

FILED

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

2016 SEP -6 PM 4: 02

BOARD OF PROFESSIONAL  
RESPONSIBILITY

Rev

EXEC. SEC'y

IN RE:        **MARSHALL SCOTT SMITH,**  
              **BPR. No. 9257, Respondent,**  
              **an Attorney Licensed to Practice**  
              **Law in Tennessee (Madison Co.)**

**DOCKET NO. 2015-2459-7-AJ**

---

**JUDGMENT OF THE HEARING PANEL**

---

This cause came for trial before this Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee on August 10, 2016 in the courtroom of the Supreme Court Building, #6 Highway 45 Bypass, Jackson, Tennessee 38301. This cause was heard pursuant to Rule 9 of the Rules of the Tennessee Supreme Court. Petitioner, the Board of Professional Responsibility (the "Board"), was represented by Alan D. Johnson. Respondent, Marshall Scott Smith ("Mr. Smith"), was represented by William W. Hunt, III. This Hearing Panel, Hugh K. McLean, Jr. (Chair), Dwayne D. Maddox, III, and Clinton H. Scott, after considering the entire file in this matter, the testimony of the witnesses, exhibits, and arguments presented to this Panel, and after thorough deliberations, makes the following Findings of Fact, Conclusions of Law, and renders its Judgment in this cause.

**I.        BACKGROUND**

Mr. Smith is licensed to practice law in Tennessee, with Board of Professional Responsibility Number 9257. A Petition for Discipline was filed against Mr. Smith by the Board on May 29, 2015. An Answer to Petition for Discipline was filed on behalf of Mr. Smith on July 2, 2015. The Board filed a Supplemental Petition for Discipline on November 3, 2015. An Answer to Supplemental Petition for Discipline was filed on behalf of Mr. Smith on December 28, 2015.

## **II. FINDINGS OF FACT**

### **A. FILE NO. 36825-7-ES – COMPLAINANT – VERNETHA MORROW**

1. Ms. Morrow retained Mr. Smith to represent her in two personal injury cases arising out of automobile accidents that occurred on April 14, 2011, and May 25, 2012.
2. One case was settled on January 5, 2012, for the total amount of \$25,000.00, and Ms. Morrow signed a release and trust agreement.
3. Mr. Smith received this settlement check in February of 2012.
4. On May 24, 2012, Mr. Smith presented Ms. Morrow with a settlement sheet, which Ms. Morrow signed.
5. The settlement sheet indicated that Ms. Morrow would receive a total of \$7,360.54, and that subrogation claims, including \$1,629.83 owed to Jackson Madison County General Hospital, would be paid from the settlement proceeds.
6. Ms. Morrow received \$7,360.54; however, Mr. Smith did not pay the \$1,629.83 subrogation to Jackson Madison General County Hospital.
7. The second personal injury case was settled on June 11, 2013 in the amount of \$2,000.00, and Ms. Morrow signed a release in full of all claims.
8. On June 13, 2013 the \$2,000 settlement check was deposited directly into the business/operating account of Mr. Smith's law practice (Trial Exhibit 8).
9. Mr. Smith did not provide Ms. Morrow with a settlement sheet.
10. During the course of the Board's investigation, Ms. Morrow agreed to accept from Mr. Smith a total of \$4,483.83.
11. Ms. Morrow testified in person at the hearing.
12. In addition to the \$1,629.83 (stipulated to) that was not paid to JMCGH, \$907.00 was not paid to the Imaging Center from the first settlement.
13. Non-payment of the \$1,629.83 to JMCGH and \$907.00 to the Imaging Center has damaged Ms. Morrow's credit rating.
14. Ms. Morrow did not receive the \$2,000 settlement proceeds from her second accident (date of loss May 25, 2012).

15. On January 9, 2014, the Board received a complaint from Ms. Morrow and sent the same to Mr. Smith requesting his response within ten (10) days. A true and correct copy of the complaint and transmittal letter is attached as Exhibit A to the Petition for Discipline.
16. By letter dated January 22, 2014, the Board sent the complaint to Mr. Smith again, requesting that he respond within ten (10) days. A true and correct copy of the Board's letter is attached as Exhibit B to the Petition for Discipline.
17. Disciplinary Counsel was subsequently informed of Mr. Smith's new address, and by letter dated February 21, 2014, sent Mr. Smith copies of the pending complaints to his new address. A true and correct copy of the Board's letter is attached as Exhibit C to the Petition for Discipline.
18. By letter dated March 27, 2014, the Board sent the complaint to Mr. Smith again, requesting that he respond within then (10) days. A true and correct copy of the Board's letter is attached as Exhibit D to the Petition for Discipline.
19. On June 2, 2014, the Board received Mr. Smith's response to the Board's request for information. A true and correct copy of Mr. Smith's letter is attached as Exhibit E to the Petition for Discipline.
20. By letter dated June 30, 2014 and received by the Board on July 2, 2014, Mr. Smith informed the Board that he was going to immediately pay Ms. Morrow the \$2,000.00 settlement from the second case and "\$2,483.83 for bills incurred in the first motor vehicle accident." Mr. Smith admits that the letter attached as Exhibit F to the Petition for Discipline was a letter he mailed to the Board on or about June 30, 2014.
21. On July 2, 2014, the Board sent Mr. Smith's responses to Ms. Morrow and requested that she reply. Her reply was received and forwarded to Mr. Smith by letter dated July 11, 2014. A true and correct copy of the Board's letter and Ms. Morrow's response are attached as Exhibit G to the Petition for Discipline.
22. By letters dated July 2, 2014, and July 30, 2014, the board requested that Mr. Smith provide answers to specific questions. True and correct copies of the Board's letters are attached as Exhibit H to the Petition for Discipline.
23. On August 7, 2014, the Board sent Mr. Smith an email informing him that letters that had been sent to him had been returned. Mr. Smith responded by email on August 9, 2014, explaining that the letters should not be going to his Post Office box and providing his home address. A true and correct copy of the email exchange is attached as Exhibit I to the Petition for Discipline.
24. On August 11, 2014, the Board emailed the previously returned correspondence to Mr. Smith and received notification that the email had been delivered. A true and correct copy of the Board's email and notification of delivery is attached as Exhibit J to the Petition for Discipline.

25. On August 13, 2014, Mr. Smith sent an email to the Board instructing that correspondence should be sent to his Post Office box. A true and correct copy of Mr. Smith's email is attached as Exhibit K to the Petition for Discipline.
26. On August 26, 2014, the Board sent a letter to the address provided by Mr. Smith that enclosed a copy of the Board's July 30, 2014 letter, and requested that he respond within seven (7) days. A true and correct copy of the Board's letter is attached as Exhibit L to the Petition for Discipline.
27. On September 2, 2014, Mr. Smith sent an email to the Board stating that he would respond to the Board's requests by Thursday, September 4, 2014. A true and correct copy of the Mr. Smith's email is attached as Exhibit M to the Petition for Discipline.
28. On September 17, 2014, Mr. Smith sent an email to the Board regarding his recent communications with Ms. Morrow. Mr. Smith informed the Board that Ms. Morrow was irate because the Board had told her that he should have paid what he had promised to pay in his June 30, 2014, letter. Mr. Smith told Ms. Morrow he could do nothing until he heard from the Board in writing. Mr. Smith admits that the email attached as Exhibit N to the Petition for Discipline was an email he sent to the Board on or about September 17, 2014.
29. Ms. Morrow testified that Mr. Smith informed her that she would not get anything because she had filed a complaint with the Board.
30. On September 17, 2014, the Board sent Mr. Smith an email asking that he provide answers to specific questions. The Board reminded Mr. Smith that he had stated in his June 30, 2014, letter that he would make the payments "immediately" and requested that he provide previously requested information. Mr. Smith admits that the Board sent him the email marked as Exhibit O to the Petition for Discipline.
31. After September 17, 2014, Mr. Smith did not respond further to the Board's request for answers and information.
32. Mr. Smith has never paid Ms. Morrow as he promised.

**B. FILE NO. 36898c-7-ES – COMPLAINANT – TERESA WILLIAMS**

33. Ms. Williams hired Mr. Smith to represent her in a divorce in 2008.
34. Ms. Williams paid Mr. Smith a \$5,000 fee.
35. Mr. Smith filed a complaint for divorce on June 6, 2008.
36. The parties then reconciled and Mr. Smith filed an order of reconciliation on January 1, 2009.
37. In 2013, Mr. Smith had a substance abuse problem.

38. On August 14, 2013, Mr. Smith requested from Ms. Williams, and received a 90-day loan for \$7,500.
39. At the time the loan was made, Mr. Smith did not: 1) set forth the essential terms of the loan in writing for Ms. Williams; 2) advise Ms. Williams, in writing, that she should seek independent legal advice, or; 3) obtain Ms. Williams' consent, informed or otherwise, in a written document signed by Ms. Williams.
40. Ms. Williams testified in person at the hearing.
41. Ms. Williams was vulnerable during her dealings with, and loan to, Mr. Smith based on the status of her relationship with her husband.
42. When Ms. Williams was approached by Mr. Smith for a second loan, which she declined to provide, Mr. Smith threatened to kill himself, causing her loss of sleep and worry.
43. Ms. Williams tried to contact Mr. Smith on numerous occasions. On one occasion Mr. Smith responded by text, "DON'T CONTACT ME AGAIN."
44. On February 6, 2014, the Board received a complaint from Ms. Williams and sent the same to Mr. Smith requesting his response within ten (10) days. A true and correct copy of the complaint and transmittal letter is attached as Exhibit Q to the Petition for Discipline.
45. On June 2, 2014, the Board received Mr. Smith's response to the Board's request for information. A true and correct copy of Mr. Smith's letter is attached as Exhibits E and R to the Petition for Discipline.
46. On June 27, 2014, the Board received a letter from Ms. Williams' lawyer stating that he was negotiating with Mr. Smith regarding repayment of amounts due Ms. Williams. A true and correct copy of his letter is attached as Exhibit S to the Petition for Discipline.
47. By letter dated June 30, 2014, Mr. Smith agreed that he was in the process of negotiating a payment plan. A true and correct copy of Mr. Smith's letter is attached as Exhibit T to the Petition for Discipline.
48. By letter dated July 2, 2014, the Board requested from Mr. Smith responses to specific questions regarding his representation of Ms. Williams. A true and correct copy of the Board's letter is attached as Exhibit U to the Petition for Discipline.
49. By letter dated July 29, 2014, the Board requested from Mr. Smith responses to specific questions regarding his representation of Ms. Williams. A true and correct copy of the Board's letter is attached as Exhibit V to the Petition for Discipline.
50. The Board engaged in an email exchange with Mr. Smith between August 7, 2014 and August 13, 2014, regarding his address and returned letters. See Exhibits I through K to the Petition for Discipline.

51. On August 13, 2014, the Board received additional information from Ms. Williams' lawyer and forwarded it to Mr. Smith on the same day, requesting his response within ten (10) days. A true and correct copy of the letter and documents provided by Ms. Williams' lawyer and transmittal letter to Mr. Smith is attached as Exhibit W to the Petition for Discipline.
52. On September 15, 2014, the Board received a letter from Mr. Smith in which he proposed a payment plan to reimburse Ms. Williams \$250.00 a month for six months, then \$500.00 per month with reasonable interest until she was repaid in full. A true and correct copy of Mr. Smith's letter is attached as Exhibit X to the Petition for Discipline.
53. Ms. Williams obtained a civil judgment against Mr. Smith in the amount of \$12,500.00. Mr. Smith has not repaid the loan or refunded the retainer fee. No payments have been made to Ms. Williams by Mr. Smith towards the judgment amount or otherwise.

**C. FILE NO. 36857-7-ES – COMPLAINANT – NIKKI MCLEMORE**

54. Ms. McLemore hired Mr. Smith to represent her in a car accident on April 22, 2011.
55. On February 14, 2012, the matter was settled and Mr. Smith received a \$7,800 check from the insured's insurance company.
56. Mr. Smith deposited the check into his trust account on February 22, 2012.
57. Ms. McLemore never received any funds from the check.
58. Ms. McLemore testified in person at the hearing.
59. Ms. McLemore did not consent to and was not conferred with regarding the settlement of her case. Mr. Smith did not discuss the terms of the settlement with Ms. McLemore, and Ms. McLemore did not authorize settlement. Ms. McLemore did not know that her case had been settled until she was informed by a third party.
60. Ms. McLemore attempted to communicate with Mr. Smith numerous times regarding her case after his representation of her began. Mr. Smith's office gave numerous excuses. Ms. McLemore was unable to speak with Mr. Smith.
61. Ms. McLemore learned of the settlement when she received a phone call from a third party.
62. Ms. McLemore did not intend to settle the case and intended to fight the case in court.
63. Ms. McLemore trusted Mr. Smith as her attorney and signed the Power of Attorney he put in front of her authorizing Smith to endorse any check on her behalf. (Trial Exhibit 7)

64. On January 27, 2014, the Board received a complaint from Ms. McLemore and sent the same to Mr. Smith requesting his response within ten (10) days. A true and correct copy of the complaint and transmittal letter is attached as Exhibit Y to the Petition for Discipline.
65. On June 2, 2014, the Board received Mr. Smith's response to the Board's request for information in which he stated that he would respond to Ms. McLemore's complaint in a few days. A true and correct copy of Mr. Smith's letter is attached as Exhibit E to the Petition for Discipline.
66. By letter dated July 8, 2014, the Board requested that Mr. Smith provide the promised information within seven (7) days. A true and correct copy of the Board's letter is attached as Exhibit Z to the Petition for Discipline.
67. On July 25, 2014 the Board received Mr. Smith's letter stating that he had spoken with Ms. McLemore and would contact the Board when he had heard back from her. A true and correct copy of Mr. Smith's letter is attached as Exhibit AA to the Petition for Discipline.
68. The Board engaged in an email exchange with Mr. Smith between August 7, 2014 and August 13, 2014, regarding his address and returned letters. See Exhibits I through K to the Petition for Discipline.
69. By letter dated August 15, 2014, the Board requested from Mr. Smith responses to specific questions regarding his representation of Ms. McLemore. A true and correct copy of the Board's letter is attached as Exhibit BB to the Petition for Discipline.
70. By letter dated September 2, 2014, the Board sent information to Mr. Smith that had been received from Ms. McLemore, consisting of an unpaid medical bill. A true and correct copy of the Board's letter and attachments are attached as Exhibit CC to the Petition for Discipline.
71. Trial Exhibit 7 contains an unsigned settlement sheet and release regarding the settlement of Ms. McLemore's auto accident claim. Ms. McLemore testified she never saw either document prior to the hearing on August 10, 2016.
72. Mr. Smith failed to pay medical expenses incurred by Ms. McLemore in the amount of \$2,228.00 (referenced in Trial Exhibit 7 on two statements to Franklin Payne/White Chiropractic). The unsigned settlement sheet shows that the \$2,228.00 would be paid by Mr. Smith.
73. Mr. Smith forwarded correspondence to the Board on July 23, 2014 representing that he had spoken with Ms. McLemore the day before. Ms. McLemore testified that she never spoke with Mr. Smith in July 2014 and that her husband was not involved with her case, which contradicts Mr. Smith's July 23, 2014 correspondence to the Board. The testimony of Ms. McLemore was not refuted by Mr. Smith.

**D. FILE NO. 37491 – 7(N)-ES – COMPLAINANT – BOARD**

74. Mr. Smith admits that his trust account was used for personal expenses in November of 2013. (See paragraph 5 of Answer to Supplemental Petition for Discipline and paragraph 11 and Exhibit A of the Supplemental Petition for Discipline).
75. On September 19, 2014, the Board sent Mr. Smith a copy of his trust account bank statement and requested his response within ten (10) days. A true and correct copy of the transmittal letter with attachment is attached as Exhibit A to the Supplemental Petition for Discipline.
76. On October 7, 2014, the Supreme Court placed Mr. Smith on Disability Inactive Status pending a determination by a Hearing Panel that he was or was not able to practice law. See Order filed October 7, 2014 attached to Trial Exhibit 2 - Second Joint Stipulation of Facts.
77. Mr. Smith subsequently withdrew his request to be placed on Disability Inactive Status, and on April 14, 2015, the Supreme Court dismissed his request. A true and correct copy of the Court's Order is attached as Exhibit DD to the Petition for Discipline and attached to Trial Exhibit 2 - Second Joint Stipulation of Facts.
78. On April 14, 2015, the Supreme Court temporarily suspended Mr. Smith from the practice of law for posing a threat of substantial harm to the public. A true and correct copy of the Court's Order of Temporary Suspension is attached as Exhibit EE to the Petition for Discipline and attached to Trial Exhibit 2 - Second Joint Stipulation of Facts.
79. After Mr. Smith withdrew his request to be placed on Disability Inactive Status, and following several requests for a response from Mr. Smith, he sent a response by email on September 15, 2015. A true and correct copy of Mr. Smith's email is attached as Exhibit B to the Supplemental Petition for Discipline.

**E. FILE NO. 37581-7-ES – COMPLAINANT – HOLLY RICE**

80. On June 13, 2014, Ms. Rice retained Mr. Smith, and paid him \$1,460.00 to represent her in a post-divorce matter in Arkansas. Mr. Smith admits that Exhibit H to the Supplemental Petition for Discipline is a copy of a letter mailed by Ms. Rice to the Board which includes a cancelled check made payable to him.
81. On June 13, 2014, Beth Cole, a friend of Ms. Rice, paid Mr. Smith \$1,400.00 as part of his fee to represent Ms. Rice in a post-divorce matter in Arkansas. Mr. Smith admits that Exhibit I to the Supplemental Petition for Discipline is a copy of a letter from Ms. Cole and a check made payable to him.
82. Mr. Smith's fee arrangement was not reduced to writing and signed by Ms. Rice.



83. Mr. Smith admits that Exhibit J to the Supplemental Petition for Discipline consists of copies of the Petition to Change or Modify Custody, Motion for Civil Contempt, Motion for M. Scott Smith, an Attorney Licensed in Tennessee, to proceed Pro Hac Vice and Motion for Mental Evaluations in the in the Circuit Court for the Chickasawba District of Mississippi County, Arkansas Domestic Relations Division that he filed on behalf of Ms. Rice.
84. On September 29, 2014, Mr. Smith filed a Notice of Disability with the Tennessee Supreme Court, alleging that he was incapable of practicing law.
85. Mr. Smith was placed on Disability Inactive Status on October 7, 2014.
86. Thereafter, Mr. Smith ceased communications with Ms. Rice and did no further work on her case.
87. By letter dated October 14, 2014, Holly Rice filed a complaint against Mr. Smith. A true and correct copy of the complaint is attached as Exhibit C to the Supplemental Petition for Discipline.
88. Because Mr. Smith had been placed on Disability Inactive Status, he was informed of the complaint and advised that the complaint had been placed in abeyance. A true and correct copy of the Board's letter dated October 22, 2014, is attached as Exhibit D to the Supplemental Petition for Discipline.
89. After Mr. Smith withdrew his request to be placed on Disability Inactive Status, and following several requests for a response from Mr. Smith, he sent a response by email on September 14, 2015. A true and correct copy of Mr. Smith's email is attached as Exhibit B to the Supplemental Petition for Discipline.
90. By email dated September 18, 2015, Ms. Rice responded to Mr. Smith's email dated September 14, 2015. A true and correct copy of Ms. Rice's email is attached as Exhibit E to the Supplemental Petition for Discipline.
91. By email dated September 25, 2015, Ms. Rice provided additional information in response to Mr. Smith's email dated September 14, 2015. A true and correct copy of Ms. Rice's email is attached as Exhibit F to the Supplemental Petition for Discipline.
92. By email dated September 29, 2015, the Board sent Ms. Rice's emails to Mr. Smith's lawyer. A true and correct copy of the Board's email is attached as Exhibit G to the Supplemental Petition for Discipline.
93. The only communication after Mr. Smith was placed on disability inactive status was a text from Ms. Rice to Mr. Smith letting him know that she was hiring another attorney.
94. No money was refunded to Ms. Rice by Mr. Smith for unearned fees.

**F. ADDITIONAL FINDINGS OF FACT**

95. Prior to the dates of the matters at issue here, Mr. Smith had recovered and ceased drinking.
96. At the time of the matters at issue here, Mr. Smith relapsed and resumed drinking.
97. On January 5, 2014, with the assistance of TLAP, Mr. Smith entered a treatment center and remained there for several weeks.
98. Since his return from the treatment center, Mr. Smith has remained sober and a regular participant in Alcoholics Anonymous meetings.
99. Mr. Smith testified he is an alcoholic.
100. Mr. Smith has attended AA meetings over the years.
101. Mr. Smith has helped various people involved with AA.
102. Mr. Smith has sponsored/mentored other individuals involved with AA.
103. Mr. Smith has been instrumental in the recovery of others.
104. Mr. Smith is looked up to and well-respected by AA attendees.
105. When Mr. Smith was active and participating daily with AA, he successfully fought his problems with alcohol. Likewise, when he was not active and participating in AA, Mr. Smith struggled with alcohol.
106. Mr. Smith testified that his secretary, Stephanie Johnson, was taking money from his law practice.
107. Mr. Smith's policy was to repay clients if they were not happy with his services.
108. After leaving the treatment center, remaining sober and attending AA meetings, Mr. Smith performed work for and accepted money from Ms. Rice to represent her in an Arkansas post-divorce action.
109. While sober, Mr. Smith did not respond timely to disciplinary counsel and did not make restitution payments to clients as promised.
110. Mr. Smith quit TLAP because he did not have money to pay for drug screens.
111. Mr. Smith testified he had no money and was trying to avoid being put "on the street" when he used his trust account for personal needs.
112. Mr. Smith has admitted or stipulated to many of the findings of facts evidencing his misconduct, which were not contradicted by Mr. Smith at the hearing.

113. Mr. Smith has found employment as an independent representative in the medical field as a sales rep.

**G. FINDINGS OF FACT-SECOND JOINT STIPULATIONS OF FACTS  
DOCUMENTS REGARDING MR. SMITH'S PRIOR DISCIPLINE  
(TRIAL EXHIBIT 2)**

114. Temporary Suspension and removed from Disability Inactive Status – April 14, 2015
115. Disability Inactive Status – October 7, 2014
116. Reinstatement to Practice – May 18, 2001
117. Disbarment – July 7, 1995 (conviction of serious crime; illegal conduct; dishonest conduct; prejudice to administration of justice; conduct reflecting adversely on ability to practice law; actions as a public official; accepting item of value; use of position to influence proceeding; statement of ability to influence a public official)
118. Temporary Suspension – June 2, 1993 (conviction of serious crime (see more detail above))
119. Temporary Suspension Lifted – March 9, 1993
120. Temporary Suspension – December 22, 1992 (public harm; substance abuse)
121. Suspension – August 2, 1985 (18 months; diligence; communication; abandonment of clients)

**H. FINDINGS OF FACT-RESPONDENT'S TENNESSEE LAWYER'S ASSISTANCE  
PROGRAM HISTORY**

122. Mr. Smith entered into a five year TLAP monitoring agreement in 2001.
123. Mr. Smith successfully completed that agreement in 2006.
124. In addition to monitoring, Mr. Smith was a dedicated TLAP volunteer throughout the terms of that agreement.
125. In September 2008, Mr. Smith experienced a period of difficulties and contacted TLAP requesting additional support.
126. Mr. Smith applied for a TLAP loan to go to Acumen, a professional evaluation center in Kansas.
127. Mr. Smith completed that evaluation.

128. Mr. Smith entered into another monitoring agreement with the Cain Fund Committee as a reporting party.
129. Mr. Smith completed that agreement in 2010, and repaid his loan in full.
130. In 2013, TLAP became aware that Mr. Smith was once again experiencing problems.
131. Mr. Smith applied for a 2<sup>nd</sup> TLAP loan in early 2014, and checked into a residential treatment program at The Ranch.
132. Mr. Smith successfully completed treatment and entered into a monitoring agreement in February 2014, with the Cain Fund Committee as a reporting party.
133. Due to Mr. Smith's lack of employment, he was unable to drug test, which was a mandatory requirement for the agreement; however, Mr. Smith was attending 12-step meetings and participating in TLAP events during this time period.
134. Because of the lack of drug screens, TLAP discharged Mr. Smith from that agreement in January 2016.
135. Mr. Smith attended Camp TLAP in April 2016.
136. Mr. Smith was recently mailed a new monitoring agreement with the Board of Professional Responsibility as the reporting party. TLAP has not yet received a signed copy of that agreement. (as of April 22, 2016)

### **III. AUGUST 10, 2016 HEARING**

At the August 10, 2016 hearing, the Board introduced multiple exhibits and presented testimony from the following witnesses: (1) Vernetha Morrow; (2) Teresa Williams; (3) Nikki McLemore; and (4) Mr. Smith. Mr. Smith presented his own testimony, as well as that of (1) Steve Milam, (2) Carl Seely, (3) Walter Townsend, (4) Rhonda Exum, (5) Coley Willis and (6) Ralph Gil Little. The testimony of Vernetha Morrow, Teresa Williams, Nikki McLemore, Steve Milam, Carl Seely, Walter Townsend, Rhonda Exum, Coley Willis and Ralph Gil Little was found to be credible. The testimony of Mr. Smith with regard to his dealings with the various complainants was not found to be credible.

### **IV. BURDEN OF PROOF**

Tennessee Supreme Court Rule 9, Section 15.2(g) states the following:

In hearings on formal charges of misconduct, Disciplinary Counsel must prove the case by a preponderance of the evidence.

## V. CONCLUSIONS OF LAW

The Hearing Panel makes the following conclusions of law based upon the evidence, the applicable law, and the applicable burden of proof.

### A. FILE NO. 36825-7-ES – COMPLAINANT – VERNETHA MORROW

RPC 1.15 – Safekeeping of Property and Funds – Violated – Mr. Smith knowingly: breached his fiduciary duty to Ms. Morrow, failed to pay medical providers (third parties), failed to deposit settlement funds into his trust account and failed to pay Ms. Morrow the \$2,000.00 settlement (or any portion to which she was entitled). Mr. Smith knowingly converted Ms. Morrow's property, obtained a personal benefit by his actions in this violation and caused injury to Ms. Morrow.

RPC 8.1(b) – Disciplinary Matters - Violated – Mr. Smith knowingly failed to timely and appropriately respond to a lawful demand for information from a disciplinary authority.

### B. FILE NO. 36898c-7-ES – COMPLAINANT – TERESA WILLIAMS

RPC 1.5 – Fees – Violated – Mr. Smith's \$5,000.00 fee for work performed was unreasonable. The work performed by Mr. Smith for Ms. Williams did not warrant retention of the full \$5000.00 fee. Mr. Smith knowingly failed to perform services for which he had charged a fee with the intent to obtain a personal benefit by his actions in this violation and caused serious injury to his client.

RPC 1.8(a) – Conflict of Interest: Current Clients - Violated – Mr. Smith received a loan from Ms. Williams without a written document setting forth the terms of the loan and advising Ms. Williams of her right to seek independent legal counsel. Additionally, Mr. Smith did not obtain Ms. Williams consent to the loan in a written document signed by Ms. Williams.

### C. FILE NO. 36857-7-ES – COMPLAINANT – NIKKI MCLEMORE

RPC 1.2(a) – Scope of Representation – Violated – Mr. Smith settled Ms. McLemore's case without consulting with her and without her consent.

RPC 8.4(c) – Misconduct – Violated – Mr. Smith engaged in conduct involving dishonesty, fraud, and deceit by settling Ms. McLemore's case without her consent, by retaining the settlement funds and by failing to pay Ms. McLemore's medical provider.

RPC 1.15 – Safekeeping of Property and Failing to Remit – Violated – Mr. Smith knowingly: breached his fiduciary duty to Ms. McLemore, failed to remit settlement funds to Ms. McLemore and to the third party chiropractor in the amount of \$2,228.00, as represented in unsigned settlement sheet (Trial Exhibit 7). Mr. Smith knowingly converted Ms. McLemore's property, obtained a personal benefit by his actions in this violation and caused injury to Ms. McLemore.

RPC 8.1(b) – Disciplinary Matters – Violated – Mr. Smith knowingly failed to timely and appropriately respond to a lawful demand for information from a disciplinary authority.

**D. FILE NO. 37581-7-ES – COMPLAINANT – HOLLY RICE**

RPC 1.1 – Competence – No Violation – The Board did not prove by a preponderance of the evidence that Mr. Smith was not competent in his representation of Ms. Rice. There was no proof presented at trial as to what is required in Arkansas to be admitted *pro hac vice*.

RPC 1.3 – Diligence – No violation – The Board failed to show by a preponderance of the evidence that Mr. Smith violated this Rule of Professional Conduct.

RPC 1.4 – Communication – Violated – Mr. Smith failed to communicate with Ms. Rice as required by RPC 1.4. Mr. Smith ceased communications with Ms. Rice after going on disability inactive status and failed to communicate his disability inactive status to her.

RPC 1.5 – Fees – Violated – Based on Trial Exhibit 5(Exhibits H, I and J thereto), and the fact that Mr. Smith ceased communications with Ms. Rice and did no further work on her case, the \$2,860.00 fee received by Mr. Smith was unreasonable. The work performed by Mr. Smith for Ms. Rice did not warrant retention of the full \$2,860.00 fee. Mr. Smith knowingly failed to perform services for which he had charged a fee with the intent to obtain a personal benefit by his actions in this violation and caused serious injury to his client.

RPC 8.4(a) – Misconduct – Violated – Based on the hearing panel’s finding that RPC 1.4 and RPC 1.5 have been violated, Mr. Smith also violated RPC 8.4(a).

RPC 8.4(d) – Misconduct – Not violated – Based on the proof, the Board has failed to carry its burden that Mr. Smith violated RPC 8.4(d).

**E. FILE NO. 37491 – 7(N)-ES – COMPLAINANT – BOARD**

RPC 1.15 – Safekeeping of Property – Violated – Proof showed that Mr. Smith knowingly used his trust account for personal expenditures. (Trial Exhibit 5 (Ex. A)). *See also* findings with regard to Ms. Morrow and Ms. McLemore.

**VI. APPLICATION OF ABA STANDARDS  
FOR IMPOSING LAWYER SANCTIONS**

In regard to violations of the Rules of Professional Conduct and subsequent discipline, Rule 9, Section 11.1 of the Rules of the Tennessee Supreme Court provides as follows:

**11.1.** Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Rules of Professional Conduct of the State of Tennessee, including acts prior to surrender of a law license, suspension, disbarment, or transfer to inactive status on other grounds, and acts subsequent to resignation, suspension, disbarment, or transfer to inactive status which acts amount to the practice of law, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client-relationship.

Once disciplinary violations have been established, the appropriate type of discipline must be based upon the application of the *ABA Standards for Imposing Lawyer Sanctions* (“ABA Standards”).

#### **A. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS**

Based upon the above Findings of Fact and Conclusions of Law with regard to Mr. Smith and his violations of the Rules of Professional Conduct and considering the factors set forth in Standard 3.0 of the ABA Standards, the Hearing Panel finds that the provisions of the ABA Standards that apply in this matter and the appropriate sanctions are as follows:

1. 4.1 Failure to Preserve the Client’s Property – 4.11 Disbarment
2. 4.3 Failure to Avoid Conflicts of Interest – 4.32 Suspension
3. 4.6 Lack of Candor – 4.61 Disbarment
4. 5.1 Failure to Maintain Personal Integrity – 5.11(b) Disbarment
5. 7.0 Violations of Duties Owed as a Professional – 7.1 Disbarment

#### **B. AGGRAVATING AND MITIGATING CIRCUMSTANCES**

Misconduct having been established, and disbarment being determined to be the appropriate discipline on four counts and suspension being the appropriate discipline on one count, the Hearing Panel now considers the aggravating and mitigating factors set out by the ABA Standards set forth in Standard, 9.0 AGGRAVATION AND MITIGATION.

##### **1. Aggravating Factors that Apply**

Based on Standard 9.22 of the ABA Standards, the Hearing Panel finds the following aggravating factors to be applicable in this case:

- (a) prior disciplinary offenses;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses
- (h) vulnerability of victims
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution

## **2. Mitigating Factors that Apply**

Based on Section 9.32 of the ABA Standards, the Hearing Panel finds the following mitigating factors to be applicable in this case:

- (c) personal or emotional problems
- (l) remorse
- (m) remoteness of prior offenses

The Hearing Panel further finds that the majority of the proof presented by Mr. Smith at trial dealt with his abuse of alcohol and the effects of said abuse on his actions. Mr. Smith also submitted proof that he voluntarily entered a treatment facility and has remained sober following said treatment. The Hearing Panel commends Mr. Smith for entering rehab, participating in TLAP programs, attending AA meetings and remaining sober. The Hearing Panel has carefully analyzed all of the evidence in the record as to whether Mr. Smith's abuse of alcohol should be considered as a mitigating factor. However, based on Standard 9.32(i), we determine that the requirements have not been met to establish same as a mitigating factor.

## **VII. JUDGMENT**

The preamble of Tennessee Supreme Court Rule 8, Rules of Professional Conduct provides, in part, the following:

(1) A lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service and engaging in these pursuits as part of a common calling to promote justice and public good. Essential characteristics of the lawyer are knowledge of the law, skill in applying the law to the factual context, thoroughness of preparation, practical and prudential wisdom, ethical conduct and integrity, and dedication to justice and the public good.

\* \* \*

(13) The legal profession's relative autonomy carries with it special responsibilities of self-government . . . . Every lawyer is responsible for observance of the Rules of Professional Conduct . . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

The Hearing Panel finds that Mr. Smith has violated the Rules of Professional Conduct as stated above. Therefore, after considering all of the evidence in this matter, the actions of Mr. Smith, the ABA Standards for Imposing Lawyer Sanctions, including the aggravating and mitigating factors and the entire record in this case, it is the opinion and judgment of the Hearing Panel that the discipline imposed on Mr. Smith is disbarment from the practice of law.

Pursuant to Tenn. Sup. Ct. R. 9, §12.7, the Hearing Panel further finds that Mr. Smith shall be required to make restitution to the following individuals. In the event restitution is made by the Tennessee Lawyer's Fund for Client Protection (TLFCP), Mr. Smith will be responsible for reimbursement to the TLFCP of the same amount.



**FILE NO. 36825-7-ES – COMPLAINANT – VERNETHA MORROW**

Mr. Smith shall pay to Ms. Morrow the sum of \$4,536.83, which includes the unpaid bill to JMC GH, the unpaid bill to the Imaging Center, and the full amount of the settlement related to her automobile accident of May 25, 2012.

**FILE NO. 36898c-7-ES – COMPLAINANT – TERESA WILLIAMS**

Mr. Smith shall pay to Ms. Williams \$4,000.00 as reimbursement of the unearned fee paid to Mr. Smith and \$7,500.00 for the loan that Mr. Smith received from Ms. Williams. Credit shall be given for any payments made towards the civil judgment obtained by Ms. Williams against Mr. Smith.

**FILE NO. 36857-7-ES – COMPLAINANT – NIKKI MCLEMORE**

Mr. Smith shall pay to Ms. McLemore the sum of \$4,854.24, which includes reimbursement of the fee he took, payment of the chiropractor bill that was not paid by Mr. Smith, and the balance of the settlement that was not received by Ms. McLemore.

**FILE NO. 37581-7-ES – COMPLAINANT – HOLLY RICE**

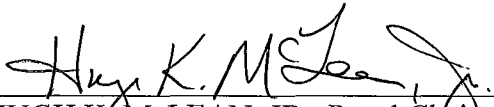
Mr. Smith shall pay to Ms. Rice the sum of \$1,860.00, which represents the unearned portion of the fee paid to Mr. Smith by Ms. Rice and/or on behalf of Ms. Rice.


**NOTICE TO RESPONDENT**

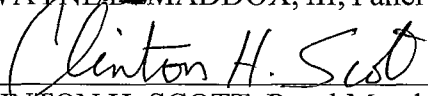
**THIS JUDGMENT MAY BE APPEALED PURSUANT TO TENN. SUP. CT. R. 9, § 33 (2014) BY FILING A PETITION FOR REVIEW IN THE CIRCUIT OR CHANCERY COURT WITHIN SIXTY (60) DAYS OF THE DATE OF ENTRY OF THE HEARING PANEL'S JUDGMENT.**

IT IS SO ORDERED.

ENTERED on this the 31<sup>st</sup> day of August, 2016

  
\_\_\_\_\_  
HUGH K. McLEAN, JR., Panel Chair

  
\_\_\_\_\_  
DWAYNE D. MADDOX, III, Panel Member

  
\_\_\_\_\_  
CLINTON H. SCOTT, Panel Member