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

IN RE: H. OWEN MADDUX
BPR No. 000515
Attorney Licensed to
Practice Law in Tennessee
(Hamilton County)

Docket No. 2010-1896-3-RS

JUDGMENT OF THE HEARING PANEL UPON PETITION FOR DISCIPLINE

This matter came to be heard before the undersigned Hearing Panel ("Panel") on January 14, 2011, upon the Petition for Discipline filed by the Board of Professional Responsibility and the entire record. The Panel in this matter consisted of Leah M. Gerbitz, Robert Gaines Norred, Jr., and Tom Greenholtz, the latter of whom was selected by the Panel members to serve as the Chairperson of the Panel.

After carefully considering the law applicable to this matter, along with entire record in this cause, including the pleadings filed and previous orders entered, the joint stipulations agreed to by Disciplinary Counsel and the Respondent H. Owen Maddux ("Mr. Maddux"), the testimony of Mr. Maddux and one other witness, the exhibits introduced into evidence at the hearing, and the arguments of counsel for the parties, the Panel issues this Judgment. For the reasons given herein, the Panel unanimously finds that Mr. Maddux committed violations of Tennessee Supreme Court Rule 8, RPCs 1.15(b), 4.1, 8.4(a), and 8.4(c).[1] A majority of the Panel

[1] The actions of Mr. Maddux described herein occurred prior to the recent revisions to Tennessee Supreme Court Rule 8, which became effective on January 1, 2011. As such, unless otherwise indicated, all references to the RPCs are intended to reference the version of the RPCs in effect at the time

also concludes and finds that a suspension from the practice of law in this State for a period of nine (9) months is the appropriate sanctions for these violations, considering the nature of the misconduct, Mr. Maddux's mental state, the potential harm caused by his misconduct and the aggravating and mitigating factors present in this matter.[2]

PROCEDURAL HISTORY

The Petition for Discipline in this matter was filed on February 8, 2010. Although Mr. Maddux participated in the initial investigation conducted by Disciplinary Counsel, Mr. Maddux did not file an answer or other responsive pleading to the Petition. On April 28, 2010, the Board filed a Motion for Default Judgment, and this motion was granted by the Panel on June 9, 2010. As part of its Order, and as required by Tenn. Sup. Ct. R. 9, § 8.2, the Panel ordered that the charges contained in the Petition shall be deemed admitted.

Mr. Maddux petitioned the Panel to vacate the default judgment on June 9, 2010, but the Panel, finding that it lacked authority to vacate the default on its own authority, referred the motion to the Chair of the Board of Professional Responsibility. This motion was denied by then-Chairman Roger A. Maness on July 15, 2010.[3]

At a case management conference held on July 23, 2010, the Panel set the hearing to consider imposing discipline, if any, for October 8, 2010. The Panel later continued the hearing

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of the relevant events. This said, the Panel concludes that the recent revisions to the RPCs would not, in any material way, have a substantive effect on its determinations here.

[2] Tenn. Sup. Ct. R. 9, § 6.4 provides that this Panel may act with the concurrence of a majority of its members.

[3] On August 23, 2010, Mr. Maness also denied a motion to reconsider this denial filed by Mr. Maddux's counsel.

date to January 14, 2011 without objection from Disciplinary Counsel or from counsel for Mr. Maddux.

On January 14, 2011, the Panel convened its hearing to consider imposing discipline, if any. Disciplinary Counsel called Mr. Maddux as a witness, and offered additional proof by way of twelve (12) exhibits, including some twenty-eight (28) stipulations agreed to by the parties. Counsel for Mr. Maddux did not object to the admission of any exhibits.

Similarly, counsel for Mr. Maddux offered proof by way of the testimony of Mr. Maddux himself and from Ms. Nancy Hayes, one of Mr. Maddux's former clients in the underlying litigation that gave rise to the present proceedings. In addition, counsel for Mr. Maddux also offered eight (8) exhibits in support of his position. Disciplinary Counsel did not object to the admission of any exhibits by Mr. Maddux.

FACTUAL FINDINGS AND BACKGROUND

Given the procedural posture of this case and the stipulations of the parties, many of the material facts are either admitted or are deemed to have been admitted. However, testimony offered by witnesses at the hearing also supplemented these facts, and as such, the Panel makes the following findings of fact:

Mr. Maddux was licensed to practice in 1974, and his present office address is 240 Forest Avenue, Suite 302, Chattanooga, Tennessee 37405.

The underlying issues in this proceeding arise from a lawsuit filed in the Hamilton County Chancery Court between Mr. Ted Hayes and his mother, Ms. Nancy Hayes, and a Mr. Gregory Scott Bean. The former two parties were represented by Mr. Maddux, and the latter party was represented by Chattanooga attorney Mr. Barry Abbott. Mr. Maddux's clients had a

dispute with Mr. Abbott's client concerning the dissolution of business entities owned by their respective two clients, and Mr. Maddux's clients alleged that Mr. Bean was unlawfully converting property and money owned by these businesses.

On or about October 31, 2008, Mr. Maddux sent some fifteen (15) letters to business customers demanding that payment for services rendered be mailed to Mr. Maddux.[4] This letter represented that Mr. Maddux would deposit the collected funds with the Chancery Court Clerk and Master. During the hearing, Mr. Maddux testified that he could not recall whether he discussed with his clients depositing any monies he received in response to his letters with the Clerk and Master. When Ms. Nancy Hayes was asked during her testimony about whether she recalled such a representation, she likewise testified that she could not recall any discussion.

Over the next two or three weeks, Mr. Maddux collected in excess of $35,000.00 from customers of the businesses, all in the form of five or six checks made payable to one or more of the businesses.[5]

Mr. Maddux did not deposit these funds into the Chancery Court as his October 31, 2008 letter represented that he would. He also did not deposit these monies into his own trust account, though he explained at the hearing that such action would have required his client, Mr. Hayes, to negotiate the checks to Mr. Maddux as the checks were made payable to the disputed businesses.

On or about December 1, 2008, Mr. Maddux met with Mr. Hayes. As Mr. Maddux testified at the hearing, Mr. Hayes related that he was almost "destitute." Apparently, because of the business dispute and the lack of corresponding income, Mr. Hayes, who had six children, was

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[4] An exemplar of this letter, which Mr. Maddux testified is substantially identical to the letters he mailed to other customers of the business, was admitted during the hearing as Exhibit 4.

[5] Copies of at least some of these checks appear as part of Exhibit 6 admitted at the hearing.

not able to buy groceries, make payments on bills, and had been threatened with a divorce. According to Mr. Maddux, Mr. Hayes "semi-demanded" the money that Mr. Maddux had received from the business debtors, and Mr. Maddux gave all of the checks to Mr. Hayes.[6]

Mr. Maddux testified that he warned Mr. Hayes that the Court would likely require an accounting, but he did not otherwise caution or admonish Mr. Hayes concerning the use or spending of the funds. Although Mr. Maddux acknowledges and admits that this conduct was a violation of RPC 1.15(b) given the disputed nature of the funds, he candidly admitted during the hearing that he did not fully realize at the time that his conduct could violate RPC 1.15(b).

Mr. Maddux did not immediately advise the Court or Mr. Abbott of his intention to deliver the funds to his client—or, indeed, of the actual delivery itself—even though the funds were collected pursuant to his representation that the funds would be paid into Court. Nevertheless, the issue was discussed, perhaps through email, between Mr. Maddux and Mr. Abbott in connection with Mr. Maddux informing Mr. Abbott that he (Mr. Maddux) would seek to withdraw from representing his clients due to various concerns not relevant to the present proceeding.

On February 19, 2009, Mr. Maddux filed a motion to withdraw from the representation of his clients, apparently due to communication difficulties Mr. Maddux was experiencing with Mr. Hayes. 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 the funds into Court. Although he agreed to allow Mr. Abbott to have his motion specially heard, Mr. Maddux responded that the checks were made out to the businesses

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[6] Although the proof is somewhat unclear, the Panel finds that a preponderance of the evidence suggests that Mr. Maddux had received payment of all fees by his clients before he gave these checks to Mr. Hayes, and that, as such, Mr. Maddux did not give these checks to Mr. Hayes in anticipation of receiving additional monies for his own legal services.

and had been given by Mr. Maddux directly to his client. He also advised the Hamilton County Chancery Court that he did not have any funds belonging to the business and had turned several checks over to his client

The Court allowed Mr. Maddux to withdraw from his representation of the Hayes, but the Chancellor also 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. Mr. Maddux filed this affidavit on March 5, 2009.[7] This affidavit reflects that Mr. Maddux collected in excess of $35,000.00, which he had paid to his client. The Chancery Court did not otherwise order Mr. Maddux, Mr. Hayes, or anyone else to pay any money into Court, and this lawsuit has apparently not been pursued since by any of the parties.

On March 30, 2009, Mr. Abbott filed a complaint with the Board of Professional Responsibility alleging misconduct by Mr. Maddux in violation of the Rules of Professional Conduct.[8] Following an investigation of the complaint, the Board filed its present Petition for Discipline alleging ethical misconduct in violation of the following Rules of Professional Conduct: 1.15(b), Safekeeping Property; 4.1, Truthfulness And Candor In Statements To Others; and 8.4(a) and 8.4(c), Misconduct.

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[7] This affidavit and attachments was admitted during the hearing as Exhibit 6.

[8] This complaint, along with its attachments, was admitted during the hearing as Exhibit 7.

LAW APPLICABLE TO DISCIPLINARY PROCEEDINGS AND THE PANEL'S CONCLUSIONS OF LAW

By virtue of the default judgment, as well as Stipulation No. 26 agreed to by the parties, the Panel finds that Mr. Maddux committed violations of RPC 1.15(b);[9] RPC 4.1;[10] RPC 8.4(a);[11] and RPC 8.4(c),[12] and that he is therefore subject to discipline for these offenses.[13] Accordingly, the essence of these proceedings consists in deciding what discipline, if any, is appropriate to remedy these violations.

Tennessee Supreme Court Rule 9, § 8.4 provides that if this Panel finds one or more grounds for discipline—as it has—then the Panel's judgment must specify the type of discipline imposed. This discipline may include disbarment, suspension, or public censure. A discipline of suspension may also include a term of probation. In all cases, however, the Panel shall consider the applicable provisions of the *ABA Standards for Imposing Lawyer Sanctions*" ("**ABA Standards**") in determining the appropriate type of discipline. See id.; see also Flowers v. Board of Prof'l Responsibility, 314 S.W.3d 882, 899 (Tenn. 2010) ("Tenn. Sup.Ct. R. 9, § 8.4

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[9] In relevant part, RPC 1.15(b) provides that "[i]f a dispute arises between the client and a third person with respect to their respective interests in the funds or property held by the lawyer, the portion in dispute shall be kept separate and safeguarded by the lawyer until the dispute is resolved." The Panel notes that the similar language appears in the Supreme Court's most recent revisions to the Tennessee Rules of Professional Conduct as part of RPC 1.15(d), effective January 1, 2011.

[10] In relevant part, RPC 4.1(a) provides that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."

[11] In relevant part, RPC 8.4(a) provides that "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct. . . ."

[12] In relevant part, RPC 8.4(c) provides that "[i]t is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

[13] As noted previously, Mr. Maddux candidly admitted during the hearing that his conduct in giving the checks to Mr. Hayes violated RPC 1.15(b).

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.'").

I. FRAMEWORK FOR DECIDING AN APPROPRIATE SANCTION

The ABA Standards adopted a model in which one "looks first at the ethical duty and to whom it is owed, and then at the lawyer's mental state and the amount of injury caused by the lawyer's misconduct." See ABA Standards, *Preface* § B Methodology. Using these criteria, the ABA Standards then recommend a *generally* appropriate sanction for the disciplinary authority to consider. See id. However, the ABA Standards also recognize that "any individual case may present aggravating or mitigating factors which would lead to the imposition of a sanction different from that recommended." Consequently, the "decision as to the effect of any aggravating or mitigating factors should *come only after this initial determination of the sanction.*" See id. (emphasis added).[14]

Thus, in looking to determine what discipline is appropriate in this case, if any, the Panel must first consider the following factors: (a) the duty violated by Mr. Maddux; (b) Mr. Maddux's mental state; and (c) the potential or actual injury caused by Mr. Maddux's misconduct. See ABA Standards, § 3.0; see also Sneed v. Board of Prof'l Responsibility, 301 S.W.3d 603, 617 (Tenn. 2010) (noting same factors to be considered); Rayburn v. Board of Prof'l Responsibility, 300 S.W.3d 654, 664 (Tenn. 2009) (same). The Panel must then look to the sanction generally recommended by the ABA Standards and then decide whether the existence of aggravating or mitigating factors warrant departure from the generally recommended sanction.

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[14] The ABA Standards emphasize this point again in its discussion of the "Theoretical Framework" in Section II by suggesting that "[i]n each case, *after making the initial determination as to the appropriate sanction*, the court would then consider any relevant aggravating or mitigating factors (Standard 9)." (emphasis added).

A. Nature of Duties Violated

Taking these considerations in turn, the Panel finds that the duties violated in this case involve (1) the failure to protect property in which two or more parties claim an interest; (2) the lawyer's lack of candor; and (3) failure to maintain personal integrity through dishonesty, deceit, or misrepresentation. These duties are not merely perfunctory, and each duty relates to the essential role of a lawyer as a fiduciary and as one who helps ensure the proper functioning of the legal system.

For example, the comments to RPC 1.15 recognize expressly that "[a] lawyer should hold property of others with the care required of a professional fiduciary." See RPC 1.15, cmt [1]. Further, comment [9] to RPC 1.15 further emphasizes that the duties owed by the lawyer to third parties in this instance are independent of those duties owed to the client. See RPC 1.15, cmt. [9] ("The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services.").

Moreover, RPC 4.1 recognizes the fundamental duty of the lawyer "to be truthful when dealing with others on a client's behalf." See RPC 4.1, cmt. [1]. Similarly, RPC 8.4(c) specifically prohibits a lawyer from engaging in conduct involving dishonesty, deceit, or misrepresentation. Further, the ABA Standards also recognize that

> In addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to be able to trust lawyers to protect their property, liberty, and their lives. The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice.

See ABA Standards, Section II, Theoretical Framework.

Indeed, so important is this duty of candor to the proper functioning of the legal system that its violation is expressly identified as a factor "reflect[ing] adversely on the lawyer's fitness to practice law." See RPC 8.4, cmt. [4]. Perhaps for this very reason, a mandatory duty of reporting misconduct arises in this State when substantial questions as to a lawyer's honesty or trustworthiness are present, as misconduct in these areas is something "that a self-regulating profession must vigorously endeavor to prevent." See RPC 8.3(a) & cmt. [3].

Accordingly, the Panel finds that the nature of the ethical duties violated by Mr. Maddux in this case is serious. Mr. Maddux violated duties owed to third parties, to the general public and, to the legal system. These violations are detrimental to the profession as a whole, and the Panel finds that these violations must be weighed heavily in the determination of the proper sanction, if any, that should be imposed as a consequence of his misconduct.

B. Mental State Involved

Next, the Panel considers Mr. Maddux's mental state involved in these actions. The ABA Standards define the applicable mental states as follows:

> "Intent" is the conscious objective or purpose to accomplish a particular result.
>
> "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.
>
> "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

See ABA Standards, Definitions.

The record does not support a finding that Mr. Maddux had a conscious objective or purpose either to deprive third parties of any interest in the disputed monies or to misrepresent how he would handle the monies received from debtors of the affected businesses. As such, the Panel does not find that Mr. Maddux acted with specific intent to accomplish these objectives.

However, the Panel does find that Mr. Maddux was aware of the nature of his conduct in dealing with monies in which other parties claimed (or could claim) an interest and that he was aware that one reason he had received these monies was due, at least in part, to his representation that he would pay these monies into court. For example, the proof introduced at the hearing plainly establishes that Mr. Maddux was aware of his obligations in holding property to which multiple parties claimed an interest. In his October 31, 2008 letter to debtors of the business entities owned by Mr. Hayes and Mr. Bean, Mr. Maddux represented that he would pay these monies into court pending the resolution of the dispute.[15] No one disputes that this proposed procedure was one way in which to ethically handle this issue. Not only is such a procedure suggested by Comment [8] to RPC 1.15, but, in interpreting similar provisions in the former Code of Professional Conduct, the Board recommended paying disputed monies into court after attempts at resolving a dispute have been attempted. See Formal Ethics Opinion 87-F-109 (Sept. 16, 1987). As such, because Mr. Maddux initially proposed to handle any monies received in response to his letter in apparent accordance with his duties under RPC 1.15(b), the Panel finds that Mr. Maddux acted with a knowing intent in acting as he did.

Mr. Maddux testified at the hearing that he was perhaps not cognizant of his specific ethical duties under RPC 1.15(b) at the time he gave the disputed checks to his client, although he acknowledges that he should have been aware of those duties. To the extent that Mr. Maddux has suggested that the Panel finds that he acted negligently rather than with knowledge, the Panel

[15] See Hearing Exhibit 4.

specifically rejects this notion. Not only is this suggestion belied by the language of the October 31, 2008 letter itself, the suggestion perhaps also ignores that Mr. Maddux has previously been introduced to the requirements of RPC 1.15 in previous disciplinary cases. See Maddux v. Board of Prof'l Responsibility, 288 S.W.3d 340, 347 (Tenn. 2009) (hereinafter "Maddux II") (finding that Mr. Maddux committed a violation of RPC 1.15(a)). Accordingly, the Panel does not find that Mr. Maddux acted with mere negligence in acting as he did.

C. The Presence of Actual or Potential Injury

The ABA Standards next counsel that the Panel consider the actual or potential injury caused by Mr. Maddux's misconduct. The ABA Standards define these terms as follows:

> "Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.
>
> "Potential injury" is 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.

See ABA Standards, Definitions.

In this matter, the proof in the record does not support a finding that Mr. Maddux's conduct caused actual injury to any party. No witness testified that he or she was actually harmed by Mr. Maddux's conduct in giving the disputed checks to Mr. Hayes, and it appears that even Mr. Bean—the party who is perhaps among those most likely to raise objection—has apparently not voiced any complaint since the filing of Mr. Maddux's affidavit nearly two years ago. As such, the Panel does not find that Mr. Maddux's conduct has caused actual injury.

Of course, the absence of actual injury does not absolve a lawyer from the possibility of sanction, as the notion of a "potential injury" itself recognizes that actual injury did not occur by virtue of the misconduct. See ABA Standards, Section II, Theoretical Framework. The Tennessee Supreme Court has apparently not had an occasion to address how potential injury arises under the ABA Standards in the context of a disciplinary matter. However, at least one other state addressing the issue of potential injury under the ABA Standards has concluded that "[t]here also is potential serious injury to the legal system, the profession, and to the public when, as here, a lawyer engages in misrepresentation that reflects adversely on the lawyer's fitness to practice law." See In re Hostetter, 238 P.3d 13, 28 (Or. 2010).

Moreover, 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. For example, Ms. Nancy Hayes testified that the business disputes with Mr. Bean had cost her, conservatively, about $275,000.00, and that she has been forced to file bankruptcy as a result. A majority of the Panel believes that it was reasonably foreseeable that Ms. Hayes would have lost an opportunity to recover at least a portion of her capital investment in the businesses by virtue of Mr. Maddux giving Mr. Hayes some $35,000.00 in monies owed to these businesses.

Finally, a majority of the Panel believes that it was also reasonably foreseeable that the debtors of these businesses also could suffer injury as a result of Mr. Maddux's actions. At the time Mr. Maddux gave the disputed monies to Mr. Hayes for his personal use, it was not unreasonable to believe that some dispute could arise as to whether these debtors actually discharged their debts to the business. Indeed, it was apparently for this reason that Mr. Maddux represented to these debtors that he would pay any monies received into court so that the funds

could be persevered. By instead paying these funds directly to Mr. Hayes for the personal benefit of Mr. Hayes, Mr. Maddux needlessly exposed these debtors to potential harm and loss on the monies paid to him in trust.

During the January 14, 2011 hearing, Mr. Maddux's counsel acknowledged that potential injury was caused by Mr. Maddux's actions—albeit with the qualification that any potential injury was far too remote to be of any serious consequence. The Panel is not unmindful of these arguments. Although a majority of the Panel disagrees that the potential injury caused by Mr. Maddux's conduct was as remote as was suggested by counsel, the Panel's majority agrees that the record does not support a finding that the potential injury here was a "serious potential injury" under the ABA Standards. Accordingly, for these reasons, a majority of the Panel finds that the actions of Mr. Maddux in knowingly failing in his fiduciary obligations and in engaging in deceitful conduct caused potential injury—meaning that potential injury between a "serious injury" and "little or no injury"—to third parties and to the legal profession as a whole.

II. IDENTIFICATION OF THE GENERALLY RECOMMENDED SANCTION

Having considered the relevant factors set forth in Section 3.0 of the ABA Standards, we now look to the guiding principles set forth in Sections 4 through 8 to determine, in general, what the appropriate sanction should be. See Rayburn, 300 S.W.3d at 664 ("General principles guiding the determination of the proper penalty appear in Sections 4 through 8 of the ABA Standards . . . .").

The ABA Standards "Cross-Reference Table" directs the Panel to consider ABA Standard 4.1 in considering the appropriate sanction when a respondent violates RPC 1.15.

Section 4.1 addresses possible sanctions for the failure to preserve client property, and this section 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.
> >
> > 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.

Admittedly, the ABA Standards do not "cleanly" apply to this case, at least insofar as violations of RPC 1.15 are concerned. For example, during the January 14, 2011 hearing, the Panel questioned Disciplinary Counsel about whether the references to the "client" in Section 4.1 of the ABA Standards meant that this section could not apply in this matter, as no proof demonstrated the Mr. Maddux's own clients were affected. Disciplinary Counsel answered that the ABA Standards are guidelines foremost, and he argued that the Panel should not read the guidance as only to apply when a client is involved. As Disciplinary Counsel argued, RPC 1.15 itself is certainly not limited to protecting client property.

The full Panel agrees that the guidance by the ABA Standards is not limited to situations involving protection of *client* property alone. However, the Panel believes that Section 7.0 of the

ABA Standards provides the more appropriate guidance here as to the appropriate sanction in this scenario. Cf. People v. Alster, 221 P.3d 1088, 1092 (Colo. O.P.D.J. 2009) (finding a violation of Colo. RPC 1.15, and noting that "ABA Standards 7.2 and 7.3 [are] more applicable to this case, because Respondent violated a rule . . . defining a certain standard of conduct rather than a rule fundamental to his professional relationship with a client.").[16] Section 7.0 provides as follows:

> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.
>
> 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
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> 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system.
>
> 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
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> 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

[16] Of course, the Board also references this Section, if only in passing, in its pre-hearing brief as well.

Irrespective of the specific section of the ABA Standards to be applied, each standard points to the same recommendation. Given the unanimous findings of the Panel that Mr. Maddux knowingly engaged in misconduct and the finding of a majority of the Panel that this misconduct caused potential injury to third parties, Section 7.2 recommends that suspension of some period is the generally appropriate sanction.

IV. CONSIDERATION OF AGGRAVATING AND MITIGATING FACTORS

After considering the nature of the duty violated, along with the lawyer's mental state, the Panel specifically finds that the ABA Standards recommend that the generally appropriate discipline in this situation is suspension of Mr. Maddux. Of course, each case is different, and each case should be measured by its own facts and circumstances. Cf. Maddux II, 288 S.W.3d at 348 ("We are not bound by the ABA Standards in determining an appropriate period of suspension," and finding suspension less than recommended length was appropriate under circumstances of case). Accordingly, Section 9.1 of the ABA Standards counsels that "[a]fter misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose." See also id. at 349 (also noting that "[s]ection 9.1 of the ABA Standards further provides that "[a]fter misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.").

A. Presence of Aggravating Factors

As our Supreme Court has recognized, "[a]ggravating factors assist in determining what sanction should be imposed." See Flowers, 314 S.W.3d at 901. Although the ABA Standards list some eleven (11) possible aggravating circumstances, the Board has argued that two (2)

aggravating circumstances actually apply:[17] First, the Board maintains that Mr. Maddux's previous disciplinary history is an aggravating factor in this case. See ABA Standards § 9.22(a). More specifically, the Board identifies the previous two proceedings involving Mr. Maddux—discussed several times throughout this opinion—as evidence supporting the presence of this aggravating factor.

In Board of Professional Responsibility v. Maddux, 148 S.W.3d 37, 39 (Tenn. 2004) (hereinafter "Maddux I"), Mr. Maddux was suspended from the practice of law for thirty (30) days for converting some $92,500.00 from his law firm in the wake of a dissolution of the firm. Mr. Maddux was charged with violations of DR 1-102, Misconduct, under the previous Tennessee Code of Professional Responsibility, including a prohibition on conduct "involving dishonesty, fraud, deceit, or misrepresentation," similar to RPC 8.4(c) that it is at issue here. The hearing panel in that case imposed a thirty (30) day suspension as a sanction, but the Hamilton County Chancery Court also imposed a probationary period of one (1) year following the suspension. All sanctions were affirmed by the Tennessee Supreme Court.

Mr. Maddux's counsel argues in this proceeding that this first disciplinary proceeding should not be given much weight here because the converted funds involved firm property and not funds belonging to a client or third parties. The Panel disagrees. First, this previous case represents only a variation on the theme presented here: Mr. Maddux deciding for himself the proper disposition of funds in which multiple parties claim an interest—whether these funds are claimed by his own partners or by partners of his client.

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[17] The Panel notes that paragraph 31 of the Petition suggests the presence of a third aggravating factor: that Mr. Maddux has refused to acknowledge the wrongful nature of his conduct. See ABA Standards § 9.22(g). However, during the January 14, 2011 hearing, Disciplinary Counsel suggested that the testimony presented at the hearing did not support application of this factor. The Panel agrees with Disciplinary Counsel's assessment in this regard.

Moreover, the Chancery Court in this previous case apparently wished to emphasize that the handling of property belonging to others was important. To ensure proper oversight in this regard, the court imposed a probationary condition that Mr. Maddux not "receive, disburse, handle nor have access to any client funds, receipts, accounts, or other property, except with the co-endorsement and/or co-signature of the monitoring attorney." See Maddux I, 148 S.W.3d at 39. Even though Mr. Maddux successfully complied with this probationary condition, it appears to this Panel that the lesson may not have been fully learned.

In Maddux v. Board of Prof'l Responsibility, 288 S.W.3d 340, 349 (Tenn. 2009), Mr. Maddux again appeared before a hearing panel for discipline in part for issues involving RPC 1.15 and involving dishonesty, fraud, deceit, or misrepresentation. In this case, Mr. Maddux failed to file an action within the applicable limitations period. After repeated failures to communicate with his clients, Mr. Maddux finally informed his clients that the statute of limitations had expired, and he offered to settle the case upon payment by him of $9,000.00. The settlement monies were drawn upon Mr. Maddux's own client trust account, and although Mr. Maddux testified that he deposited some $10,000.00 of his own money in this account, no dispute existed that he comingled his own monies with those belonging to other parties. Although apparently not charged in the initial Petition for Discipline, the Supreme Court found specifically that "Mr. Maddux violated Rule 1.15(a) by commingling the personal funds he used to settle [his clients'] with client funds in his lawyer trust account." See id. at 347. The Supreme Court also affirmed a suspension of five (5) months for this misconduct.

The Panel finds that Mr. Maddux's previous disciplinary history is quite significant for these proceedings. ABA Standard § 8.2 provides that "[s]uspension 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." In both of these previous cases, Mr. Maddux has been sanctioned for conduct that involved "dishonesty, fraud, deceit, or misrepresentation." Similarly, in both of these previous cases, Mr. Maddux was sanctioned for his role in mishandling property in which others claimed an interest. Even if the circumstances of these two previous cases are not identical to those presented here, these cases are so sufficiently similar that Mr. Maddux has plainly not benefitted from prior discipline involving the handling of property in which others claim an interest and in avoiding conduct involving deceit or misrepresentation. The Panel therefore gives great weight to this aggravating factor and finds that the legal profession and administration of justice would be disserved if Mr. Maddux did not receive a serious sanction here.

Second, the Board also maintains that an aggravating factor in this case is that Mr. Maddux has substantial experience in the practice of law. See ABA Standards § 9.22(a). The proof and Stipulations of the parties established that Mr. Maddux has been licensed in Tennessee since 1974, and this aggravating factor was established in Mr. Maddux's two previous disciplinary proceedings as well. See Maddux II, 288 S.W.3d at 349; Maddux I, 148 S.W.3d at 41. Accordingly, the Panel agrees that this factor is an aggravating factor in this case and that this factor is entitled to significant weight.

In addition to the aggravating factors urged by the Board, the Panel also finds that the proof established that Mr. Maddux was not cooperative in these proceedings, at least as an initial matter. The proof in the record shows clearly that Mr. Maddux failed to respond to the initial requests for information by Disciplinary Counsel and that he failed to timely respond to the Petition for Discipline.

In isolation, this factor would not be especially significant. However, this conduct is not an isolated occurrence. In his previous disciplinary proceeding, Mr. Maddux also failed to timely respond to inquiries from Disciplinary Counsel, and he failed to respond to the initial Petition. See Maddux II, 288 S.W.3d at 349. We are not unmindful at the reasons advanced by Mr. Maddux for his most recent failures to timely respond to these proceedings, and, indeed, our sympathies are with Mr. Maddux. Nevertheless, the Panel finds that Maddux's repeated failures to respond in a timely manner to requests for information from Disciplinary Counsel indicate a pattern and practice of disregard for the ethical rules. Consequently, while the Panel does not give substantial weight to this factor, it is clear that this factor is entitled to some weight in the analysis of the appropriate sanction.

B. Presence of Mitigating Factors

For his part, Mr. Maddux urged the Panel to consider several mitigating factors.[18] The principal factor urged by Mr. Maddux's counsel in argument was the lack of any actual harm to others caused by Mr. Maddux's conduct. The Panel unanimously agrees that the record does not support a finding of actual harm to third persons or to Mr. Maddux's clients. However, for the reasons explained above, the ABA Standards do not require a finding of actual harm to support a general recommendation of suspension, and the presence of potential harm is sufficient so long as that harm is foreseeable at the time of the misconduct. As such, the Panel does not agree that the lack of actual harm is a mitigating factor in this case.

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[18] In addition to the possible mitigating factors discussed herein, counsel for Mr. Maddux urges the Panel to consider examples of similar, or even more egregious, conduct that did not result in suspensions of the charged lawyer. This factor is discussed in more detail in Section VI of this Judgment.

Counsel for Mr. Maddux also argued that Mr. Maddux's remorse should be considered to be a mitigating factor. See ABA Standards, § 9.32(*l*). During the hearing, Mr. Maddux expressed regret that this situation had arisen to this level, and when asked by the Panel whether this expression of regret was tantamount to an expression of remorse, Mr. Maddux's counsel replied that it was, explaining that Mr. Maddux's "stoic nature" may have contributed to the impression.

The Panel does not discredit counsel's explanation in this regard, but the record does not establish the presence of remorse as a strong mitigating factor. As such, to the extent that Mr. Maddux's remorse is entitled to weight as a mitigating factor, it is not heavily weighed in our consideration. Indeed, the Panel notes that similar expressions of "regret" were given by Mr. Maddux in the previous disciplinary proceedings, and these expressions were likewise given little, if any, weight. See Maddux II, 288 S.W.3d at 349 ("[W]hile section 9.32 includes "remorse" as a mitigating factor to be considered in imposing sanctions, given the other factors in this case, we do not agree that Mr. Maddux's expression of regret is sufficient to merit a reduction in the sanction imposed by the Panel.").

Although not argued as such, the Panel finds that one mitigating factor is present in that Mr. Maddux did not act out of dishonest or selfish motives. See ABA Standards, § 9.32(b). To the contrary, he apparently acted to help a client who he believed was in "desperate" need. However, even if his client's needs were genuine—Mr. Maddux did not undertake any steps to confirm any facts related by his client before turning over some $35,000.00 in which others had interest—Mr. Maddux's conduct may be explained by this fact, but it cannot be excused. Accordingly, while the Panel gives some weight to this factor, this factor is not determinative in the analysis.

Although the Panel does not find the presence of any other mitigating factors, the Panel does wish to address other possible factors raised by the proof. First, during his testimony, Mr. Maddux testified as to his participation in the Chattanooga Bar Association as a director and as a participant on various committees. Nevertheless, counsel for Mr. Maddux did not argue that this participation in service of the bar works in mitigation of the present misconduct, and we do not believe consideration of these facts as mitigating factors would be appropriate under the ABA Standards. See Threadgill v. Board of Prof'l Responsibility, 299 S.W.3d 792, 810 (Tenn. 2009) ("The ABA Standards do not cite involvement in professional associations among the relevant mitigating factors.").

In addition, the Panel recognizes that proof of good character or reputation may also serve in mitigation. See ABA Standards, § 9.32(g). This mitigating factor was recognized in previous disciplinary proceedings involving Mr. Maddux. See Maddux I, 148 S.W.3d at 42. No proof of this factor was offered in these proceedings, however. Moreover, the Panel declines to take notice of this factor, in the absence of such proof, merely by virtue of the finding in previous hearings. Because the present proceeding is the third disciplinary hearing involving Mr. Maddux in which serious violations have been found, the Panel does not find that this factor should be entitled to especial weight here in any event.

V. APPROPRIATE SANCTION IN THIS CASE

Based upon the Panel's findings as to the nature of the conduct, Mr. Maddux's intent, and the nature of the potential harm caused, the ABA Standards suggest that some period of suspension is the appropriate sanction in this case, and the Panel agrees that that suspension is appropriate here. The question next presented, therefore, concerns the length of the suspension.

Section 2.3 of the ABA Standards provides that "[g]enerally, suspension should be for a period of time equal to or greater than six months." See also Threadgill, 299 S.W.3d at 810 n.40; Maddux II, 288 S.W.3d at 348. The Board vigorously urges that a suspension for a period of one year is both necessary and essential. Mr. Maddux agues that, if the Panel believes that suspension is the appropriate sanction, the period should be commensurate with the facts.

Considering the record as a whole, along with the guidance provided by the ABA Standards, and the aggravating and mitigating factors present, a majority of the Panel believes that a suspension of nine (9) months is appropriate. Admittedly, the aggravating factors found unanimously by the Panel justify a suspension greater than the six (6) month period generally recommended by the ABA Standards, and these aggravating circumstances could conceivably justify a suspension of one (1) year or more. Nevertheless, the Panel's majority finds and concludes that the mitigating factors are of such weight that a sanction of less than one (1) year represents the more appropriate sanction.

The Panel does not lightly reach this conclusion that a nine (9) month suspension is the most appropriate sanction for these ethical violations. This period of suspension is significant, and we realize that Mr. Maddux's livelihood is at stake. At the same time, however, this Panel takes seriously its obligations under Rule 9 to address and remedy ethical violations, and the Panel's majority firmly believes that the evidence establishes that this sanction is the most appropriate under all of the circumstances.

VI. SANCTIONS IMPOSED IN SIMILAR CASES

Finally, Tenn. Sup.Ct. R. 9, § 8.4 provides that the recommended punishment should be reviewed "with a view to attaining uniformity of punishment throughout the state." Although this function is perhaps most appropriately undertaken by our Supreme Court, the Panel also believes that it may be part of its own responsibility as well, as Section 8.4 requires us to examine the "sanctions that have been imposed in prior cases that present similar circumstances so as to maintain consistency and uniformity in disciplinary proceedings." See Maddux I, 148 S.W.3d at 40. In addition to cases decided within Tennessee, the Supreme Court has also examined cases from other states as well addressing similar issues. See, e.g., id. at 41.

Counsel for the Board and for Mr. Maddux have been unable to locate previous disciplinary actions in this State that are similar or identical to the facts and circumstances involved in this case, and we likewise have uncovered none. For example, counsel for Mr. Maddux has brought to our attention several matters in which the sanctioned lawyer mishandled client property and received a public censure or a short suspension. See, e.g., Re: John Cris Helton (Sept. 22, 2008) (public censure for violating, among other provisions, RPC 1.15). In each of these cases, though, it does not appear that the disciplined lawyer had a previous disciplinary history, including suspensions, for similar misconduct, and the Panel believes that this aggravating factor is especially significant in this case. Moreover, in at least some of these cases, the lawyer had not also committed offenses involving dishonesty or misrepresentation.

Similarly, the Board offers examples for our consideration where the disciplined lawyer received significantly greater sanctions for misappropriation of funds or monies. However, in each of these cases, it appears that the lawyer acted with dishonest of selfish motives. Whatever else can be said here, the Panel does not find—and, to its credit, the Board does not appear to

argue—that Mr. Maddux acted with an intent to benefit himself, an important mitigating factor in this case.

Moreover, review of cases from other states suggests—but does not definitively confirm—that a nine (9) month suspension here is within the range of reasonable sanctions for this type of misconduct. For example, in In re Fischer, 89 P.3d 817 (Colo. 2004), a lawyer in a divorce case disbursed disputed funds to his client in violation of an agreement with the opposing party. The lawyer was found to have been in violation of several ethical duties, including the equivalents of RPC 8.4(c) and 1.15(b), both dealing with deceitful conduct and improper handling of property in which others claimed an interest.

The hearing board initially hearing the case recommended that the lawyer be disbarred, but the Colorado Supreme Court instead suspended the lawyer for one year and one day—similar to the recommendation of the Board here. In so doing, the court recognized substantial evidence supporting various mitigating factors also present in this case, including that the lawyer did not treat funds entrusted to him by anyone, much less his client, as if they were his own; that the lawyer did not personally benefit from the distributions; that the lawyer made no attempt to conceal his transactions from the court; and that the lawyer, when admonished, acknowledged his ethical lapse and accepted responsibility. In addition, the Fischer Court also recognized that the lawyer had an excellent reputation in the profession, had a record of pro bono and community service, and was not a risk to the public. Indeed, the lawyer possessed no recent disciplinary history other than a private admonition and no disciplinary history involving dishonesty.

Even with this evidence of mitigation, however, the Fischer Court imposed a suspension of greater length than is imposed here, even without similar proof in this record. The Panel fully

acknowledges that courts in other states appear to have imposed a variety of sanctions, and their respective decisions show that no particular sanction is necessarily more appropriate than any other when addressing this type of misconduct. Accordingly, the Panel finds that a sanction of a nine (9) month suspension under the facts and circumstances in this case will not result in an inconsistency or lack of uniformity in disciplinary proceedings. See Tenn. Sup.Ct. R. 9, § 8.4.

JUDGMENT OF THE HEARING PANEL

Based upon the pleadings, the evidence and testimony offered at the hearing, the argument of counsel, the ABA Standards for Imposing for Imposing Lawyer Sanctions, relevant case law and other disciplinary proceedings, and the entire record in this cause, it is therefore

ORDERED, ADJUDGED and DECREED that the Respondent, H. Owen Maddux, be suspended from the practice of law for nine (9) months for his violations of Tennessee Supreme Court Rule 8, RPCs 1.15(b), 4.1, 8.4(a), and 8.4(c); it is also

ORDERED, ADJUDGED AND DECREED that Respondent, H. Owen Maddux, reimburse the Board of Professional Responsibility for all costs and expenses resulting from this disciplinary hearing.

This, the 21st day of January, 2011.

HEARING COMMITTEE PANEL MEMBERS:

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SEPARATE OPINION

I write separately to express my view that a nine (9) month suspension is perhaps too harsh a sanction under the facts and circumstances of this case. I fully agree with the Panel's findings under the ABA Standards as to the nature of the violations and the intent with which Mr. Maddux acted. I also fully agree with the Panel's analysis of the aggravating and mitigating factors present in this case. However, I very respectfully disagree as to the presence of potential injury demonstrated by the record developed at the hearing, and, as such, respectfully disagree that a suspension of nine (9) months is the most appropriate sanction here under the ABA Standards.

In my view, the record does not support a finding that Mr. Maddux's actions resulted in potential harm. Under the definition of "potential harm" in the ABA Standards, the harm not only must have been reasonably foreseeable, but it also would have occurred "but for some intervening factor or event." See ABA Standards, Definitions.

In this case, the record does not support the notion that any harm would have occurred but for some intervening factor or event. In fact, no evidence suggested the presence of any intervening factor or event, subsequent to delivery of the money to Mr. Hayes, that prevented

any harm that was otherwise likely to occur. As such, my view is that no potential harm is present in the record—at least as that factor is defined by the ABA Standards. See, e.g., In re Disciplinary Proceeding Against Poole, 125 P.3d 954, 966 (Wash. 2006) (finding that evidence showing that actions "'could have' caused injury" is an "insufficient basis" upon which to find the presence of "potential injury" under the ABA Standards).

I think it important here that Mr. Maddux's actions, and the notion of potential harm, was actually addressed by the Hamilton County Chancery Court. Upon learning of Mr. Maddux's actions, Mr. Abbott requested that the Chancery Court order the funds received on behalf of the disputed businesses to be paid into court. The Chancellor ordered that Mr. Maddux file an affidavit as to what monies had been received by him and given to Mr. Hayes, but the Chancellor did not otherwise order any party to pay these funds into court to ensure further preservation.

Moreover, since that time, it does not appear that any party has raised any issue with this money. No party identified any possible business creditor that would be affected, and no person or entity paying money to Mr. Maddux in response to his October 31, 2008 letter has apparently been subject to a claim of improper payment. From all appearances, everyone possibly affected by Mr. Maddux's actions has declined to pursue the issue any further.

The Panel also relies, in part, upon the presence of potential harm to Ms. Nancy Hayes. However, Ms. Hayes did not testify that her son's receipt of the money adversely affected her, and the absence of this testimony is conspicuous. Although one may conclude that Ms. Hayes *may* have been harmed by her son's receipt of these monies given her personal bankruptcy, her testimony was not sufficiently developed to support a finding about debts owed and the effect that payment of this money to her son would have had. As such, I believe that this potential harm is too speculative upon which such a finding should be made.

Where evidence of potential harm is speculative at best, other courts applying the ABA Standards have found that this consideration does not merit a presumptive suspended sentence under the general guidance. See, e.g., In re Discipline of Lerner, 197 P.3d 1067 (Nev. 2008) (finding speculative potential harm, despite clear ethical violation and knowing mental state); People v. Nelson, 848 P.2d 351, 352-353 (Colo. 1993) (finding that public censure was appropriate given speculative injury, though noting that other evidence of injury would result in presumptive sanction of suspension). Consequently, analyzing the presumptive sanctions generally recommended by the ABA Standards under Sections 4.1 and 7.0 as the Panel's majority has properly done, I would find that the presumptive sanction is an admonition rather than a suspension. See ABA Standards, §§ 4.14, 7.14. In addition, although Mr. Maddux's conduct in violating RPC 4.1 certainly reflects adversely on his fitness to practice law, the ABA Standards suggest that the presumptive sanction in this case is a reprimand, at least in the absence of actual or potential harm. See ABA Standards § 5.13 (noting that a "[r]eprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that reflects adversely on the lawyer's fitness to practice law.").

Nevertheless, I fully agree with the Panel's analysis of the aggravating and mitigating factors found to be present in this case, though I would give more weight to alleged mitigating factor offered by Mr. Maddux's counsel regarding the lack of potential harm. Importantly, Mr. Maddux has been subject twice before to discipline for ethical violations that, while not identical to the violations found here, are sufficiently similar for this Panel to weigh heavily this previous disciplinary history in its assessment of an appropriate sanction. In fact, so significant is this previous disciplinary history in the context of this case, with the additional aggravating and

mitigating factors shown by the proof, that I agree that some period of suspension is perhaps appropriate here despite the presumptive sanction suggested by the ABA Standards.

In my view, therefore, a suspension for the minimal period of thirty (30) days would be a more appropriate sanction. See Tenn. Sup. Ct. R. 9, § 4.2 ("No suspension shall be ordered for a specific period less than thirty days . . . ."). This sanction recognizes the important duties violated by Mr. Maddux and gives weight to his mental state, but the sanction also recognizes that no actual or potential injury resulted from his misconduct. In addition, this sanction also gives appropriate weight to Mr. Maddux's previous disciplinary history. Although some argument could be made that a more appropriate sanction would be a suspension at least as great as that previously received by Mr. Maddux—a suspension of at least five (5) months, for example—each case must be viewed on its own. See Board of Prof'l Responsibility v. Curry, 266 S.W.3d 379, 393 (Tenn. 2008). In my view, Mr. Maddux's previous disciplinary history is already taken into account through the increase in the presumptive punishment recommended by the ABA Standards.

Finally, I agree with the Panel's analysis of other similar cases and likewise conclude that a suspension of thirty (30) days under the facts and circumstances in this case will not result in an inconsistency or lack of uniformity in disciplinary proceedings. See Tenn. Sup.Ct. R. 9, § 8.4.

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