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DEPARTMENT OF PROFESSIONAL
RESPONSIBILITY
Rw EXCERPT

**IN DISCIPLINARY DISTRICT II
OF THE BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF TENNESSEE**

**IN RE: ROBERT LEE VOGEL
 BPR: 23374, Respondent,
 Attorney Licensed to
 Practice Law in the State of Tennessee
 (Knox County)**

DOCKET NO. 2014-2341-2-WM

HEARING PANEL'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on Thursday, December 18, 2014 and for further consideration on Friday, January 9, 2015, before hearing panel members Donald A. Bosch, R. Deno Cole and Mark E. Stephens. William C. Moody, Disciplinary Counsel, represented the Board of Professional Responsibility, and the Honorable Julie A. Rice and Troy Jones represented Robert Lee Vogel.

The Board of Professional Responsibility (Board) alleges in a Petition for Discipline filed on July 14, 2014, that Mr. Vogel committed certain violations of the Rules of Professional Responsibility relating to his representation of two clients: Lisa Horn-Brichetto and Ashley Alford. Specifically, the Board alleges that while serving as Ms. Lisa Horn-Brichetto's court appointed attorney in a state court criminal matter, Mr. Vogel disclosed confidential information to the presiding Judge, the Hon. Eugene Eblen. The Board alleges that Mr. Vogel's disclosures of confidential information to Judge Eblen, without Ms. Horn-Brichetto's informed consent, violated the Rules of Professional Conduct, specifically, Rules 1.6(a) (Confidentiality of Information), Rule 1.9(c) (Duties to Former Clients), and Rule 8.4(a) (Misconduct). Further, the Board maintains that Mr. Vogel's conduct prejudiced Ms. Horn-Brichetto.

With regard to Ms. Alford, the Board alleges that Mr. Vogel, while representing Ms. Alford as her court appointed attorney in a criminal matter in the Federal District Court for the Eastern District of Tennessee, engaged in sexual relations with Ms. Alford on at least three occasions. The Board alleges that Mr. Vogel's conduct created a significant risk that his representation of Ms. Alford would be materially limited by his personal interest. The Board alleges that Mr. Vogel's conduct violated Rules of Professional Conduct 1.7(a)(2) (Conflict of Interest: Current Clients), and 8.4(a) (Misconduct).

Lisa Horn-Brichetto

The facts of this case are not in dispute. Mr. Vogel was appointed to represent Ms. Horn-Brichetto in a state court criminal case. During the course of that representation, Mr. Vogel filed a Motion to Withdraw. In his Motion, Mr. Vogel averred that a conflict of interest existed between him and Ms. Horn-Brichetto that "compelled" him to move to withdraw. In his Motion to Withdraw, Mr. Vogel maintained that Rule 1.6 of the Rules of Professional Responsibility precluded him from divulging the nature and extent of the conflict. The trial court did not conduct a hearing on Mr. Vogel's Motion; instead, the trial court (Judge Eugene Eblen) entered an Order granting the Motion.

Ms. Horn-Brichetto learned of Mr. Vogel's Motion to Withdraw by way of an email sent to her from Mr. Vogel's office. The Motion to Withdraw was attached to the email. Ms. Horn-Brichetto wrote a letter to Mr. Vogel requesting an explanation as to why he requested to withdraw from future representation in her case. Receiving no response to that letter, Ms. Horn-Brichetto sent a second letter six weeks later and copied Judge Eblen.

Following Ms. Horn-Brichetto's second letter, Judge Eblen communicated with Mr. Vogel, instructing him to respond to Ms. Horn-Brichetto's second letter. Mr. Vogel responded in

a two-page letter dated August 26, 2013, where he offered a detailed explanation as to why he had withdrawn from representation of Ms. Horn-Brichetto. Mr. Vogel's letter contained assertions that cast Ms. Horn-Brichetto in a negative light. He provided a copy of this letter to Judge Eblen. Ms. Horn-Brichetto's case was still pending before Judge Eblen at the time Judge Eblen received Mr. Vogel's correspondence. As a result of Judge Eblen reading Mr. Vogel's correspondence that included negative assertions made by Mr. Vogel about Ms. Horn-Brichetto, successor counsel moved to recuse Judge Eblen from her case. Judge Eblen granted successor counsel's Motion to Recuse and removed himself from Ms. Horn-Brichetto's case.

The parties to this proceeding agree that the communication between Mr. Vogel and Judge Eblen contained confidential information. Further, the parties agree that Ms. Horn-Brichetto did not explicitly consent to Mr. Vogel releasing the otherwise confidential information to Judge Eblen.

The Board maintains that Ms. Horn-Brichetto was injured by Mr. Vogel's disclosure of confidential information evidenced by the fact that Judge Eblen recused himself from her case resulting in a delay in the ultimate disposition of her case.

Mr. Vogel maintains that his actions in sending Judge Eblen a copy of his response letter to Ms. Horn-Brichetto's letter of inquiry did not violate the Rules of Professional Responsibility as:

- (a) Ms. Brichetto "opened the door" (waiving any privilege) by requesting, in writing, that Mr. Vogel explain why he had withdrawn from representation of her and her sending a copy of that written request to Judge Eblen;
- (b) Ms. Horn-Brichetto "introduced any taint" to/by the presiding judge by copying him on her letter to Mr. Vogel;
- (c) Rule 1.6(b)(5) allowed Mr. Vogel to reveal this confidential information because Ms. Horn-Brichetto's letter of inquiry was related to the representation of Ms. Horn-Brichetto by Mr. Vogel and Mr. Vogel reasonably believed it necessary to respond to the allegations made against Mr. Vogel;

(d) Judge Eblen should not have presented Ms. Horn-Brichetto's letter to Mr. Vogel, but once he did, Mr. Vogel believed he had to respond to Judge Eblen; and,

(e) Ms. Horn-Brichetto was not injured. Mr. Vogel points out that it was nearly one year from the day of Mr. Vogel's correspondence that Judge Eblen recused himself in Ms. Horn-Brichetto's matter. Mr. Vogel alleges that Ms. Horn-Brichetto was provided new, competent counsel, was provided a new judge, and was not in any way prejudiced or injured by Mr. Vogel's communication of this confidential information to Judge Eblen.

Issues Presented [Horn-Brichetto]

The Rules of the Supreme Court of the State of Tennessee, Rule 1.6, Confidentiality of Information, reads as follows:

- (a) A lawyer shall not reveal information relating to the representation of a client unless:
 - (1) the client gives informed consent;
 - (2) the disclosure is impliedly authorized in order to carry out the representation;
 - or
 - (3) the disclosure is permitted by paragraph (b) or required by paragraph (c).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;
 - (2) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;
 - (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;
 - (4) to secure legal advice about the lawyer's compliance with these Rules; or
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.
- (c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all

non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or (3) to comply with RPC 3.3, 4.1, or other law.

The parties agree that the letter sent to Judge Eblen by Mr. Vogel contained confidential information. The issues center around whether Ms. Horn-Brichetto's actions (copying Judge Eblen on her letter of inquiry) constituted informed consent thereby authorizing Mr. Vogel to reveal confidential information related to his representation of her to any person, including Judge Eblen, or whether Ms. Horn-Brichetto's letter of inquiry constituted allegations brought in a proceeding concerning Mr. Vogel's representation such that Mr. Vogel may choose to reveal information related to the representation.

The panel finds by a preponderance of the evidence that Ms. Brichetto's action copying Judge Eblen to her letter of inquiry to Mr. Vogel did not constitute "informed consent" such that Mr. Vogel was free to reveal otherwise confidential information to any person including Judge Eblen.

Mr. Vogel recognized that revealing the specific nature of the conflict existing between he and Ms. Horn-Brichetto would require that he reveal confidential - protected - information. Mr. Vogel affirmatively acknowledged the confidential nature of the information and that Rule 1.6 precluded him from revealing that information in his Motion to Withdraw. Mr. Vogel specifically wrote in his Motion to Withdraw that Rule 1.6 would not allow him to state more without violating the privilege of confidentiality between he and his client. While Ms. Horn-Brichetto's letter of inquiry asked for an explanation as to why Mr. Vogel withdrew from representation, the Panel is of the opinion that Mr. Vogel could have provided Ms. Horn-Brichetto with the explanation requested, while at the same time assuring Judge Eblen that he had fully communicated with his former client. Revealing specific client confidences to Judge

Eblen was not necessary or appropriate under the Rules and it fully appears that Mr. Vogel understood - but chose to disregard - that prohibition.

Further, the Panel finds that the letter of inquiry to Mr. Vogel from Ms. Horn-Brichetto did not constitute "allegations in any proceeding concerning a lawyer's representation of the client." Ms. Horn-Brichetto asked Mr. Vogel for an explanation as to why he had withdrawn from representation of her. The state court criminal prosecution was not a proceeding concerning Mr. Vogel's representation of Ms. Horn-Brichetto. Further, Ms. Horn-Brichetto made no allegations against Mr. Vogel, but instead made an inquiry as to why he had moved to withdraw, an inquiry that Mr. Vogel had for weeks ignored. Ms. Horn-Brichetto admittedly took a more aggressive course of action in seeking a response from Mr. Vogel. The Panel does not find that Ms. Horn-Brichetto's letter of inquiry turned a pre-dispositional state criminal court proceeding into a proceeding concerning the lawyer's representation of Ms. Horn-Brichetto.

The Panel finds, by a preponderance of the evidence, that Mr. Vogel revealed otherwise confidential information of a former client to a third party (Judge Eblen) without his former client's informed consent, and without authority under Rule 1.6 of the Rules of Profession Conduct, to otherwise disclose this information.

Ashley Alford

Mr. Vogel represented Ms. Ashley Alford as her court appointed attorney in a criminal matter in the Federal District Court for the Eastern District of Tennessee. In addition, during the course of that federal criminal court representation, Ms. Alford employed Mr. Vogel to represent her in a civil matter involving a car accident. The Board alleges that during the course of Mr. Vogel's representation of Ms. Alford he engaged in sexual relations with her on at least three occasions. The Board alleges that Mr. Vogel's conduct created a significant risk that his

representation of Ms. Alford would be materially limited by his personal interest. The Board alleges that Mr. Vogel's conduct violated Rules of Professional Conduct 1.7(a)(2) (Conflict of Interest: Current Clients), and 8.4(a) (Misconduct).

As in the case of Ms. Horn-Brichetto, the issues in Ms. Alford's case are not disputed. Mr. Vogel admits to making sexual advances and on multiple (three) occasions to engaging in sexual relations with Ms. Alford while he represented her. He acknowledges that prior to the second sexual activity, Ms. Alford wanted to end the sexual relationship between the two of them. Mr. Vogel acknowledges that he pleaded with Ms. Alford to continue the sexual relationship. While the Board characterizes the sexual relationship as "consensual," the Board emphasizes that Ms. Alford was a "reluctant participant." Proof elicited at the hearing through the deposition of Ms. Alford was that Ms. Alford talked Mr. Vogel into hiring a friend of Ms. Alford's - who was also abusing narcotics - and who would be more willing to engage in sexual relations with Mr. Vogel so she (Ms. Alford) would no longer have to engage in that conduct. The proof further showed that Mr. Vogel's wife and child walked in on Mr. Vogel and this "friend/employee" while engaged in sexual activity at the office.

The Board maintains that Mr. Vogel exploited his fiduciary relationship to further his own personal interest. The Board argued, and the Panel finds, that Mr. Vogel was twice Ms. Alford's age; that he was serving in the capacity of her court-appointed counsel; and, that Ms. Alford was using drugs at the time Mr. Vogel was representing her and was under federal indictment for felony drug charges. Finally, the Board emphasized that Ms. Alford was particularly vulnerable and consequently Mr. Vogel should be severely disciplined for his behavior.

Mr. Vogel, through counsel, emphasized to the Panel that there is no specific prohibition against a lawyer engaging in a sexual relationship with an otherwise consenting client. Mr. Vogel takes exception to the Board's characterization of Ms. Alford as "vulnerable" and "reluctant" pointing out that Ms. Alford also engaged in sexual relations with the D.E.A agent, Bubba Poston, who was investigating her case.

Most of the presentation of proof at the disciplinary hearing centered around Mr. Vogel's behavior following the disclosure that he had engaged in a sexual relation with Ms. Alford. The proof shows that Mr. Vogel was forthright and acknowledged what he had done. Mr. Vogel called the Board of Professional Responsibility and sought advice as to whether he should report his conduct as an ethical violation. However, Mr. Vogel testified at the hearing that he was advised that his sexual relationship with Ms. Alford was not a *per se* violation of any specific rule and consequently did not report to the Board.

Following acknowledgment by the federal court of the sexual relationship existing between Mr. Vogel and Ms. Alford, Mr. Vogel was relieved by District Court Judge Thomas A. Varlan, of further representation of Ms. Alford. Mr. Vogel testified that he was ashamed of what he had done and voluntarily entered inpatient treatment. The proof showed that while in inpatient treatment, Mr. Vogel was diagnosed with an impulse control disorder; specifically, sexual addiction.

Following 35 days of inpatient treatment, Mr. Vogel continued to attend three group meetings per week; one individual weekly meeting with a counselor; one weekly meeting with a marital counselor he and his wife attended; and, one face-to-face monthly meeting with a sponsor. Further, the proof showed that Mr. Vogel remains fully engaged with the Tennessee Lawyer's Assistance Program, and has been for nearly one year.

Mr. Vogel testified that he made it clear to Ms. Alford that his personal relationship and his professional responsibilities to Ms. Alford were two very different things. He adamantly maintains that he did not compromise his professional responsibilities towards Ms. Alford, maintaining that he did not "short change" her. He testified that his representation was "extremely competent."

The Honorable Guy Blackwell testified that he was contacted by U. S. Magistrate Judge H. Bruce Guyton and asked to represent the court's interest by conducting an investigation into the circumstances regarding allegations that Mr. Vogel and Ms. Alford were engaged in a sexual relationship while Mr. Vogel was serving as Ms. Alford's court-appointed attorney. Mr. Blackwell served as an Assistant United States Attorney for thirty years prior to entering private practice. Mr. Blackwell testified that his investigation lasted for approximately three months. Mr. Blackwell testified that Mr. Vogel cooperated thoroughly and completely, acknowledging his mistakes and outlining the remedial steps he had taken.

During his investigation, Mr. Blackwell interviewed Ms. Alford - in the presence of successor counsel - for approximately three and a half hours. He found her to be credible and found Mr. Vogel's version of what happened to be consistent with Ms. Alford's testimony. Mr. Blackwell pointed out that Mr. Vogel was willing to take any and all steps that medical professionals recommended to deal with his impulse control disorder and his sexual addiction.

Mr. Vogel called Mr. Ted Rice, who has worked for nine years for the Tennessee Lawyer's Assistance Program and is currently serving as the Deputy Director for the Tennessee Lawyer's Assistance Program. Mr. Rice testified that he first met Mr. Vogel in October of 2013 at which time he engaged in a two hour consultation with Mr. Vogel. He indicated that during this interview, Mr. Vogel was clearly in crisis and needed residential care. He testified that Mr.

Vogel voluntarily agreed to enroll in inpatient treatment during which he was diagnosed as suffering from an impulse control disorder – with sexual compulsivity. Mr. Rice testified that Mr. Vogel's "emotional equilibrium" was established through sexual encounters and that only through professional inpatient treatment could Mr. Vogel address the emotional equilibrium he had established.

Mr. Rice further testified that TLAP began a monitoring program with Mr. Vogel in the spring of 2014. He testified that he felt comfortable in asserting that Mr. Vogel's condition had improved. The monitoring program is a two year program during which Mr. Vogel is required to maintain complete alcohol and drug abstinence. Finally, Mr. Rice offered his professional opinion that there was a "low likelihood" that Mr. Vogel would reengage in the sexual conduct that had brought him before the Panel.

Following the conclusion of Mr. Blackwell's investigation he did not recommend that Mr. Vogel be banned from practice in federal court. Instead, Mr. Vogel voluntarily agreed to withdraw from the CJA panel and not take future appointed cases for a two year period of time. Mr. Vogel is allowed to continue to practice in federal court and currently has approximately six cases pending before the federal court.

Issues Presented [Alford]

The Board maintains that Mr. Vogel's conduct (i.e. engaging in a sexual relationship with his court-appointed client during the pendency of his representation) created a concurrent conflict of interest in that the sexual advances made by Mr. Vogel to his "vulnerable" and "reluctant" client created a significant risk that Mr. Vogel's representation of Ms. Alford would be materially limited by Mr. Vogel's personal interests in continuing the sexual relationship.

Mr. Vogel emphasized the dearth of proof the Board presented regarding whether Mr. Vogel's representation of Ms. Alford was in any way materially limited. In fact, Mr. Vogel maintained that his representation of Ms. Alford was "extremely competent."

Mr. Vogel argued that to the extent Ms. Alford could be characterized as "vulnerable", any vulnerability of Ms. Alford should be offset by Mr. Vogel's corrective actions following the disclosure of the relationship.

In addition, Mr. Vogel argued that he was diagnosed as suffering from an impulse control disorder – with sexual compulsivity, and that his actions weren't motivated by his own selfish desires.

Mr. Vogel argued that he has already served a 35-day "suspension" during the time he spent in inpatient treatment constituting a voluntary cessation of practice.

Finally, Mr. Vogel argues that following a ninety-day investigation by former Assistant United States Attorney Guy Blackwell, disciplinary actions were taken against Mr. Vogel which did not include the suspension from practice in federal court. While the actions of the federal court are not binding on the Board of Professional Responsibility, they are - and should be - persuasive.

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(c) A lawyer shall not represent more than one client in the same criminal case or juvenile delinquency proceeding, unless:

(1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and

(2) each affected client gives informed consent.

The Panel finds by a preponderance of the evidence that Mr. Vogel engaged in sexual advances directed at his young, drug using, court-appointed client who was under federal indictment for drug related charges. Those advances included "begging" his client to engage in sexual intercourse with him and, in fact, did result in the client having sexual intercourse with Mr. Vogel. After engaging in sexual intercourse with Mr. Vogel, the proof shows that Ms. Alford told Mr. Vogel she did not want to engage in any further sexual intercourse, but Mr. Vogel persisted in asking her for further sexual favors resulting in sexual intercourse with the client on two additional occasions. Ms. Alford told Mr. Blackwell that she acquiesced to the additional sexual activity because Mr. Vogel held her future in his hands.

Judgment [Ms. Horn-Brichetto]

The conduct complained of in this Petition for Discipline occurred in 2012 and 2013. The Panel's actions are governed by Rule 9 *Tennessee Supreme Court Rules* prior to the January 2014 Amendment, as the complaints were filed in 2013.

Acts or omissions by an attorney which violate the Rules of Professional Conduct of the State of Tennessee constitute misconduct and shall serve as grounds for discipline. The discipline which can be imposed for an attorney's misconduct include disbarment, suspension,

temporary suspension, public censure, private reprimand, private informal admonition, or restitution, including the condition of a practice monitor.

With regard to Ms. Horn-Brichetto, there is no dispute that Mr. Vogel revealed confidential information regarding his representation of Ms. Horn-Brichetto. The Panel finds that Mr. Vogel's disclosures were without the informed consent of his client and were not authorized by Rule 1.6(b)(5). Further, the Panel finds that Mr. Vogel's disclosures caused Ms. Horn-Brichetto injury in that as a direct consequence of Mr. Vogel's disclosure of confidential information, the trial judge presiding over her case was forced to recuse himself and his recusal caused delay in the ultimate disposition of her case.

The Panel - guided by the American Bar Association's Standards for Imposing Lawyer Sanctions Rule 4.22 - believes that suspension from the practice of law is the appropriate discipline for this act of misconduct.

Rule 4.2 Failure to Preserve The Client's Confidences:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving improper revelation of information relating to representation of a client:

4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

With regard to Ms. Horn-Brichetto, as a result of Mr. Vogel's misconduct, the Panel believes that he should be suspended from the practice of law for a period of twelve months. However, pursuant to Rule 9, Section 8.5, the Panel believes that all twelve months of this suspension should be suspended and Mr. Vogel should be placed on probation for a period of twelve months with the Panel being of the opinion that in light of Mr. Vogel's remedial actions there exists little likelihood that he will harm the public during the period of rehabilitation.

Judgment [Ms. Alford]

With regard to Ms. Alford, the Panel finds that Mr. Vogel engaged in a sexual relationship with Ms. Alford, who by all accounts appeared to be at best a "consenting, but reluctant participant in the relationship." While the Rules of Professional Conduct do not specifically prohibit a consensual sexual relationship between a lawyer and his/her client, Comment 12(a) of the Rules provides critical context:

[a] client's dependence on the lawyer's knowledge of law is likely to make the relationship between the lawyer and client unequal. The sexual relationship between the lawyer and client can involve unfair exploitation of the lawyer's fiduciary role and thereby violate the lawyer's basic obligation not to use the trust of the client to the client's disadvantage.

The Panel finds by a preponderance of the evidence that Mr. Vogel did, in fact, unfairly exploit his fiduciary role. Ms. Alford's testimony - through her proof deposition - makes clear that she sought to end the sexual relationship between her and her lawyer, but was afraid to do so as Mr. Vogel "could control the next 10 years of her life." The Panel finds that Mr. Vogel's conduct with regard to Ms. Alford created a concurrent conflict of interest and further that his behavior created a significant risk that his representation of Ms. Alford - a vulnerable, court-appointed client - was materially limited by his personal interests. The Panel emphasizes that the Rule does not require the Board to prove that Mr. Vogel's representation was, in fact, materially limited, only that the concurrent conflict of interest created a substantial risk that his representation would be materially limited. The Panel is of the opinion that the proof in this case supports - by a preponderance of the evidence - a finding that Mr. Vogel violated Rule 1.7 of the Rules of Professional Conduct.

The Panel finds the existence of certain mitigating circumstances including: Mr. Vogel's recognition of the fact that he had a problematic disorder; the willingness of his wife and other

professional associates who know Mr. Vogel to continue to support him; the proactive establishment and implementation of safeguards regarding Mr. Vogel's future interaction with female clients; Mr. Vogel's willingness to enter inpatient treatment; as well as his compliant participation in the Tennessee Lawyer's Assistance Program (TLAP) and the extensive rehabilitation criteria with which Mr. Vogel has complied. Though moved by those circumstances, the Panel is more persuaded by the presence and weight of the aggravating circumstances in this case including: Ms. Alford's vulnerability due to her young age and the fact that she was under the influence of drugs at the time of Mr. Vogel's persistent sexual advances; the fact that she "really did not want to have sex with Mr. Vogel but felt submissive to him - asking him to 'just hurry' - and that she saw Mr. Vogel as an authority figure who could control the next 10 years of her life"; and, Mr. Vogel was serving as Ms. Alford's appointed counsel demonstrating her lack of financial resources to end the relationship by discharging Mr. Vogel and retaining other counsel.

With regard to the appropriate disciplinary response, again the Panel looks to the American Bar Association's Standards for Imposing Lawyer Sanctions, specifically, Rule 4.3 which states as follows:

Rule 4.3 Failure to Avoid Conflict of Interest:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

The Panel believes that suspension from the practice of law is the appropriate discipline for this act of misconduct.

Finally, the American Bar Association's Standards for Imposing Lawyer Sanctions, Rule 2.3 Suspension, reads as follows:

Suspension is the removal of an attorney from the practice of law for a specified minimum period of time. Generally, suspension should be for a period of time equal to or greater than six months but in no event should the time period prior to application for reinstatement be more than three years.

The Panel acknowledges the remedial steps taken by Mr. Vogel over the last several months. The Panel has considered those steps in determining the appropriate period of suspension. Pursuant to Rule 9 Section 4.2, the Panel believes a suspension of Mr. Vogel's privilege to practice law is the appropriate discipline and that his suspension should be for a period of twelve months. However, pursuant to Rule 9, Section 8.5, the Panel believes that all but thirty days of that period should be suspended, the Panel being of the opinion that in light of Mr. Vogel's remedial actions there exists little likelihood that he will harm the public during the period of rehabilitation.

The Panel recommends that the period of suspension recommended in both the Horn-Brichetto case and the Alford case be served concurrently and, further, that Mr. Vogel's probation be conditioned on his continuing to abide by the sanctions imposed by the Federal District Court for the Eastern District of Tennessee as well as his continued compliance with all requirements and obligations imposed by the Tennessee Lawyer's Assistance Program.

THIS JUDGMENT MAY BE APPEALED PURSUANT TO RULE 9, SECTION 1.3 OF THE TENNESSEE SUPREME COURT RULES BY FILING A PETITION FOR A WRIT OF CERTIORARI, WHICH PETITION SHALL BE MADE UNDER OATH OR AFFIRMATION AND SHALL STATE THAT IT IS THE FIRST APPLICATION FOR THE WRIT.

ENTER this 14th day of January 2015.


MARK E. STEPHENS (CHAIR)


DONALD A. BOSCH

PARTIAL CONCURRENCE AND PARTIAL DISSENT

I, R. Deno Cole, Hearing Panel Member, concur in part and dissent in part to the Judgment in this matter. I concur entirely in the Hearing Panel's Findings of Fact and Conclusions of Law with regard to the findings of fact and conclusions of law and judgment in relation to the Complaint brought by Lisa Horn-Brichetto and prosecuted by the Tennessee Board of Professional Responsibility (hereinafter "Board").

I concur in the findings of fact and conclusions of law regarding the Ashley Alford complaint, which the Board prosecuted in connection with its Petition for Discipline. I respectfully dissent only in the sanctions imposed by the majority of the Panel. I would find it appropriate to suspend Respondent's entire 12-month suspension from the practice of law, instead of requiring Respondent to serve 30 days of active suspension.¹

A hearing panel is required to "evaluate each instance of attorney discipline in light of its particular facts and circumstances. . .". Bd. of Prof'l Responsibility v. Maddux, 148 S.W.3d 37, 40 (Tenn. 2004). In the Alford case, there is no doubt that Respondent pressured a young, drug

¹ Tenn. Sup. Ct. R. 9, § 8.4 and 8.5 allows all suspensions to be served entirely on probation in this case; however, Rule 9 has been amended to require at least 30 days of active suspension regarding suspension penalties for all disciplinary complaints initiated after January 1, 2014. The Alford Complaint was initiated prior to January 1, 2014; therefore, it would be legally permissible for this Panel to probate the entirety of Respondent's 12-month suspension.

addicted, court-appointed client into having sex with him, but due to all of the facts surrounding the violation and the steps taken by Respondent to correct his behavior, active suspension is not appropriate.

The “Mitigating Factors,” as set forth in ABA Standard 9.3, that persuade me the most in determining that no active suspension should be served include (1) absence of a prior disciplinary record, (2) personal or emotional problems,² (3) full and free disclosure to disciplinary board [and] cooperative attitude toward proceedings,³ (4) mental disability,⁴ (5) imposition of other penalties or sanctions,⁵ and (6) remorse. I am persuaded that Respondent recognized that he had a psychological, sexual addiction disorder requiring extensive therapeutic intervention and that he devoted his focus on treating his addiction. Respondent’s wife, who is also the manager of this law office, has supported her husband and has maintained her marriage to Respondent, despite his indiscretions including those that she and their child unfortunately witnessed first-hand. Respondent’s wife, along with Mr. Vogel’s associate attorneys and other staff, have implemented safeguards that would make it unlikely for Respondent to have the opportunity to relapse into a pattern of reckless, sexually addictive behavior.

I believe that the legal services Respondent provided to Ashley Alford were no different than the services he would have provided any other Federal Court, criminal defense client that he did not also pursue sexually.

² Respondent’s emotion problems would include his diagnosed, sexual addition disorder.

³ Respondent fully cooperated with the Board and with Guy W. Blackwell, the Federal District Court’s disciplinary counsel appointed under E.D. Tenn. L.R. 83.7.

⁴ Respondent’s mental disability would include his diagnosed, sexual addition disorder.

⁵ Respondent was sanctioned by the Eastern District Court of Tennessee, by being removed from the Criminal Justice Act (CJA) panel of attorneys who are individually appointed by the Court, and compensated by the U.S. government, to defend those accused of federal criminal law, who cannot afford to otherwise hire private counsel.

Ted Rice, who is the Deputy Director of TLAP, opined that Respondent was "humble and sincere," in his interviews with TLAP, that Respondent was fit to practice law, and that Respondent was not a threat to the public. TLAP, through the U.S. District Court for the Eastern District of Tennessee, required Respondent to enter into an extensive, two-year monitoring agreement that required complete abstinence from alcohol or drugs, random urine screens, attendance of three support groups per week, and the maintenance of a counseling relationship. Respondent maintained counseling with his former counselor in Kinnelon, New Jersey, and he regularly attends marital counseling through his church with his wife.

I would agree with the Majority that Ashley Alford was not completely willing to have sex with Respondent; however, Ms. Alford was an opportunist and appeared to be agreeable to engage in sexual relations if it appeared to benefit her, given the fact she had sex with Bubba Poston, a D.E.A. agent with whom she was providing apparent confidential informant services in an effort to decrease her possible felony drug sentence in Federal Court. Ms. Alford was not a dependable employee when she was employed by Respondent's law office. Ms. Alford was cunning in her efforts to refer her friend to become employed by Respondent's law office, with the proviso that her friend would be willing to have sex with Respondent.

The Majority has found that a 30-day active suspension is appropriate in the Alford case, despite the fact that Guy W. Blackwell did not recommend, nor did Chief Judge Thomas A. Varlan require any active suspension of Respondent's right to practice in the Eastern District Federal Court. Judge Varlan announced his decision at a hearing on February 28, 2014, and Respondent has continued to comply with the requirements of Judge Varlan's Order. I join Judge Varlan's decision in not requiring Respondent to serve any active suspension and to allow

him to continue to represent his active clients. I am constrained to dissent for the reasons set forth above.



R. DENO COLE