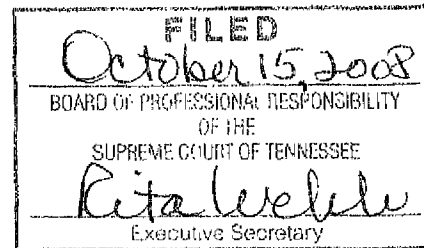


**BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE
DISCIPLINARY DISTRICT V**



IN RE:

G. THOMAS NEBEL, RESPONDENT

BPR No. 5206

Docket No. 2005P - 1491 - 5 - JJ

An Attorney Licensed to Practice
Law in Tennessee (Davidson
County)

JUDGMENT

This matter was heard in Nashville, Tennessee on July 21, 22, 23 and 24, 2008 before the undersigned Hearing Panel duly appointed by the Tennessee Supreme Court. Present before the Hearing Panel were Nancy S. Jones, Chief Disciplinary Counsel for the Board of Professional Responsibility (hereinafter "the Board"), Krisann Hodges, Disciplinary Counsel for the Board of Professional Responsibility, Ben Cantrell, Attorney for Respondent, and G. Thomas Nebel, the Respondent. Upon the pleadings filed in this cause, the testimony of witnesses before the Panel, the exhibits introduced in the hearing, statements of counsel, and the entire record in this cause, the Hearing Panel unanimously renders the following judgment.

I. STATEMENT OF THE CASE

The Board filed a Petition for Discipline against the Respondent on February 8, 2005. After receiving permission to extend the time to answer the Petition, Respondent filed a Response to the Petition for Discipline on April 5, 2005. A Supplemental Petition was filed on November 1, 2005. Respondent again requested an extension of time to answer the

Supplemental Petition; however, he also filed a General Denial on November 28, 2005. On March 8, 2006, Respondent was granted additional time to file a response to the Supplemental Petition and to a pending Motion for Partial Judgment on the Pleadings.

The Board filed a Second Supplemental Petition against Respondent on July 12, 2006. Respondent filed an Answer to the Second Supplemental Petition for Discipline on August 29, 2006 which was once again beyond the permitted time for filing an answer.

The Board filed a Third Supplemental Petition for Discipline on June 28, 2007. Respondent did not file an answer to this Petition, thus prompting the Board to file a Motion for Default Judgment on August 7, 2007. Respondent did file a response to the Motion for Default on August 14, 2007 setting forth various reasons for his failure to answer the Third Supplemental Petition and requesting another extension, which was granted. Respondent filed a Response to the Third Supplemental Petition for Discipline on August 31, 2007.

The Board filed a Motion for Partial Summary Judgment on May 15, 2008. The Panel entered an Order denying Partial Summary Judgment on July 10, 2008. Respondent also filed a Motion for Summary Judgment with a supporting memorandum on May 15, 2008 and the Panel also denied this motion on July 9, 2008.

The hearing on this matter commenced on July 21st, 2008 and was concluded on July 24th, 2008.

II. FINDINGS OF FACT

A. General

The Respondent, G. Thomas Nebel, is an attorney admitted by the Supreme Court of Tennessee to practice law in the State of Tennessee, Board of Professional Responsibility No. 5206. The Respondent's address as registered with the Board is 4141 Woodlawn Drive, Apt. 32, Nashville, Tennessee, 37205, and is therefore located in Disciplinary District V. Respondent was granted a license to practice law in Tennessee in 1976. Prior to opening his own practice in 1997, Respondent was a partner at Bass, Berry, & Sims, PLC and later at Williams and Associates, PC.

Respondent was publicly censured on June 25, 2003 for sharing fees with a non-lawyer. Respondent was temporarily suspended from the practice of law on September 25, 2007, for failure to respond to a disciplinary complaint. Respondent filed a Petition for Dissolution of the suspension on October 23, 2007, in which Respondent stated that he was retiring from the practice of law. Respondent was summarily suspended on July 14, 2008 for failure to pay his annual fee to the Board of Professional Responsibility.

B. Tanya Luker (File No. 28945-6-JJ)

On February 27, 2006, Tanya Luker filed a complaint of ethical misconduct against Respondent. Ms. Luker learned of Respondent's law practice through another attorney, David Goad. Ms. Luker was seeking representation for a possible medical malpractice case related to the death of her husband, Rick Luker, in August 1998. At the time of her husband's death, Ms. Luker was pregnant, and gave birth to a son only five weeks after her husband's death.

It is undisputed that Ms. Luker was a woman of limited means and Respondent testified

that he knew it. Ms. Luker does not have a high school education, failing to complete the eighth grade, and she has never been gainfully employed outside the home.

Ms. Luker hired Respondent and filed a lawsuit against Vanderbilt University on August 12, 1999. The case went to mediation in December, 2000. Ms. Luker and Respondent were both present at the mediation. While they were in mediation, Respondent asked Ms. Luker what she intended to do with any money they might recover in the case. Ms. Luker indicated that she had no idea. Respondent advised her that he had some ideas and that they would talk about it at a later time. Ms. Luker told Respondent that she didn't know anything about investing. Part of Ms. Luker's case settled in mediation for a little over \$150,000, which was to be paid after a trial on the remaining parts of the case in late January, 2001. In about 10 to 15 phone conversations between Respondent and Ms. Luker after mediation (December, 2000) but before trial (January, 2001), Respondent repeatedly brought up the idea of Ms. Luker's loaning Respondent the \$150,000 that she was to be paid after the date of the trial.

Respondent placed considerable pressure on Ms. Luker to agree to the loan. Ms. Luker felt very connected to Respondent and to his law firm because, in her words, they had become like a surrogate family to her. Respondent assisted her at a vulnerable time and she felt that he was acting in her best interests. Additionally, Respondent told Ms. Luker that he needed the money for his law practice and that this money would be used for other people "just like her. It would be used to help other people who could not afford an attorney." These statements made by Respondent to Ms. Luker occurred before the date of the trial and were instrumental in convincing Ms. Luker to part with almost all of the cash settlement that she received from her husband's death. In an effort to keep the transaction free from scrutiny, Respondent asked Ms.

Luker not to say anything to anyone about the fact that she was loaning the settlement proceeds to Respondent. Respondent specifically asked Ms. Luker not to talk about the loan with David Gode, the attorney who had referred Ms. Luker to Respondent.

On February 2, 2001, only two days after the date of the trial, Respondent gave Ms. Luker a letter and enclosed a Promissory Note drafted by Respondent. On February 14, 2001, Ms. Luker loaned Respondent \$150,000 and Respondent signed a Promissory Note of even date. The Promissory Note dated February 14, 2001 called for fifteen percent annual interest and a due date of February 14, 2003.

The \$150,000 loaned to Respondent represented almost all of the cash settlement that Ms. Luker had received from the mediation settlement. The remaining portion of Ms. Luker's cash settlement that she was allowed to retain amounted to just under \$2,000, and she testified that she used this money to pay for her husband's funeral.

At the time Ms. Luker loaned Respondent the \$150,000 in settlement proceeds, she was not employed, her son was still an infant, and she was receiving social security. Respondent was well aware of Ms. Luker's financial condition at the time.

Between March 2001 and February 2003, Respondent failed to make the required payments every month. At least two checks were returned for insufficient funds. Ms. Luker was responsible for paying bank fees on the returned checks. Further, Respondent failed to repay the principal by February 2003 as promised. Instead, Respondent prepared and signed a second promissory note whereby he again agreed to pay Ms. Luker \$1,875 per month in interest on the 15th of each month. The principal sum of \$150,000 would be due in another two years' time. Respondent did not make any provisions in the new promissory note related to the delinquent

payments of the prior note. Respondent did not advise Ms. Luker to seek independent legal advice regarding the advisability of entering into this new business arrangement. He did not explain the potential for conflict or that the arrangement could result in an adversarial relationship. Throughout the period of the notes, Respondent continued to represent Ms. Luker whenever she needed representation. Immediately following the execution of the second promissory note, Respondent was again delinquent in payments. The second Promissory Note, similar to the first, called for fifteen percent annual interest and a due date of February 17, 2005. In 2005, Respondent failed to make the principal payment to Ms. Luker and stopped making payments in any amount. Ms. Luker has received no further payments from Respondent since 2005.

At some point during this time, Respondent offered Ms. Luker a job in his law office as a receptionist, even though she had never before held gainful employment of any kind. Ms. Luker testified that Respondent told her that she "had a good heart" and that is why he thought she would be perfect for the position. Ms. Luker testified that she tried the work for a short time, but was forced to quit because the stress was too much for her.

On April 9, 2006, Respondent filed bankruptcy and listed Ms. Luker as a creditor, seeking to discharge all responsibility for repayment of his loan to her. It was at this point that Ms. Luker realized for the first time that Respondent had no real intention of ever repaying her money.

Ms. Luker's experience with Respondent has had a very profound impact upon her. Since her dealings with Respondent, she has a hard time trusting anyone. Her credit has been ruined; she can't afford medical insurance and can't afford the medicines that she needs. She is

therefore forced to ask medical professionals for samples of medications. Ms. Luker has not been able to afford to see a dentist since her husband passed away, and she cannot even afford to get her car fixed. In 2001, Ms. Luker had hoped to invest the settlement proceeds so that one day she would have the money to fall back upon. Ms. Luker's son is now 9 years old.

C. Ralph E. Wesley, M.D. (File No. 29629-6-JJ)

In 1998 or 1999, Respondent filed a suit against Paul Revere Insurance Company on behalf of Dr. Wesley for this company's failure to pay on this complainant's disability insurance policy. Dr. Wesley had to completely retire from practice due to a heart condition which lasted from December 1997 until February 15, 1999.

During the litigation of this suit for Dr. Wesley against Paul Revere, Respondent requested that Dr. Wesley loan him money to help keep Respondent's law practice afloat. Respondent stated to Dr. Wesley at this time that he needed \$250,000 to help with "cash flow" issues, but that he should be able to repay the loan within a year. Dr. Wesley explained to Respondent that he did not have \$250,000 to lend but discussed with Respondent the possibility of mortgaging his farm in Williamson County to obtain the money for Respondent.

At the time Respondent asked him for a loan, Dr. Wesley was particularly vulnerable. Given his health issues and uncertainty about whether he would be able to continue practicing medicine, Dr. Wesley was very concerned about how Respondent's financial difficulties might affect his lawsuit, and he didn't want to lose Respondent as his lawyer at that point in the litigation, thereby being forced to start over with a new lawyer. Dr. Wesley felt compelled to make the loan due to his concern about his pending litigation and the effect changing counsel

would have on the case. Dr. Wesley described Respondent as his only "hope". Dr. Wesley described the circumstances as "desperate."

In connection with the requested loan, Respondent promised to provide Dr. Wesley with complete financial information such as tax returns, business statements, personal financial statements, and term insurance payable to Dr. Wesley in the amount of the loan. Respondent never did provide these documents to Dr. Wesley. Respondent further failed to provide the promised life insurance. At no time in discussing the potential loan with Dr. Wesley did Respondent advise Dr. Wesley that an IRS lien was pending against Respondent. Respondent in fact provided no real picture of his then financial situation. In the end, Dr. Wesley provided Respondent with an unsecured loan of \$250,000. Dr. Wesley would never have made an unsecured loan of \$250,000 to anyone and did so to Respondent only because Respondent was Dr. Wesley's lawyer, and Dr. Wesley trusted Respondent to protect his interests.

Respondent drafted and signed a promissory note on April 26, 2000, in which he agreed to repay the loan in one payment of all outstanding principal plus any unpaid accrued interest by April 25, 2001. Respondent agreed to make regular interest payments to the bank where Dr. Wesley obtained the loan beginning on May 25, 2000. In order to make the loan, Dr. Wesley arranged for a \$250,000 mortgage on his Williamson County farm. Respondent was able to draw directly from the account and quickly withdrew the entire \$250,000.

Respondent continued to represent Dr. Wesley in the pending lawsuit against Paul Revere at the same time he solicited and obtained the \$250,000 loan. The lawsuit eventually reached settlement in 2002.

Respondent failed to abide by the terms of the promissory note in that he failed to repay

the entire balance and accrued interest by April 25, 2001. When he failed to honor his commitments under the Promissory Note, Respondent convinced Dr. Wesley to renew and/or extend the loans several times. Sometime in 2005, the loan was transferred from one bank to another so that Respondent could avoid paying renewal fees.

After November, 2005, Respondent never made any further payments on the debt to Dr. Wesley, and the interest payment check he issued on November 4, 2005, to Dr. Wesley in the amount of \$3,200 was returned due to insufficient funds.

At no time did Respondent ever advise Dr. Wesley either orally or in writing to seek disinterested advice from independent counsel who was aware of all of the attendant circumstances. Further, Respondent did not inform Dr. Wesley at any point between 2000 and 2006 that Respondent had an outstanding IRS lien or that he had filed a previous bankruptcy before 2000. On April 9, 2006, Respondent filed bankruptcy and listed Dr. Wesley as a creditor, seeking to discharge all responsibility for repayment of his loan to him.

D. Melvin Law, M.D.¹

Sometime after October, 2004, Respondent began representing Dr. Law. Respondent continued to serve as Dr. Law's attorney until sometime in May, 2007. At some point in the representation, Respondent approached Dr. Law about the possibility of Dr. Law's loaning Respondent money. Respondent ultimately borrowed approximately \$300,000 from Dr. Law while representing his interests as an attorney. There were approximately ten promissory notes drafted by Respondent in favor of Dr. Law which are approximately \$30,000 each on average. At no time did Respondent ever advise Dr. Law either orally or in writing to seek disinterested

¹ Although no formal complaint has yet been filed by Dr. Law against Respondent, these facts were uncovered when the Panel questioned Dr. Law about certain aspects of his testimony on other issues in this cause.

advice from independent counsel who was aware of all of the attendant circumstances. Respondent additionally leased real property from Dr. Law and has failed to pay him approximately \$25,000 under the lease agreement.

E. Jonathan Nebel²

Although no formal complaint has yet been filed by Mr. Nebel against Respondent, certain facts were adduced at the hearing on this matter while Respondent was testifying. Respondent represents Jonathan Nebel in litigation concerning the Governor's Club in Tennessee. While representing Mr. Nebel, Respondent borrowed an undisclosed amount of money from Mr. Nebel while he was still a client in the litigation and while Respondent was still performing legal work for Mr. Nebel. At no time did Respondent ever advise Mr. Nebel either orally or in writing to seek disinterested advice from independent counsel who was aware of all of the attendant circumstances.

F. Harold Hardaway (File No. 28504c-5-JJ)/W. Neil Thomas (File No. 28706-5-JJ)

On September 22, 2005, Harold Hardaway filed a complaint of ethical misconduct against Respondent. On November 29, 2005, the Honorable Neil Thomas, Circuit Judge for the Eleventh Judicial District in Chattanooga, filed a complaint relative to Mr. Hardaway's case based upon Mr. Nebel's failure to appear at a show cause hearing. Mr. Nebel submitted an initial response to Mr. Hardaway's complaint on October 11, 2005.

On or around March of 2004, Mr. Hardaway hired Respondent's law firm to represent him in a pending lawsuit filed in Hamilton County Circuit Court against several defendants, including Hamilton County, the Hamilton County Board of Education, and other entities who

² Although no formal complaint has been filed against Respondent by Mr. Nebel, the facts set forth herein came to light while Respondent was testifying at the hearing.

allegedly caused mold damage to the complainant's home. Mr. Hardaway and Respondent discussed the representation prior to Respondent formally accepting the case. Mr. Randy Bostic, an attorney in Respondent's firm, also provided legal services on the case. Respondent, however, was included on pleadings as attorney of record along with Mr. Bostic.

On or around July 11, 2005, Mr. Bostic made an oral motion to the Court requesting permission for Respondent's law firm to withdraw from the case and for a continuance of a pending Motion for Summary Judgment filed by defendant Hamilton County. Mr. Hardaway filed a *pro se* motion to revoke the attorney's order of withdrawal. He sent a copy to Respondent's firm and noticed Respondent and Mr. Bostic that the motion would be heard on August 15, 2005.

Respondent, through Randy Bostic, filed a response to Mr. Hardaway's motion on August 15, 2005. The response indicates that Mr. Bostic was leaving the firm. The office address of Respondent and Mr. Bostic is listed on this response as 2525 West End Ave, Suite 1490, Nashville, Tennessee, 37203. By mid-August, Randy Bostic was no longer an attorney in Respondent's law firm. Neither Respondent, nor Mr. Bostic, appeared at the August 15, 2005, hearing. The Court revoked the Order allowing Respondent's firm to withdraw. A copy of this Order was sent to Respondent at the West End address. Respondent admits to receiving a copy of the Order revoking the withdrawal.

At the time Mr. Bostic made an oral motion to withdraw, a pending motion for Summary Judgment was set for September 19, 2005. Even though Respondent received a copy of the Order revoking his withdrawal, Respondent failed to appear on September 19, 2005. The Court

continued the hearing until October 3, 2005, and requested the presence of both Respondent and Mr. Bostic.

At trial, Respondent admitted that he received a letter dated September 19, 2005, from Hamilton County attorney Mary Neill Southerland alerting him to the Court's request. The letter was addressed to Respondent's West End address. Respondent further admitted that he did not appear on October 3, 2005. Mr. Hardaway asked the Court to continue the matter again and the Court agreed to continue the matter to October 31, 2005. Respondent did not appear on October 31, 2005. The Court took the Summary Judgment under advisement. Mr. Hardaway filed another motion to stay the case until the issue with Respondent's representation was resolved.

The Court heard the motion on November 14, 2005, and on that date issued an Order to Show Cause as to why Respondent should not be held in contempt for failing to appear for the previous court dates. The Show Cause was set for November 28, 2005. Respondent admitted that Ms. Southerland mailed a copy of the Show Cause Order to him at the West End address immediately following the November 14, 2008 hearing.

The Respondent did not appear on November 28, 2005. The Court passed the pending motions until December 12, 2005. On December 12, 2005, Respondent appeared and explained that his office address changed on or around October 25, 2005.

Respondent did not notify his client, opposing counsel, or the Court of the imminent change of address. Respondent testified, however, that he arranged to have all mail forwarded to his new address. Likewise, Respondent acknowledged receiving the Order revoking his withdrawal and the letter from Ms. Southerland alerting him to the October 3rd court date.

In addition to the letter from Ms. Southerland dated September 19, 2005; Respondent admits that he received a fax from the Board on October 12, 2005, inquiring as to the outcome of the October 3, 2005 hearing. Respondent further admits that he failed to respond to the specific inquiries posed by Disciplinary Counsel in the October 12th fax. Respondent again filed a motion to withdraw following the December 12, 2005, hearing. This motion was granted.

Despite his firm's earlier stated intention to withdraw, Respondent did not deliver Mr. Hardaway's file until January 2006. Judge Thomas filed a complaint to the Board specifically related to Respondent's failure to appear on November 28, 2005. After Respondent appeared on December 12, 2005, Judge Thomas notified the Board that he was withdrawing his complaint. However, the Board elected to pursue the complaints related to Respondent's handling of Mr. Hardaway's matter due to the pattern of neglect which culminated in a Show Cause hearing and which potentially caused injury to Mr. Hardaway's interests.

G. E. Clifton Knowles (File No. 29142-6-JJ)

On May 8, 2006, a complaint alleging ethical misconduct was opened by the Board against the Respondent, as submitted by the Honorable E. Clifton Knowles, U.S. Magistrate Judge for the Middle District of Tennessee related to the matter of Paul F. Caruana, et al. v. Dan J. Marcum, et al., Case No. 3:01-1567.

On May 17, 2006, the Respondent submitted his initial written response to the complaint. Beginning in October of 2001, Respondent represented Paul F. Caruana and his wife Ms. Fitch-Caruana, in a dispute involving Mr. Caruana's ownership of an automobile dealership through a corporation. Mr. Caruana employed Respondent's law firm and agreed to pay respondent's law offices contingent fees of 1/3 of any recovery, unless the case was appealed. According to the

Employment Contract, Mr. Caruana agreed to pay Respondent all costs on a monthly basis, and the employment contract allowed Respondent's firm to advance the costs incidental to the case which Mr. Caruana agreed would be reimbursed to Respondent from any ultimate recovery or settlement.

Although the Employment Contract between Respondent and the Caruanas was on a contingency fee basis (unless the case settled by October 15, 2001, which gave the client the option of paying Respondent's firm on a hourly basis), Respondent paid Suzette Peyton, Esq., actual attorneys fees in the following amounts: \$2,500 incurred April 16th, 2002; \$4,000 incurred on June 12th, 2002; and \$1,224.42 incurred November 27th, 2002. Each of these amounts were identified as "Research/Contract" services.

In the "EXP" section of the Value Code Report, Respondent included another bill from Ms. Peyton in the amount of \$6,682.00, incurred April 1st-23rd, 2002. This charge is also listed as "Research/Contract" services.

At all times relevant to the Caruana matter, Suzette Peyton was a licensed attorney who performed legal research and writing on the Caruana case. Ms. Peyton began working on a contract basis with Respondent on or about April 1, 2002. In June 2002, Ms. Peyton became a salaried attorney with Respondent's law firm. She remained an employee of the firm until February 2003. From February 2003 until January 2004, she continued to work with Respondent on a contract basis. In January 2004, Ms. Peyton again became a salaried attorney on staff at Respondent's firm until January 2006.

The Respondent's Value Code Report indicates other charges attributed to Ms. Peyton which are specifically identified as recognizable "cost" items, such as Fed Ex and Kinko's.

These items are clearly distinguishable from the "Expenses/Research" items listed above in that they are small amounts and identify the actual expense. This action on Respondent's part in paying, or agreeing to pay attorney fees to an attorney/employee of Respondent's, and charging these amounts to the Caruanas as expenses, was in violation of the Employment Contract between Respondent and the Caruanas.

The Respondent's actions in charging Mr. Caruana \$42,897.29 for "expenses" which Respondent claims he has "paid" or "incurred" within his May 17, 2006 letter to this Board, where that figure includes a payment or "incurred" obligation to pay attorney fees in that amount to Suzette Peyton, constitutes the charging of unreasonable fees and expenses to the Caruanas in violation of RPC 1.5(a), since Mr. Caruana could not be charged attorney fees by Respondent's firm after October 15, 2001, except on a contingency basis

Respondent failed to ensure that an expert witness, Mr. Lucien Pera, was paid from the money that Mr. Caruana deposited to pay expenses on the case. This was the basis for the Caruanas' letter to Magistrate Knowles that ultimately led to Respondent withdrawing from the case.

H. Eddie Mehaffey (File No. 29007-6-JJ)

On March 20, 2006, Eddie Mahaffey employed Respondent to represent him in a pending case after Respondent convinced him that his then-current lawyer was fine but not a trial lawyer like him. Mr. Mehaffey nonetheless paid \$1000 a month until he had paid a total of \$10,000 and Respondent assigned a new lawyer just out of law school to manage the case. For two years, while Respondent had the case, nothing was done. Suddenly, Mr. Mahaffey received an email from Respondent saying that he could not be his lawyer anymore. No reason was given.

At trial, Mr. Mahaffey testified that he had received a \$500 refund on his fees after Respondent offered to refund his \$10,000 in \$1000 monthly increments. Respondent testified that he did promise to refund the fees. However, before any further refunds could be made, Respondent filed for bankruptcy protection, although the promised refund was not listed as a debt.

I. John A. Gibney (File No. 28961-6-JJ)

This complaint involved the use of another attorney's trust fund account to shield a payment for attorney fees made to Respondent by his client, Bulgartabac which was apparently subject to attachment by the bank. Part of the payment was for attorney fees incurred by Mr. Gibney. Although Respondent admitted that Mr. Gibney was paid late, he was in fact paid. There is no evidence that this transfer of trust funds to another lawyer's trust account was done for any purpose other than a sincere desire to shield trust funds from attachment by the bank. We find no ethical violation in this action and therefore, this complaint is dismissed.

J. Radford/McCord (File No. 27912-5-JJ and 26229-5-JJ)

This complaint involves the submission by Respondent to opposing counsel of various Rule 26 expert disclosures where he did not directly speak with the expert whose opinion he was representing through the disclosure or where the expert never agreed to testify as an expert. The Board argues that this is a violation of Rule 8.4(d) which prohibits conduct that is prejudicial to the administration of justice along with other rules involving conduct which is dishonest.

We feel that the Board failed to carry its burden of proof that the conduct involving the Rule 26 disclosures was an act of dishonesty or one which prejudiced the administration of justice. The evidence suggests that Respondent reasonably relied on representations made by his

expert locator service and that at least one expert simply changed his mind and testified contrary to previous understanding. We therefore do not find an ethical violation in these matters and these complaints are dismissed.

K. Ross/Harwell (File No. 27530-5-JJ)

These complaints are based on allegations that Respondent misrepresented his knowledge concerning certain employees having been disbarred in another state. Respondent testified that he relied on legal advice that Ernest Szarwark was not technically “disbarred or suspended” because he had surrendered his law license. The Board alleges that these acts are prejudicial to the administration of justice. Rule 8.4(d). The comments to Rule 8.4 suggest actions such as those involving fraud or willful failure to file tax returns would fall under this rule. Other actions that involve violence, dishonesty, breach of trust or “serious interference with the administration of justice” fall under this rule.

We conclude that the Board has not carried its burden of showing that these actions constitute willful dishonesty or serious interference with the administration of justice. Therefore, these complaints are dismissed.

L. Benita Pressley (File No. 29296-6-JJ)

On July 5, 2006, a complaint alleging ethical misconduct against the Respondent was opened by the Board as submitted by Benita Pressley. The complaint alleged that Respondent failed to obtain an expert evaluation to determine whether the death of Ms. Pressley’s father, George Buchanan, was a result of medical malpractice. On August 18, 2006, after receiving an extension to provide a response, Respondent submitted his initial written response to the

complaint along with a copy of the employment agreement between Respondent's law office and Ms. Pressley in the underlying case.

Ms. Pressley paid Respondent \$3,000.00 to secure the medical evaluation. In his August 18, 2006 initial response letter to the Board, Respondent admits that he spoke with a consulting physician "verbally" about the matter involving Ms. Pressley's deceased father; that he asked this physician several times to put the opinions in writing, but that he never obtained a written opinion from the physician. Respondent also admits that the lawsuit he filed in this matter had no merit, but that he filed a suit to keep the limitations statute from tolling.

Respondent testified that he engaged Dr. Melvin Law to review the medical record. Dr. Law was never paid for this consultation. Respondent never requested a written report from Dr. Law; rather, he asked Dr. Law to review medical records during a dinner meeting that was previously arranged for the purpose of discussing Dr. Law's divorce. Dr. Law was a client of Respondent at the time of the meeting and he testified that the primary purpose for meeting Respondent was to discuss his own case.

Dr. Law is a board certified orthopaedic surgeon. He testified that he only had one conversation with Respondent about Mr. Buchanan's medical records. He testified that he did a quick "curbside" review but that the medical issues were outside his area of specialty. Dr. Law does not recall Respondent asking for a written report. Further, Dr. Law testified that he would not have offered to provide a written evaluation because Mr. Buchanan's medical issues were not his area of specialty. In Dr. Law's opinion, the case required the review of a physician with internal medicine, pulmonary medicine, or thoracic surgery expertise.

According to Dr. Law's testimony, Respondent never asked Dr. Law to provide a written report. During 2005 and 2006, however, Respondent continued to maintain in conversations with the Pressleys and in a pleading filed in Davidson Circuit Court that he was waiting on a written report from a doctor. Respondent met with the Pressleys in person and by telephone. At each occasion he told them that he would be obtaining a written report from the doctor.

Respondent failed to send the Pressleys a copy of the petition he filed in the matter of Estate of George Buchanan, Deceased, v. Centennial Medical Center, Case No. 05C-1331, Davidson Circuit Court. The suit was filed on May 5, 2005. In July 2005, the Pressleys traveled to Tennessee to discuss the case and to express their concern that the medical expert had not provided a report. Respondent personally met with the Pressleys, however, he did not provide a copy of the petition filed on May 5, 2005. Benita and Manual Pressley testified that they had never seen any of the pleadings filed in the lawsuit until Disciplinary Counsel mailed a copy to them.

An Order of Dismissal was entered on June 21, 2006, for want of prosecution. The Certificate of Service indicates that a copy was mailed to Respondent. Respondent did not forward a copy of this Order to the Pressleys. Respondent filed a Motion to Alter or Amend the Order of Dismissal on July 21, 2006. In this Motion, Respondent cites that he recently lost his entire staff of attorneys, that he is withdrawing from the practice of law for health reasons, and that he has been spending a large amount of time out-of-town to attend to a new job.

The Circuit Clerk sent a letter to Respondent on August 3, 2006 informing him that he will need to pay a filing fee for the motion in the amount of \$25.00. Respondent did not pay the filing fee and did not request that the Pressleys do so, either. Although Respondent maintains

now that he was only required to get an oral report from a medical expert, and that he did so, Respondent never informed the Pressleys of the opinion of the medical expert. The Pressleys' testified that Respondent never sent them notice that he was moving to a new office location. Mr. Pressley was unable to contact Respondent in late 2005 because he did not know Respondent's new location.

We conclude that the Board has not carried its burden of showing that these actions constitute willful neglect or lack of diligence. Therefore, this complaint is dismissed.

III. CONCLUSIONS OF LAW

Pursuant to Section 1, Rule 9 of the Rules of the Supreme Court, any attorney admitted to practice law in Tennessee is subject to "the disciplinary jurisdiction of the Supreme Court, the Board of Professional Responsibility, the Hearing Committee hereinafter established, and the Circuit and Chancery Courts." The license to practice law in this state "is a privilege and it is the duty of every recipient of that privilege to conduct himself at all times in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law."

Pursuant to Section 8.2, Rule 9 of the Rules of the Supreme Court, the Board must prove that a disciplinary violation has occurred by a preponderance of the evidence. Preponderance of the evidence has been commonly defined as evidence that as a whole shows that the existence of the contested fact is more probable than its non-existence.

Prior to March 1, 2003, the conduct of Tennessee attorneys was governed by the Code of Professional Conduct. On March 1, 2003, the Code was replaced by the Rules of Professional Conduct. Although Respondent made an issue of the Board's failure to formally introduce the

relevant portions of the Code into evidence at the hearing, the Panel concluded that this issue was without merit because, pursuant to Rule 202(a) of the Tennessee Rules of Evidence, the Panel was required to take judicial notice of all rules, including the former Code, that had been adopted by the Tennessee Supreme Court.

After a full review of the pleadings, evidence and testimony presented before the Hearing Panel, the Panel finds that the Board has shown by a preponderance of the evidence that Respondent violated Disciplinary Rules and also violated the Rules of Professional Conduct as discussed further below.

A. Solicitation of Personal Loans from Clients

The Respondent's conduct in preying upon a vulnerable clients such as Ms. Luker and Dr. Wesley for large personal loans is a classic example of the behavior that DR 5-104 and RPC 1.8(a) are designed to prevent.³ The applicable portions of these rules are set forth below:

DR 5-104 Limiting Business Relations with a Client

- (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

RPC 1.8 Conflict of Interest: Prohibited Transactions

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a

³ Both the prior Disciplinary Rules and the current Rules of Professional Conduct are implicated in this matter since Respondent's misconduct, as demonstrated by his continual renewal of these loans, is considered continuing misconduct.

manner that can be reasonably understood by the client;
and

- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents thereto in a writing signed by the client.

This Panel finds that the loan transactions between Respondent, Ms. Luker, and Dr. Wesley were violations of the applicable disciplinary rules. In both cases, the clients were particularly vulnerable to Respondent's pleas for money. Ms. Luker was experiencing a traumatic period in her life during which Respondent became an indispensable advocate. Dr. Wesley was in the middle of contentious litigation that would seriously impact future income, not to mention the attendant health problems giving rise to the disability claim.

The transactions between attorney and client were not "fair and reasonable to the client" in that Respondent moved immediately to deprive Ms. Luker of the proceeds of her lawsuit. There can be no question that Respondent imposed upon Ms. Luker about making this loan at a time when she was dependent upon his services, advice, and protection. In the space of less than one (1) month after a proposed settlement became imminent, Respondent began making suggestions to Ms. Luker designed to induce her to loan the money so that he could keep his law practice afloat. In fact, he broached the subject during an actual mediation conference where the amount of Ms. Luker's settlement was at issue. Further, within a week of actually receiving a settlement, he prepared a promissory note setting out the terms of a loan that he was in no position to honor. In 2001, Respondent was already in financial trouble. He borrowed \$250,000 from Dr. Wesley less than ten (10) months prior to the Luker loan. At the initial inception of the loans and at each renewal, Respondent articulated the same reasons for needing the loans: his

law practice was in trouble but he wanted to continue representing deserving clients.

Respondent did not advise Ms. Luker to seek independent legal advice at any point. In fact, he asked Ms. Luker to refrain from mentioning it to another lawyer because he was embarrassed about his financial situation. Respondent did not supply the collateral that he promised to deliver. Ms. Luker is not a sophisticated investor. She relied entirely on Respondent's presentation of himself as an honorable attorney who wanted to make a difference in his clients' lives as he had done for her. Respondent did not advise her of the full extent of his indebtedness to other people or to the IRS. Respondent did not advise Ms. Luker that he had recently taken a loan from another client, Dr. Wesley, in the amount of \$250,000. Respondent did not act fairly and with full disclosure as to the significant risk she would be taking due to his disastrous handling of his own finances. This became quickly evident once Respondent began missing payments and bouncing checks. Further, Ms. Luker has not received a dime of repayment. Her efforts to collect have been unsuccessful and her debt will likely be discharged in bankruptcy. This panel views Respondent's attempts to offer Ms. Luker some form of employment as simply a ploy to keep her close and away from the courthouse where she might have actually been able to remedy this injustice.

Respondent used Dr. Wesley's vulnerable position to obtain a very large personal loan. Respondent knew that Dr. Wesley would have to mortgage his farm to obtain the money for the loan. Respondent knew that Dr. Wesley was very invested emotionally and financially in the outcome of his disability lawsuit. Dr. Wesley was concerned that if the Respondent's law practice closed down, his own case would be in jeopardy. Respondent never advised Dr. Wesley to seek independent legal advice. Although Respondent claims that Dr. Wesley was a

sophisticated investor, no investor can make an informed decision without the documents that Respondent refused or neglected to provide to Dr. Wesley. Respondent did not provide the collateral he promised in either the Luker or Wesley matter.

In both cases, the clients expected Respondent to protect their interests. In both cases, Respondent's interests were in direct conflict with his clients' interests. The conflicts became more pervasive as Respondent continued a yearly pattern of renewing the loans due to his inability to make payments.

Respondent continues to deny that his conduct was unethical because, as he puts it, "going into debt is not an ethical violation." It is most certainly a violation of DR 5-104 and RPC 1.8(a) when the debt was acquired due to an attorney's undue influence upon a vulnerable client and when the client is unable to make an informed decision. The proof is clear that Respondent placed his own needs and interests above those of his clients. This Panel finds that the testimony of Tanya Luker and Dr. Ralph Wesley is credible and compelling. The Panel further finds that while Respondent has expressed remorse about the debts, he appears to be remorseful only about his inability to conduct his law practice in a fiscally sound manner and thus be in a position to repay the debts. Respondent has failed to demonstrate remorse or an understanding for his actions that caused a conflict of interest, complete devastation to one client and partial devastation to another.

Further, these transactions are violations of RPC 1.4, DR 5-104 and RPC 1.8(a) in that Respondent failed to fully explain the matter of the loan and his financial situation so that his clients could make an informed decision. They may have ultimately decided to make the loans, but that does not eliminate Respondent's duty as their attorney to ensure that their decision was

an informed one. Lastly, Respondent's misconduct includes deceit and misrepresentations to Ms. Luker and Dr. Wesley in that he never provided the collateral and financial documentation he promised. He wrote checks that he could not cover. And, ultimately, he failed to honor a contract with both parties. These actions are violations of RPC 8.4.

The evidence further reveals that Tanya Luker and Ralph Wesley were not the only clients from whom Respondent borrowed money during his representation of the client. Dr. Law testified that Respondent represented him in a domestic matter beginning in October 2004. On or around January 2005, Respondent began borrowing money from Dr. Law in the amounts of \$30,000 to \$45,000 over the course of twelve (12) months. The total amount of unpaid loans is approximately \$300,000. This time period coincides with the Luker and Wesley loans in that Respondent had been missing payments on this loan by the time Dr. Law loaned Respondent money. In addition to the unpaid personal loans, Respondent owes Dr. Law approximately \$25,000 in lease payments for a condominium. The revelation regarding the loans from Dr. Law demonstrates that Respondent has a clear intent to engage clients in conflicting business transactions during his representation of them and the further proof regarding the additional and more current loan transactions with Mr. Nebel by Respondent indicate that Respondent will not stop in his pursuit of future victims

B. Neglect of Client Matters, Negligence and Unearned Fees.

With respect to the neglect of client matters, negligence and unearned fees, the RPC provides:

RPC 1.3 Diligence
A lawyer shall act with reasonable diligence and promptness in representing a client.

RPC 1.4(a)(b) Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and comply with reasonable requests for information within a reasonable time.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RPC 8.4(a)(d) Misconduct

It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) ...
- (c) ...
- (d) Engage in conduct that is prejudicial to the administration of justice;

If the proof establishes a disciplinary violation, the ABA Standards should apply.

Applicable ABA Standards include 4.11, 4.62, and 7.2. Additionally, 4.41 applies in this complaint. It states:

Disbarment is generally appropriate when:

- a) A lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
- b) A lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

“Potential injury” as defined in the ABA Standards 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.

1. Pressley Complaint

Although we have elected to dismiss the complaint of Ms. Pressley, we nonetheless feel that Respondent did not earn the fee that he charged her. The testimony showed that Respondent discussed the potential medical malpractice case with Dr. Law over lunch and, even though Dr. Law found no merit to the claim, he filed the lawsuit anyway with no expert opinion that the case was meritorious. There was no evidence presented that any part of the retainer paid by Ms. Pressley went toward expert evaluation. Since no expert was ever paid and the filing of the lawsuit was frivolous, we feel that the \$3000 fee was unearned and therefore conclude that this fee should be refunded.

2. Hardaway Complaint

In the Hardaway complaint, Respondent once again failed to properly communicate with his client at a time when critical issues were at stake. Regardless of the relationship between Mr. Hardaway and Respondent's firm, once the Court found that the Respondent was required to remain on record as Mr. Hardaway's attorney, Respondent had an ongoing obligation to appear for court dates and advise his client accordingly. Instead, Respondent failed to appear for Court on the following dates: August 15, 2005; September 19, 2005; October 3, 2005; October 31, 2005; November 14, 2005, and November 28, 2005. Respondent admits receiving letters advising him of the court dates. The first letter and court dates (through October 31) were received by Respondent prior to the relocation of Respondent's office. Respondent failed to alert his client that he was moving. He failed to notify the Court or opposing counsel that he was moving. His actions were prejudicial to the administration of justice in that the client, opposing party, and the Court were seriously inconvenienced by his repeated failure to appear.

Respondent violated RPCs 1.3, 1.4(a)(b), 3.4(c), 8.4(a) and (d). The Panel finds the following ABA Standards to be applicable to this complaint: ABA Standard 4.41, stated above, 7.2, and 6.22.

ABA Standard 6.22 states:

Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or party, or interference or potential interference with a legal proceeding.

Respondent's failure to communicate with his client, opposing counsel or the Court prior to a Show Cause hearing demonstrates neglect to a degree that Mr. Hardaway's case was delayed for at least four (4) months. The opposing party was also affected by his actions in that their summary judgment motion was continued several times due to Respondent's failure to appear. The facts of this complaint support a suspension. However, in combination with the other complaints discussed herein, it provides an additional basis for disbarment.

3. Caruana/Knowles Complaint

The Board received a complaint from U.S. Magistrate Judge Knowles following a confidential communication sent to him by Respondent's clients, the Caruanas. The essence of the complaint is that Respondent failed to pay an expert, Lucien Pera, on behalf of his clients. The investigation of the complaint revealed that Respondent charged the Caruanas for attorney's fees (for the services of Suzette Peyton, Esquire) in violation of the fee agreement of the parties. Respondent claims that his clients were responsible for expenses, however, the improper charges for attorney's fees could have covered the expert witness expense at least in part. The Value Code Report generated by Respondent indicates that attorneys' fees for Ms. Peyton were charged

during the period of time when she was employed as a contract attorney and during the period of time when she was an employee of Respondent's law office. The Value Code Report reflects the total amount of money paid by Mr. Caruana from which attorneys fees (reflected in the "DTF" section) were deducted. Respondent is unable to explain the specific entries of the Value Code Report with any detail.

When the Third Petition for Discipline was filed, Respondent had still not been relieved of representation of the Caruanas. An Order granting his withdrawal was entered on October 17, 2007; sixteen (16) months following the evidentiary hearing of the matter. The Panel finds that Respondent has violated RPCs 1.3, 1.4(a)(b), 1.5(a), 1.16(d)(1)(2)(3), 3.4(c) 8.4(a)(c) and (d). The Panel applies ABA Standards 4.12, 4.42, 4.62 and 7.2. ABA Standard 4.12 states:

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.

The facts of this complaint support a suspension. However, in combination with the other complaints discussed herein, it provides an additional basis for disbarment.

IV. FACTORS TO BE CONSIDERED

Having concluded that misconduct has been established, the Panel now turns to the consideration of the factors to be considered in imposing discipline, if any, against Respondent. ABA Standards for Imposing Lawyer Sanctions, §3.0 (1992) ("ABA Standards")⁴ The ABA Standards are designed to promote consistency in the imposition of sanctions by identifying the relevant factors that courts should consider and then applying these factors to situations where

⁴ "In determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the ABA Standards for Imposing Lawyer Sanctions." Tennessee Supreme Court Rule 9, §8.4.

lawyers have engaged in various types of misconduct. These standards have been adopted by the Board and we therefore apply these standards to this case. *Dockery v Board of Professional Responsibility*, 937 S.W.2d 863, 867 (Tenn. 1996). In imposing sanctions after a finding of lawyer misconduct, a Court is to consider the following factors: 1) the duty violated, 2) the lawyer's mental state, 3) the actual or potential injury caused by the lawyer's misconduct, and 4) the existence of aggravating or mitigating factors. (ABA Standards, 3.0)

A. Duty Violated

The Panel is of the opinion that the duty that Respondent violated in this matter goes to the very heart of the relationship between an attorney and his client: the concept of trust. The Tennessee Supreme Court described the relationship as follows:

The relationship of attorney and client is an extremely delicate and fiduciary one, so far as the duty of the attorney toward the client is concerned, and the courts jealously hold him to the utmost good faith in the discharge of his duty.

Cooper v. Bell, 19 Cates 142, 127 Tenn.142, 153 (Tenn. 1913).

The Tennessee Supreme Court has also stated:

The relation he (the attorney) bears to the client implies the highest trust and confidence. The client lays bear to his attorney his very nature and heart, leans and relies upon him for support and protection in the saddest hours of his life, knowing not which way to go to attain his rights, he puts himself under the guidance of his attorney and confides that he will lead him aright.

Bank v. Hornberger, 4 Cold. 531, 44 Tenn. 531, 572 (Tenn. 1867).

The Panel finds that there is no higher duty owed to a client than to act in the utmost good faith and honesty in all dealings with the client. Respondent has severely breached his obligations in this regard on repeated occasions and this factor weighs heavily in the Panel's consideration of this matter.

B. Respondent's Mental State

There was no significant evidence proffered at the hearing regarding Respondent's mental state and therefore the Panel finds that this factor does not apply in the consideration of the discipline to be imposed.

C. Actual Injury Caused by the Misconduct

This Panel is unable to imagine a greater injury that could be suffered by a client than that suffered by Ms. Luker. Beyond the monetary losses incurred by Ms. Luker, Dr. Wesley and Dr. Law as a result of Respondent's misconduct, Ms. Luker suffered much more. Not only was Ms. Luker's life completely devastated by Respondent's actions, she lost faith in our system of justice generally and in attorneys specifically.

D. Aggravating and Mitigating Factors

Aggravating and mitigating circumstances generally relate to the offense at issue, matters independent of the specific offense but relevant to fitness to practice, or matters arising incident to the disciplinary proceeding. ABA Standards, §9.1 Commentary. Aggravating Factors are any considerations or factors that may justify an increase in the degree of discipline to be imposed, including prior disciplinary offenses, dishonest or selfish motive, a pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, submission of false statements, refusal to acknowledge the wrongful nature of conduct, substantial experience in the practice of law, and indifference to making restitution. ABA Standards, §9.22, *H. Parker Stanley v Board of Professional Responsibility*, 640 S.W. 2d 210 (Tenn. 1982).

1. Prior disciplinary offenses

Respondent has been disciplined on several prior occasions as described in the Findings of Fact discussed supra. Accordingly, we find that this is an aggravating circumstance.

2. Dishonest or Selfish Motive

With regard to the loans that Respondent wrongfully obtained from clients Luker, Wesley, Law and Nebel, Respondent had a selfish motive in preying upon his clients. Almost all of the money gained through Respondent's misconduct went to fund Respondent's law practice and to fund his personal expenses. This is sufficient to find an aggravating circumstance of dishonesty or selfish motive.

3. Pattern of Misconduct

It is clear to this Panel that there is a consistent pattern of conduct by Respondent in preying upon his clients for his own personal and/or business gain. This is evident in the fact that the same misconduct has been repeated in the same manner by Respondent on four separate occasions over the last nine years. This constitutes a pattern of misconduct and is an aggravating factor.

4. Multiple Offenses

This panel has found six separate acts of misconduct by Respondent.⁵ This is deemed an aggravating circumstance.

5. Refusal to Acknowledge Wrongful Conduct

At no time during these proceedings has Respondent ever acknowledged or even intimated that his conduct was wrongful on either a legal or even moral level. Indeed,

⁵ Luker, Wesley, Law, Hardaway, Knowles and Mehaffey.

Respondent went to great lengths to convince this panel that “going into debt is not unethical”.

Respondent has shown no remorse whatsoever for the carnage he has caused by his misconduct.

One statement made by Respondent during direct examination was found particularly troubling by this Panel. Respondent testified that he was attempting to retire from the practice of law and that he had begun employment with a new company in the energy field. He commented that his “future looked bright.” The Panel wishes that the same could be said for Ms. Luker. Respondent’s complete refusal to acknowledge the wrongfulness of his actions and his cavalier attitude toward the injuries that he has caused is deemed to be an aggravating factor.

6. Substantial Experience in the Practice of Law

Respondent has been licensed to practice law in Tennessee since 1976. In *Board of Professional Responsibility vs Charles Robert Castellaw*, the respondent, who was licensed in 1989 and disbarred in 2000, was found to have had “substantial experience” in the practice of law, a span of 11 years. By contrast, Respondent has been practicing for over thirty years. Therefore, we find that Respondent has had substantial experience in the practice of law and that this is an aggravating factor.

The Panel has reviewed the list of possible mitigating factors set forth in Section 9.3 of the ABA Standards and finds that none of the possible mitigating factors are applicable to the facts of this case. The Panel therefore concludes that there are no mitigating factors to be considered in imposing discipline upon Respondent.

V. DISCIPLINE TO BE IMPOSED

A. Disbarment

The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession. (ABA Standards 1.1). Along with the primary purpose of protecting the public, courts have also recognized the purpose of protecting the integrity of the legal system, to ensure the administration of justice and to deter further unethical conduct and, where appropriate, to rehabilitate the lawyer. *In re Stout*, 75 N.J. 321, 382 A.2d 630 (1978), *Matter of Rubi*, 133 Ariz. 491, 652 P.2d 1014 (1982), *In re Zderic*, 92 Wash. 2d. 77, 600 P.2d 1297 (1979), *In re Nadler*, 91 Ill. 2d. 326, 438 N.E.2d 198 (1982), *Matter of McInerney*, 389 Mass. 528, 451 N.E.2d 401 (1983), *Matter of Carroll*, 124 Ariz. 80, 602 P.2d 461 (1979), *Committee on Professional Ethics v Gross*, 326 N.W.2d 272 (Iowa 1982).

Even absent aggravating or mitigating circumstances, disbarment is generally appropriate in cases involving the misappropriation or failure to preserve client property. (ABA Standard 4.1) Some courts have held that disbarment is always the appropriate discipline when a lawyer knowingly converts client funds. For example, in the case of *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979), the Supreme Court of New Jersey discussed the rationale for imposing disbarment as a sanction on lawyers who misappropriate client funds. It said:

Like many rules governing the behavior of lawyers, this one has its roots in the confidence and trust which clients place in their attorneys. Having sought his advice and relying on his expertise, the client entrusts the lawyer with the transaction including the handling of the client's funds. Whether it be a real estate closing, the establishment of a trust, the purchase of a business, the investment of

funds, the receipt of proceeds of litigation, or any one of a multitude of other situations, it is commonplace that the work of lawyers involves possession of their clients' funds. That possession is sometimes expedient, occasionally simply customary, but usually essential. Whatever the need may be for the lawyer's handling of clients' money, the client permits it because he trusts the lawyer.

It is a trust built on centuries of honesty and faithfulness. Sometimes it is reinforced by personal knowledge of a particular lawyer's integrity or a firm's reputation. The underlying faith, however, is in the legal profession, the bar as an institution. No other explanation can account for clients' customary willingness to entrust their funds to relative strangers simply because they are lawyers.

Id., 409 A.2d at 1155.

Since the proof establishes a disciplinary violation, the Panel should turn to application of the ABA Standards. ABA Standard 4.31 states that:

Disbarment is generally appropriate when a lawyer, without the informed consent of the client(s):

- a) Engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client;...

Further, ABA Standard 4.61 states that:

Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.

ABA Standard 7.1 states that:

Disbarment is generally appropriate when a lawyer knowingly engaged in conduct that is a violation of a duty owed to the profession 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.

Further, the Panel should note the specific definitions of "knowledge" under the ABA Standards:

"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.

The behavior of Respondent in each of the complaints above justifies disbarment according to ABA Standard 4.31 (Failure to Avoid Conflicts of Interest). The Commentary states that “[t]he Courts generally disbar lawyers who intentionally exploit the lawyer-client relationship by acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client without the client’s understanding or consent”. The Commentary cites several cases which stand for the proposition that a lawyer acting in his own self-interest, to the detriment of the client, should be disbarred.⁶ Respondent’s conduct in the Luker and Welsey matters alone would justify disbarment in the opinion of this Panel.

California has held that disbarment is appropriate even absent knowing conversion when a lawyer is grossly negligent in dealing with client property. As the California Supreme Court observed, “[e]ven if [the attorney’s] conduct were not wilful and dishonest, gross carelessness and negligence constitute a violation of an attorney’s oath faithfully to discharge his duties and involve moral turpitude.” *Chefsky v State Bar*, 36 Cal.3d 116, at 123, 680 P.2d 82 (1984).

Most courts, however, reserve disbarment for cases in which the lawyer uses the client’s funds for the lawyer’s own benefit. In *Carter v Ross*, 461 A.2d 675 (R.I. 1983), for example, the lawyer took money from an estate and used it to pay office and personal expenses. The Rhode Island Supreme Court cited the *Wilson* case and imposed disbarment. “We like our New Jersey colleagues, are convinced that continuing public confidence in the judicial system and the bar as

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See *In re: Wolf*, 82 N.J. 326, 413 A2d 317 (1980) where attorney convinced his widow client to invest money in a company in which he was a stockholder and officer. See also *In re: Hills*, 296 Or. 526, 678 P.2d 262 (1984) where attorney entered into a loan transaction with clients in which he intentionally misrepresented that funds were available to pay the note. He also entered into a partnership agreement with another client in which he misrepresented the nature of the partnership. In neither of these disciplinary matters did the attorney advise the client to seek independent legal advice.

a whole requires that the strictest discipline be imposed in misappropriation cases.” 461 A.2d at 676. Similarly, in *In re Freeman*, 647 P.2d 820 (Kan. App. 1982), a lawyer was disbarred who caused checks from an insurance company to be issued to fictitious payees, and then converted that money for his own use. In these types of cases, where the lawyer’s lack of integrity is clear, only the most compelling mitigating circumstances should justify a lesser sanction than disbarment.

In Tennessee, these standards have been applied consistently. In the case of *Board of Professional Responsibility vs Robert B. Akard, Jr.*, the respondent was found guilty of violating DR 1-102(A)(3) - (6) after falsely signing the name of another attorney to a bond and stealing funds belonging to his law firm and \$485,000 from a business associate. In *Board of Professional Responsibility v Larry M. Baker*, the respondent was charged with misappropriating approximately \$250,000 in funds entrusted to him in real estate transactions. In each of these cases, disbarment was the ultimate sanction. Indeed, disbarment is the proper sanction, it seems, even absent mitigating or aggravating factors. As previously discussed, we have made reference to several aggravating factors and have found no mitigating factors whatsoever.

In light of our findings that Respondent misappropriated funds from his clients under the circumstances at issue, we are compelled to find that disbarment is the only appropriate sanction. The amount of money that Respondent converted to his own use is simply astounding and the argument consistently advanced by Respondent throughout these proceedings, that “it is not unethical to go into debt” is repulsive at best. Respondent grossly misled his clients and thereby caused incredible injury to people who trusted him as a member of this noble profession. His actions bring embarrassment to the bar and the public will surely be apprehensive about trusting

attorneys with large settlement funds in the future because of this case. The damage is incalculable and far-reaching to say the least. Adding further injury is the apparent position of Respondent that he is himself somehow a victim of circumstance and his abject refusal to accept full responsibility for his actions or to acknowledge the wrongfulness of his conduct further supports our holding that he should be DISBARRED until he has completed all the required conditions for reinstatement.

B. Disgorgement of Fees.

In *Cohn v Board of Professional Responsibility*, W2003-01516-SC-R3-CV (2004), the Tennessee Supreme Court considered a case where an experienced bankruptcy attorney had been sanctioned by the bankruptcy court for using a system of charging fees that was not authorized. After a petition for discipline was filed, a hearing panel ruled that the attorney had violated certain ethical rules and ordered public censure, disgorgement of certain fees, and suspension until such time as the disgorgement was satisfied. Rejecting the respondent's argument that the bankruptcy court had already considered the attorney fee issue and therefore, the Tennessee Supreme Court could not order disgorgement of the same fees, the Court clearly repeated the well settled law that it has jurisdiction to regulate the practice of law, including the discipline of attorneys.

Secondly, the Court affirmed the disgorgement of more fees than had been ordered by the bankruptcy court, essentially accepting the Board's position that attorneys who are in the wrong are not entitled to *quantum meruit* compensation. See *Swafford v. Harris*, 967 S.W.2d 319, 324-25 (Tenn. 1998); *White v. McBride*, 937 S.W.2d 796, 803 (Tenn. 1996). The Court also noted that the respondent admitted to not keeping time sheets to support his hourly billing.

Therefore, the Panel is of the opinion that Respondent should be required to pay Benita Pressley the sum of \$3,000 and Eddie Mehaffey the sum of \$9,500 prior to being eligible for reinstatement of his law license.

C. Restitution

The Panel finds that further injustice would result if Respondent were allowed to resume the practice of law in the future without first making full restitution to the clients who suffered such tremendous monetary loss as a result of Respondent's misconduct. Such restitution should be made as follows:

1. **Tanya Luker.** Payment to Ms. Luker in the principal amount of \$150,000 together with a simple interest payment calculated at the annual rate of fifteen percent from February 14, 2001.

2. **Ralph Wesley.** Payment to Dr. Wesley in the principal amount of \$250,000 together with a simple interest payment calculated at the annual rate of ten percent from April 26, 2000.

3. **Melvin Law.** Payment to Dr. Law in the principal amount of \$325,000 together with simple interest calculated at the annual rate of ten percent from July 24, 2008.

VI. CONDITIONS FOR REINSTATEMENT

Disbarment terminates an individual's status as a lawyer. No application for relicensure should be considered for five years from the date of the order of disbarment and, at that time, Respondent must show by clear and convincing evidence that he has complied with the following conditions:

1. Successful completion of all aspects of the Tennessee Bar Exam;
2. Successful completion of the Law Office Management class taught by John Kitch, Esq. at the Nashville School of Law or successful completion of a comparable course in the event said course is no longer available;
3. Compliance with all applicable discipline orders or rules;
4. Rehabilitation and satisfaction of a fitness review to practice law;
5. Completion of a full ethics course at an ABA accredited law school; ⁷
6. Full payment of any borrowed funds used to make restitution ordered herein;
7. Full restitution as ordered herein (\$725,000 plus interest); ⁸
8. Full payment of all disgorged fees ordered herein (\$12,500);
9. If Respondent should ultimately be reinstated, a prohibition against ever borrowing monies from clients for any purpose;
10. Full payment of costs of these proceedings. ⁹

⁷ Ample precedent exists for conditioning reinstatement upon further legal education, meaning a regular curriculum course not a legal education course. *Dockery v Board of Professional Responsibility*, 937 S.W.2d 863, 865, 867 fn8 (Tenn. 1996) (upholding requirement for reinstatement that respondent successfully complete a three hour legal ethics course at an "accredited Tennessee law school").

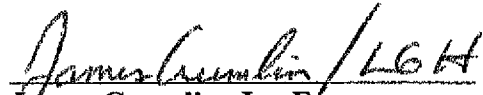
⁸ Tennessee Supreme Court Rule 9, §8.4.

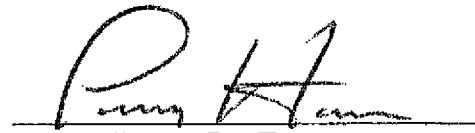
⁹ Rule 9, §24.3 essentially requires the Board of Professional Responsibility to assess against a respondent attorney upon whom sanctions are imposed all costs incurred as a result of formal proceedings.


VII. CONCLUSION

Therefore, it is the unanimous and considered judgment of this panel that the Respondent, G. THOMAS NEBEL, be DISBARRED, and that following the expiration of the applicable five year period, he be denied reinstatement until he has fully complied with each and every requirement for such reinstatement, as further described above.

It is so ORDERED.


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