

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

CARLOS EUGENE MOORE,

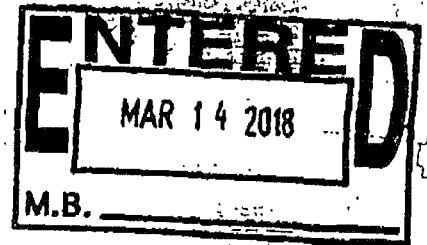
Petitioner,

v.

No. CH-17-1691 III

BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
SUPREME COURT OF TENNESSEE,

Respondent.



ORDER

Petitioner, Carlos Eugene Moore, appeals the decision of the Tennessee Board of Professional Responsibility ("Board") pursuant to Tenn. Sup. Ct. R. 9, section 33. Honorable William B. Acree, Jr., Senior Judge, sitting by designation over the Chancery Court of Shelby County, heard arguments on February 6, 2018; reviewed the record, which included the Hearing Panel transcript, exhibits, and briefs submitted by the parties; and made its ruling from the same. In sum, Petitioner's conduct of making a Fee Agreement with an impermissible clause and attempting to collect fees pursuant to that Fee Agreement violated the Rules of Professional Conduct. For the reasons set forth herein, the decision of the Hearing Panel is affirmed.

DISCIPLINARY HISTORY

Petitioner was licensed to practice law in Mississippi in 2002, and he was licensed to practice law in Tennessee in 2010. Petitioner has never been disciplined in Mississippi or Tennessee.

On October 10, 2016, the Board filed a Petition for Discipline against Petitioner for

alleged misconduct arising from his representation of a client in the circuit court of Shelby County. On November 14, 2016, Petitioner filed a Response to the Petition.

On July 11, 2017, a Hearing Panel of the Board of Professional Responsibility conducted a hearing. The Panel entered its Judgment, Findings of Fact and Conclusions of Law, on August 31, 2017. The Panel found that Petitioner violated Rules of Professional Conduct ("RPC") 1.5(a), 1.5(c), 1.8(i), and 8.4(a) and concluded a public censure was appropriate.

The decision was timely appealed to the Chancery Court of Shelby County. A hearing was held on February 6, 2018.

FINDINGS OF FACT¹

The Petition for Discipline involves Petitioner's representation of Linda Day ("Ms. Day") in the matter of Linda Day vs. United Methodist Neighborhood Centers of Memphis, Inc., d/b/a Miriam Child Development Center, Shelby County Circuit Court, Docket No. CT-005120-12.

In 2012, Ms. Day obtained Petitioner and his law firm, the Moore Law Group, P.C., as counsel for a slip and fall personal injury matter.² Pursuant to Petitioner's representation of Ms. Day, they entered into a Fee Agreement where Petitioner would be paid on a contingency fee basis. The agreement stated as follows:

For service rendered and to be rendered, I set over and assign to my attorneys an undivided contingent interest in any such claim that I may have arising therefrom in the following percentages:

1. 33.33% if recovery is made without filing suit, plus expenses;
2. 40.00% if recovery is made after filing suit, plus expenses;
3. 45.00% if recovery is made after appeal to an appeals court, plus expenses.

¹ There is no significant dispute of fact in this matter. See Respondent's Proposed Findings of Fact and Conclusions of Law, page 1 (citing Transcript of Hearing, at p. 6, lines 14-19) (where the Board asserts that the issue in the case is what legal conclusions to draw from undisputed facts).

² Ms. Day filed the lawsuit as a self-represented litigant, and the case was pending when the Petitioner was employed.

It is further agreed as follows:

d. Should I refuse to make any settlement which my attorney advise[s] me is reasonable and should be taken, then I understand that I am responsible for their fee on the basis of that offer, unless they waive this provision.

See Exhibit 1 to the Hearing of July 11, 2017; Authority to Represent- Contingent Fee, January 23, 2013.

During Petitioner's representation of Ms. Day, Ms. Day received a settlement offer in the amount of \$12,500.³ Petitioner recommended that Ms. Day accept the offer opining the offer was reasonable. Ms. Day did not accept the offer. When Ms. Day did not accept the offer, Petitioner testified that the attorney-client relationship deteriorated. Petitioner felt that Ms. Day no longer valued his professional opinion.

On March 13, 2015, Petitioner filed a Motion to Withdraw as Counsel and Assert Lien.

In the motion, Petitioner states, in pertinent part:

1. Plaintiff and her counsel of record have reached an impasse on how to proceed with her case and it would be in Plaintiff's best interest to retain new counsel.
2. Specifically, Plaintiff refuses to adhere to the advice of counsel, making it impossible to continue representation of counsel
3. Plaintiff has also expressed that she no longer desires to be represented by the Moore Law Group, P.C.
4. Plaintiff will suffer no prejudice if her current counsel is allowed to withdraw and assert a lien of \$13,605.00 for 45.33 hours of work at \$300 an hour attorney's fees, and \$2,428.52 for expenses....

...Plaintiff's Counsel moves for an Order granting its withdrawal and noting its total lien of \$16,033.52....

³ The Court is not clear whether the settlement offer was for \$12,500.00 or \$12,000.00 because throughout the record the amount is not consistent.

See Motion to Withdraw as Counsel and Assert Lien, March 13, 2015, ¶¶ 1 – 4.

On March 27, 2015, the court granted Petitioner's motion to withdraw, but the court did not address the lien.

On April 2, 2015, Petitioner filed a Motion to Assert Lien. In the motion, Petitioner states, in part:

1. [Petitioner] performed other, additional legal services related thereto, for which Plaintiff agreed to pay the Firm for legal services performed by [Petitioner], according to a validity signed contingency contract, including reimbursement of the Firm's advancement of funds and outlays for the Client's benefit in regard to this action, as a prerequisite to performing legal services in and related to this action.
2. ***
3. Plaintiff presently owes The Moore Law Group, P.C., the sum of \$18,123.91 (51.65 hours of work at \$300 an hour for attorneys' fees and \$2,628.91 for expenses) for the performance of legal services and expenditure of costs and expenses for the benefit of Plaintiff in regard to its cause of action against Defendant and in connection with the Firm's representation of Plaintiff in the present action and other matters relating thereto.
4. ***
5. ***
6. This notice is filed without waiver or release of any right, privilege, or interest of the Firm with regard to the subject matter of fees and expenses owed it by Plaintiff, or any other matter....

See Motion to Assert Lien, April 2, 2015, ¶¶ 1, 3, 6.

On November 16, 2015, the court granted Ms. Day a voluntary dismissal.

On May 4, 2016, Petitioner filed an Amended Motion to Assert Lien. In the motion, Petitioner states, in part:

1. [Petitioner] performed other, additional legal services related thereto, for which Plaintiff agreed to pay the Firm for legal services performed by [Petitioner], according to a validity signed contingency contract, including reimbursement of the Firm's advancement of funds and outlays for the Client's benefit in regard to this action, as a prerequisite to performing legal

services in and related to this action.

2. ***
3. Plaintiff presently owes The Moore Law Group, P.C., the sum of \$7,428.91 (\$4,800 in attorneys' fees, which is 40% of the \$12,000 offer counsel suggested Plaintiff accept and \$2,628.91 for expenses) for the performance of legal services and expenditure of costs and expenses for the benefit of Plaintiff in regard to its cause of action against Defendant and in connection with the Firm's representation of Plaintiff in the present action and other matters relating thereto....
4. ***
5. ***
6. This notice is filed without waiver or release of any right, privilege, or interest of the Firm with regard to the subject matter of fees and expenses owed it by Plaintiff, or any other matter.

See Amended Motion to Assert Lien, May 4, 2016, ¶¶ 1, 3, 6.

Petitioner attached a "Time Slip" to all three lien requests detailing the hours and expenses he incurred working on Ms. Day's case. Petitioner never set a hearing for the liens asserted in his March 13, 2015; April 2, 2015; or May 4, 2016, Motions. Therefore, the circuit court did not address this issue. Ms. Day has not paid Petitioner any fees to date. At the hearing of the Panel, Petitioner testified that he will waive any claim to attorney's fees in Ms. Day's action.⁴

The Board alleged that Petitioner violated RPC 1.3 (diligence), 1.5 (a) and (c) (fees), 1.8(i) (conflict of interest), 1.16 (declining or terminating representation), and 8.4 (misconduct). The Panel dismissed allegations that Petitioner violated RPC 1.3 and 1.16.

The proof presented during the hearing of the panel consisted of the following:

1. Testimony of Petitioner;
2. Deposition Testimony of Complainant Linda Day; and

⁴ Ms. Day has obtained new counsel and refiled her action in circuit court. The case is still pending at this time.

3. Testimony of Expert Witness, Robert Moore.

The Panel found that Petitioner violated RPC 1.5(a) and (c), 1.8(i) and 8.4(a). The Panel found that “[Petitioner] made an agreement for and has sought to collect an unreasonable fee in violation of 1.5(a) & (c).” See Judgment, Findings of Fact and Conclusions of Law of the Hearing Panel for Disciplinary District IX, ¶ 4. The Panel focused on the fact the agreement provided for a contingent fee that is not permitted under the RPC because “the fee under the fee agreement was not contingent on the outcome of the case, but rather, it was contingent on [Petitioner’s] recommendation of a settlement offer which he deemed reasonable.” See Id. at ¶ 9. Further, the agreement between Petitioner and Ms. Day gave Petitioner entire control over waiver of a settlement offer. See Id. at ¶ 7. In addition, “[Petitioner] ultimately sought to impose an attorney’s lien on Day’s claim in the Subject Action based on a percentage of the offer which UNC made, which he recommended to Day and which Day rejected, and as a result, [Petitioner] attempted to collect an attorney’s fee which violated Rule 1.5 of the Rules of Professional Conduct.” See Id. at ¶ 25.

The Panel found that Petitioner violated RPC 1.8(i) “because Day became obligated when [Petitioner] advised Day that the settlement offer from UNC was ‘reasonable and should be taken.’” See Id. at ¶ 17. The Panel opined that the “fee agreement as written is overbearing and overreaching.” See Id. at ¶ 22. [Petitioner] twice affirmatively sought to impose an attorney’s lien on Day’s claim in the Subject Action based on an hourly fee calculation which is an attempt to collect an attorney’s fee to which the client did not agree.” See Id. at ¶ 24. Moreover, a poorly drafted fee agreement must be construed against the Petitioner as the author. See Id. at ¶ 20.

The Panel found that Petitioner violated Rule 8.4(a) because he violated Rules 1.5(a),

1.5(c), and 1.8(i).

STANDARD OF REVIEW

The standard of review for appeals of the Panel of the Board of Professional Responsibility is set out in Tennessee Supreme Court Rule 9, § 33.1(b), which provides:

The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the hearing panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The trial court may, in its discretion, permit discovery on appeals limited only to allegations of irregularities in the proceeding. The court may affirm the decision of the hearing panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the party filing the Petition for Review have been prejudiced because the hearing panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the hearing panels jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record. In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the hearing panel as to the weight of the evidence on questions of fact.

See Rule 9, § 33.1(b).

Further, “[a]lthough the trial court may affirm, remand, reverse, or modify a Hearing Panel decision; the trial court may not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.” Board of Professional Responsibility v. Allison, 284 S.W.3d 316, 322 (Tenn. 2009). This Court will not reverse the decision of a Hearing Panel so long as the evidence “furnishes a reasonably sound factual basis for the decision being reviewed.” Hughes v. Board of Professional Responsibility, 259 S.W.3d 631, 641 (Tenn. 2008) (quoting Jackson Mobilphone Co. v. Tennessee Public Service Commission, 876 S.W.2d 106, 111 (Tenn.Ct.App. 1993)).

“When none of the first three grounds for reversal are present, as is the case here, the hearing panel should be upheld unless the decision was arbitrary or capricious, ‘characterized by

an abuse, or clearly unwarranted exercise, of discretion' or lacking in support by substantial and material evidence." Hughes at 641 (citing CF Indus. V. Tenn. Pub. Serv. Comm'n., 599 S.W.2d 536, 540 (Tenn. 1980)). "An arbitrary [or capricious] decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion."

Id. at 641.

Likewise, a reviewing court should not apply Tenn. Code Ann. § 4-5-322(h)(5)'s "substantial and material evidence" test mechanically. Instead, the court should review the record carefully to determine whether the administrative agencies decision is supported by "such relevant evidence as a rational mind might expect to support a rational conclusion.".... The evidence will be sufficient if it furnishes a reasonably sound factual basis for the decision being reviewed.

Id. (citing Jackson Mobilphone Co. v. Tennessee Public Service Commission, 876 S.W.2d 106 (Tenn.Ct.App. 1993).

RULING

Petitioner alleges the Panel erred in finding he violated RPC 1.5 and 1.8. Petitioner also alleges that the Panel erred in determining the appropriate discipline for Petitioner's conduct. In sum, Petitioner does not contend and there is no evidence that the decision of the panel was in violation of constitutional or statutory provisions, in excess of the panel's jurisdiction, made upon unlawful procedure or arbitrary and capricious. The petitioner contends the decision was unsupported by the evidence which is both substantial and material in the light of the entire record.

Unreasonable Fees - 1.5(a) and (c)

The Petitioner contends his fee agreement did not violate RPC 1.5 because the proof did not show that Petitioner's agreement with Ms. Day would allow him to receive a contingent fee even when Ms. Day made no recovery. Specifically, "the fee agreement pertains to an attorney's

fee to which Ms. Day agreed that would be contingent on the settlement of the case, which is an outcome.” See Petitioner’s Brief, January 25, 2018, p. 7. This Court is not persuaded by Petitioner’s argument.

RPC 1.5 states:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d)⁵ or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

⁵ Paragraph (d) prohibits contingent attorneys’ fees in several domestic relations situations and criminal defense representation, neither of which are relevant in this matter.

See RPC 1.5(a), (c).

This Court finds that the Panel's decision is supported by substantial and material evidence. The Panel focused on the fact the agreement provided for a contingent fee that is not permitted under the RPC because "the fee under the fee agreement was not contingent on the outcome of the case, but rather, it was contingent on [Petitioner's] recommendation of a settlement offer which he deemed reasonable." See Id. at ¶ 9. Further, the agreement between Petitioner and Ms. Day gave Petitioner entire control over waiver of a settlement offer. See Id. at ¶ 7.

The agreement stated, "*Should I refuse to make any settlement which my attorney advise[s] me is reasonable and should be taken, then I understand that I am responsible for their fee on the basis of that offer, unless they waive this provision.*" See Exhibit 1 to the Hearing of July 11, 2017; Authority to Represent- Contingent Fee, January 23, 2013 (emphasis added). The record clearly reflects that, pursuant to their fee agreement, Petitioner sought a fee in conjunction with the offer Ms. Day received. According to the plain language of the agreement, when Ms. Day did not accept a settlement that Petitioner opined was reasonable, Petitioner had the option to charge a fee or waive the fee. This right was solely predicated on Ms. Day's decision not to heed the Petitioner's advice.

Next, the Panel considered the fact that Petitioner actually charged an unreasonable fee as evidenced by his several motions to assert a lien in the matter. The record shows that Petitioner, through the motions he filed, first claimed he was entitled to a lien of \$16,033.52 based on 45.35 hours of work at \$300 per hour plus expenses. See Motion to Withdraw as Counsel and Assert Lien, March 13, 2015, ¶ 4. Then, Petitioner asserted he was entitled to a lien of \$18,123.91 based on 51.65 hours of work at \$300 per hour plus expenses. See Motion to Assert Lien, April

2, 2015, ¶ 3. Finally, Petitioner asserted he was entitled to a \$7,428.91 lien which was based on a 40% calculation from the offer of \$12,000.00 plus expenses. See Amended Motion to Assert Lien, May 4, 2016, ¶ 3.

The Panel found that the fee was unreasonable because Petitioner's first attempt to acquire a lien (March 13, 2015, Motion to Withdraw as Counsel and Assert Lien) did not disclose the existence of a fee agreement, and there was no provision in the Fee Agreement that stated Petitioner could recover on an hourly rate. See Judgment, Findings of Fact and Conclusions of Law of the Hearing Panel for Disciplinary District IX, ¶¶ 11, 13. Similarly, the Panel found that Petitioner's second attempt to acquire a lien (April 2, 2015, Motion to Assert Lien) was an attempt to charge an unreasonable fee because there was no provision in the fee agreement which would allow Petitioner to recover based on an hourly rate. See Id. at ¶ 13. Finally, the Panel found that Petitioner's third attempt to acquire a lien (May 4, 2016, Amended Motion to Assert Lien) was an attempt to charge an unreasonable fee because it was based on the calculation of a settlement offer Petitioner *suggested* Ms. Day accept. See Id. at ¶ 15.

Petitioner contends that he filed the Motion(s) to Assert Lien to protect his claim for attorneys' fees and expenses in any future recovery Ms. Day received.⁶ He also testified that he has waived the right to assert a fee and does not plan to obtain a fee in the future. However, the evidence showed that, on the face of the motions alone, Petitioner believed he was "presently owed" a fee from Ms. Day. Petitioner states:

⁶ Specifically, Petitioner asserts:

The fees referenced in those Motions were contingent on the settlement of the case.... [T]his provision of the fee agreement was intended to cover a situation where Mr. Moore performed a significant amount of work on the case, without which a settlement could not be reached, and then the client settled the case pro se or with another attorney. [Petitioner] would be entitled under those circumstances to be paid for the work he did on the case, from which the client obtained significant value and without which the settlement would not have occurred.

See Petitioner's Brief, January 25, 2018, page 8.

Plaintiff presently owes The Moore Law Group, P.C., the sum of \$18,123.91 (51.65 hours of work at \$300 an hour for attorneys' fees and \$2,628.91 for expenses) for the performance of legal services and expenditure of costs and expenses for the benefit of Plaintiff in regard to its cause of action against Defendant and in connection with the Firm's representation of Plaintiff in the present action and other matters relating thereto

See Motion to Assert Lien, April 2, 2015, ¶3 (emphasis added). This Court questions how one can assert someone "presently owes" a fee while also asserting he may be owed a fee *if a certain event occurs*. In other words, Petitioner had already charged an unreasonable fee and his current position is not well-taken.

This Court notes that while issues concerning the accuracy of the lien amounts were not addressed and ruled upon during Ms. Day's case, this Court questions the accuracy of the attorneys' fees claimed and the hours indicated on Petitioner's Time Slips. For example, the March 13, 2015, Motion to Withdraw and Assert Lien and the April 2, 2015, Motion to Assert Lien request a lien sum that is greater than the settlement offer Ms. Day received. In addition, by this Court's reading, Petitioner's Time Slip portrays numerous unreasonable time allocations for seemingly short and simple efforts. See e.g., Exhibit A, Motion to Assert Lien, March 13, 2015, page 2 (where on August 22, 2014, it appears Petitioner alleges he spent one hour mailing postage). Also, aside from limited discovery, it appears from the time records that little work was performed in preparation for trial. It is difficult for the Court to understand how petitioner spent over fifty hours on the case. It seems that the Panel also had a question about the work performed and the hours claimed. The Panel opined, "[t]he time entries set forth in the time slips do not adequately detail the time allegedly spent on the Subject Action to allow the Hearing Panel to evaluate the work allegedly performed even if [Petitioner] were entitled to seek a fee on a non-contingent, hourly basis." See Judgment, Findings of Fact and Conclusions of Law of the Hearing Panel for Disciplinary District IX, ¶ 35.

Altogether, Petitioner may have been entitled to receive a fee from Ms. Day's potential future award. However, Petitioner did not assert his interest in a proper manner under the Rules of Professional Conduct. His impermissible Fee Agreement and Motion(s) to Assert Lien violated RPC 1.5 because they resulted in Petitioner making an agreement for and then charging an unreasonable fee. Moreover, the purported attorneys' fees owed to Petitioner that were greater than the settlement offer were not likely true and correct calculations of the work Petitioner actually performed. The Petitioner's Fee Agreement, Motion(s) to Assert Lien, and Petitioner's testimony were sufficient evidence for the Panel to reasonably conclude Petitioner violated RPC 1.5(a) and (c).

For the aforementioned reasons, the Panel's decision regarding RPC 1.5(a) and (c) is **AFFIRMED**.

Proprietary Interest – 1.8(i)

The petitioner contends the panel erred in finding Petitioner violated RPC 1.8(i). RPC 1.8 states:

- (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
 - (1) acquire a lien authorized by law to secure the lawyer's fee or expenses;
and
 - (2) contract with a client for a reasonable contingent fee in a civil case.

See RPC 1.8(i).

The Panel found that Petitioner violated RPC 1.8(i) "because Day became obligated when [Petitioner] advised Day that the settlement offer from UNC was 'reasonable and should be taken.'" See Id. at ¶ 17. The Panel opined that the "fee agreement as written is overbearing and overreaching." See Id. at ¶ 22. [Petitioner] twice affirmatively sought to impose an attorney's

lien on Day's claim in the Subject Action based on an hourly fee calculation which is an attempt to collect an attorney's fee to which the client did not agree." See Id. at ¶ 24. Moreover, a poorly drafted fee agreement must be construed against the Petitioner as the author. See Id. at ¶ 20.

As this Court previously stated, the evidence showed that Petitioner attempted to acquire a lien for an unreasonable fee. In addition, Petitioner's fee agreement allows Petitioner to receive an unreasonable fee based on a settlement offer and not an outcome in the case.

Under these circumstances, the Panel had sufficient evidence to conclude that Petitioner violated RPC 1.8(i). Therefore, the Panel's decision is AFFIRMED.

Disciplinary Decision

The Panel ultimately found that Petitioner's conduct warranted a public censure. Petitioner correctly contends that the Panel was limited to a determination of public censure or dismissal. The Tennessee Supreme Court Rules state, in pertinent part:

Temporary suspension (Section 12.3), private reprimand (Section 12.5), and private informal admonition (Section 12.6) are not types of discipline available to the hearing panel following the filing of a Petition for Discipline. In determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the ABA Standards for Imposing Lawyer Sanctions.

See Tenn. Sup. Ct. R. 9 §15.4(a).

Petitioner also contends that no sanction should be imposed against him, as his conduct complied with the applicable rules, and he did not violate any duty to Ms. Day or cause real or potential injury to Ms. Day. In addition, Petitioner asserts that other cases in which a public censure has been imposed and upheld involve far more serious allegations and actual harm. This Court disagrees.

In a footnote, the Panel states:

The Panel notes that in their collective opinion, a private reprimand would be more appropriate; however, given the posture of this case, the Rules did not permit this Panel to entertain a private reprimand. The Panel duly notes that the more serious allegations were dismissed by the Board on the eve of the hearing in this cause.

See Judgment, Findings of Fact and Conclusions of Law of the Hearing Panel for Disciplinary District IX, footnote 2. Interestingly, in an earlier footnote, the Panel states that because public censure and dismissal are the only two options available:

[T]he Hearing Panel did not consider whether a Private Reprimand or a Private Informal Admonition might have been the appropriate sanction. The Hearing Panel also did not accept the argument of counsel for [Petitioner] that mitigating factors permitted reducing the type of discipline to an admonition.

See Id. at footnote 1.

This Court's duty is to "take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the hearing panel as to the weight of the evidence on questions of fact." See Rule 9, § 33.1(b). Here, the Panel both opined that it did not consider whether a private reprimand was the appropriate discipline and that it believes a private reprimand is the appropriate discipline. Considering the equities, this Court cannot give either footnote much weight in its determination.

The Petitioner's conduct supports the Panel's findings and sanction. The Panel relied on the fact that Petitioner violated RPC 1.5(a), 1.5(c), 1.8(i), and 8.4(a). The evidence furnishes a reasonably sound factual basis for the decision being reviewed. Similar to a criminal sentencing decision, when a mandatory sentence is required, the court must impose the mandatory sentence relative to the crime committed. Here, the Panel found that Petitioner's conduct violated the Rules of Professional Conduct, and this Court finds the record establishes the Panel had sufficient evidence to reasonably make that finding. As such, the public censure was the appropriate discipline.


Furthermore, the Panel's decision correctly considered the ABA standards articulated in Rule 9,⁷ and the Panel correctly used the standards as guideposts rather than rigid rules for determining appropriate and consistent sanctions for attorney misconduct. See Bailey v. Board of Professional Responsibility, 441 S.W.3d 223, 232 (Tenn. 2014). The Panel also considered a mitigating factor in that Petitioner did not have prior disciplinary history. See Lockett v. Board of Professional Responsibility, 380 S.W.3d 19, 28 (Tenn. 2012) (finding the aggravating and mitigating factors listed in the ABA Standards are illustrative rather than exclusive).

The disciplinary decision of the Panel is AFFIRMED.

CONCLUSION

For the foregoing reasons, the decision of the Panel is AFFIRMED. Court costs shall be assessed to the Petitioner.

It is so ORDERED this the 14 day of March 2018.



WILLIAM B. ACREE, JR.
Senior Judge

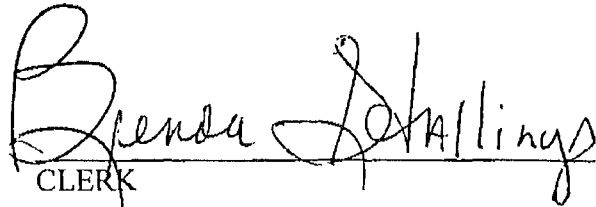
⁷ The Panel considered sections 4.33, 7.3, and 9.23 of the ABA Standards for Imposing Lawyer Sanctions.

CERTIFICATE OF SERVICE

I hereby certify that I will dispatch a true and correct copy of the foregoing Judgment to the following at their respective addresses on this 26th day of March, 2018:

-Attorneys for the Petitioner
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CLERK