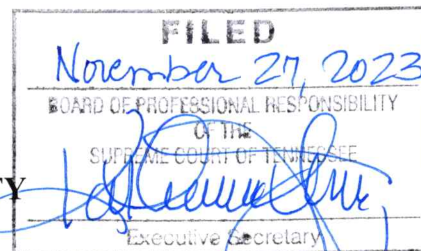

IN DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE: KELVIN ARTHUR MASSEY
BPR No. 011059, Respondent,
an Attorney Licensed to Practice
Law in Tennessee
(Shelby County)

DOCKET NO. 2022-3270-9-EF

FINAL JUDGMENT OF THE HEARING PANEL INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a disciplinary matter against Respondent, Mr. Kelvin Arthur Massey (hereinafter "Respondent" or "Mr. Massey"), which proceeded in accordance with all provisions of Tenn. Sup. Ct. R. 9, § 15. The Final Hearing of this matter before the appointed Hearing Panel was held and concluded on August 16, 2023, at the University of Memphis, Cecil C. Humphreys School of Law, in Memphis, Tennessee.

The Hearing Panel presiding over this matter consisted of Panel Chair, Ashley Satterfield, Esq., and Panel Members Leslie R. Yohey, Esq. and E Lee Whitwell, Esq. Petitioner, the Board of Professional Responsibility (hereinafter "the Board") was represented by Disciplinary Counsel Eric Fuller. Respondent Massey was represented by Joseph E. Feibelman, Esq., at trial and through the proceedings. The Board called at trial and elicited testimony from Respondent Kelvin A. Massey. Respondent Massey also testified on direct in his own defense and called as a fact witness Ms. Wanda Woodruff.

The relevant and probative facts were largely or entirely undisputed, as established by admissions in Respondent's Answer to the Petition for Discipline as to almost all allegations therein, and through introduction of evidence at trial as confirmed by corroborating testimony of witnesses. The Hearing Panel was therefore tasked with determining, based on the conduct of

Respondent as factually established to a preponderance of the evidence standard, pursuant to Tenn. Sup. Ct. R. 9, § 15.2 (h), whether said conduct involved ethical violations of any Rule of Professional Conduct, as alleged in the Petition for Discipline, and if so, the appropriate punitive sanction to be imposed for said violations.

STATEMENT OF THE CASE

1. This disciplinary proceeding was brought by the Board against Mr. Massey, an attorney initially licensed to practice law in Tennessee in 1994.

2. On August 17, 1994, Respondent Massey was suspended from the practice of law temporarily pending the outcome of formal disciplinary proceedings.

3. On March 19, 1996, per an Order of Enforcement of the Supreme Court of Tennessee, and in accordance with a conditional guilty plea submitted by Respondent, Mr. Massey was suspended from practicing law in Tennessee for a period of five (5) years, with the entirety of said suspension to be served as an active suspension, retroactively commencing on August 17, 1994, when the temporary suspension began.

4. Since 1996, Mr. Massey has never applied for nor otherwise sought reinstatement of his license to practice law in Tennessee. Per Mr. Massey's testimony at trial, he is not now, nor has he ever been licensed to practice law in any other jurisdiction.

5. On June 2, 2021, the Board received a complaint against Mr. Massey via e-mail from Informant Jennifer L. Sneed, Esq., alleging potential misconduct by Respondent. Informant Sneed specifically alleged that Respondent had engaged in the unauthorized practice of law despite his still active suspension from legal practice. (*See Sneed Letter of June 2, 2021,* admitted as Trial Exhibit 4).

6. After investigation of the matter, on June 10, 2022, the Board authorized issuance of a Notice of Public Censure against Mr. Massey, finding that he had violated the order

suspending his law license and negligently provided legal advice, drafted legal documents, and held himself out as a licensed Tennessee attorney, conduct which violated Rules of Professional Conduct (RPC) 3.4(c) (fairness to opposing party and counsel), 5.5(b) (unauthorized practice of law), and 8.4(g) (misconduct involving failing to comply with a final court order).

7. On June 28, 2022, Respondent Massey rejected the public censure and demanded a formal hearing.

8. On August 5, 2022, in accordance with the demand of Mr. Massey and pursuant to Tenn. Sup. Ct. R. 9, § 15.1(e), the Board filed a Petition for Discipline against Mr. Massey.

9. Respondent thereafter, through counsel, timely filed a responsive pleading on September 21, 2022.

FINDINGS OF FACT

After considering the testimony and evidence introduced at the Final Hearing and reviewing the pleadings in this matter, the Hearing Panel makes the following factual findings with the enumerated facts either undisputed or deemed established to a preponderance of the evidence standard, the requisite standard per Tenn. Sup. Ct. R. 9, § 15.2 (h).

The alleged violations of the Rules of Professional Conduct in this matter can be roughly separated into allegations related to Respondent's business and website through which he allegedly held himself out, negligently or intentionally, as a licensed attorney, and allegations related to Respondent's involvement in a trust and estates matter.

Factual Findings Regarding Respondent's Suspension from Law Practice in 1994

1. After practicing law in Tennessee without disciplinary issues for a ten (10) year period from 1984 to 1994, on August 17, 1994, Respondent Massey was temporarily suspended from the practice of law pending the outcome of formal disciplinary proceedings.

2. The August 1994 Order of Temporary Suspension was based on a finding that Mr.

Massey had "misappropriated client funds to his own use, converted law firm funds to his own used and poses a substantial threat of irreparable harm to the public." (*See Order of Temporary Suspension*, admitted as Trial Exhibit 2).

3. Respondent thereafter executed a conditional guilty plea and on March 19, 1996, was suspended from practicing law in Tennessee for a period of five (5) years. This suspension was to be served entirely as an active suspension, retroactively commencing on August 17, 1994, when the temporary suspension began. (*See Order of Enforcement*, admitted as Trial Exhibit 3).

4. Since 1996, Mr. Massey has never applied for nor otherwise sought reinstatement of his license to practice law in Tennessee, nor has Mr. Massey ever been licensed to practice law in any other jurisdiction.

Factual Findings Regarding Respondent's Business and Related Website

5. In 2001, Mr. Massey formed or participated in the formation of a company called Managed Solutions, LLC. Managed Solutions, LLC, has a customer-facing website which can be found at: https://www.managedsolutionsllc.net/.

6. According to the front-page "about us" section of Respondent's company's website, as of the date of the filing of a Petition for Discipline in this matter, the company claimed to provide: "professional advice, counsel, and guidance to individuals and small businesses throughout the U.S. and Puerto Rico. Our Services include tax preparation & mitigation; organizational strategies for new businesses; mergers & acquisitions; asset transfers; crisis management; capital acquisition; strategic organizational studies."

7. According to the "what we do" section of Managed Solutions, LLC's website (hereinafter the "website," as of the date of the filing of a Petition for Discipline in this matter, the company provided services which included litigation support and financial reporting and compliance.

8. As of the date of the filing of the Petition for Discipline, Respondent Massey was designated on the front page of the website as "Kelvin A. Massey, **JD** MBA MIBA, **Sr. Consultant & Managing Member.**" (emphasis added)

9. As of the date of the filing of the Petition for Discipline, there was no disclaimer on the website that Respondent is not a licensed attorney.

Factual Findings Regarding Respondent's Actions on Behalf of Wanda Woodruff as Successor Trustee to the William O. Woodruff, Sr. Revocable Trust Agreement

10. Mr. William O. Woodruff was a friend and mentor of Respondent's for a period exceeding forty (40) years. In addition to enjoying a personal relationship, Respondent Massey also advised Mr. Woodruff as to his business affairs. Mr. Woodruff specifically consulted with Respondent Massey, on several occasions, to discuss estate planning.

11. These estate planning consultations with Respondent Massey were intended to provide Mr. Woodruff and his heirs with a strategy to avoid complications and costs associated with formally probating his will in Probate Court. Respondent Massey charged Mr. Woodruff an hourly fee of $175.00 per hour for consultation as to trust and estate planning.

12. Based on these discussions and periods of consultation, Mr. Massey formulated, or participated in formulating, the William O. Woodruff Sr. Revocable Trust Agreement, said agreement executed on January 3, 2020. Mr. Woodruff, Sr., along with his wife Althea Woodruff, had previously executed a joint will and other estate planning documents, drafted by a licensed attorney, in 2001.

13. Mr. and Mrs. Woodruff had one child: Wanda R. Woodruff, born in 1959. Mr. Woodruff, Sr., also had three (3) children from a prior relationship: William O. Woodruff, Jr., (born 1948), Carolyn Ragsdale (born 1949), and Charlotte Mathis (born 1950).

14. Althea Woodruff died in 2008, with her share of the joint estate passing to William Woodruff, Sr.

15. The William O. Woodruff Sr. Revocable Trust Agreement, executed on January 3, 2020, was drafted by Respondent Massey on behalf of Mr. Woodruff. This Trust Agreement and supporting documents, all drafted by Respondent, included a general durable power of attorney, a medical power of attorney, an assignment of personal property, and a statement of intent to revoke, modify, or amend the prior joint will of William O. Woodruff, Sr., and Althea Woodruff.

16. William O. Woodruff, Sr., died on October 21, 2020. Ms. Wanda Woodruff, the sole child of both William O. Woodruff, Sr. and Althea Woodruff, was named as trustee of the William O. Woodruff Sr. Revocable Trust Agreement.

17. Wanda Woodruff thereafter reached a tentative agreement with the three other remaining heirs to provide $10,000.00 to each, in the form of a cashier's check, with said payment intended to compensate each heir for their share of the real property located at 2022 Quinn Avenue in Memphis, Tennessee, as prescribed in the trust agreement.

18. On April 28, 2021, Respondent Massey contacted the three other heirs (William O. Woodruff, Jr., Carolyn Ragsdale, and Charlotte Mathis) by letter. In the April 28, 2021 letter to the three (3) heirs, Mr. Massey "attempted to summarize what he believed Mr. Woodruff's estate plan provided and how Wanda Woodruff thought it was appropriate to proceed."

19. Mr. Massey attached to the April 28, 2021 letter a "Release and Hold Harmless Agreement," and stated in the letter that the $10,000.00 checks would be forwarded to each heir upon execution of the release agreement. Mr. Massey himself drafted this document styled as a "Release and Hold Harmless Agreement."

20. In this letter of April 28, 2021 letter, drafted by Respondent, Mr. Massey explicitly states that Respondent was acting "on behalf of Wanda (Woodruff) as successor trustee ..."

21. In that letter, Respondent discussed the "council" (sic) he provided to Mr. Woodruff, Sr. "relative to his business affairs," and noted that he had met with Mr. Woodruff, Sr.,

"on several occasions to discuss estate planning."

22. The letter further notes that "on behalf of Wanda" he is providing a copy of "the Trust Agreement and relevant documents for your review and discussion."

23. The letter further states as follows:

> In consideration of the above, please find enclosed a **Release and Hold Harmless Agreement**[1] for your review and signature upon approval. Wanda has instructed this office to immediately forward the original cashier's checks for negotiation upon receipt of the executed release instrument.

24. The letter concluded: "Finally, Managed Solutions LLC is not a law firm and does not attempt to provide legal advice relative to the subject matter nor representation of the beneficiaries herein. In this regard it is advised that each recipient consider, seek or obtain independent legal advice."

25. However, the letter does not, at any point, indicate that in fact Respondent Massey is not a licensed attorney.

26. Respondent closed the letter by noting that he is Kelvin A. Massey, **JD** MBA MIBA. (emphasis added).

Testimony of Respondent Kelvin Massey

27. During his testimony at trial, Respondent Massey confirmed the recitation of factual findings and admissions, *supra*, and also provided additional details and information as to his conduct and actions.

28. Notably, Respondent affirmed that in a letter to the Board on March 17, 2022, in which he responded to the allegations herein, Respondent stated: "I have made a conscious effort to avoid any perception to the general public that I am licensed to practice law in the state of

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[1] This emphasis is in the original April 28, 2021 letter. As discussed *supra*, it is undisputed that Respondent also drafted this hold harmless agreement.

Tennessee." (*See Respondent's Letter to Board Dated March 17, 2022*, admitted as Trial Exhibit 5).

29. Under questioning from the Board, Respondent affirmed that he believed this statement was a fair summation of his ethical duties under the terms of the conditional guilty plea and the period of suspension imposed through that plea arrangement in 1996.

30. Mr. Massey further testified that despite this self-stated duty to "make a conscious effort to avoid any perception to the general public that I am licensed to practice law in the state of Tennessee," there was no explicit indication on his website that he was not licensed to practice law.

31. Respondent further affirmed that nowhere in letter to the Woodruff heirs of June 2, 2021, did he explicitly explain that he was not licensed to practice law, only that Managed Solutions, LCC was not a law firm. (*See Woodruff Letter dated April 28, 2021,* admitted as Trial Exhibit 6).

32. Respondent testified that it was well known and obvious that his business was in fact a one-man operation, therefore if he clarified that the business was not a law firm, he was effectively explaining that he was not, as an individual, licensed to practice law.

33. Mr. Massey confirmed in testimony that in his March 17, 2022 letter to the Board responding to the complaint made against him, he acknowledged claiming that "[a]t no point was there an attempt on my part to represent Wanda Woodruff, individually or as trustee." (*See Respondent's Letter to Board Dated March 17, 2022*, admitted as Trial Exhibit 5).

34. However, Respondent acknowledged that in the April 28, 2021 letter to the other three (3) non-represented trustees, he stated explicitly: "Pursuant to our recent telephone conversations, and on behalf of Wanda as Successor Trustee, please find a copy of the Trust Agreement and relevant documents for your review and discussions." (*See Woodruff Letter dated*

April 28, 2021, admitted as Trial Exhibit 6)(emphasis added).

Testimony of Witness Wanda Woodruff

35. Respondent called to testify Ms. Wanda Woodruff, daughter to Mr. William O. Woodruff, Sr., and successor trustee to the Woodruff estate.

36. Ms. Woodruff credibly testified that she had known Respondent Massey for over twenty (20) years and was aware that he had formerly been licensed to practice law.

37. Ms. Woodruff testified that she had no personal knowledge as to the basis for Respondent Massey's suspension from the practice of law in 1994.

38. Ms. Woodruff testified that she had no personal knowledge as to specific advice or counsel provided to her father, William O. Woodruff, Sr., by Respondent Massey, either prior to or after his 1994 suspension from legal practice.

39. Ms. Woodruff testified that she had trust in Mr. Massey's judgement and expertise based on her prior experience with Mr. Massey.

40. Under cross-examination, when asked what the letters "J.D." after Mr. Massey's name on his website and letter head signified to her, she stated that it signified that Mr. Massey was a "lawyer."

CONCLUSIONS OF LAW

The jurisdiction and authority of this Panel is derived from Tenn. Sup. Ct. R. 9, and the specific provisions prescribed therein. Attorneys admitted to practice law in Tennessee are subject to the disciplinary jurisdiction of the Supreme Court, the Board of Professional Responsibility, the appointed Hearing Committee, and the Circuit and Chancery Courts. (*See* Tenn. Sup. Ct. R. 9, § 8)

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 or herself at all times in conformity with the standards imposed

upon members of the bar as conditions for the privilege to practice law (*See* Tenn. Sup. Ct. R. 9, § 1). Acts or omissions by an attorney, individually or in concert with any other person, which violate the Rules of Professional Conduct of the State of Tennessee constitute misconduct and grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. (*See* Tenn. Sup. Ct. R. 9, § 11).

In this or any disciplinary matter, pursuant to Tenn. Sup. Ct. R. 9, § 15.2 (h), the Board must establish any RPC violations to a preponderance of the evidence standard. Under § 9.2 of the ABA Standards for Imposing Lawyer Sanctions (hereinafter the "ABA standards"), only if violations are thus established can this Hearing Panel then consider aggravating and mitigating circumstances in addressing the imposition of an appropriate disciplinary sanction.

The Petition for Discipline in this matter alleged violations of Rules of Professional conduct 3.4(c) (fairness to opposing party and counsel), 5.5 (unauthorized practice of law), and 8.4(g) (misconduct involving failing to comply with a final court order), based on the Board's assertion that Respondent's conduct rose to the level of holding himself out to the public or otherwise representing that he was licensed to practice law, and was thus engaged in unauthorized practice in violation of the 1996 Supreme Court Order of Enforcement suspending his license.

These referenced Rules of Professional Conduct are further enumerated as follows:

RULE 3.4(c)
FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

. . .

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

RULE 5.5(b)

UNAUTHORIZED PRACTICE OF LAW

. . .

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

RULE 8.4 (g)
MISCONDUCT

It is professional misconduct for a lawyer to:

. . .

(g) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

With the conduct here either wholly undisputed or readily established through evidence and testimony, the question of law for the Hearing Panel is therefore straightforward: did the conduct of Respondent – an attorney suspended from legal practice – in his business practices and related website management and/or in his conduct in the Woodruff estate matter, violate prohibitions, negligently or intentionally, against representing to the public that he was licensed to practice law?

It should initially be noted that both parties, in addressing the challenges of identifying and defining unauthorized practice of law, have cited approvingly to *Petition of Burson*, 909 S.W.2d 768 (Tenn. 1995), and specifically to the foregoing passage in that opinion:

> It is neither necessary nor desirable to attempt the formulation of a single specific definition of what constitutes the practice of law. **Functionally the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of**

> **law to a specific legal problem of a client;** and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.
>
> *Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995)(emphasis added).

The Hearing Panel joins the parties in relying largely upon *Burson* and has reviewed the holding carefully, although it is distinguishable from these proceedings in that *Burson* was a review of the constitutionality of a statutory provision, Tenn. Code Ann. § 67-5-1514, which provided that taxpayers contesting the assessment of their real and personal property before boards of equalization may be represented by non-attorney agents. In short, *Burson* addressed the conduct of non-lawyers, not suspended lawyers acting under Order of Enforcement of the Supreme Court.

Further, in a parenthetical footnote, the *Burson* court cited to the then in effect provision at Tenn. Sup. Ct. R. 9, § 20.2(e), noting with approval its definition of the practice of law as "any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy, in or out of court, rendered in respect to the rights, duties, regulations, liabilities or business relations of one requiring the services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document or law." *Petition of Burson*, 909 S.W.2d at 776, n 6. While the *Burson* opinion suggests this definition has limited applicability to non-lawyers, it appears plainly applicable to attorneys with suspended licenses to practice law.

Respondent also points to a recent disciplinary matter appealed to the Tennessee Supreme Court, *Waggoner v. Bd. of Pro. Resp.*, 673 S.W.3d 227 (Tenn. 2023). However, the *Waggoner* holding is readily distinguishable from the facts here, most notably in that the respondent attorney

in *Waggoner* was alleged to have violated RPC 5.5(a) – rather than 5.5(b)(2), as is applicable in the instant Massey matter. In *Waggoner*, the respondent attorney, after being suspended from legal practice, "communicated with his former clients through [a non-attorney] who was Memphis Legal Group's office manager, and through other staff members. Mr. Waggoner interviewed and hired attorneys to staff Memphis Legal Group and otherwise directed and marketed the firm after his suspension. The hearing panel found that Mr. Waggoner's use of [a non-attorney] as an intermediary to communicate with his former clients about their cases and what they 'could do' in their cases and who from the Waggoner Law Firm would be in court with them was not a 'firewall' against unauthorized practice." *Waggoner v. Bd. of Pro. Resp.*, 673 S.W.3d 227 (Tenn. 2023).

Here, the allegation against Respondent Massey is not that he practiced through intermediaries or proxies, but that he held himself out or otherwise represented that he was licensed to practice, in violation of RPC 5.5(b)(2). Notably, later discussion in *Waggoner* appears on point here in highlighting the prohibition against effectively working around an existing suspension of practice. As the *Waggoner* Court noted, "It would undermine the purpose of the attorney disciplinary process if a suspended attorney could make an end-run around his suspension, practice law by proxy, and continue to generate revenue from the practice of law." *Id.*

After reviewing the allegations, testimony, and documentary evidence, the Hearing Panel finds that Respondent acted in violation of RPC 5.5(b) by holding himself out or otherwise representing, either intentionally or negligently, that he was still licensed to practice.

Respondent affirmed in testimony his self-stated proposition that he had an obligation, as a suspended attorney, to "make a conscious effort to avoid any perception to the general public that I am licensed to practice law in the state of Tennessee." However, the language on his website appears to give the perception to the general public that he was a licensed attorney. As noted *supra*, "Kelvin Massey, JD," the "senior consultant and managing member," advertised that he provided,

inter alia, professional advice, compliance, counsel, and guidance to individuals and small businesses, litigation support. The website boasted: "Solo practitioners or small law firms, are you bogged down in personal injury claims and case management? We draft pleadings and offer claim settlement support. Book with us today!" Significantly, Respondent promoted the fact that he held a J.D. degree and offered "litigation support" services specifically directed at solo practitioners and small law firms but did not include any language on his website to clarify that he was not a licensed attorney. Lawyers understand that a J.D. is a prerequisite to a license to practice law, but this distinction is often not clear to laypersons. This is exemplified by Ms. Woodruff's testimony before the panel that she believed the designation of a J.D. meant that the person was a licensed attorney. The distinction between a J.D. and a license to practice law can become even more nebulous for laypersons when, like here, an individual holds a J.D., obtains a license to practice law, and is subsequently suspended from the practice of law. Given the real risk of confusion here, it does not appear that Mr. Massey made a conscious effort to avoid any perception to the general public that he was licensed to practice law in the state of Tennessee. The panel finds that Respondent's conduct, whether intentionally or negligently, created the reasonable impression that he was a licensed attorney.

This analysis is also applicable to Respondent's conduct in the Woodruff estate matter. The April 28, 2021 letter to the remaining heirs states specifically that he was acting "on behalf of Wanda (Woodruff) as successor trustee …" Respondent therein provided to the heirs voluminous documents including the trust agreement, a general durable power of attorney, a medical power of attorney, an assignment of personal property, a quit-claim deed, a statement of intent to revoke, modify, or amend the prior joint will of William O. Woodruff, Sr., and Althea Woodruff, and a release and hold harmless agreement. These documents were all drafted by Respondent Massey,

and they were all sent by Kelvin Massey, JD, to the then unrepresented heirs, explicitly "on behalf of" Wanda Woodruff.

The letter also included copies of checks for $10,000/00 and appears to attempt to negotiate with these unrepresented parties, on behalf of Wanda Woodruff, when Respondent writes: "in consideration of the above, please find enclosed a Release and Hold Harmless Agreement for your review and signature upon approval. Wanda has instructed this office to immediately forward the original cashier's checks for negotiation upon receipt of the executed release instrument." This statement appears a clear indication that Mr. Massey was negotiating "in consideration" of the significant offered sums in exchange for executing the release, and doing so because "Wanda has instructed this office" to take that action on her behalf. Again, Mr. Massey promoted the fact that he held a J.D. degree without clearly making it known that he was not a licensed attorney or that he was not acting as counsel on behalf of Ms. Woodruff.

Respondent through counsel argued in closing remarks that there is no evidence of anyone actually being confused by Respondent's statements and omission or wrongly concluding that Respondent was a licensed attorney. The Hearing Panel is not persuaded by that argument because it is undisputed here that the attorney who eventually came to represent the other Woodruff heirs filed an ethics complaint raising questions of unauthorized practice specifically because of the concerns and confusion of her clients. In other words, it seems undisputed that at least the Woodruff heirs had concluded that Respondent held himself out as being admitted to practice law, or been substantially confused as to this role in the matter and the status of his professional licensure.

Finally, the Hearing Panel returns to this passage cited by both parties from *Burson*: "Functionally the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his

educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . ." It appears to the Panel that this definition accurately encapsulates Respondent's conduct in the Woodruff matter and is thus applicable here.

In short, Respondent held himself out as a lawyer in violation of RPC 5.5(b)(2) by actively promoting the fact that he held a law degree, explicitly stating that he was acting "on behalf of" a trustee in an estate matter, drafting numerous legal documents and presenting them to the unrepresented heirs, advertising services which could reasonably be perceived as legal services, including litigation support and drafting of pleadings in personal injury cases, **without clearly stating that he was not actually licensed to practice law.**

Notably, the Panel makes no distinction whether Respondent's conduct was intentional or negligent, because it is irrelevant to the violation – although it could be a factor in determining the proper discipline to be imposed. Through his conduct, Respondent violated RPC 5.5(b)(2)(unauthorized practice of law), and by extension, violated RPC 3.4(c) (fairness to opposing party and counsel) by holding himself out to the Woodruff heirs as an attorney acting "on behalf of the successor trustee" and further violated RPC 8.4(g) (misconduct involving failing to comply with a final court order) by violating the 1996 Order of Enforcement instituting the still effective suspension of his licensure.

APPLICATION OF THE ABA STANDARDS

Pursuant to Tenn. Sup. Ct. R. 9, § 8.4, the appropriate discipline must be based upon application of the ABA Standards for Imposing Lawyer Sanctions, ("ABA Standards"). Pursuant to Tenn. Sup. Ct. R. 9, § 15.4(a), "[i]f the hearing panel finds one or more grounds for discipline of the respondent attorney, the hearing panel's judgment shall specify the type of discipline imposed: disbarment (Section 12.1), suspension (Section 12.2), or public censure (Section 12.4)."

In imposing a sanction after a finding of lawyer misconduct, this Hearing Panel must

consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyer's misconduct; and d) the existence of aggravating or mitigating factors. (ABA Standard 3.0). Under the ABA Standards, intent is defined as "the conscious objective or purpose to accomplish a particular result" and knowledge is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."

The ABA Standards suggest the appropriate baseline sanction, and aggravating and mitigating factors provide a basis for increasing or reducing the sanction imposed. *See* ABA Standard 3.0. *See also Hancock v. Board of Professional Responsibility*, 447 S.W.3d 844, 857 (2014) (length of an attorney's suspension depends in large part on the aggravating and mitigating circumstances).

As to Respondent's violation of RPC 3.4(c) (fairness to opposing party and counsel), 5.5(b)(unauthorized practice of law), and 8.4(g) (misconduct involving failing to comply with a final court order), per § 6.22 of the ABA standards, 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. Conversely, per § 6.23 of the ABA standards, reprimand [Public Censure] is generally appropriate when a lawyer negligently fails to comply with a court order or rule and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

Further, per § 7.2 of the ABA standard, 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. Conversely, per § 7.3 of the ABA standards reprimand [public censure] 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.

Finally, under § 8.1(a) of the ABA standards disbarment is generally appropriate when a lawyer: (a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession. Conversely, under § 8.3, reprimand [public censure] is generally appropriate when a lawyer: (a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession.

In summary, the appropriate baseline disciplinary sanction here is dependent entirely upon whether Respondent acted intentionally and knowingly in violating the prior Order of Enforcement imposing suspension of his license to practice law, or whether said conduct was negligent. Here, while there are troubling examples of conduct which circumstantially suggest Respondent was aware of the perception he was erroneously creating among potential clients, other parties, and the public, the Hearing Panel elects to give the benefit of doubt to Respondent and find that his conduct was negligent rather than intentional.

Therefore, the appropriate baseline sanction is Public Censure.

Aggravating and Mitigating Circumstances

Under § 9.2 of the ABA Standards for Imposing Lawyer Sanctions, after misconduct has been established, mitigating and aggravating circumstances may be considered in deciding what punitive sanctions to impose.

Here, there are many mitigating factors as listed in § 9.32 of the ABA Standards which are applicable to this analysis, most notably the evidence of Respondent's character and reputation as introduced by witness Wanda Woodruff, and the remoteness of his prior discipline, having received no discipline since the 1996 conditional guilty plea and suspension. However, there are

also aggravating factors present as per § 9.22 of the ABA Standards, including Respondent's prior disciplinary offenses and substantial experience in the practice of law.

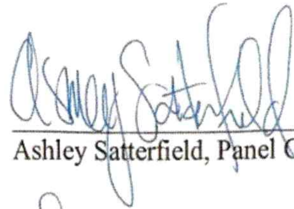
Again, it is clear that suspension could be appropriately applied as a disciplinary sanction. However, the Board initially offered Respondent resolution through imposition of a Public Censure; more importantly, as a practical matter, a suspension will have no real impact on an attorney who has already been suspended for almost thirty (30) years and who by all accounts is unlikely to again seek licensure to practice law. Thus, a Public Censure adequately and appropriately signals to Respondent that his conduct is in ethical violation and must be amended and provides the public with specific notice of the status of Respondent's licensure.

CONCLUSION AND JUDGMENT

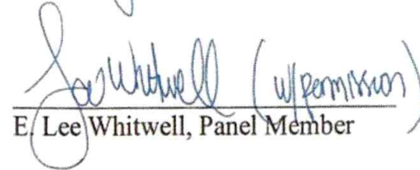
Based upon the testimony and evidence presented at the Final Hearing, application of the Rules of Professional Conduct, and consideration of the applicable ABA Standards and the aggravating and mitigating circumstances in this matter, the Hearing Panel FINDS and RECOMMENDS by a preponderance of the evidence that Mr. Massey committed disciplinary misconduct and should be hereafter PUBLICLY CENSURED pursuant to Tenn. Sup. Ct. R. 9, § 12.4, and that the Board shall thereafter cause notice of this discipline to be published as required by Tenn. Sup. Ct. R. 9, § 28.11. The Board may submit an appropriate Application for Assessment of Costs pursuant to Tenn. Sup. Ct. R. 9, § 31.3(a).

IT IS SO ORDERED.

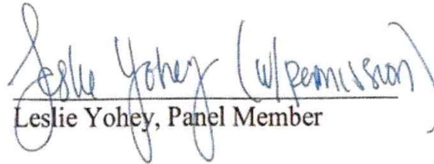
ENTERED ON THIS THE 27th DAY OF November 2023.



Ashley Satterfield, Panel Chair



E. Lee Whitwell, Panel Member



Leslie Yohey, Panel Member

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been sent to Kelvin Arthur Massey, Respondent, c/o Joseph E. Feibelman, Counsel,130 North Court Avenue, Memphis, TN 38103, by U.S. First Class Mail, and hand-delivered to Eric A. Fuller, Disciplinary Counsel, on this the 27th day of November 2023.

Katherine Jennings
Executive Secretary

NOTICE

This judgment may be appealed by filing a Petition for Review in the appropriate Circuit or Chancery Court in accordance with Tenn. Sup. Ct. R. 9, § 33.