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

BOARD OF PROFESSIONAL
RESPONSIBILITY

REW EXEC. SEC.

IN RE: JAMES S. POWELL (BPR #015619),)
An Attorney Licensed and Admitted)
to the Practice of Law in Tennessee,)
(Hardin County),)
Respondent.)

Docket No. 2012-2135-7-KB

ORDER

This cause came to be heard on the 28th day of January, 2013 by the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee. This cause was heard pursuant to *Tennessee Supreme Court Rule 9*. This Hearing Committee, Paul Allen Phillips, Chair, James Krenis and Jennifer Twyman King, makes the following findings of fact and submits its judgment in this cause as follows:

I. STATEMENT OF THE CASE

1. A Petition For Discipline was filed on July 6, 2012.
2. On July 12, 2012, Respondent provided a response to said petition, but same did not conform to the Rules of Civil Procedure.
3. On October 30, 2012, the Board filed a motion to require Respondent to submit a responsive pleading and, further, to enlarge the discovery deadline.
4. On November 2, 2012, the Hearing Panel filed an order extending discovery deadline and ordering Respondent to show cause requiring Respondent to either respond to the Petition For Discipline with specific negative averments or respond to the Board's motion for the purpose of showing cause as to why he should not be found in default.
5. Respondent failed to respond to said order.
6. On November 21, 2012, the Board filed a Motion For Default Judgment.

7. On January 10, 2013, this Panel granted the Board's Motion For Default Judgment and found that the allegations contained in the Petition For Discipline be deemed admitted.

8. The hearing remained set for January 28, 2013 and the Respondent was given due notice of same.

II. FINDINGS OF FACT

9. There are multiple alleged violations of the disciplinary rules by Respondent with three such files dealing with trust account overdraft violations. Specifically, File No. 34461-7(N)-PS alleges that the Respondent's IOLTA account was the subject of an overdraft notice from SunTrust Bank received on or about September 6, 2001. On September 7, 2001, the Board sent a letter of inquiry to Respondent regarding the trust account overdraft and requested a response. On September 9, 2011, the Board received a second trust account overdraft notice from SunTrust Bank relating to Respondent's IOLTA account. On September 15, 2011, the Board sent a letter of inquiry to Respondent regarding the second trust account overdraft notice. A second request to Respondent asking for a response was sent on October 5, 2011. An e-mail was sent to Respondent on October 27, 2011, requesting a response. On October 29, 2011, Respondent sent a reply e-mail to the Board. On December 28, 2011, the Board sent a letter to Respondent advising that the overdraft issue had been assigned to the investigations section and requested a response. There were no further responses to the Board's inquiries by Respondent.

On or about August 30, 2011, Respondent caused his trust account to be debited in the amount of Twenty-Five Hundred (\$2,500.00) Dollars at a time when he only had funds available in the amount of Two Thousand Ninety Dollars and Ninety-One Cents (\$2,090.91). On or about August 30, 2011, Respondent issued a check against his trust account in the amount of One Hundred Twenty-Six Dollars and Eighty Cents (\$126.80) when such account such account was overdrawn. On or about August 30, 2011, Respondent issued another check against his trust account in the amount of Two Hundred Two Dollars and Sixty-Four Cents (\$202.64) when such account was overdrawn. On or about September 2, 2011, Respondent issued a check against his trust account in the amount of Three Hundred Sixty-Four Dollars and Fifty-Nine Cents (\$364.59) when such account was overdrawn.

10. It is alleged that Respondent failed to keep a trust receipt and

disbursement book for his trust account; that he failed to keep a client trust ledger book for his trust account; that he failed to safeguard and/or improperly used funds in his trust account and that the improper use of the trust account was the sole basis for the overdrafts which are the subject of this complaint.

11. The Board also maintained File No. 34652-7(N)-PS on Respondent. The allegations are virtually identical to the allegations in the first file number discussed above. Specifically, on November 9, 2011, the Board received a trust account overdraft notice from SunTrust Bank relating to Respondent's IOLTA account. The next day, the Board sent a letter of inquiry. On November 14, 2011, two additional trust account overdraft notices from SunTrust were received by the Board regarding Respondent's IOLTA account. These resulted in further correspondence from the Board. The notice from the bank resulted in two checks being issued by Respondent when he either had insufficient funds or an overdrawn account. The same allegations of misuse and/or mismanagement of the trust account were made regarding this particular file number.

12. The Board also maintained File No. 34778-7(N)-PS on Respondent. The allegations were again that the Board received notice from SunTrust Bank of overdraft violations from SunTrust Bank regarding Respondent's IOLTA account. The Board also corresponded with Respondent regarding this allegation and again Respondent failed to respond to the Board's inquiries or to provide the Board with the requested documentation.

All of the violations set forth in the Board's files regarding IOLTA account mismanagement were alleged to have violated ethical misconduct in violation of Rules 1.15(b), 8.1(b), and 8.4(a) of the Tennessee Rules of Professional Conduct and Formal Ethics Opinion 89-F-21.

13. The Board maintained File No. 34693-7-PS on Respondent regarding allegations of a former client, Eddie Atkins.

14. On or about November 18, 2011, Mr. Atkins filed a disciplinary complaint against Respondent with the Board. On November 22, 2011, the Board notified the Respondent of Mr. Atkins' complaint, and asked for a response within ten (10) days. Several attempts to serve the complaint upon the Respondent were made at the last known address given by Respondent, including e-mail attempts. Respondent failed to respond to the Board's inquiries.

The basic facts of the complaint of Mr. Atkins are that Atkins retained

Respondent to represent him in a civil matter in the General Sessions Court of McNairy County, Tennessee regarding a contractual dispute with a contractor. The allegations were that the contractor had performed insufficient work for Mr. Atkins. A retainer was paid by Atkins to Respondent in the amount of Seven Hundred Fifty (\$750.00) Dollars.

Respondent rescheduled Atkins' court date on two separate occasions.

Mr. Atkins left telephone messages with Respondent on several occasions between August 15, 2011 and October 17, 2011, but the calls were not returned. Respondent failed to appear in court on October 17, 2011. At that point, Atkins went to Respondent's office and discovered it was vacant. Mr. Atkins found that Respondent had left Atkins' file with another attorney. Ultimately, Mr. Atkins' case was dismissed by the General Sessions Court of McNairy County for failure to prosecute.

The allegations against Respondent regarding Mr. Atkins' complaint are that he, Respondent, failed to act with reasonable diligence and promptness in his representation of Atkins; failed to adequately communicate with Mr. Atkins about his case; failed to properly withdraw from Mr. Atkins' case and failed to promptly unearned fees to Mr. Atkins; failed to expedite Mr. Atkins' litigation; failed to respond to the claim of misconduct against him; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and engaged in conduct prejudicial to the administration of justice.

15. The acts and omissions alleged against Respondent set forth in the Petition For Discipline allegedly violate Rules 1.3, 1.4, 1.15(b), 1.16(d), 3.2, 8.1(b) and 8.4(a)(c) and (d) of the Tennessee Rules of Professional Conduct.

The rules and sections of the Rules of Professional Conduct applicable to this case are as follows:

Rule 1.3
Diligence
(Effective January 1, 2011)

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

Rule 1.4
Communication
(Effective January 1, 2011)

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;

- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.15(b)
Safekeeping Property and Funds
(Effective January 1, 2011)

- (b) Funds belonging to clients or third persons shall be deposited in a separate account maintained in an FDIC member depository institution having a deposit-accepting office located in the state where the lawyer's office is situated (or elsewhere with the consent of the client or third person) and which participates in the required overdraft notification program as required by Supreme Court Rule 9, Section 29.1. A lawyer may deposit the lawyer's own funds in such an account for the sole purpose of paying financial institution service charges or fees on that account, but only in an amount reasonably necessary for that purpose. Other property shall be identified as such and appropriately safeguarded. Complete records of such funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Rule 1.16(d)
Declining or Terminating Representation
(Effective January 1, 2011)

- (d) A lawyer who is discharged by a client, or withdraws from representation of a client, shall to the extent reasonably practicable, take steps to protect the client's interests. Depending on the circumstances, protecting the client's interests may include: (1) giving reasonable notice to the client; (2) allowing time for the employment of other counsel; (3) cooperating with any successor counsel engaged by the client; (4) promptly surrendering papers and property to which the client is entitled and any work product prepared by the lawyer for the client and for which the lawyer has been compensated; (5) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse affect on the client with respect to the subject matter of the representation; and (6) promptly refunding any advance payment of fees that have not been earned or expenses that have not been incurred.

Rule 3.2
Expediting Litigation
(Effective January 1, 2011)

A lawyer shall make reasonable efforts to expedite litigation.

Rule 8.1(b)
Maintaining the Integrity of the Profession
(Effective January 1, 2011)

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by RPC 1.6.

Rule 8.4
Misconduct
(Effective January 1, 2011)

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;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;

Formal Ethics Opinion 89-F-21
The Mechanics of Trust accounting

The above cited Formal Ethics Opinion may be obtained via the following link to the Board of Professional Responsibility's website:

http://www.tbpr.org/Attorneys/MX-M623N_20120323_131212.pdf

16. The allegations in the complaint are deemed admitted as Respondent failed to adequately respond to the Petition For Discipline against him, despite being given the opportunity to do so. Though he timely filed a cursory response, the Respondent failed to respond with specific negative averments as prayed for by the

Board and as ordered by this Panel on November 2, 2012. Respondent had the opportunity to participate in a scheduling conference call in the fall of 2012, prior to any deadlines being set. He was well aware of the pending petition and the deadlines therein. Also, he was made aware by the filings of the Board, and by e-mails and letters regarding same, that a specific negative averment to each allegation was needed.

This Panel did not summarily grant a motion for default. Instead, as mentioned, on November 2, 2012, this Panel filed an order extending discovery deadlines and for Respondent to show cause why he did not respond with specific negative averments or to show cause as to why he should not be found in default. A Motion For Default was then filed on November 22, 2012, having given the Respondent nineteen days in which to respond and the Motion For Default was not granted until January 10, 2013.

After the Motion For Default was granted, the only remaining issue was the extent of discipline to be imposed against Respondent. A hearing for same was set on January 28, 2013. At said hearing, neither Respondent nor anyone on his behalf appeared. Complainant, Eddie Atkins, did appear and testified under oath.

The conduct of Respondent throughout the proceedings as evidenced by his (1) failing to completely respond to the initial petition; (2) failure to respond specifically to the petition after being requested to do so; (3) failing to specifically respond to the petition after being ordered to do so; (4) failing to show cause as to why he should not be held in default; (5) failing to appear at his hearing for the imposition of discipline and (6) a pattern of conduct which generally reflected a cavalier attitude toward the seriousness of the allegations against him lead the Panel to consider the conduct as an aggravating factor in that Respondent has refused to acknowledge the wrongful nature of his conduct. Further, it evidences an indifference on the part of Respondent in making restitution to Mr. Atkins or even in giving an adequate response to Mr. Atkins'

complaint.

This Panel finds Mr. Eddie Atkins to be credible. He is a resident of McNairy County, Tennessee and is employed in an industrial setting. It is important to note that on January 28, 2013, Mr. Atkins took time from his own schedule, likely missing time from work, and at his own expense, traveled approximately one hour to Jackson to testify. The Panel finds that he is credible and that his version of the facts is accurate.

17. Mr. Atkins testified that he, indeed, retained Respondent to represent him in a contractual matter involving faulty workmanship by a contractor. His retainer agreement with Respondent was exhibited to the proof. Seven Hundred and Fifty (\$750.00) Dollars was paid by Mr. Atkins to Respondent. This was never refunded to Mr. Atkins after he complained to Respondent.

Atkins testified that he, indeed, had his Civil Warrant dismissed in the General Sessions Court of McNairy County, Tennessee due to Respondent's failure to prosecute same. He learned from a third party that the Respondent had been suspended from practice. He then had to travel to Respondent's former office only to learn that it was vacant. He found his file had been transferred to another attorney without his permission.

Mr. Atkins did not appear in his testimony at the hearing on January 28, 2013 to be prosecuting his complaint out of a sense of spite or vindictiveness. To the contrary, Mr. Atkins was most conciliatory, even to the point of "apologizing" to the Panel and counsel for the Board for their having to appear on January 28, 2013, when instead, he, as a member of the public, is truly the victim of the Respondent's conduct unbecoming a member of the Bar of Tennessee. Mr. Atkins was thanked for his participation rather than chastised for appearing at a hearing not of his own making.

18. This panel specifically finds that Respondent violated Rules 1.3, 1.4,

1.16(d), 3.2, 8.1(b) and 8.4(a), (c) and (d) of the Tennessee Rules of Professional Conduct regarding his representation of Mr. Atkins. The Panel specifically finds that Respondent did not act with reasonable diligence and promptness. Further, he did not adequately communicate with Mr. Atkins pursuant to Rule 1.4. He did not decline or terminate his representation under Rule 1.16(d) when he should have withdrawn after being suspended. This Panel takes particular note of the fact that, after retention of Respondent by Mr. Atkins, Respondent was suspended from the practice of law by an order dated September 21, 2011 by the Supreme Court. This should have triggered notification to Mr. Atkins of Respondent's suspension and proper withdrawal procedures under the Rules. Further, all of this constitutes a failure to expedite litigation and maintaining the integrity of the profession. He has violated Rule 8.4 by violating the Rules of Professional Conduct, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and generally engaging in conduct that is prejudicial to the administration of justice.

The Panel further finds that the other three files before the Board dealing with the IOLTA account violations constitute gross negligence in the handling of Respondent's trust account. Respondent is a repeat offender, based upon these three separate files, repeatedly caused to be written checks that were either drawn on an account having no balance or an insufficient balance. Said overdrafts were promptly brought to Respondent's attention under the Rules and he failed to adequately respond to same. These constitute at least six (6) separate overdrafts during a three (3) month period and shows a pattern of misconduct that the Panel considers to be an enhancing factor to the punishment rendered hereunder. These repeated violations violate Rules 1.15(b), 8.1(b) and 8.4(a) of the Tennessee Rules of Professional Conduct as well as formal Formal Ethics Opinion 89-F-21.

III. Conclusions

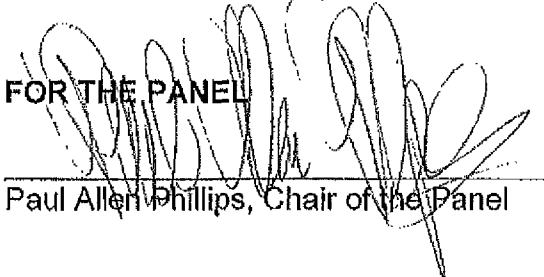
19. Because the Board has made findings of fact that Respondent has violated numerous ethical rules and Formal Ethics Opinions as set forth above, the imposition of a suspension is appropriate. The Panel has specifically considered the damage done to Mr. Atkins; the fact that Mr. Atkins is an innocent victim and an unwilling participant in the system because of Respondent's conduct; that Respondent failed to properly respond to repeated requests of the Board regarding his trust account violations; that he failed to adequately respond to the actual Petition For Discipline in this case, as well as demonstrated a generally cavalier attitude in total disregard for the seriousness of the allegations herein.

20. The Board requested a suspension for a period of time no less than one (1) year as well as restitution of Seven Hundred and Fifty (\$750.00) Dollars to Mr. Atkins. Given the aggravating factors above and, more specifically, that there is a prior disciplinary offense; that he had a dishonest or selfish motive; that he has multiple offenses; that he has refused to acknowledge the wrongful nature of his conduct; and that he has over twenty (20) years of practice, as well as his indifference towards making restitution, a two (2) year suspension from the practice of law in the State of Tennessee is appropriate. Further, restitution should be made to Mr. Atkins of the Seven Hundred and Fifty (\$750.00) Dollars retainer fee. The Panel regrets that it cannot award Mr. Atkins any further damages under the Rules in this specific proceeding for such things as lost court costs, and damages, if any, for his having to appear at the hearing. Having no statutory or procedural authority for same, this Panel still recognizes the damage done to Mr. Atkins by not only ordering restitution, but by also recognizing his participation in the process ordered by the Supreme Court for issues involving attorney discipline.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Respondent be suspended for a period of two (2) years from practicing law in the State of Tennessee and that he be ordered to provide restitution to Eddie Atkins in the amount of Seven Hundred and Fifty (\$750.00) Dollars. This is the recommendation of the Panel to be the final discipline of the Respondent in this matter.

FOR THE PANEL

By:


Paul Allen Phillips, Chair of the Panel