**

The procedure to be followed in an attorney disciplinary proceeding is set forth in Rule 8.2, Rules of the Supreme Court as follows:

Formal disciplinary proceedings before a hearing panel shall be instituted by Disciplinary Counsel by filing with the Board a petition which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A petition to initiate a formal disciplinary proceeding shall not include allegations of any private discipline previously imposed against the respondent.

A copy of the petition shall be served upon the respondent. The respondent shall serve an answer upon Disciplinary Counsel and file the original with the Board within 20 days after the service of the petition, unless such time is extended by the Chair. In the event the respondent fails to answer, the charges shall be deemed admitted; provided, however, that a respondent who fails to answer within the time provided may obtain permission of the Chair to file an answer if such failure to file an answer was attributable to mistake, inadvertence, surprise or excusable neglect. At the time of filing of the answer to the petition, the respondent shall simultaneously file a completed Licensing Information Statement in the form adopted by the Board of Professional Responsibility.

This court interprets the foregoing to mean that the authority to extend the time for answering a disciplinary complaint may be extended by the Board Chair within the 20 day period for any reason the Chair, in its discretion, deems appropriate. After the 20 day period or any extension thereof, an answer may only be filed with permission of the Board Chair and the Chair is limited in granting that permission to situations where the failure to file a timely answer was due to mistake, inadvertence, surprise or excusable neglect.

Mr. Maddux admits receiving the Petition for Discipline in mid-February 2010. The thrust of the affidavit, dated June 6, 2010, filed in support of his motion to set aside the default judgment seems to be that he failed to receive a copy of the motion for default judgment. The only paragraph relating to his reasons for not timely filing an answer is as follows:

6. I admit that I received the petition for discipline around the middle of February but I had been sued for over \$300,000.00 and I had financial problems and my mind was not where it should have been. I neglected to file a response but am prepared to file one and am working on it today.

In this case, the Board Chair determined that Mr. Maddux's affidavit did not establish that the failure to timely file a response was attributable to "mistake, inadvertence, surprise or excusable neglect." The court is of the opinion that the Board Chair's refusal to allow a late-filed response is reviewable by this court under an abuse of discretion standard. See e.g. Tenn. Dept. Of Human Servs. v. Barbee, 689 S.W.2d 863, 866 (Tenn. 1985). It is obvious that an attorney seeking to set aside a default judgment and file a response after the 20 day period has elapsed has the burden of establishing "mistake, inadvertence, surprise or excusable neglect." In the opinion of the court, the Board Chair's determination that Mr. Maddux had failed to carry his burden was appropriate based upon the affidavit filed and the denial of allowing a late-filed response did not amount to an abuse of discretion.<sup>2</sup>

The court is also of the opinion that the fact Mr. Maddux asserts he did not receive a copy of the Board's motion for a default judgment is without significance. In order to file a response after the 20 day period has elapsed, he must have had the permission of the Board Chair. Since he did not have that permission, the allegations of the complaint for discipline are deemed admitted with or without a default judgment.

### **The Nine Month Suspension**

Mr. Maddux next alleges that a suspension was not justified or was for a greater period than was justified under the facts of the case. The hearing panel was divided on this issue and the court has struggled with it as well.

Rule 9, section 8.4 provides that "[i]n determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the *ABA Standards for Imposing Lawyer Sanctions*." As pointed out by the hearing panel, the ABA Standards "Cross-Reference Table" directs that ABA Standard 4.1 be used for determining the appropriate sanction for a violation of Rules of Professional Conduct §1.15. That standard provides as follows:

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11. Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12. Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

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<sup>2</sup>In any event, Mr. Maddux stipulated to the allegations of the Petition for Discipline as outlined above.

4.13. Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14. Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

Both the majority of the hearing panel and the author of the separate opinion found the evidence failed to establish that an actual injury was caused by Mr. Maddux's conduct. The majority of the hearing panel found, however, that at the time Mr. Maddux gave the disputed monies to his client, it was reasonably foreseeable that harm could be caused to the "owners, debtors, and creditors" of the affected businesses. The author of the separate opinion, Mr. Tom Greenholtz, believed the evidence did not establish a potential injury.

The ABA Standards define potential injury as "the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." The "harm," it appears to the court, must be viewed in the context of the attorney's client or some person who the disciplinary rule violated is designed to protect. Section 1.15(b) of the Rules of Professional Conduct, § 1.15(b), RPC, requires an attorney to keep separate and safeguard disputed funds in his or her possession. This rule is obviously designed to protect the persons involved in the dispute and the potential injury would be limited to one of them. It would not, in the opinion of the court, ordinarily extend to harm that might be suffered by creditors of the claimants. Similarly, § 4.1, RPC, prohibits an attorney from knowingly making a false statement of material fact or law to a third person in the course of representing a client. That rule is designed to protect the client and the third person to whom the statement is made from injury and it is the harm to these people and the legal profession which is to be considered.

The evidence does not support a finding of potential injury to the debtors involved in the case. To the contrary, the evidence reveals Mr. Maddux had Mr. Hayes, a partner in the various businesses, to execute a waiver of lien for each debtor prior to turning over each of the checks involved. Moreover, there is no evidence that at the time Mr. Maddux wrote the letter to the debtors he intended to turn any payments received over to Mr. Hayes nor was it foreseeable at that time that any harm could be caused by paying the monies owed to Mr. Maddux.

In the opinion of the court, the evidence does not support a finding that the owners of the businesses involved were potentially harmed by Mr. Maddux's turning over the disputed funds to his client. Mr. Maddux testified that after he had conducted some discovery, he learned that Mr. Bean had taken significantly more than his share of the funds and property that belonged to the businesses. That testimony was not contradicted. It also appears that Ms. Hayes was not an owner of any of the businesses. While she answered one question suggesting that she was a partner, during questioning by hearing panel member, Mr. Rob Norred, she clearly testified that the partners in each entity were her son, Ted Hayes, and Scott Bean. It thus appears that Ms.

Nancy Hayes was a creditor of the various partnerships. If she was merely a creditor, she would not be a person §1.15(b) was designed to protect and, in the opinion of the court, potential injury to her would be too remote for consideration. She was, however, also a client of Mr. Maddux. Harm to a client is included within the definition of potential injury contained in the ABA standards. Mr. Maddux acknowledged during his testimony that he was acting in behalf of both Ted Hayes and Nancy Hayes. The law suit filed by Mr. Maddux alleges Ms. Hayes established a line of credit with her home as security and Hayes and Bean partnerships had borrowed \$94,973.09 against this line of credit. In addition, she had guaranteed for use in these businesses a CitiBank Visa card which had a \$3,349.30 unpaid balance, and an American Express Card with an unpaid balance of over \$20,600.00. She also alleged she had allowed the businesses to charge \$9,900.00 on her Sears Credit card with the promise she would be repaid. Finally, she alleged she was owed \$2,390.00 in back rent for the use of her home as a business office. The suit filed in her behalf evidences Mr. Maddux's knowledge of her claims against Mr. Bean and the partnership entities. Mrs. Hayes testified that she was not present when the checks were transferred to her son. When asked whether she knew her son had approached Mr. Maddux attempting to get the checks, she responded, "Yes. Well sort of." That response lends itself to the interpretation that Mr. Maddux did not discuss the situation with her prior to disbursing the checks to Mr. Hayes. Clearly, distribution of partnership assets at that point in time forseeably could have been harmful to Ms. Hayes' ability to recover the amounts owed to her. "In determining whether substantial and material evidence supports the panel's decision, the Court evaluates whether the evidence 'furnishes a reasonably sound factual basis for the decision being reviewed.'" *Threadgill v. Bd. of Prof'l Responsibility*, 299 S.W.3d 792, 807, 2009 Tenn. LEXIS 736, 2009 WL 4169438, at \*10 (Tenn. 2009). The court must conclude that the hearing panel's finding of potential injury to Ms. Hayes was supported by a reasonably sound factual basis.

With regard to the length of the suspension, the court notes that the hearing panel considered section 2.3 of the ABA Standards for Imposing Lawyer Sanctions which provides that "[g]enerally, should be for a period of time equal to or greater than six months." The panel also noted, as an aggravating factor that Mr. Maddux had previously been suspended from the practice of law on two occasions for similar offenses. It also noted his substantial experience in the practice of law as an aggravating factor. The panel found, as a mitigating factor that Mr. Maddux did not act out of dishonest or selfish motives but with the intent of helping a client with six children who he viewed to be in desperate financial circumstances. In view of these factors, which are supported by the evidence, the court is unable to find the length of the suspension is arbitrary or capricious. While the court may have imposed a shorter period of suspension, it cannot replace the hearing panel's determination with its own

The judgment of the hearing panel shall be affirmed and the costs of this cause shall be taxed to Mr. Maddux.

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Donald P. Harris, Special Judge  
Sitting by Designation of the  
Tennessee Supreme Court

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