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APPENDIX A

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

May 31, 2019

Session Heard at Nashville

Issued July 2, 2019

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE v. LORING EDWIN JUSTICE

Direct Appeal from the Chancery Court for Knox County No. 189578-1, 189418-3 Robert E. Lee Davies, Senior Judge

No. E2017-01334-SC-R3-BP

This lawyer-disciplinary proceeding stems from a Knoxville attorney's conduct in a federal personal injury lawsuit where the attorney represented the plaintiff. The federal district court imposed a discovery sanction against the corporate defendant and ordered it to pay the attorney's fees and costs the plaintiff had incurred in locating and deposing a witness the corporate defendant failed to disclose. When the plaintiff's lawyer submitted an itemization of fees and costs to the federal district court, the lawyer falsely claimed as his own work the work that a paralegal had performed. The lawyer also submitted a written declaration along with the

itemization falsely claiming that he had kept contemporaneous records of his time in the case and attesting to the truth and accuracy of the itemization. The lawyer also requested in the itemization "grossly exaggerated and unreasonable" attorney's fees of more than $103,000 for work beyond the scope of the federal district court's order. Later, the lawyer testified falsely in a hearing before the federal district court by reaffirming the truth and accuracy of the itemization and the written declaration. A Hearing Panel of the Board of Professional Responsibility ("Hearing Panel") determined that the lawyer had violated four provisions of the Tennessee Rules of Professional Conduct ("RPC")—RPC 1.5(a) (Fees); RPC 3.3(a) (Candor Toward the Tribunal); RPC 3.4(b) (Fairness to Opposing Party and Counsel); and RPC 8.4(a) and (c) (Misconduct). The Hearing Panel found six aggravating and two mitigating factors and sanctioned the lawyer with a one-year active suspension and twelve additional hours of ethics continuing legal education. The Board of Professional Responsibility ("Board") and the lawyer appealed to the Chancery Court for Knox County. Tenn. Sup. Ct. R. 9, § 1.3. The trial court affirmed the Hearing Panel's findings of fact and conclusions of law but modified the sanction to disbarment. The trial court concluded that Standard 5.11 of the ABA Standards for Imposing Lawyer Sanctions ("ABA Standards"), which identifies disbarment as the presumptive sanction, applies and that the aggravating and mitigating factors do not warrant a lesser sanction than disbarment. The lawyer appealed, and after carefully reviewing the record and applicable authorities, we affirm the trial court's judgment in

all respects, including its modification of the sanction to disbarment.

Tenn. Sup. Ct. R. 9, § 1.3 (currently Tenn. Sup. Ct. R. 9, § 33.1(d)) Direct Appeal; Judgment of the Trial Court Affirmed

CORNELIA A. CLARK, J., delivered the opinion of the Court, in which JEFFREY S. BIVINS, C.J., and SHARON G. LEE, HOLLY KIRBY, and ROGER A. PAGE, JJ., joined.

Linn Guerrero, Knoxville, Tennessee, for the appellant, Loring E. Justice.

Gerald Morgan and William C. Moody, Nashville, Tennessee, for the appellee, Board of Professional Responsibility.

OPINION

I. Factual and Procedural Background

A. Hearing Panel Proof

Loring Edwin Justice grew up in Oak Ridge, Tennessee, obtained his undergraduate degree in 1995 from the University of Tennessee, and in 1998, graduated from Yale University School of Law. That same year he obtained his license to practice law in Tennessee, and from 1998-1999, Mr. Justice worked as a judicial law clerk for a judge of the United States Court of Appeals for the Sixth Circuit. After working the next year as an associate at a Nashville law firm, in 2000, Mr. Justice returned to East Tennessee and founded Loring Justice PLLC ("the law firm"), where he has practiced ever since.

From May to September 2009, Mr. Benjamin

Kerschberg worked for the law firm. Mr. Justice and Mr. Kerschberg met while they were both students at Yale Law School. They remained friends after law school and both served as judicial clerks for the same federal circuit court judge. Mr. Kerschberg did not obtain his Tennessee law license, so he worked as a contract paralegal for the law firm, and he billed the law firm for his services by submitting invoices with narrative entries describing the tasks performed, the date the services were rendered, and the time he spent on the tasks, in quarter-hour increments.

During the time Mr. Kerschberg worked for the law firm, Mr. Justice represented Scotty Thomas in a personal injury lawsuit ("the Thomas case") in the United States District Court for the Eastern District of Tennessee ("District Court") against Lowe's Home Centers ("Lowe's"). Mr. Thomas alleged that, on June 21, 2005, while he was working for a merchandising company inside a Lowe's store near Knoxville, a large stack of metal roofing sheets collapsed on top of him, causing very serious injuries, including brain damage. Lowe's denied liability and also denied having any knowledge or records showing that the incident occurred or that the merchandising company was in the Lowe's store on the date of the alleged incident.

Mr. Thomas recalled a female Lowe's employee assisting him after the incident, however, so during discovery Mr. Justice repeatedly asked Lowe's to identify this employee. Lowe's failed to disclose this employee's name, even though she was a human resources manager for Lowe's, was onsite at the Lowe's store the day the incident allegedly occurred, and made an appointment for Mr. Thomas

at a health clinic the day of the incident. In July 2010, Mr. Justice learned her identity from a medical record he obtained by subpoena from the health clinic where Mr. Thomas was first treated for his injuries.

By this time, Mr. Justice had already moved for a default judgment based on Lowe's discovery violations. The District Court held the motion in abeyance until December 1, 2010, and then referred it to a federal magistrate judge, who concluded that Lowe's had failed to satisfy its discovery obligations and that "the Plaintiff should be compensated for the labor and costs incurred in finding [the witness], because these costs were necessitated by [Lowe's] failure to properly investigate the allegations of this suit." The magistrate judge also recommended that Lowe's "be required to pay all reasonable fees and expenses incurred in locating and deposing [the witness], including attorneys' fees, transcription costs, court reporter fees, and other costs" and that Mr. Justice be required "to file an affidavit and/or documentation evidencing the fees, expenses, and costs incurred."

On March 15, 2011, the District Court adopted in part the magistrate judge's recommendations.[1] The District Court required Lowe's to "pay Plaintiff [Mr. Thomas] all reasonable attorney's fees and expenses incurred in locating and deposing [the witness], including attorney's fees,

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[1] The District Court did not accept the magistrate's recommendation to bar Lowe's from presenting evidence at the trial that would dispute Mr. Thomas's version of how the accident occurred.

transcription costs, court reporter fees, and other costs" and required Mr. Justice to provide the District Court by April 8, 2011, "documentation evidencing the fees, expenses, and costs incurred, associated with the discovery of [the witness]." The District Court gave Lowe's fourteen days thereafter "to file objections to the reasonableness of the fees and costs requested," after which the District Court would determine "the final amount of the monetary sanctions."

Mr. Justice submitted a preliminary itemization by the initial deadline but obtained an extension of time and submitted the final itemization and fee petition ("Itemization") to the District Court on April 22, 2011. The Itemization included 288 entries for work and expenses incurred from January 9, 2009 to April 8, 2011, listed 371.5 hours of work attributed to three lawyers and four assistants, and sought $106,302.00, which included more than $103,000 in attorney's fees. Of the attorney hours, 325.5 were attributed to Mr. Justice and billed at the rate of $300 per hour. Only eleven hours were attributed to Mr. Kerschberg and billed at the rate of $90 per hour. Along with the Itemization, Mr. Justice submitted a written declaration attesting under penalty of perjury that he had maintained contemporaneous records of the work performed on the Thomas case and that the Itemization was true and correct.

Questions were raised in the District Court about the Itemization, in part because several of the narrative entries purporting to describe Mr. Justice's work were identical, or nearly identical, to entries in the invoices Mr. Kerschberg had submitted to Mr.

Justice's law firm from May to September 2009 describing Mr. Kerschberg's work.

At a hearing in the District Court on February 17, 2012, Mr. Justice testified at length, as did several other witnesses. Upon considering the proof, the District Court suspended Mr. Justice from practicing law in the District Court for six months.[2] Mr. Justice appealed his suspension, but the United States Court of Appeals for the Sixth Circuit affirmed, and the United States Supreme Court denied his petition for writ of certiorari.

While the federal proceedings were pending, a lawyer with whom Mr. Kerschberg had discussed the matter reported it to the Board. At Mr. Justice's request, the Board held its investigation in abeyance pending disposition of some of the federal proceedings. Eventually, the Board completed its investigation and filed a petition for discipline against Mr. Justice on September 25, 2013.[3] The Board alleged that Mr. Justice had violated RPC 1.5(a) (Fees), RPC 3.3(a)(1) (Candor Toward the Tribunal), RPC 3.4(b) (Fairness to Opposing Party and Counsel), and RPC 8.4(a), (b), (c), and (d) (Misconduct).This Court revised Tennessee Supreme Court Rule 9 effective January 1, 2014. This disciplinary proceeding, however, was initiated prior

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[2] The District Court never awarded any attorney's fees and costs for Lowe's discovery violation.

[3] This Court revised Tennessee Supreme Court Rule 9 effective January 1, 2014. This disciplinary proceeding, however, was initiated prior to January 1, 2014, and it is therefore governed by the prior version of the rule. See Garland v. Board of Professional Responsibility, 536 S.W.3d 811, 816 (Tenn. 2017). Any references herein are to the pre-2014 version of Rule 9.

to January 1, 2014, and it is therefore governed by the prior version of the rule. See Garland v. Board of Professional Responsibility, 536 S.W.3d 811, 816 (Tenn. 2017). Any references herein are to the pre-2014 version of Rule 9.

The Hearing Panel convened from January 20-23, 2015. The Board presented no live witnesses. As for its claim that Mr. Justice violated RPC 1.5(a) by charging an unreasonable attorney fee, the Board presented the District Court's order and Mr. Justice's Itemization. The Board asserted that many of the entries in the Itemization were for work completely unrelated to locating and deposing the witness, such as: (1) attending the Tennessee Rule of Civil Procedure 26(f) discovery conference; (2) preparing the initial written discovery; (3) preparing an amended complaint; (4) meeting with his client;

(5) reading hotel reservations; (6) researching electronic filing rules; (7) talking with the clerk's office about electronic filings; (8) practicing a motion argument in front of his paralegal; (9) locating an expert witness; and (10) workshopping the case at the American Association for Justice Deposition College.

The Board also introduced Mr. Kerschberg's deposition upon written questions, his 2009 invoices, and excerpts of his former testimony in the District Court to establish that Mr. Justice had claimed Mr. Kerschberg's work as his own. In his deposition and in his testimony in the District Court, Mr. Kerschberg stated that he had personally performed the work described in his invoices, that Mr. Justice had paid the invoices without question, and that he had no knowledge of Mr. Justice ever recording his

own time on the Thomas case or on any other case. Mr. Kerschberg recognized the possibility that Mr. Justice could have done work on the Thomas case without his knowledge that was similar to his own, and he acknowledged using Mr. Justice's notes on occasion to describe his own work in the narrative invoice entries. But Mr. Kerschberg consistently testified that the narrative invoice entries described his own work, not Mr. Justice's work, and maintained that, to his knowledge, Mr. Justice had never kept time on the Thomas case or any other case.

The Board emphasized as well that seventeen Itemization entries were virtually identical to entries in Mr. Kerschberg's invoices in terms of the dates, descriptions of the work, and time necessary to perform the tasks.[4] A side-by-side comparison of the Itemization and invoice entries appears below.

a. June 13, 2009

Kerschberg

1.25 Revision of Motion to Have Requests for Admission Deemed Admitted.

Justice

1.2 Revision of Motion to Have Requests for Admission Deemed Admitted

b. June 14, 2009

[4] Mr. Kerschberg recorded his time in quarter hour increments and used the initials "LJ" or "Loring" to refer to Mr. Justice. Mr. Justice recorded his time in tenth of an hour increments.

Kerschberg

2.25 Added Loring edits to Motion to Deem Requests for Admissions admitted. Added section about Letter to Clint Woodfin and Motion to Supplement. Researched electronic filing rules for the E.D. Tenn. Researched proper procedure for filing Amended Complaint (Local Rules; Scheduling Order; FRCP).

Justice

2.2 Edits to Motion to Deem Requests for Admissions admitted. Added section about Letter to Clint Woodfin and Motion to Supplement. Researched electronic filing rules for the E.D. Tenn.

c. June 16, 2009

Kerschberg

2.5 All final preparations of Amended Complaint and Motion to Deem Requests For Admissions Deemed Admitted. Preparation of all PDF exhibits. Compilations of files. Filing with E.D. Tenn. via ECF. Hard copies of everything for file.

Justice

2.5 All final preparations of Amended Complaint and Motion to Deem Requests for Admissions Deemed Admitted. Preparation of all PDF exhibits. Compilation of files. Filing

with E.D. Tenn. via ECF. Hard copies of everything for file.

d. June 16, 2009

Kerschberg

3.0 Edited Motion to Compel Discovery and Memorandum In Support thereof prepared by Juliane Moore.

Justice

3.0 Preparation and editing of Motion to Compel Discovery and Memorandum In Support partially prepared by legal assistant

e. June 17, 2009

Kerschberg

1.0 Talked to Angela Brush at district court to correct misunderstandings re our filings. Second conversation with LJ about Consent Motion To Amend with Clint Woodfin. Drafted Consent Motion for review by Clint Woodfin.

Justice

1.0 Talked to Angela Brush at district court to correct misunderstandings re our filings

f. June 17, 2009

Kerschberg

4.0 Continued to revise and rewrite Motion to Compel Discovery.

Justice

4.0 Continued to research, revise and rewrite Motion to Compel Discovery

g. June 18, 2009

Kerschberg

4.5 Motion to Compel Discovery.

Justice

4.5 Continued research, revision and refinement of Motion to Compel Discovery

h. June 19, 2009

Kerschberg

.5 Letter to Bob Davies regarding additional materials needed from MSG.

Justice

.5 Letter to Bob Davies regarding additional materials needed from MSG about the project

i. July 16, 2009

Kerschberg

.25 Reviewed Loring's notes from meeting with Clint Woodfina [sic] and calendared follow-up call to Cory re: Clint's call.

Justice

.2 Reviewed notes from meeting with Clint Woodfin and calendared

follow-up call to Cory Kitchen re: Clint's call

j. July 22, 2009

Kerschberg

5.0 Drafted and typed memo for trip to Alabama.

Justice

5.0 Drafted and typed memo for trip to Florence, Alabama to meet with Plaintiff's MSG co-workers. This memo summarized the liability issues in the case and listed important questions to ask to try to understand whether it was plausible Lowe's could lack notice and to prove Lowe's indeed had notice and to gain physical descriptions of individuals of interest

k. July 27, 2009

Kerschberg

4.5 Reviewed all notes from our trip to Alabama and compiled Master To-Do List for Loring and BG. Drafted Affidavits of Kitchen, Yeates, and McBride. Online research re: Teresa Beavers (Lowe's Manager).[5]

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[5] The Board also introduced an entry from Mr. Justice's preliminary Itemization in which Mr. Justice referred to himself in the third person as "Loring." This entry stated in relevant part, "Reviewed all notes from our trip to Alabama to meet with the MSG witnesses and *compiled Master To-Do List for Loring* and B. Griffith, summer clerk." The Board alleged that this reference resulted from Mr. Justice copying Mr.

Justice

4.5 Reviewed all notes from our trip to Alabama to meet with the MSG witnesses and compiled Master To-Do List. Drafted Affidavits of Kitchen, Yeates, and McBride. Online research re: Teresa Beavers (Lowe's Manager)

l. July 29, 2009

Kerschberg

.25 Revisions of Affidavits of Kitchen, Yeates, and McBride.

Justice

.2 Revisions of Affidavits of Kitchen, Yeates, and McBride

m. August 8, 2009

Kerschberg

4.0 Coordinated with Debi Dean to make sure that Randy, Bradley and Corey will sign Affidavits and get them back to us notarized. Prepared final versions with LJ edits. Two versions for Bradley and Cory—one with and one without Teresa Beavers. Researched FRCP and EDTN Rules re: timeliness of Notice of Filing with respect to Hearing Date. Drafted Notice of Filing. Drafted Memorandum

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Kerschberg's invoice. This third-person reference was omitted from Mr. Justice's final Itemization.

to accompany Notice of Filing for filing with the court this week.

Justice

3.0 Coordinated with Debi Dean of Alabama Head Injury Foundation to make sure that Randy, Bradley, and Corey will sign Affidavits and get them back to us notarized. Reviewed legal assistant's research of FRCP and EDTN Rules re: timeliness of Notice of Filing with respect to Hearing Date. Drafted Notice of Filing. Drafted Memorandum to accompany Notice of Filing for filing with the court this week.

n. August 10, 2009

Kerschberg

.5 Coordination of all Affidavit signings, etc. with Debi Dean.

Justice

.5 Coordination of all Affidavit signings, etc. with Debi Dean

o. August 27, 2009

Kerschberg

5.0 Reviewed file and all FRCP related to discovery to look at options and obligations for supplementation before the September 14 hearing, as well as the possibility of fee shifting.

Justice

5.0 Reviewed file and all FRCP related to discovery to look at options and obligations for supplementation before the September 14 hearing, as well as the possibility of fee shifting and sanctions

p. August 31, 2009

Kerschberg

2.0 Prepared outline for Loring as to action plan before September 14 hearing. Researched Lowe's Loss/Safety Prevention Manager. Drafted proposed Interrogatory re: iinformation [sic] on who held that position at the time of the accident. Revised and prepared cover letters to Clint Woodfin and Clerk's office.

Justice

2.0 Prepared outline as to action plan before September 14 hearing. Researched Lowe's Loss/Safety Prevention Manager. Drafted proposed Interrogatory re: information on who held that position at the time of the accident. Revised and prepared cover letters to Clint Woodfin and Clerk's office

q. September 9, 2009

Kerschberg

1.25 Reviewed our initial disclosures and discovery responses to see what needs to be supplemented. Reviewed

> all supplemental materials provided by Clint Woodfin. Detailed email to Loring reviewing thoughts on the supplemental documents and possible RFPs. Google search for the two other female managers mentioned by Clint Woodfin. Results in email to LJ. Email to Mike Conley on Listserv re: obtaining the good information he has re falling products litigation.
>
> Justice
>
> 1.2 Detailed email to file and staff after reviewing supplemental documents of defendant and possible RFPs. Google search for the two other female managers mentioned by Clint Woodfin.

The Board additionally offered into evidence an April 11, 2011 email by which Mr. Justice transmitted the initial Itemization to Mr. Kerschberg for review.[6] This email stated:

> Thanks for the email Kersch. I billed a lot of time for my reading your work rather than you doing it so you won't have to testify if it comes to that. Hope you are not mad about that. I really appreciate you. Tell me what you think of this. What a war.

The Board pointed out that the Itemization did not include a single entry for time Mr. Justice spent

[6] The record does not support Mr. Justice's assertion that this e-mail was marked for identification but not received into evidence.

"reading" Mr. Kerschberg's work.

By agreement, the Board and Mr. Justice introduced excerpts of Mr. Justice's former testimony from the District Court hearing. The Board presented Mr. Justice's testimony denying that he had wrongly attributed Mr. Kerschberg's work to himself in the Itemization, reaffirming the accuracy of the Itemization, and maintaining that he had contemporaneously recorded the time he spent working on the federal case. The Board also introduced the written declaration Mr. Justice had submitted along with the Itemization, in which he reaffirmed that he had performed the work claimed in the Itemization, that he had contemporaneously recorded his time for the work claimed in the Itemization, and that the Itemization was true and accurate—all claims that the Board alleged were false.

When the Board closed its proof, Mr. Justice moved for involuntary dismissal, but the Hearing Panel denied his motion. Mr. Justice then presented his proof, which consisted of written exhibits, including excerpts of testimony given in the District Court hearing, as well as the in-person testimony of Chad Rickman, an associate with Mr. Justice's law firm, and Mr. Justice's own in-person testimony.

Mr. Rickman testified that the law firm is contingency-fee based, does not have a billing system, and does not typically require employees and lawyers to record time. Mr. Rickman did not work at the law firm when Mr. Kerschberg worked there and first worked on the Thomas case in July 2010. But, Mr. Rickman recalled Mr. Justice instructing all law firm employees and lawyers to

record their time on the Thomas case. Mr. Rickman had recorded his time either on handwritten notes or in emails. Clerical staff used the notes and emails to enter his time into a Word document that included the time of all law firm personnel on the Thomas case. As an example of his own time records, Mr. Rickman produced an April 2011 email reporting his time. But this email was sent after the District Court filed its order awarding the discovery sanction, and Mr. Rickman could not produce any email or note predating the District Court's order by which he had reported time on the Thomas case.

As for the Word document containing all of the time records for personnel of the law firm on the Thomas case, Mr. Rickman stated that it became the Itemization that Mr. Justice filed in the District Court. But Mr. Rickman had not seen the Word document in any format other than the Itemization, and he had first seen the Itemization only after the District Court awarded the discovery sanction.

Mr. Rickman acknowledged that he had reviewed the Itemization before it was filed to eliminate confidential work product and to ensure that the entries were appropriate and not duplicative. But Mr. Rickman neither reviewed Mr. Kerschberg's invoices nor compared the Itemization to any other time records. As for the scope of the Itemization, Mr. Rickman disagreed with the Board's assertion that the Itemization sought unreasonable fees by listing tasks that were beyond the scope of the District Court's order. Mr. Rickman, like Mr. Justice, interpreted the District Court's order as awarding "all fees and expenses associated with all the extra work that had to be

done since the initial disclosure because of Lowe's discovery abuse." Mr. Rickman said that he and Mr. Justice never really considered interpreting the District Court's order narrowly as authorizing only fees associated with finding and deposing the witness because that interpretation "seemed pretty inconsistent with what the [magistrate judge] and [the District Court] had said." Mr. Rickman maintained that Mr. Justice had intended to give any monetary sanction awarded to Mr. Thomas. Mr. Rickman believed that federal law generally requires paying discovery sanctions to clients, and he interpreted the District Court's order as requiring Lowe's to pay the sanction to Mr. Thomas.

In general, both in the District Court and before the Hearing Panel, Mr. Justice testified consistently with Mr. Rickman. Mr. Justice agreed, for example, that ordinarily neither he nor anyone else at the law firm records time. Mr. Justice said that the Thomas case was the exception and that he began keeping contemporaneous time records on the Thomas case and requiring all other law firm personnel to do so around the discovery conference on December 10, 2008, because he believed Lowe's blanket denials would eventually result in a discovery sanction. Mr. Justice stated that he recorded his own time either by personally entering it into the Word document or by giving clerical staff his handwritten time records to enter into the Word document. But Mr. Justice was unable to produce any handwritten note or email recording his own time on the Thomas case, and he could not recall the name of the Word document. Like Mr. Rickman, Mr. Justice said that all time records on the Thomas case were entered into the Word document. He

explained that the Word document was either emailed around the law office or saved to portable drives and copied to various law firm computers for various personnel to enter time. He testified that the Word document had been overwritten each time data was entered and that earlier versions of the document had not been saved. According to Mr. Justice, the Word document eventually became the Itemization that was filed in the District Court.

Mr. Justice attempted to locate earlier versions of the Word document after questions were raised about the Itemization in the District Court. He had instructed the law firm's in-house technology staff to search for earlier versions of it. He also engaged an outside computer consultant to search the law firm's computers for earlier versions of the Word document. Eventually, four versions of the Word document were located, but none predates the District Court's order awarding the discovery sanction.

Mr. Justice opined that no earlier version of the Word document was located because it was overwritten each time data was entered and because the law firm computers used a "defragmenting" process. According to Mr. Justice, this process made it difficult or impossible to recover earlier versions of Word documents. Mr. Justice said that he had turned off this process after the Itemization was questioned in the District Court. Mr. Rickman corroborated Mr. Justice's testimony on this point, saying that he remembered Mr. Justice frantically going to each computer in the office to turn off the defragmenting process.

Concerning the seventeen Itemization

entries, Mr. Justice denied copying Mr. Kerschberg's invoices and again maintained, as he had in the District Court, that he had personally performed the work described in the Itemization and that he had contemporaneously recorded his time, meaning within seven-to-ten days of completing the work. Mr. Justice offered various explanations for the similarities between his Itemization entries and Mr. Kerschberg's invoice entries. He posited that Mr. Kerschberg may have copied his notes when creating the invoice entries, and, as support for this theory, pointed to Mr. Kerschberg's acknowledgment that he had occasionally used Mr. Justice's notes to create his own invoice entries. Mr. Justice speculated that law firm personnel, including Mr. Rickman, may have mistakenly entered or incorrectly assigned time when preparing the Itemization. Mr. Justice also implied that Mr. Kerschberg may have gained unauthorized access to the firm's computers and manipulated the Itemization. To support this suggestion, Mr. Justice described Mr. Kerschberg's father as a nationally known computer expert and said that the law firm's technology staff had discovered oddities in the law firm's computer system during the federal proceedings, including the forwarding of emails from Mr. Kerschberg's deactivated account to another email address associated with Mr. Kerschberg.

Mr. Justice emphasized as well that, although he had not copied Mr. Kerschberg's invoice entries, doing so would not have been improper because he had actually performed the tasks described in the Itemization entries. Mr. Justice reaffirmed the truth and accuracy of the Itemization

and his assertion that he and Mr. Kerschberg had performed the same or similar work (including clerical tasks), on the same date, and for exactly, or almost exactly, the same amount of time.

Mr. Justice agreed that the law firm had paid Mr. Kerschberg in 2009 without questioning the charges or the entries describing his work. When asked by the Hearing Panel to review Mr. Kerschberg's invoices and point out errors, Mr. Justice identified only typos and misnomers and nothing substantial. When asked the meaning of his April 11, 2011 email to Mr. Kerschberg stating that he had billed "a lot of time" for "reading" Mr. Kerschberg's work, Mr. Justice explained that this statement merely reflected the "Chamberlain" principle that he had followed when preparing the Itemization. Mr. Justice said that, under this Chamberlain principle, which he purportedly derived from Chamberlain Mfg. Corp. v. Maremont Corp., 92-C-0356, 1995 WL 769782, at 1 (N.D. Ill. Dec. 29, 1995), any duplicative work he and Mr. Kerschberg performed could be billed at the higher attorney rate.[7] By ascribing this meaning to the email, Mr. Justice also implicitly answered the question of why the Itemization had not included any entries for Mr. Justice "reading" Mr. Kerschberg's work.

With respect to the Board's assertion that the Itemization sought unreasonable fees for tasks far exceeding the scope of the District Court's order, Mr.

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[7] As explained more fully herein, contrary to Mr. Justice's argument, Chamberlain does not stand for the proposition that an attorney can charge a higher rate when duplicating a paralegal's work. 1995 WL 769782, at *9.

Justice asserted that the Lowe's discovery violation had impacted the entire case, causing much more work than otherwise would have been necessary. Mr. Justice maintained that the Itemization had been conservative and had included only a portion of the time for the extra work necessitated by Lowe's discovery violation. As did Mr. Rickman, Mr. Justice interpreted the District Court's order as broader than its literal language and as encompassing fees for any and all extra work stemming from Lowe's discovery violation. Like Mr. Rickman, Mr. Justice stated that federal law requires paying discovery sanctions to clients, and as a result, Mr. Justice claimed that he had no financial incentive to inflate the fees sought by the Itemization. Mr. Justice also claimed that even if he had not been required to do so by federal law, he would have given the sanction to Mr. Thomas because Mr. Thomas needed the money more than the law firm.

B. Hearing Panel's Decision

At the conclusion of the proof, the Hearing Panel took the matter under advisement and allowed the parties to submit post-hearing proposed findings of fact and conclusions of law. The Hearing Panel issued its twenty-five-page written decision on March 9, 2015. The Hearing Panel concluded that Mr. Justice had violated RPC 1.5(a) (Fees);[8] RPC 3.3(a) (Candor Toward the Tribunal);[9] RPC 3.4(b)

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[8] "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Tenn. Sup. Ct. R. 8, RPC 1.5(a).

[9] "A lawyer shall not knowingly make a false statement of fact or law to a tribunal . . . ." Tenn. Sup. Ct. R. 8, RPC 3.3(a)(1).

(Fairness to Opposing Party and Counsel);[10] and RPC 8.4(a) and (c) (Misconduct).[11] Although the Board's prehearing brief had listed ABA Standards 5.11 and 6.11,[12] both of which identify disbarment as the applicable presumptive sanction, the Hearing

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[10] "A lawyer shall not . . . falsify evidence [or] counsel or assist a witness to offer false or misleading testimony . . . ." Tenn. Sup. Ct. R. 8, RPC 3.4(b).

[11] "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" or "(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Tenn. Sup. Ct. R. 8, RPC 8.4(a), (c).

[12] ABA Standard 5.11 provides:

> Disbarment is generally appropriate when:
>
> a. a lawyer engages in serious criminal conduct a necessary element of which incudes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft . . .
>
> or
>
> b. a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA Standard 6.11 provides:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

Panel failed to reference any ABA Standard establishing a presumptive sanction. Rather the Hearing Panel discussed aggravating and mitigating factors, found six aggravating and two mitigating factors, and imposed a sanction of one-year active suspension and twelve additional hours of ethics continuing legal education. The Hearing Panel found that:

(1) Mr. Kerschberg's invoices described work he had done;

(2) Mr. Justice's testimony that he had worked the time in the seventeen matching entries was not credible, and Mr. Justice's explanations for why the entries were nearly identical were implausible;

(3) Mr. Justice's April 11, 2011 email to Mr. Kerschberg was actually an acknowledgment that Mr. Justice had claimed time on the Itemization for himself for work Mr. Kerschberg had actually performed, and Mr. Justice's assertion that it merely advised of his use of the Chamberlain principle was implausible;

(4) The credibility of Mr. Justice's testimony concerning his work was "further called into question by his demeanor on the witness stand" because Hearing Panel questions were "often met with lengthy periods of silence prior to answering the question" and Mr. Justice's answers to

Hearing Panel questions about the Itemization were "often evasive;"

(5) Regarding the seventeen nearly identical entries, Mr. Justice knew he was representing to the District Court that he had performed work that actually had been performed by another;

(6) By claiming to have performed work performed by Mr. Kerschberg, Mr. Justice gave a false statement under oath;

(7) Mr. Justice knowingly testified falsely before the District Court by testifying that he worked the time attributed to him in the Itemization and by testifying that he kept a contemporaneous record of his time;

(8) By claiming in the Itemization to have performed work actually performed by Mr. Kerschberg, Mr. Justice made a false statement of fact to a tribunal in violation of RPC 3.3(a)(1) (Candor Toward the Tribunal);

(9) By testifying falsely before the District Court that he made no false statements in the Itemization, personally worked the time attributed to him, and kept a contemporaneous record of his time, Mr. Justice made false statements of fact to a tribunal in violation of RPC 3.3(a)(1) (Candor Toward the Tribunal);

(10) Numerous entries in the Itemization were unrelated to locating and deposing [the witness] and exceeded the scope of the District Court's order;

(11) By including numerous items that far exceeded the scope of the District Court's order, the fee petition requested an unreasonable fee in violation of RPC 1.5(a);

(12) By adopting work as his own that was actually performed by Mr. Kerschberg, Mr. Justice falsified evidence in violation of RPC 3.4(b) (Fairness to Opposing Party and Counsel);

(13) By violating the foregoing ethical rules, Mr. Justice violated RPC 8.4(a) and (c) (Misconduct);

(14) The proof established the following aggravating factors: (a) a dishonest or selfish motive; (b) a pattern of misconduct; (c) multiple offenses; (d) submission of false evidence; (e) false statements or other deceptive practices during the disciplinary process; (f) refusal to acknowledge wrongful nature of conduct; and (g) substantial experience in the practice of law;[13]

(15) The proof established the following two mitigating factors—(a) absence of a prior disciplinary record and (b) the imposition of other penalties or

[13] See ABA Standard 9.22.

sanctions (the six-month suspension from the practice of law by the District Court);[14]

(16) The proper sanction, after weighing aggravating and mitigating factors, is a one-year active suspension and twelve additional hours of continuing legal education in ethics.

C. Trial Court Proceedings

Both Mr. Justice and the Board appealed from the Hearing Panel's decision. Mr. Justice raised many issues, but the Board argued only that the Hearing Panel erred by suspending rather than disbarring Mr. Justice. The trial court affirmed the Hearing Panel's findings of fact but modified the sanction to disbarment. In doing so, the trial court emphasized that the Hearing Panel had failed to begin its analysis with any ABA Standard that identified the presumptive sanction for the factual circumstances. The trial court determined that ABA Standard 5.11(b), which identifies disbarment as the presumptive sanction, applies in these circumstances.[15] After considering the aggravating and mitigating factors, the trial court imposed the presumptive sanction, finding no basis to impose a lesser sanction. In explaining its decision in an order filed February 2, 2017, the trial court stated:

This Court is reluctant to impose the

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[14] See ABA Standard 9.32.

[15] The trial court concluded that ABA Standard 6.11 does not apply in these circumstances, although it also identifies disbarment as the presumptive sanction.

> sanction of disbarment upon a lawyer with no prior disciplinary offenses. The comments to ABA Standard 5.11 state "in imposing final discipline in such cases, most courts impose disbarment of lawyers who are convicted of serious felonies." However, the intentional deceit by [Mr.] Justice on the opposing party, [and the federal judges], along with the refusal to acknowledge the wrongful nature of his conduct and the total lack of remorse leaves this Court with no alternative.

Mr. Justice then moved to alter or amend the judgment, challenging, among other things, the trial court's modification of the sanction to disbarment. In a fifteen-page order filed May 31, 2017, the trial court addressed and rejected each of Mr. Justice's claims. With respect to the sanction, the trial court stated:

> Although the Court believed the sanction of disbarment was justified in this case, the Court acknowledges it was reluctant to impose such a severe sanction on Mr. Justice. However, any lingering doubt as to the disbarment of Mr. Justice has been obliterated by his motion to alter or amend. [Mr.] Justice blames everyone and everything for his predicament, other than his own misconduct.

II. Standard of Review

This Court recently reaffirmed the familiar

standard of review that applies in lawyer-disciplinary appeals, stating:

> The Tennessee Supreme Court is the final arbiter of the professional conduct of all lawyers practicing in Tennessee, Sneed v. Bd. of Prof'l Responsibility, 301 S.W.3d 603, 612 (Tenn. 2010), and the source of authority of the Board and all its functions, Long v. Bd. of Prof'l Responsibility, 435 S.W.3d 174, 178 (Tenn. 2014) (citing Brown v. Bd. 0f Prof'l Responsibility, 29 S.W.3d 445, 449 (Tenn. 2000)). Attorneys charged with disciplinary violations have a right to an evidentiary hearing before a hearing panel, which determines whether a violation has occurred and, if so, the appropriate sanction for the violation. Bd. of Prof'l Responsibility v. Daniel, 549 S.W.3d 90, 99 (Tenn. 2018) (citing Maddux v. Bd. of Prof'l Responsibility, 409 S.W.3d 613, 621 (Tenn. 2013)). Either party dissatisfied with the hearing panel's decision may appeal to the circuit or chancery court, where review is conducted upon "the transcript of the evidence before the hearing panel and its findings and judgment." Tenn. Sup. Ct. R. 9, § 1.3 (currently § 33.1(d)). Either party dissatisfied with the trial court's decision may appeal directly to this Court, which will resolve the appeal based "upon the transcript of the record from the circuit or chancery court,

which shall include the transcript of evidence before the hearing panel." Id. This Court applies the same standard of review as the trial court, Daniel, 549 S.W.3d at 100, and determines whether the hearing panel's findings, inferences, conclusions, or decisions are:

> (1) in violation of constitutional or statutory provisions; (2) in excess of the panel's jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.

Id. § 1.3 (currently 33.1(b)). In determining whether substantial and material evidence supports a hearing panel's decision, this Court evaluates whether the evidence "furnishes a reasonably sound factual basis for the decision being reviewed." Sneed, 301 S.W.3d at 612 (quoting Threadgill v. Bd. of Prof'l Responsibility, 299 S.W.3d 792, 807 (Tenn. 2009), overruled on other grounds by Lockett v. Bd. of Prof'l Responsibility, 380 S.W.3d 19, 27–28 (Tenn. 2012)); see also Sallee v. Bd. of

> Prof'l Responsibility, 469 S.W.3d 18, 36 (Tenn. 2015).
>
> We review questions of law de novo but do not substitute our judgment for that of a hearing panel as to the weight of the evidence on questions of fact. Daniel, 549 S.W.3d at 100 (citing Maddux, 409 S.W.3d at 622); see also Tenn. Sup. Ct. R. 9, § 33.1(b) (2018) (stating that in determining the substantiality of evidence, the court shall not substitute its judgment for that of the hearing panel as to the weight of the evidence on questions of fact).
>
> Finally, this Court's review of attorney disciplinary appeals is conducted in light of our inherent power to promulgate and enforce disciplinary rules and to ensure that these rules are enforced in a manner that preserves both the integrity of the bar and the public trust in our system of justice. See Hughes v. Bd. of Prof'l Responsibility, 259 S.W.3d 631, 647 (Tenn. 2008).

Green v. Bd. of Prof'l Responsibility of Supreme Court of Tennessee, 567 S.W.3d 700, 712–13 (Tenn. 2019) (footnote omitted). With these principles in mind, we evaluate Mr. Justice's claims.[16]

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[16] Mr. Justice lists seventeen issues in the appropriate section of his brief but also advances many others in the argument portion of his brief. We decline to separately address each issue raised because many have not been properly preserved and

III. Analysis

A. Rulings on the Admissibility of Evidence

Mr. Justice challenges the Hearing Panel's rulings on certain evidence. As the challenger, Mr. Justice bears the burden of establishing that the Hearing Panel abused its discretion. Bd. of Prof'l Responsibility of Supreme Court of Tennessee v. Sheppard, 556 S.W.3d 139, 146 (Tenn. 2018). A hearing panel abuses its discretion by applying an incorrect legal standard or reaching a decision that is against logic or reasoning and which causes an injustice to the party complaining. Id. Under this deferential standard of review, if reasonable minds can disagree about the propriety of a hearing panel's decision, this Court will uphold the ruling. Id.

Mr. Justice argues that the Hearing Panel erred by excluding the written declaration of Yalkin Demirkaya, the independent computer consultant he engaged to search the law firm's computers for the Word document. Because the Board introduced excerpts of Mr. Justice's testimony from the District Court hearing, Mr. Justice claims that the rule of completeness embodied in Tennessee Rule of Evidence 106 entitled him to introduce Mr. Demirkaya's written declaration, which was admitted into evidence in the District Court hearing by agreement of the parties. The Board argues that Rule 106 does not entitle Mr. Justice to introduce a

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others are too outlandish to dignify with discussion. For example, at oral argument, Mr. Justice argued through counsel that he should receive a new hearing because the trial judge's given name illustrates bias. Not only is this argument without merit, it is absurd.

writing prepared by another person. The Board is correct.

Tennessee Rule of Evidence 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Tenn. R. Evid. 106. This evidentiary rule:

> reflects a concern for fairness and is designed to let the jury assess related information at the same time rather than piecemeal. This should help the jury avoid being misled by hearing only partial information about a writing or recorded statement. Moreover, it will assist the jury in assessing the weight to be given to the written or recorded statement by permitting the jury to consider at the same time other relevant writings and recordings.

Neil P. Cohen, Sarah Y. Sheppeard, and Donald F. Paine, Tennessee Law of Evidence § 1.06[2][a] (6th Ed. 2011 LexisNexis Matthew Bender) (footnotes omitted). Applied in this case, Rule 106 means that when the Board introduced excerpts of Mr. Justice's testimony in the District Court, then Mr. Justice could have introduced any other parts of his own testimony that "ought in fairness to be considered contemporaneously with it." Tenn. R. Evid. 106; see also State v. Keough, 18 S.W.3d 175,

182 (Tenn. 2000) (explaining how Rule 106 applies in criminal cases). The Hearing Panel appropriately allowed Mr. Justice to introduce other parts of his District Court testimony. Rule 106 did not authorize Mr. Justice to introduce the testimony or proof other persons provided in the District Court. The Hearing Panel thus did not abuse its discretion by excluding Mr. Demirkaya's written declaration.

Also without merit is Mr. Justice's assertion that the Hearing Panel erred by admitting Mr. Kerschberg's testimony by written deposition. Tennessee Rule of Civil Procedure 32.01 provides:

> At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof . . . .

Tenn. R. Civ. P. 32.01. Mr. Justice initiated Mr. Kerschberg's deposition and obviously had notice of it. Additionally, the record belies his assertion that the Hearing Panel and trial court improperly limited his opportunity to impeach Mr. Kerschberg on grounds of Mr. Kerschberg's mental health. As the trial court pointed out, Mr. Justice failed to proffer redirect questions after he was served with the Board's cross-examination questions, and this was the proper procedure for initiating redirect when a witness is deposed upon written questions. See Tenn. R. Civ. P. 31.01 (describing the procedure for

depositions upon written questions and stating that "[w]ithin 10 days after being served with cross questions, a party may serve redirect questions upon all other parties" and "[w]ithin 10 days after being served with redirect questions, a party may serve recross questions upon all other parties"). This issue is without merit.

B. Interference with Decision to Testify

Mr. Justice argues that the Hearing Panel deprived him of the ability to make an intelligent choice about testifying when it delayed ruling on whether it could draw an adverse inference from his invocation of his constitutional privilege against self-incrimination in his prehearing deposition. This argument, too, is without merit.

On the first day of the hearing, January 20, 2015, the Hearing Panel ruled that Akers v. Prime Succession of Tennessee, Inc., 387 S.W.3d 495 (Tenn. 2012) applies to attorney-disciplinary proceedings. Under Akers, "the trier of fact may draw a negative inference from a party's invocation of the Fifth Amendment privilege in a civil case only when there is independent evidence of the fact to which a party refuses to answer by invoking his or her Fifth Amendment privilege." Id. at 506–07. The Hearing Panel reserved its ruling on whether it would actually draw an adverse inference based on Mr. Justice's invocation of the privilege at his prehearing deposition until after the Board presented its proof so that it could determine whether the requirements of Akers had been satisfied.

As already noted, the Board did not call Mr. Justice as a witness at the hearing, but it introduced

excerpts of his former testimony in the District Court and also the transcript of his deposition. Mr. Justice also introduced excerpts of his former testimony in the District Court.[17] When the Board closed its proof, Mr. Justice moved for an involuntary dismissal, arguing that the Board had failed to prove its case. The Hearing Panel denied this motion. Mr. Justice then asked for permission to delay the presentation of his proof until the next day so that he would have the opportunity to decide overnight, after consultation with his attorney, whether to testify in his own behalf. The Hearing Panel granted this request. When the proceedings resumed the next day, Mr. Justice chose to testify, although he asserted before doing so that the Hearing Panel had erred by ruling that Akers applies to lawyer disciplinary proceedings. In its written ruling, the Hearing Panel expressly declined to draw an adverse inference against Mr. Justice for his invocation of the right against self-incrimination and explicitly based its decision on the evidence presented at the hearing. The trial court affirmed the Hearing Panel's decision.

As the foregoing recitation illustrates, the Hearing Panel ruled before the hearing began on whether it could draw an adverse inference from Mr. Justice's prehearing invocation of his privilege against self-incrimination. After the Board presented its proof, the Hearing Panel allowed Mr. Justice another evening to consult with his attorney and

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[17] For reasons not clear from the record, Disciplinary Counsel apparently agreed not to argue that Mr. Justice had implicitly waived his right to invoke the privilege against self-incrimination in the disciplinary proceeding by testifying in the District Court.

decide whether he would testify. The Hearing Panel did not interfere with or hinder Mr. Justice from intelligently deciding whether to testify.[18]

C. Procedural Challenges

1. Questioning by the Hearing Panel

Mr. Justice argues that the Chair of the Hearing Panel erred by extensively questioning him and Mr. Rickman. We disagree. As this Court has stated in another attorney-disciplinary proceeding where the hearing panel chair questioned the attorney: "The Tennessee Rules of Evidence apply to attorney disciplinary proceedings, Tenn. Sup.Ct. R. 9, § 23.3, and Tennessee Rule of Evidence 614 allows the Panel to interrogate witnesses." Bd. of Prof'l Responsibility v. Reguli, 489 S.W.3d 408, 419 (Tenn.

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[18] Because the Hearing Panel expressly declined to draw an adverse inference from Mr. Justice's prehearing invocation of his privilege against self-incrimination, we need not address Mr. Justice's assertion that the Hearing Panel erred by ruling that an adverse inference may be drawn from an attorney's invocation of the privilege in a lawyer-disciplinary proceeding. See People v. Robnett, 859 P.2d 872, 875 (Colo. 1993) ("We need not resolve the question whether the fact finder in an attorney disciplinary proceeding may draw a negative inference from an attorney-respondent's invocation of the Fifth Amendment privilege against self-incrimination, however, because there is no indication that the hearing board below drew any such inference."). We reserve decision on this issue of first impression for another day. We note that courts in Georgia, New York, and Wisconsin have allowed an adverse inference to be drawn in such circumstances in attorney-disciplinary cases. See In re Meier, 334 S.E.2d 212, 213 (Ga. 1986); In re Snyder, 897 N.Y.S.2d 398, 399–400 (N.Y. App. Div. 2010); In re Muraskin, 731 N.Y.S 2d 458 (N.Y. App. Div. 2001); State v. Postorino, 193 N.W.2d 1, 3 (Wis. 1972).

2015).

2. Insufficient Findings and Conclusions

Mr. Justice argues that the Hearing Panel and the trial court failed to make sufficient written findings of fact and conclusions of law. We disagree. Both the Hearing Panel and the trial court rendered thorough written decisions setting out facts and conclusions. Adjudicators are not required to address every issue that lacks merit. See Hodge v. Provident Life & Accident. Ins. Co., 664 S.W.2d 297, 300 (Tenn. Ct. App. 1983) (stating that a trial court need not "treat separately each fact or question at issue so long as [its] findings as a whole cover all relevant facts necessary to a determination of the case"); Adkins v. Bluegrass Estates, Inc., 360 S.W.3d 404, 415 (Tenn. Ct. App. 2011) (same).

3. Insufficient Fraud Allegation

We also reject Mr. Justice's argument that the Board failed to plead fraud with sufficient specificity. The Board's petition for discipline clearly states which Rules of Professional Conduct Mr. Justice allegedly violated and the facts alleged to constitute the violations. Mr. Justice filed a response to the petition, but after doing so he moved to dismiss the petition and in the alternative requested a more definite statement, citing Tennessee Rule of Civil Procedure 12.05.[19] Because he had filed a

[19] Tennessee Rule of Civil Procedure 12.05 provides that "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Tenn. R. Civ. P. 12.05.

response, Rule 12.05 technically did not apply, but the Hearing Panel nonetheless granted his motion in part and required the Board to identify the Itemization entries that it alleged were false. The Board then identified the seventeen entries, quoted herein, that it alleged were copied from Mr. Kerschberg's invoices. Thus, contrary to Mr. Justice's assertions, the Board provided him with very specific notice of the allegations of fraud and the claims against him. This issue is without merit.

4. Service of Process

Mr. Justice next argues that: (i) the Hearing Panel's decision was not properly served on him; (ii) he was not properly served with the Board's petition for writ of certiorari; and (iii) the summons with which he was served was defective.

Mr. Justice's claim that he was not properly served with the Hearing Panel's decision is without merit. Tennessee Supreme Court Rule 9, section 8.3 provides that "[t]he Board shall immediately serve a copy of the findings and judgment of the hearing panel upon the respondent and the respondent's counsel of record." Tennessee Supreme Court Rule 9, section 12.2 provides that "[s]ervice of any other papers or notices required by these Rules shall, unless otherwise provided by these Rules, be made in accordance with Rule 5.02, Tennessee Rules of Civil Procedure." Tennessee Rule of Civil Procedure 5.02 says, in relevant part, that, "[w]henever . . . service is required . . . to be made on a party represented by an attorney, *the service shall be made upon the attorney* unless service upon the party is ordered by the court." (Emphasis added.) Here, the Board served Mr. Justice by mailing a copy of the Hearing Panel's

judgment to him in the care of his attorney on March 9, 2015. The Board therefore complied fully with the requirements of Tennessee Supreme Court Rule 9, sections 8.3 and 12.2 when it served Mr. Justice's attorney with a copy of the Hearing Panel's judgment.

Mr. Justice's claim that he was not properly served with the Board's petition for writ of certiorari also is without merit. The petition was mailed to the Clerk and Master of the Chancery Court for Knox County on April 9, 2015, and filed on April 13, 2015. Before mailing the petition, the Board contacted Mr. Justice's attorney to inquire whether he would accept service on Mr. Justice's behalf. Mr. Justice's attorney responded on April 28, 2015, that he would not accept service. The Board then wrote the Clerk and Master requesting issuance of a summons for service on Mr. Justice. This summons was issued on April 30, 2015, only seventeen days after the filing of the Board's petition for writ of certiorari. This summons was served on May 5, 2015, but because someone other than Mr. Justice had actually signed the summons, the Board requested issuance of an alias summons. This alias summons was personally served on Mr. Justice by a private process server on July 23, 2015. This chronology refutes Mr. Justice's claim that the Board intentionally delayed issuance of the summons and failed to properly serve him with the petition for writ of certiorari.

Mr. Justice's next claims that, because the alias summons incorrectly listed $4,000 as the personal exemption, the Board's petition should be dismissed. In Sneed v. Board of Professional Responsibility, 301 S.W.3d 603, 613 (Tenn. 2010),

this Court held that "[u]nder Tennessee Supreme Court Rule 9, section 1.3, the purported unlawful procedure must have resulted in prejudice to the petitioner." Here, as in Sneed, no prejudice has been shown, so dismissal is not appropriate.[20]

D. Substantial and Material Evidence

Mr. Justice asserts that the Hearing Panel's decision is not supported by substantial and material evidence. In determining whether substantial and material evidence supports the Hearing Panel's decision, this Court "take[s] into account whatever in the record fairly detracts" from the weight of the evidence, but this Court does "not substitute its judgment for that of the [Hearing Panel] as to the weight of the evidence on questions of fact." Tenn. Sup. Ct. R. 9, § 1.3. Mr. Justice argues that the evidence against him was entirely circumstantial, and as a result, does not rise to the level of substantial and material evidence. He asserts that circumstantial evidence has less probative value

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[20] As he did in the trial court, in his brief to this Court, Mr. Justice insinuates that he has been targeted by the Board, the Hearing Panel, and the trial court for reasons outside this record. As an example, Mr. Justice claims that the trial judge and the attorney for the Board engaged in inappropriate *ex parte* communication during a chance encounter in a hotel lobby at approximately 8:45 a.m. on the morning of the hearing before the trial judge. The record belies this claim and establishes that the trial judge and the Board's lawyer discussed only a scheduling matter, in particular, the time the hearing would begin. The Board's lawyer promptly notified Mr. Justice and his attorney of this chance meeting and conversation and in their presence texted the trial judge the start time of the hearing. The trial court and the Board's conversation about scheduling did not constitute inappropriate *ex parte* communication. See Tenn. Sup. Ct. R. 10, RJC 2.9(A)(1).

than direct evidence. Despite Mr. Justice's protestations to the contrary, in evaluating the evidence, we do not differentiate between direct and circumstantial evidence. Tennessee law draws no distinction between the probative value of direct and circumstantial evidence. See State v. Dorantes, 331 S.W.3d 370, 381 (Tenn. 2011) (stating that a criminal conviction may be based solely on circumstantial evidence and that the prosecution need not disprove alternative theories of guilt when relying on circumstantial evidence alone); Hindman v. Doe, 241 S.W.3d 464, 468 (Tenn. Ct. App. 2007) (stating that "the law does not distinguish between the probative value of direct evidence and the probative value of circumstantial evidence"). This Court determines whether the evidence "furnishes a reasonably sound factual basis for the decision being reviewed." City of Memphis v. Civil Serv. Comm'n of Memphis, 216 S.W.3d 311, 317 (Tenn. 2007) (quoting Jackson Mobilphone Co., Inc. v. Tenn. Pub. Serv. Comm'n, 876 S.W.2d 106, 111 (Tenn. Ct. App. 1993)). We conclude, based on our review of the record on appeal, that the evidence, as already recounted herein, furnishes an eminently sound factual basis for the Hearing Panel's decision.[21]

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[21] The questions Mr. Justice has continued to raise in his brief about the completeness and accuracy of the record on appeal are without merit. This Court remanded the matter to the trial court in accordance with Tennessee Rule of Appellate Procedure 24(e), which provides that "[a]ny differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court." The trial court held a hearing and acknowledged that he had shredded the record, believing it to be a courtesy copy. The trial court reviewed the replacement copy that was provided,

The proof in the record on appeal establishes that the Itemization included seventeen entries purporting to describe Mr. Justice's work on the Thomas case that were either identical or nearly identical to entries on Mr. Kerschberg's invoices that described Mr. Kerschberg's work on the Thomas case. In his preliminary itemization, Mr. Justice referred to himself in the third person, which the Board asserted illustrated that he had copied Mr. Kerschberg's invoices. Mr. Kerschberg testified that the invoices described his work on the Thomas case, not Mr. Justice's work, and that, to his knowledge, Mr. Justice "did not ever document his work on the Thomas case or any other case." The record establishes that Mr. Justice paid Mr. Kerschberg for the time claimed on the invoices without question more than a year before he submitted the Itemization. The record contains Mr. Justice's April 11, 2011 email stating that Mr. Justice had billed a lot of time for "reading" Mr. Kerschberg's work. Yet, the Itemization did not include any entry for Mr. Justice "reading" Mr. Kerschberg's work. Mr. Justice testified that this email was simply a reference to the Chamberlain principle that allowed him to charge the higher attorney rate for work that both he and Mr. Kerschberg's performed, but the problem with this claim is twofold. The email does not mention Chamberlain, and Chamberlain actually does not support that proposition. Chamberlain, 1995 WL

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resolved the disputes concerning its accuracy and authenticity, certified the record for appeal, and denied Mr. Justice's subsequent attempts to raise new issues. "Absent extraordinary circumstances, the determination of the trial court is conclusive." Tenn. R. App. P. 24(e). Mr. Justice has failed to establish extraordinary circumstances.

769782, at *9. Indeed, the Chamberlain opinion commends the "judicious" use of paralegals and other such resources as a way to "lower overall fees." Id. Other decisions citing Chamberlain also do not interpret the opinion as Mr. Justice does. One of those opinions actually makes the opposite point by stating that, when an attorney does a paralegal's work, his fee should be reduced to a paralegal's rate because the work is nonlegal in nature. J.H. v. Bd. of Educ. of Pikeland Coummunity [sic] Unit Sch. Dist. #10, No. 13-CV-3388, 2014 WL 1716564, at *3 (C.D. Ill. May 1, 2014).[22] Thus, the record supports the Hearing Panel's interpretation of the email as a confirmation that Mr. Justice claimed Mr. Kerschberg's work as his own. The Hearing Panel found that Mr. Justice gave only implausible explanations for why the Itemization entries were identical or nearly identical to Mr. Kerschberg's invoice entries. The Hearing Panel did not believe Mr. Justice's testimony that he had performed the same administrative tasks, on the same date, and for the same amount of time as work Mr. Kerschberg had done and been compensated for more than a year before the Itemization was submitted. This Court does not second-guess the Hearing Panel's credibility findings.

Furthermore, no other proof in the record on appeal casts doubt on the Hearing Panel's credibility

[22] Nor is Chamberlain a landmark case as Mr. Justice has implied. Chamberlain is an unreported federal district court decision from the Seventh Circuit applying Illinois law, and according to Westlaw, it has only been cited in twenty-five cases: twenty-three times by Illinois federal courts, once by a Minnesota federal court, and once by the Tennessee federal court ordering Mr. Justice's suspension.

findings. For example, even though Mr. Justice testified that neither he nor anyone else at the law firm ordinarily records time, he failed to keep a single document showing that he had in this one unusual circumstance contemporaneously recorded his time on the Thomas case. Although Mr. Rickman produced an email by which he had reported his time, this email was dated after the District Court's order awarding the sanction. Nor could Mr. Justice locate a version of the Word document containing all the time records that predated the District Court's order awarding the sanction. He also could not recall the name of the Word document.

Mr. Justice asserts that the Hearing Panel's decision lacks substantial and material evidentiary support because Mr. Kerschberg recanted his original allegations of misconduct. This assertion is simply incorrect. While Mr. Kerschberg acknowledged occasionally using Mr. Justice's handwritten comments to create some of the narratives for his invoices, he unequivocally and consistently testified that these narrative entries described his own work not Mr. Justice's. Mr. Kerschberg recognized the possibility that Mr. Justice could have done work similar to his own on the Thomas case without Mr. Kerschber's knowledge, but Mr. Kerschberg reiterated that, "When I created these invoices, however, I was documenting only my own work. *As far as I know, Loring Justice did not ever document his work on the Thomas case, or any other case."* (Emphasis added).

We also disagree with Mr. Justice's assertion that the Hearing Panel and the trial court ignored and "manipulated" his testimony and that of Mr.

Rickman. The Hearing Panel considered the testimony in context and noted that Mr. Rickman had not worked for the law firm when Mr. Kerschberg worked there; did not know what Mr. Justice did or did not do before he began working at the law firm; did not compare the Itemization to Mr. Kerschberg's invoices; and did not see the Word document until after the District Court awarded the discovery sanction. The record fully supports the Hearing Panel's findings and the trial court's conclusion that Mr. Rickman "was in no position to determine the accuracy of [Mr.] Justice's entries."

The Hearing Panel considered but rejected Mr. Rickman's and Mr. Justice's broad interpretation of the District Court's order, concluding that it was inconsistent with the clear text of the order. The Hearing Panel also considered but rejected Mr. Justice's and Mr. Rickman's testimony that they intended to give the attorney's fees to Mr. Thomas and described this testimony as "unbelievable" and as "post-conduct rationale." The Hearing Panel and the trial court neither ignored nor manipulated Mr. Rickman's and Mr. Justice's testimony.

Mr. Justice argues that the Hearing Panel's decision that he violated RPC 1.5(a), which provides that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses" is not supported by substantial and material evidence. Specifically, Mr. Justice asserts that he did not charge an unreasonable fee because the sanction would have been paid to his client not the firm and because he never received any fee after the proceedings began in the District Court. The Hearing Panel disbelieved

Mr. Justice's testimony that any fee collected would have been given to Mr. Thomas. As already noted, this Court does not second-guess the Hearing Panel's credibility determinations.

Additionally, we note that courts in other states have held that a lawyer may "charge" an unreasonable fee without actually collecting it. For example, in Iowa Supreme Court Board of Professional Ethics & Conduct v. Hoffman, 572 N.W.2d 904, 907 (Iowa 1997), the Iowa Supreme Court considered whether a lawyer had violated an ethical rule that prohibited lawyers "from entering into an agreement for, charging, or collecting an illegal or clearly excessive fee." The lawyer in Hoffman argued that his actions in filing the fee application with an Iowa administrative worker's compensation judge did not violate the disciplinary rule "because he never actually received the amount requested." Id. The Iowa Supreme Court rejected this argument, stating that the lawyer's actions in seeking the fee "fit within the legal definition of charge: 'to create a claim against property; to assess; to demand.'" Id. at 908 (quoting Black's Law Dictionary 232 (6th ed.1990)); see also Comm. on Prof'l Ethics & Conduct v. Zimmerman, 465 N.W.2d 288, 291–92 (Iowa 1991) (stating that a lawyer's application for excessive and duplicative fees violated a disciplinary rule prohibiting lawyers from charging an excessive fee).

Having carefully and fully considered the record on appeal, we conclude that ample substantial and material evidence supports the Hearing Panel's findings of fact, which the trial court adopted.

E. Appropriateness of the Sanction

To assess the appropriateness of the disciplinary sanction in a given case, this Court begins with the ABA Standards. See Tenn. Sup. Ct. R. 9, § 8.4 (currently § 15.4); Daniel, 549 S.W.3d at 100. The ABA Standards are "guideposts" rather than rigid rules for determining appropriate and consistent sanctions for attorney misconduct. Id. (quoting Maddux III, 409 S.W.3d at 624).

> [T]he standards are not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct. Rather, the standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend on the presence of any aggravating or mitigating factors in that particular situation. The standards thus . . . are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct.

ABA Standards, Theoretical Framework. The presumptive sanction in each case may be identified by considering:

> (1) the ethical duty the lawyer violated—whether to a client, the public, the legal system, or duties as a professional; (2) the lawyer's mental state; and (3) the extent of the actual or potential injury caused by the lawyer's misconduct." Next, any aggravating or mitigating

> circumstances must be considered in determining whether to increase or decrease the presumptive sanction in a particular case.

Daniel, 549 S.W.2d at 100 (citations omitted).

As already noted, the Hearing Panel failed to consider the ABA Standards identifying the presumptive sanction. The trial court concluded ABA Standard 5.11(b) applies in these circumstances, and it provides:

> Disbarment is generally appropriate when . . . a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

In light of the Hearing Panel's findings that Mr. Justice gave a false statement under oath, knowingly testified falsely in the District Court, and sought an unreasonable fee in the Itemization, we conclude that the trial court correctly identified ABA Standard 5.11(b) as establishing the presumptive sanction. The trial court also correctly concluded that the substantial and material evidence supports the Hearing Panel's findings of the six aggravating factors—a dishonest or selfish motive, a pattern of misconduct, multiple offenses, submission of false evidence, false statements during the disciplinary process, refusal to acknowledge wrongful nature of conduct, and substantial experience in the practice of law—and the two mitigating factors of the District Court's prior six-month suspension for the same

conduct and Mr. Justice's lack of a prior disciplinary record.

Mr. Justice asserts that the trial court also should have considered as a mitigating factor the delay in this matter, pointing out that the alleged misconduct occurred in 2011 and the hearing was not held until 2015. While this argument is appealing in theory, in fact it is not persuasive because most of this delay is attributable to Mr. Justice's request that the Board hold its investigation in abeyance pending the disposition of the federal proceedings. So, we cannot say that the Hearing Panel and the trial court erred by declining to consider delay as a mitigating factor.

We also disagree with Mr. Justice that his good record and lack of ethical violations in the ensuing years should be viewed as mitigating factors. Lawyers are professionally obligated to comply with the Rules of Professional Conduct, and compliance is the norm and expectation. It does not mitigate a lawyer's previous failure to fulfill his professional obligation.

Mr. Justice also asserts that the Hearing Panel did not err by imposing a sanction less severe than the presumptive sanction of disbarment because in Daniel, this Court changed "controlling legal authority" and held that it is not error for a hearing panel to consider sanctions less than the presumptive sanction. 549 S.W.3d at 102. Although Mr. Justice is correct as to the holding of Daniel, his characterization of the decision as a change in controlling legal authority is not correct. Daniel simply applied prior decisions of this Court that had described the ABA Standards as "'guideposts.'"

Daniel, 549 S.W.3d at 100 (quoting Maddux III, 409 S.W.3d at 624). More importantly, Daniel is factually distinct from this case. Here, the Hearing Panel did not consider and reject the presumptive sanction of disbarment. It simply failed to consider any ABA Standard identifying presumptive sanctions.

We agree with the Board that the trial court's modification of the sanction was appropriate, considering the Hearing Panel's lack of analysis of the presumptive sanction under the ABA Standards, the imbalance of aggravating and mitigating factors, and the nature of Mr. Justice's misconduct, which evidenced his utter disregard for the fundamental obligation of lawyers to be truthful and honest officers of the court. Culp v. Bd. of Prof'l Responsibility, 407 S.W.3d 201, 211 (Tenn. 2013) (denying reinstatement to an attorney convicted of extortion and stating that the attorney had engaged in "egregious conduct," conduct striking "at the heart of our system of justice" and "threatening the very core of a legal system based on probity and honor"); Murphy v. Bd. of Prof'l Responsibility, 924 S.W.2d 643, 647 (Tenn. 1996) (finding that the conduct of lying to a grand jury and trying to convince another witness to lie to the grand jury "strikes at the very heart and soul of the judicial system and without question would have a detrimental impact on the integrity and standing of the bar, the administration of justice and the public interest"). Recognizing that the sanction of disbarment is not to be imposed lightly, the trial court conscientiously and carefully analyzed the issues and ultimately concluded, as do we, that Mr. Justice's conduct in claiming Mr. Kerschberg's work as his own, in submitting the false Itemization and written declaration, and in testifying

falsely in the District Court strikes at the very heart of the legal profession and merits the presumptive sanction of disbarment.

Mr. Justice argues that Napolitano v. Bd. of Prof'l Responsibility, 535 S.W.3d 481 (Tenn. 2017) illustrates that disbarment is too harsh a punishment here. In Napolitano, the hearing panel found that the attorney had committed trust account violations and lied under oath when answering discovery deposition questions in a lawsuit over a fee dispute with a client. Id. at 503. The hearing panel suspended the attorney for five years but ordered only one year of active suspension. Id. at 494. This case bears some factual resemblance to Napolitano, but it is distinct in at least two important respects. First, this Court found that the record in Napolitano did not support a finding that the attorney gave false testimony "with the intent to deceive a court." Id. at 503. Additionally, unlike Mr. Justice, Mr. Napolitano called a number of lawyers and judges to testify to his good professional and personal character. Id. at 487–89. Each attorney disciplinary appeal is evaluated "in light of its particular facts and circumstances." Maddux, 148 S.W.3d at 40.

In another recent case factually similar to this one, Board of Prof'l Responsibility v. Barry, 545 S.W.3d 408 (Tenn. 2018), this Court upheld the trial court's modification of the sanction to disbarment. In Barry, the hearing panel imposed an eighteen-month suspension, with sixty days active suspension. Id. at 411–412. The trial court modified the sanction to disbarment, and this Court affirmed. Id. at 412 In Barry, as here, the hearing panel had failed to consider the ABA Standards regarding presumptive

sanctions. Id. at 420. In Barry, as here, the hearing panel found that the attorney's misconduct was "knowing." Id. at 425. The trial court's decision modifying the sanction in this case from suspension to disbarment is consistent with Barry. See also Hornbeck v. Bd. of Prof'l Responsibility, 545 S.W.3d 386, 387 (Tenn. 2018) (disbarring an attorney based upon multiple acts of professional misconduct, "including knowing conversion of client funds with substantial injury to clients, submitting false testimony, falsifying documents in court proceedings, engaging in the unauthorized practice of law, violating Supreme Court orders, and defrauding clients").

IV. Conclusion

For the reasons stated herein, we affirm the judgment of the trial court in all respects, including its modification of the sanction from suspension to disbarment. Costs of this appeal are taxed to Loring Edwin Justice for which execution may issue if necessary.

CORNELIA A. CLARK, JUSTICE

APPENDIX B

IN THE CHANCERY COURT FOR KNOX COUNTY TENNESSEE

BOARD OF PROFESSIONAL RESPONSIBILITY	)	
Plaintiff,	)	
v.	)	**Docket No. 184818-3**
LORING E. JUSTICE	)	
Defendant.	)	

Issued: May 31, 2017

FINAL ORDER

This cause came on to be heard on the 10th day of May, 2017, before Robert E. Lee Davies, Senior Judge, upon Loring Justice's Motion to Alter or Amend pursuant to Rule 59 of the Tenn. R. Civ. P., the Board's Response, and Justice's Reply thereto. After argument of counsel, and consideration of the entire record herein, the Court hereby finds as follows:

Request for Alternative Findings of Fact

Justice complains the Court did not include certain findings of fact which he believes exonerate

him. He contends the Court should have emphasized Lowes' conduct in the Federal case; that Justice kept his own time records; that Kerschberg was also a computer expert and therefore could have altered or deleted Justice's time records; that Kerschberg had an agenda; that there was no fraudulent intent on behalf of Justice; that exhibits 44 through 51 support Justice's contention that he performed the work for some of the seventeen entries; that Justice deleted Kerschberg's entries; that the one-sided phone call between Justice and Kerschberg, testified to by Rickman, shows Kerschberg was untruthful; that Ms. Vaughn's time records (exhibit 17) support Justice's contention that he kept contemporaneous time records; and that the Panel distorted Justice's testimony regarding the scope of the discovery sanction order from Judge Phillips.

These complaints indicate a misunderstanding of the standard of review applied by this Court to a decision of a Hearing Panel. The Trial Court may not substitute its judgment for the findings of fact by the Hearing Panel regarding the weight of the evidence. Bd. of Profl. Responsibility v. Allison, 284 S.W.3d 316, 323 (Tenn. 2009). The Hearing Panel specifically found that "Justice testified that on the seventeen time entries at issue, he personally worked the time reflected in those entries and be did the work reflected in those time entries." The Hearing Panel then found "with respect to each of the seventeen entries, Justice claimed he worked the amount of time reflected on the fee petition or more. The Panel finds his testimony in this regard is not credible." The Panel then

went on to articulate facts from the record that supported its conclusion that Justice did not tell the truth regarding these seventeen entries. The Panel found that Justice could not provide any definitive explanation as to why those seventeen entries attributed to him were identical (or nearly identical) to the entries on Kerschberg's time records. Although Justice contended he and Kerschberg were performing the same work at the same time, including clerical tasks such as making copies, the Panel found this explanation not to be plausible. Although Justice emphasizes that Rick.man's testimony exonerates him, the Panel specifically found it was impossible for Rickman to determine the accuracy of Justice's entries since Rickman was not working at Loring Justice, PLLC in 2009 when these records were allegedly created, and as the Panel determined there was not a single independent record of Justice's time available at the time the fee petition was drafted. The Panel found with respect to the seventeen entries at issue, that Justice knew he was representing to the Federal Court that he had performed work that was in fact performed in whole or in part by other individuals and that he did not perform the work or did not work the time that was set forth on the fee petition; that he attributed work to himself that had actually been performed by Kerschberg resulting in a much higher compensation rate; and that the statements made to the Federal Court were false and that Justice knew they were false. A comparison of Justice's time records to Kerschberg's time records is set forth below:

Justice Time Sheet	Kerschberg Time Sheet
6/13/09 -Revision of Motion to have request for admission deemed admitted. **1.2 hrs.**	**6/13/09** - Revision of Motion to Have Request for Admission Deemed Admitted. **1.25 hrs.**
6/14/09 -Edits to motion to deem request for admissions admitted. Added section about letter to Clint Woodfin and Motion to Supplement. Researched electronic filing rules for the E.D. Tenn. **2.2 hrs.**	**6/14/09-** Added Loring edits to motion to deem request for admissions admitted. Added section about letter to Clint Woodfin and motion to supplement. Researched electronic filing rules for the ED Tenn. Researched proper procedure for filing amended complaint (local rules; scheduling order; FRCP). **2.25 hrs.**

6/16/09 - All final preparations of Amended Complaint and Motion to Deem Requests For Admissions Deemed Admitted. Preparation of all PDF exhibits. Compilation of files. Filing with E.D. Tenn via ECF. Hard copies of everything for file. **2.5 hrs.**	**6/16/09** - All final preparations of Amended Complaint and Motion to Deem Request for Admissions Deemed Admitted. Preparation of all PDF exhibits. Compilation of files. Filing with ED Teno via ECF. Hard copies of everything for file. **2.5 hrs.**
6/17/09 - Talked to Angela Brush at district court to correct misunderstandings re our filings. **1.0 hr.**	**6/17/09** - Talked to Angela Brush at district court to correct misunderstandings re our filings. Second conversation with LJ about Consent Motion to Amend with Clint Woodfin. Drafted Consent Motion for review by Clint Woodfin. **1.0 hr**
6/17/09 - Continued to research, revise and rewrite Motion to Compel Discovery. **4.0 hrs.**	**6/17/09** - Continued to revise and rewrite Motion to Compel Discove ry. **4.0 hrs.**

6/18/09- Continued research, revision and refinement of Motion to Compel Discovery. **4.5 hrs.**	**6/18/09 - Motion** to Compel Discovery. **4.5 hrs.**
6/19/09 - Letter to Bob Davies regarding additional materials needed from MSG about the project. **.5 hrs.**	**6/19/09** - Letter to Bob Davis regarding additional material needed from MSG. **.5 hrs**
7/16/09 - Reviewed notes from meeting with Clint Woodfin and calendared follow-up call to Corey Kitchen re: Clint's call. **.2 hrs.**	**7/16/09** - Reviewed Loring's notes from meeting with Clint Woodfin and calendared follow-up call to Cory re: Clint's call. **.25 hrs.**

7/22/09 - Drafted and typed memo for trip to Florence, Alabama to meet with Plaintiff's MSG co-workers. This memo summarized the liability issues in the case and listed important questions to ask to try to understand whether it was plausible Lowe's could lack notice and to prove Lowe's indeed had notice and to gain physical descriptions of individuals of interest. **5.0 hrs.**	**7/22/09** - Drafted and typed memo for trip to Alabama. **5.0 hrs.**
7/27/09 - Reviewed all notes from our trip to Alabama to meet with the MSG witnesses and compiled Master To-Do List. Drafted affidavits of Kitchen, Yeates, and McBride . Online research re: Teresa Beavers (Lowe's Manager). **4.5 hrs.**	7/27/09 - Reviewed all notes from our trip to Alabama and compiled Master To-Do List for Loring and BG. Drafted Affidavits of Kitchen, Yeates, and McBride. Online research re: Teresa Beavers (Lowe's Manager). **4.5 hrs.**

7/29/09 - Revisions of affidavits of Kitchen, Yeates, and McBride. **.2 hrs.**	7/29/09 - Revisions of Affidavits of Kitchen, Yeates, and McBride. **.25 hrs.**
8/8/09 - Coordinated with Debi Dean of Alabama Head Injury Foundation to make sure that Randy, Bradley, and Corey will sign affidavits and get them back to us notarized. Reviewed legal assistant ' s research of FRCP and EDTN Rules re: timelines of Notice of Filing with respect to Hearing Date. Drafted Notice of Filing. Drafted Memorandum to accompany Notice of Filing with the court this week. **3.0 hrs.**	**8/8/09** - Coordinated with Debi Dean to make sure that Randy, Bradley, and Corey will sign Affidavits and get them back to us not arized. Prepared final versions with LJ edits. Two versions for Bradley and Cory one with and one without Teresa Beavers. Researched FRCP and EDTN Rules RE: timelines of Notice of Filing with respect to Hearing Date. Drafted Notice of Filing. Drafted Memorandum to accompany Notice of Filings for filing with the court this week. **4.0 hrs.**
8/10/09 - Coordination of all affidavits signings, etc. with Debi Dean. **.5 hrs.**	**8/10/09** - Coordination of all Affidavit signings, etc. with Debi Dean. **.5 hrs.**

8/27/09 - Reviewed file and all FRCP related to discovery to look at options and obligations for supplementation before September 14 hearing, as well as the possibility of fee shifting and sanctions. **5.0 hrs.**	**8/27/09** - Reviewed file and all FRCP related to discovery to look at Qptions and obligations for supplementation before the September 14 hearing, as well as the possibility of fee shifting. **5.0 hrs.**
8/31/09 - Prepared outline as to action plan before September 14 hearing. Researched Lowe's Loss/Safety Prevention Manager. Drafted proposed interrogatory re: information on who held that position at the time of the accident. Revised and prepared cover letters to Clint Woodfin. **1.2 hrs.**	**8/31/09** - Prepared outline for Loring as to action plan before September 14 hearing. Researched Lowe's Loss/Safety Prevention Manager. Drafted proposed Interrogatory re: information on who held that position at the time of the accident. Revised and prepared cover letters to Clint Woodfin and Clerk's Office. **2.0 hrs.**

9/9/09 - Detailed email to file and staff after reviewing supplemental documents of defendant and possible RFPs. Google search for the two other female mangers mentioned by Clint Woodfin. **1.2 hrs.**	**9/9/09** - Reviewed our initial disclosures and discovery responses to see what needs to be supplemented. Reviewed all supplemental material provided by Clint Woodfin. Detailed email to Loring reviewing thoughts on the supplemental documents and possible RFP' s. Google search for the two other female managers mentioned by Clint Woodfin. Results in email to LJ. Email to Mike Conley on Listserv re: obtaining the god information he bas re falling products litigation. **1.25 hrs.**

The crucial question is whether the findings of the Panel are unsupported by evidence which is both substantial and material in light of the entire record. The Court does not act as the thirteenth juror. The Court finds the evidence relied upon by the Panel for its findings was both substantial and material considering the entire record, and the Court will not substitute its judgment for that of the Hearing Panel as to the weight of the evidence on questions of fact. Maddux v. Bd. of Prof'l. Responsibility, 409 S.W. 3d 613, 621 (Tenn. 2013).

Testimony of Kerschberg

Justice complains that the Panel abused its discretion by allowing Kerschberg to testify by written deposition questions pursuant to Rule 31 T.R.C.P.; that the Board should not have been allowed to ask cross questions; that Kerschberg recanted his testimony; and that Kerschberg was impeached. A trial court abuses its discretion only when it: "Apply[s] an incorrect legal standard, or reach[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. Myint v. Allstate Ins. Co., 970 S.W.2d 920,927 (Tenn. 1998).

Initially, the Court notes that the testimony of Mr. Kerschberg was initiated by Justice when he submitted a deposition upon written questions pursuant to Rule 31 of the *Tennessee Rules of Civil Procedure.* Although the Panel had entered an order that discovery would be completed on or before

December 15, 2014, it allowed the deposition of Mr. Kerschberg to be taken on January 15, 2015. The deposition of Mr. Kerschberg was delayed as a result of the witness filing a motion for a protective order which ultimately was ruled upon by the Chancery Court for Knox County. The Court denied the protective order and required Kerschberg to testify. The Board did not submit its cross questions until the Chancery Court for Knox County had ruled that Mr. Kerschberg would be required to give his deposition. The Panel allowed the Board to submit its cross questions, and this Court finds no abuse of discretion by the Panel for this decision.

Another complaint by Justice is that Kerschberg did not answer the written questions until January 15, 2015, thus depriving Justice of submitting redirect questions. This is a misunderstanding of the application of a Rule 31 deposition. Unlike an oral deposition, a party is not allowed to ask follow-up questions after a question is answered. Instead, the Rule requires a party to serve cross questions within thirty days after the original written questions are served, and within ten days after being served with cross questions, a party may serve redirect questions. In this case, the Board served its cross questions on December 22, 2014. In the event Justice wished to serve redirect questions, they would have been required to be served by January 2, 2015, not after Mr. Kerschberg answered the questions on January 15, 2015. Justice had adequate time to serve redirect questions and his failure to do so within the time allowed rests squarely on his shoulders.

Justice places great emphasis on the phone

call between Justice and Kerschberg which was admitted into evidence through the testimony of Mr. Rickman, over the Board's objection. Rickman testified about a time entry on June 17, 2009, from Kerschberg regarding a telephone call to the Clerk of the Court. According to Rickman, Kerschberg indicated that the entry was actually for a series of phone calls to the clerk that he made rather than just one. Justice's first response was that the statement was not being offered for the truth of the matter asserted, and therefore was not hearsay. If that was the case, then the conversation would have had no relevance whatsoever. Justice then argued its admissibility as a prior inconsistent statement attacking the credibility of Kerschberg pursuant to Rule 806 of the *Tennessee Rules of Civil Procedure*. Apparently, Justice believed Kerschberg's acknowledgment that the time entry for his work was for a series of phone calls to the Clerk rather than one, was a significant prior inconsistent statement. Apparently the Panel gave this little to no weight, as does this Court. What is significant is that Justice's fee application indicates he participated in the same conversation(s) as his paralegal with the Clerk, for one hour. Yet, Kerschberg's invoice for the same one hour period includes "second conversation with LJ about consent motion to amend with Clint Woodfin. Drafted consent motion for review by Clint Woodfin." It is obvious from Kerschberg's entry on June 17, 2009, that his telephone calls with Angela Brush at the District Court were significantly less than one hour since his one hour time entry included a conversation with Justice about a consent motion and the drafting of the consent

motion. Yet, Justice's fee petition is for a one hour conversation with the district court clerk. The bottom line is that the Panel found Justice's explanation for the identical billing entries between himself and Kerschberg, not to be credible, and the evidence supports that conclusion.

Fifth Amendment

Justice contends the U.S. Supreme Court's decision in McKune v. Lile, 536 U.S. 24 (2002) overrules U.S. v. Stein, 233 Fed. 3d 6 (1st Cir. 2000) and therefore provides him with complete immunity. In other words, he argues that the potential threat of disbarment under the holding of Spevack v. Klein, 385 U.S. 511, 516 (1967) provides him with all of the Fifth Amendment Rights of a criminal defendant, which the Panel violated by ruling it could take an adverse inference if Justice did not testify. Justice points to Sher v. US.Dept. of Veterans Affairs, 488 Fed. 3d 489 (1st Cir. 2007) that an adverse inference can no longer be drawn from an attorney's refusal to testify in a disciplinary proceeding.

Sher v. U.S. Dept. of Veterans Affairs, *supra,* involved the issue of *"Garrity Immunity".*[1] In Garrity, the U.S. Supreme Court held that confessions made by police officers during an investigation into the fixing of traffic tickets could not be sustained as voluntary under the Fifth Amendment and could not be used against the officers in subsequent *criminal prosecutions* because the confessions resulted from a choice between forfeiting their jobs

[1] Garrity v. New Jersey. 385 U.S. 493 (1967).

or self- incrimination. Accordingly, *Garrity Immunity* applies to government employees and requires that the employer inform the employee that his statements to questions are protected by the Fifth Amendment and that in any type of administrative proceeding or investigation of possible criminal conduct, the employee's answers to questions cannot be used against him in a subsequent criminal prosecution; however, if he refuses to answer those questions, he does face potential loss of employment. In Sher, the First Circuit Court found that none of the circuits have held the governmental employer must give notice of *Garrity Immunity* to an employee who is represented by counsel. However, in a footnote the Court stated thefollowing:

> True, we have previously noted that a state may compel incriminating answers to its questions if the testimony and its fruits are rendered unavailable for use in subsequent criminal proceedings, i.e. through a grant of immunity. U.S. v. Stein. However, in light of the considerable amount of persuasive authority from other circuits on this issue, we think it clear that Stein should be read to mean that testimony compelled by the threat of adverse employment action automatically triggers a grant of immunity under Garrity.

Sher v. U.S. Dept. of Veterans Affairs, 488 Fed. 3d 489, Footnote 12 (First Cir. 2007)

The Court disagrees that the above cases stand for the proposition that an attorney facing a potential disbarment disciplinary proceeding is entitled to all of the rights under the Fifth Amendment to which a defendant in a criminal prosecution is entitled. The First Circuit in Sher emphasized that the *Garrity Immunity* afforded to a government employee is not "transactional immunity", that he can never be prosecuted for the subject matter of the potential crime. *Garrity Immunity* only guarantees the state may not use a defendant's own statements in an administrative proceeding to prosecute him in a subsequent criminal proceeding.

Justice cites the Court to Vasquez v. State, 777 So. 2d 1200 (Fl. App. 2001) in support of his position. In doing so, Justice has misrepresented the holding of this case. Vasquez was a civil proceeding regarding the forfeiture of over $226,000 seized by law enforcement pursuant to an investigation into a money laundering and drug trafficking scheme. Mr. Vasquez contended that the court's requirement of further detail regarding the source and nature of his alleged ownership of the currency violated his Fifth Amendment rights. The Florida Court of Appeals ruled "at the evidentiary hearing, Vasqez should suffer no penalty for invoking his Fifth Amendment Privilege. See Spevack v. Klein, (citations omitted) but, it must be noted that the trial court may draw an adverse inference against a party in a civil action who invokes his privilege against self-incrimination. See Baxter v. Palmigiano (citations omitted)." Thus, Vasquez is exactly in line with the approach taken by this Court.

The Supreme Court of Georgia has allowed an adverse inference to be drawn against an attorney who refused to testify in a disciplinary proceeding.

> Because Redding responded to requests for admission propounded by the State Bar by invoking the *Fifth Amendment of the United States Constitution* to some eighteen requests, and because such a response in a civil proceeding may result in an adverse inference being drawn by the fact finder, which applies in disciplinary proceedings (citation omitted), her outright admissions and her admissions by virtue of invoking the Fifth Amendment constitute admission of the essential allegations of the charges against her.

In the matter of Redding, 501 S.E. 2d 499 (Ga. 1998).

New York likewise has addressed this issue and allowed an adverse inference to be drawn from an attorney's invocation of their Fifth Amendment right. In the Matter of Saghir, 86 A.D.3d 121 (NY 2011); In the Matter of Bater, 46 A.D.3d 1 (NY 2007); and In the Matter of Muraskin. 286 A.D.2d 18 (NY2001).

While Justice may be entitled to immunity from a future criminal prosecution, he is not entitled to immunity from prosecution for any event or transaction described in the compelled

testimony. In the case at bar, Justice invoked the Fifth Amendment at his deposition and refused to answer any questions from the Board's attorney. At trial, he reversed himself and elected to testify. He is an experienced trial attorney, and he was represented by an experienced trial attorney at all stages of the proceedings before the Panel. He was well aware of the consequences of testifying in this case.

Delay in the Proceedings

Justice alleges that the delay in the adjudication of his case is a comment on the Board's attitude that it does not believe Justice is a danger to his clients or the practice of law. Initially the Court notes Justice neither plead nor argued unjust delay before the Panel. More importantly, most of the delay in these proceedings was caused by Justice himself. He requested multiple delays during the investigation phase of this matter; he requested that he not be required to respond to the complaint until after the completion of his disciplinary hearing in Federal District Court (which he then unsuccessfully appealed to the U.S. Circuit Court of Appeals and the U.S. Supreme Court); he requested an extension of time to file his answer to the complaint; and during the scheduling conference, his attorney requested a lengthy period for discovery prior to the hearing date. While it is true some of the delay occurred after the Hearing Panel rendered its decision due to the retirements of Senior Judge Blackwood and Senior Judge Cantrell, no delay in this matter was attributable to the Board.

The Rule of Completeness

Justice argues the Panel erred in excluding the affidavit of Yalkin Demirkaya. Mr. Demirkaya was a computer expert hired by Justice. Mr. Demirkaya submitted an affidavit in the federal case before Judge Collier which was admitted into evidence without objection. In the trial before the Hearing Panel, Justice sought to introduce Mr. Demirkaya's affidavit which was objected to by the Board and sustained by the Panel as hearsay. Justice contends the (the rule of completeness) found in Rule 106 Tenn. R. of Evidence allowed him to submit Mr. Demirkaya's affidavit after the Board introduced Justice's prior testimony in the District Court case. Rule 106 reads as follows:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Tenn. R. of Evidence.

All of the Tennessee cases which have considered this Rule have involved a writing or recorded statement of the witness who is testifying. The purpose of the Rule l 06 is to keep the trier of fact from being misled by hearing only part of a writing or recorded statement, and that any other part of that writing or recorded statement ought to be considered

contemporaneously with it, if fairness so dictates. Neil P. Cohen, et al, Tenn. Law of Evid. § 106.2. Justice contends the Rule of Completeness allows him to introduce the affidavit of Mr. Demirkaya after Justice's prior testimony was entered as an exhibit. Justice has not cited a single case to support the proposition that the writing or recorded statement of a third person may be introduced under Rule 106 after the admission of the written statement of the witness. While the federal courts disagree whether Rule 106 authorizes the admissibility of evidence that is not otherwise admissible, the justification for allowing evidence which should otherwise be excluded is that by introducing part of a document, a party can be viewed as waiving an objection to other items in that same document. Neil P. Cohen, et al, Tenn. Law of Evid. § 106.3(b). This did not happen here. In this case, Rule 106 would permit Justice to introduce other portions of his prior testimony from the federal court case. It would not allow Justice to introduce portions of another witness' testimony, especially an affidavit of a third person, who was not subject to cross examination.

Request to Reopen the Proof

Justice has moved the Court pursuant to Rule 59 to allow the introduction of additional proof which was not submitted to the Hearing Panel at the trial. Pursuant to Rule 59.04 of the *Tennessee Rules of Civil Procedure,* a party may file a motion to alter or amend a judgment within thirty days after its entry. The motion should be granted when the controlling law changes before

the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of the law or to prevent injustice. A Rule 59 Motion should not be used to raise or present new, previously untried or unasserted theories or legal arguments. In Re: M. L. D., 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005). In order to sustain a motion to alter or amend under Rule 59 based upon newly discovered evidence, "it must be shown that the new evidence was not known to the moving party prior to or during the trial and that it could not have been known to him through exercise of reasonable diligence." Seay v. City of Knoxville, 654 S.W.2d 397, 399 (Tenn. Ct. App. 1983). Justice has not presented any reason which would support the reopening of proof under Rule 59.04. Accordingly, this request is denied.

The Sanction of Disbarment

Although the Court believed the sanction of disbarment was justified in this case, the Court acknowledges it was reluctant to impose such a severe sanction on Mr. Justice. However, any lingering doubt as to the disbarment of Mr. Justice has been obliterated by his motion to alter or amend. Justice blames everyone and everything for his predicament, other than his own misconduct. He impugns the Panel by suggesting they were motivated by a desire to curry favor with the Federal District Court. He impugns the integrity of the Board by suggesting that this entire proceeding is a "payback" because he represented clients who filed a complaint against an attorney with the Board. He impugns the

integrity of the court reporter by suggesting that she destroyed her audio recording of one of the hearing days. He has made false assertions in his pleadings such as "the Board never requested Justice produce [the hand-written time records]."[2] He has suggested that disciplinary counsel and the Court have had inappropriate communications, which is completely untrue. Finally, his pleadings demonstrate a complete lack of respect and distain for the Court and this disciplinary proceeding.[3]

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[2] Request number 3 by the Board asks Justice to produce a copy of any contemporaneous record of your time used in preparation of any itemized accounting of services filed in the Thomas case.

[3] In his motion, Justice makes the following statements:

1. "The Court, in similar fashion claims in its Order disbarring Justice that Kerschberg's recantation makes Kerscbberg more credible. This would be laughable if this were not a case involving Scotty Thomas, who is dead, and an attorney's potential loss of his livelihood and ability to feed his family ... the Court's explanation Kerschberg did not recant is flawed, at best, if not manipulative." Pg. 9

2. "The Court's flawed reasoning on this point alone merits a new trial. ... and now the Court's spin [sic] this recantation bolsters Kerschberg's credibility delegitimizes the proceedings. It is one thing to decide against a party on facts; it is another thing to distort, minimize or conceal facts adverse to the desired outcome." Pg. 10

3. "Disbarments or suspensions of lawyers should rest on evidence, not selectively ignoring inconvenient evidence or 'spinning' it to support a desired result. If Justice is to be sanctioned it ought to be on the finding of cited facts and conclusions of cited legal authority, as opposed to a partisan brief, disguised as an order." Pg. 11

4. "The Court's spurious and inflammatory findings the Panel explicitly found Rickman not credible warrant a new trial." Pg. 19

5. "So in the fashion of the so-called 'trials' portrayed in the works of Orwell and Kafka, the Court pretends this evidence is not there and writes an Opinion that effectively represents an official 'myth', as opposed to a genuine discussion of the proof, for and against all parties." Pg. 23

6. "Here, the Court only states in its disbarment Order, 'Lowe's denied Mr. Thomas was injured on its property'. This is not even the half of it, and the Court knows this. This is exceptionally misleading . . . . The Court's attempt to make light of the severity of Lowe's discovery abuse and its fraud on the District Court and the late Scotty Thornas's [sic] case is sad." Pg. 24

7. "It is an ethical violation to ignore United States Supreme Court rulings on matters of the federal Constitution. The Court's admission its decision is at odds with the precedents of the United States Supreme Court is remarkably disturbing." Pg. 28

8. "It is ridiculous for the Board and this Court to state that when Tennessee's Supreme Court held lawyer disciplinary cases were ' quazi-criminal', it really meant they were just civil." Pg. 32

9. "While Judge Robert E. Lee Davies of this Court may wish to do so, it is not the function of the Chancery Court of Knox County to re-write hundreds of years' worth of federal law." Pg. 33

10. "It *would* be a farce for this Court to hold the Panel did not violate the standards governing waiver of the Fifth Amendment right, given the Court acknowledged the Panel did so at hearing." Pg. 40

11. "There is great appearance of bias, where this Court dodged a 2016 precedent of the United States Court of Appeals for the Sixth Circuit, and instead relied on a 2000 precedent of the First Circuit that clearly did not survive the decision in *McKune* intact, to scrape up a

Conclusion

For all of the reasons set forth above, Mr. Justice's motion to alter or amend is denied.

It is so **ORDERED.**

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rationalization to disbar. An unbiased court at least acknowledges contrary authority, particularly from the controlling jurisdiction." Pg. 50

12. "The Court's red herring here is so red; it is near crimson ... Shockingly, the Court falsely asserted Justice takes the exact opposite position in its disbarment Order: 'His position is founded on the premise that an attorney facing a disciplinary proceeding has the same rights as a criminal defendant in this state.' A Court should not construct a straw man to artificially disbar a lawyer." Pg. 51

13. "If the Court is going to issue a disbarment ruling, it at least ought *to* distinguish the issues Justice properly raises. Otherwise, the appearance - - and the word appearance is stressed - is that of a frame up." Pg. 77.

14. "The oddity of the citation by both the Board and this Court shows what must be admitted if there is to be integrity here: The Board has no case and the Court's sanction of disbarment is ludicrous." Pg. 90

15. "The Court's blatant refusal *to* follow settled law is stunning." Pg. 104

16. "That the Board appealed the Panel's Findings and Judgment Justice should be suspended for a year and requested disbarment is peculiar, to say the least, and that the Court went along with the Board's request on such shaky, non-existent evidence is, frankly, absurd." Pg. 109

APPENDIX C

IN THE CHANCERY COURT FOR KNOX COUNTY TENNESSEE

BOARD OF PROFESSIONAL RESPONSIBILITY	)	
Plaintiff,	)	
v.	)	**Docket No. 184818-3**
LORING E. JUSTICE	)	
Defendant.	)	

Issued: February 2, 2017

Re-Issued: February 9, 2017

ORDER

This matter came on to be heard on the 15th day of December, 2016, before R. E. Lee Davies, Senior Judge, upon the petitions for certiorari filed by the Tennessee Board of Professional Responsibility

(sometimes referred to as "Petitioner") and Loring E. Justice (sometimes referred to as "Respondent"). The Court has received a copy of the Hearing Panel transcripts, the official record with exhibits, and the briefs filed by each party. After argument of counsel for Petitioner and Respondent the Court makes the following findings of fact and conclusions of law.

FACTUAL AND PROCEDURAL HISTORY

Statement of the Case

This case arose out of complaints filed with the Tennessee Board of Professional Responsibility as a result of a proceeding in the United States District Court for the Eastern District of Tennessee in which Mr. Justice presented a sworn fee petition for attorney's fees and expenses pursuant to a discovery sanction issued by Judge Phillips of the Eastern District for Tennessee.

On September 25, 2013, the Board filed a Petition for Discipline against Mr. Justice pursuant to Tennessee Supreme Court Rule 9 (2006). Mr. Justice responded to the petition on December 3, 2013. Mr. Justice filed a motion to dismiss which was denied by order entered February 18, 2014. Mr. Justice filed a second motion to dismiss and for a more definite statement and a motion to compel discovery. An order was entered which granted Respondent's motion in part by ordering the Board to supplement its response to interrogatory number 6. Interrogatory number 6 requested the Board to identify each billing or expense entry in the fee petition that the Board alleged was fraudulent. The Board filed a supplemental response in which it set forth highlighted entries on exhibit B to interrogatory

number 4 as being the entries which the Board contended were false.

On November 19, 2014, Benjamin Kerschberg, a witness in the case filed a motion for protective order with the Panel. The Panel denied the motion by stating it did not have jurisdiction to rule on the request and informed the attorney for the witness and the parties that such a motion needed to be filed with the appropriate court. The witness refiled the motion for protective order, with the Knox County Chancery Court. The Chancery Court granted the motion in part and denied the motion in part. On December 11, 2014, the Board filed a motion to compel Respondent to give a deposition after Respondent informed the Board that he intended not to testify and exercise his right against self-incrimination. On December 2, 2015, Respondent filed a response to the motion to compel and motion to dismiss on the grounds that the Board violated Respondent's rights under the United States and Tennessee Constitutions due to improper commentary by the Board to the Panel concerning Respondent's exercise of his right against self-incrimination. On January 5, 2015 the Panel granted the motion of the Board to compel Respondent to give his deposition. The Respondent's motion to dismiss was denied. A hearing was conducted on January 20-23, 2015. The Hearing Panel entered its decision on March 9, 2015. It found Mr. Justice violated Rule 1.5(a), fees; Rule 3.3(a), candor toward the tribunal; Rule 3.4(a), fairness to opposing party and counsel; and Rule 8.4(a) (c), misconduct. After finding six aggravating factors _and two mitigating factors, the Panel imposed a one year suspension and twelve additional hours of continuing legal education approved for ethics.

On April 13, 2015, the Board filed its petition for writ of certiorari. On May 8, 2015, Mr. Justice filed his petition for writ of certiorari.

Facts

Mr. Justice is an attorney licensed to practice law in Tennessee since 1998. He was representing a client named Scotty Thomas in a personal injury case filed in federal court against Lowes. Lowes denied Mr. Thomas was injured on its property. After three years of litigation, Mr. Justice discovered a former Lowes' employee who actually witnessed the injury to his client. He filed a motion for sanctions against Lowes for its failure to disclose the identity of this employee. The trial judge (Judge Phillips) issued an order granting the motion and directed Mr. Justice to file a claim, with supporting documentation, for fees and expenses incurred in locating and deposing this witness by the name of Mary Sonner.

In response to the trial court's order, Mr. Justice filed a preliminary Itemized Accounting of Services and a final Itemized Accounting of Services in April 2011. Mr. Justice's affidavit for fees consisted of a claim for his time at the rate of $300 per hour and $90 an hour for paralegal services. The total fee requested by Mr. Justice was $106,302. Lowes objected to the fee request, and the matter was referred to Judge Curtis Collier, District Judge for the Eastern District of Tennessee in Chattanooga pursuant to a show cause order. Judge Collier conducted a four day hearing on February 17, 21, 22 and 23, 2012. At this hearing Mr. Justice testified all of the documentation he had filed with Judge Phillips were true and that he had kept a contemporaneous record of all of his time.

At the trial before the Hearing Panel, the first exhibit introduced into evidence was the deposition of Mr. Justice. In that deposition, Mr. Justice refused to answer any questions regarding any of the issues raised by the Board in its petition for discipline.[1]

Exhibit 2 was the deposition upon written questions of Benjamin Kerschberg taken on January 14, 2015 in Virginia. Mr. Kerschberg was a paralegal working on a contract basis for Mr. Justice. Mr. Kerschberg attached invoices he created for work he did for Justice. These invoices were created at the time he performed the work and were sent to Mr. Justice every two weeks for payment. Mr. Kerschberg testified he personally performed all the work set forth in these invoices. Kerschberg suffers from depression, anxiety and has been diagnosed as bi-polar II. He is under treatment by a psychiatrist who prescribes medication for his condition.

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[1] Some of the questions which Mr. Justice refused to answer based on the Fifth Amendment are:

1. Do you contend that all of the attorney fees in the Itemized Accounting of Services filed in Thomas v. Lowes were reasonably related to locating and deposing Mary Sonner?
2. Did you keep a contemporaneous record of the time that you spent working on Thomas v. Lowes?
3. Did you make any false statements while testifying in In Re: Justice?
4. Did you adopt any of the work done by Mr. Kerschberg as if it were your own in making the Itemized Accounting of Services in Thomas v. Lowes?

The next exhibit introduced by the Board was the trial testimony of Mr. Justice in U.S. District Court before Judge Collier. In that hearing, Mr. Justice denied that he wrongfully attributed to himself work actually performed by his paralegal, Mr. Kerschberg, and denied that he made any false certification or statements in his fee application. Instead, he claimed he personally performed all of the work reflected in the entries shown in his fee application.

Mr. Justice had a personal injury practice. He did not record his time and never had any billing software in his office. He admitted the Thomas v. Lowes case was the first fee application he had ever prepared, so when the District Court ordered him to supply the supporting documents for his fee request, all Mr. Justice had was Microsoft Word entries. Mr. Justice testified he kept track of his time contemporaneously within a week or two of the time the work was actually performed. He also received invoices from Kerschberg which Justice kept in his own file. Because his computers were not networked, if Mr. Justice wanted to transfer the information from one computer to another to edit old entries or create a new entry, he would have been required to use a flash drive. However, Justice had no specific recollection of whether he transferred any documents from one computer to another. When it was suggested to Mr. Justice to allow a neutral forensic computer expert to go through his computer system, he declined, claiming there were sensitive documents on the computer that needed protecting. Mr. Justice hired his own expert to search his computer; however, neither his expert nor any of his employees were able to find any of the original time records before they

were transformed into an early version of the fee petition filed with the District Court. When asked by Judge Collier for the name of the document in his computer under which he kept his time records, Mr. Justice could not recall.

Mr. Justice's relationship with Mr. Kerschberg went back to law school. Mr. Kerschberg stopped working for Mr. Justice in September 2009. During the same period of time in April 2011, when Mr. Justice was compiling and submitting his two petitions for fees and expenses, he sent an email to Mr. Kerschberg dated April 11, 2011, in which he stated:

> Thanks for the email Kersch. I billed a lot of the time for my reading your work rather than you doing it so you won't have to testify if it comes to that. Hope you are not mad about that. I really appreciate you. Tell me what you think of this. What a war.

After the show cause order was issued by Judge Collier, Mr. Justice conducted a search for any emails that were related to the Thomas v. Lowes case. He discovered three additional versions of the initial Word document. He indicated that at times more than one Word document existed for the time he kept on this case but was later consolidated into one document. According to Mr. Justice, he was attempting to delete overlapping time. He met with his associate Chad Rickman and legal assistant, Caroline Vaughn, instructing them to delete any duplicative entries.

In the hearing before the Panel, Mr. Justice

called his associate, Chad Rickman, as his first witness. Mr. Rickman began working for Mr. Justice in early 2010. His first work on the Thomas case began in July 2010 when Justice told him to start keeping his time. Mr. Rickman recorded his time on a legal pad which he would turn in to his legal assistant to enter it into the Word document. The first time Mr. Rickman ever saw the Word document was after they received the order from the District Court trial judge -awarding them fees and expenses in the Thomas v. Lowe case.

As his last witness, Mr. Justice elected to take the stand and give his version of the facts before the Hearing Panel. His testimony was substantially the same as his testimony in Federal District Court.

The Board alleged seventeen specific time entries contained in Mr. Justice's fee petition which were false. The Board contended that on these specific entries, Mr. Justice claimed work performed by Mr. Kerschberg as his own. The Hearing Panel found these seventeen entries were in fact work performed by Mr. Kerschberg, not Mr. Justice, as he claimed. The seventeen entries are as follows:

6/13/09 Revision of Motion to Have Requests for Admission Deemed Admitted, **1.2**

6/14/09 Edits to Motion to Deem Requests for Admissions admitted Added section about Letter to Clint Woodfin and Motion to Supplement. Researched electronic filing rules for the E.D. Tenn. **2.2**

6/16/09 All final preparations of Amended Complaint and Motion to Deem Requests For Admissions Deemed Admitted. Preparation of all PDF exhibits. Compilation of files. Filing with E.D. Tenn. via ECF. Hard copies of everything for file. **2.5**

6/16/09 Preparation and editing of Motion to Compel Discovery and Memorandum in Support partially prepared by legal assistant. **3.0**

6/17/09 Talked to Angela Brush at district court to correct misunderstandings re our filings. **1.0**

6/17/09 Continued to research, revise and rewrite Motion to Compel Discovery. **4.0**

6/18/09 Continued research, revision and refinement of Motion to Compel Discovery. **4.5**

6/19/09 Letter to Bob Davies regarding additional materials needed from MSG about the project. **.5**

7/16/09 Reviewed notes from meeting with Clint Woodfin and calendared follow-up call to Corey Kitchen re: Clint's call. **.2**

7/22/09 Drafted and typed memo for trip to Florence, Alabama to meet

	with Plaintiffs MSG co-workers. This memo summarized the liability issues in the case and listed important questions to ask to try to understand whether it was plausible Lowe's could lack notice and to prove Lowe's indeed had notice and to gain physical descriptions of individuals of interest. **5.0**
7/27/09	Reviewed all notes from our trip to Alabama to meet with the MSG witnesses and compiled Master To-Do List. Drafted affidavits of Kitchen, Yeates, and McBride. Online research re: Teresa Beavers (Lowe's Manager). **4.5**
7/29/09	Revisions of affidavits of Kitchen, Yeate4s, and McBride. **.2**
8/8/09	Coordinated with Debi Dean of Alabama Head Injury Foundation to make sure that Randy, Bradley, and Corey will sign affidavits and get them back to us notarized. Reviewed legal assistant's research of FRCP and EDTN Rules re: timelines of Notice of Filing with respect to Hearing Date. Drafted Notice of Filing. Drafted Memorandum to accompany Notice of Filing for filing with

the court this week. **3.0**

8/10/09 Coordination of all affidavit signings, etc. with Debi Dean. **.5**

8/27/09 Reviewed file and all FRCP related to discovery to look at options and obligations for supplementation before September 14 hearing, as well as the possibility of fee shifting and sanctions. **5.0**

8/31/09 Prepared outline as to action plan before September 14 hearing. Researched Lowes' Loss/Safety Prevention Manager. Drafted proposed interrogatory re: information on who held that position at the time of the accident. Revised and prepared cover letters to Clint Woodfin and Clerk's office. **2.0**

9/9/09 Detailed email to file and staff after reviewing supplemental documents of defendant and possible RFPs. Google search for the two other female managers mentioned by Clint Woodfin. **1.2**

The Panel cited the April 11, 2011 email written by Justice to Kerschberg and noted it contained no acknowledgement that Justice had performed any of the work. The Panel found Kerschberg's billing records were sent to Mr. Justice near the time Kerschberg's time was recorded; that Justice paid those invoices; and that at the time the

invoices were paid, Justice did not question whether Kerschberg performed the work. The Panel found the entries on Justice's fee petition were identical or nearly identical to the Kerschberg bills and that Justice's explanation was not plausible or credible.

The Panel found that many of the entries on Mr. Justice's fee petition were not related to the fees approved in the District Court's order. It found that the submission of 371.5 hours of time went well beyond the scope of the order and that Justice knew he was requesting compensation for time which was not related to locating and deposing Mary Sonner. The Panel also found the corroborating testimony of Chad Rickman not to_ be credible. Specifically with regard to any potential fee awarded by the Court as a result of the discovery sanction motion, the Panel did not believe Rickman's testimony that he and Justice were required to pay the fee to the client, Mr. Thomas. Finally, the Panel specifically found that the statements made by Justice to Judge Collier were false and that Justice knew they were false.

STANDARD OF REVIEW

When reviewing a Hearing Panel's judgment, a trial court must consider the transcript of the evidence before the Hearing Panel and its findings and judgment. Tenn. Sup. Ct. R9, § 1.3. On questions of fact, the trial court may not substitute its judgment for that of the Hearing Panel as to the weight of the evidence. Bd. of Prof. Responsibility v. Allison, 284 S.W.3d 316, 323 (Tenn. 2009). Any modification to a Hearing Panel's decision must be based on one of the specific factors set forth in Tenn. Sup. Ct. R9, §1.3. Bd. Of Prof. Responsibility v. Love, 256 S.W.3d 644, 652 *(Tenn.* 2008).

Under Section 1.3, a trial court has the discretion to reverse or modify a decision of the Hearing Panel only if the petitioner's rights have been prejudiced by findings, inferences, conclusions, or decisions that are (1) In violation of constitutional or statutory provisions; (2) In excess of the Panel's jurisdiction; (3) Made upon unlawful procedure; (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) Unsupported by evidence which is both substantial and material in light of the entire record. Tenn. Sup. Ct. Rule 9 § 1.3. This Court reviews questions of law *de novo* but does not substitute its judgment for that of the Hearing Panel as to the weight of the evidence on questions of fact. Tenn. Sup. Ct. Rule 9 § 1.3; Maddux v. Board of Prof'l Responsibility, 409 S.W. 3d 613, 621 (Tenn. 2013).

ANALYSIS

In his petition for writ of certiorari, Mr. Justice raises a multitude of issues. For purposes of appeal, the Court will classify these issues into three groups: 1) procedural complaints against the Board and the Panel; 2) complaints about the sufficiency of the evidence presented by the Board; and 3) Justice's assertion of his Fifth Amendment privilege against self-incrimination. The Board raises one issue. It claims the Panel erred by not imposing disbarment.

I.

Fifth Amendment Privilege against self-incrimination

On January 20, 2015, a pretrial hearing was

held by the Panel to address certain motions *in limine* filed by the parties. One of the motions filed by Justice pertained to the Fifth Amendment privilege against self-incrimination. In its order entered February 9, 2015, the Board ruled that it was entitled to take an adverse inference in an attorney disciplinary proceeding where an attorney refused to give testimony on the basis of the Fifth Amendment. The Panel ruled pursuant to Akers v. Prime Succession of Tennessee, Inc., 387 S.W.3d 495 (Tenn. 2002) that it was entitled to take an adverse inference if the elements set forth in Akers were met but that it would not make any ruling as to whether it would take an adverse inference until after the proof was presented. Justice argues the Panel coerced him to testify. His position is founded on the premise that an attorney facing a disciplinary proceeding has the same rights as a criminal defendant in this state.

Attorney disciplinary proceedings are "quasi-criminal" in nature. Moncier v. Bd. Prof'l Responsibility, 406 S.W.3d 139, 155 (Tenn. 2013) (citing In Re: Ruffalo, 390 U.S. 544, 551, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968)). Accordingly, attorneys who are subject to discipline are entitled to procedural due process. Moncier, at 156. The question becomes what approach our Supreme Court will adopt regarding an attorney's assertion of the Fifth Amendment privilege against self-incrimination in a disciplinary proceeding; Thus, the task before this Court is to analyze this issue using the prior decisions of our Supreme Court as guidance.

Our Supreme Court has held that attorney disciplinary proceedings do not give rise to "the full

panoply of [due process] rights afforded to an accused in a criminal case." Hyman v. Bd. of Prof'l Responsibility, 437 S.W.3d 435, 445 (Tenn. 2014). In Moncier, the Supreme Court cited with approval, the holding articulated by the Supreme Court of Colorado in People v. Harfman, 638 P.2d 745 (Co. 1981). Harfman argued he was entitled to the same constitutional safeguards as an accused in a criminal case. The Colorado Supreme Court held that disciplinary proceedings, which are *sui generis* will not be afforded the same constitutional rights as an accused in a criminal case, and refused to apply the exclusionary rule to shield an attorney charged in a disciplinary complaint. Id. at 747.

Justice points to Spevack v. Klein, 385 U.S. 511 (U.S. 1967) for the proposition that the U.S. Supreme Court has forbidden the imposition of any penalty upon an attorney for invoking the Fifth Amendment privilege in a lawyer disciplinary case. This Court disagrees. One year after its holding in Spevack, the Supreme Court stated, "[i]n Spevack, we ruled that a lawyer could not be disbarred solely because he refused to testify at a disciplinary proceeding on the ground that his testimony would tend to incriminate him." Gardner v. Broderick, 392 U.S. 273, 277 (U.S. 1968). The U. S. Supreme Court has not ruled whether an adverse inference can be drawn from an attorney's refusal to testify in a disciplinary proceeding; however, lower courts have considered this issue.

In U.S. v. Stein, 233 F.3d 6 (1st Cir. 2000). The Massachusetts Board of Bar Overseers (B.B.O.) conducted an investigation of professional misconduct against Attorney Golenbock.

Golenbock' s attorney became concerned about the possibility of a criminal proceeding and advised her to assert her Fifth Amendment privilege at a deposition. Golenbock declined to answer any questions asserting her Fifth Amendment privilege. After changing attorneys, Golenbock changed her position and when she appeared a subsequent time before the B.B.O., she chose to forego her Fifth Amendment privilege and testify. Later, Attorney Golenbock was charged with one count of bankruptcy fraud and one count of conspiracy to commit bankruptcy fraud. Golenbock moved to suppress the statements she made in front of the B.B.O. contending that she had been coerced to answer ' questions by the threat that assertion of her Fifth Amendment privilege would be used against her in the B.B.O. proceeding. On appeal, the Court of Appeals reviewed the denial of Golenbock's motion to suppress. Golenbock argued that her refusal to testify before the B.B.O. would be subject to an adverse inference as to the matters at issue in that proceeding, with the result being her disbarment. The First Circuit Court of Appeals held "The penalty of adverse inference and possible disbarment was too conditional to establish a conclusion that her B.B.O testimony was compelled in contravention of the Fifth Amendment." The Court of Appeals acknowledged that the Supreme Court had made a distinction where the effect of invoking the Fifth Amendment by itself, would result in the loss of job or license as distinguished from where the invocation of the Fifth could result in damage to one's chances of retaining a job or license. (citing Lefkowitz v. Cunningham, 431 U.S. 801,806 (U.S. 1977)).

> The B.B.O.'s own rules and practice make it plain that Golenbock was not faced with an automatic sanction. The B.B.O. makes its decisions based on a preponderance of the evidence, with the Bar Counsel bearing the Burden of Proof ... Nothing in the record suggests that the B.B.O. has either a formal rule or an unwritten policy or practice to disbar or suspend attorneys simply for invoking Fifth Amendment privileges. Hence, the consequences of Golenbock's assertion of the privilege before the B.B.O. were the same as in any civil proceeding, in that the fact-finder could - but was not required to - draw an adverse inference from such an assertion. (citing Baxter v. Palmigiano, 425 U.S. 308, 317 (U.S. 1976)) …
>
> As said, there is no evidence of any **B.B.O.** rule mandating that claiming one's constitutional right to remain silent must necessarily result in disbarment. Golenock could have asserted her Fifth Amendment privilege and later argued to the **B.B.O.** fact-finder that the evidence against her, as a whole, was inadequate to disbarment. We conclude that [n]either Garrity[2] nor any of its progeny brings defendant within the ambit of the coerced testimony doctrine.

[2] Garrity v. New Jersey, 385 U.S. 493 (U.S. 1967}

.

U.S. v. Stein at 16.

Our Supreme Court has addressed the issue of a negative inference resulting from the assertion of a Fifth Amendment privilege. In Akers v. Prime Succession of Tennessee, 387 S.W.3d 495 (Tenn. 2012) the Court recognized the tension between the Fifth Amendment's protections in a civil trial and the other party's right to a fair proceeding. "[T]he majority of jurisdictions, including Tennessee, permit fact-finders to draw adverse inferences against parties who invoke their Fifth Amendment rights in a civil case." Akers, at 506. However, the Court refused to allow an adverse inference to be drawn from invocations of the privilege in every case. Instead, the Court took a balanced approach holding:

> We hold that the trier of fact may draw a negative inference from a party's invocation of the Fifth Amendment privilege in a civil case only when there is independent evidence of the fact to which a party refuses to answer by invoking his or her Fifth Amendment privilege. In instances when there is no corroborating evidence to support the fact under inquiry, no negative inference is permitted.

Akers, at 506.

The Court went further by requiring the plaintiff to present corroborating evidence regarding the specific fact to which the defendant refuses to answer. Thus, in determining whether a negative inference is permissible, the analysis must be on a question-by-

question basis. Akers, at 507.

While our Supreme Court has indicated disciplinary proceedings are quasi-criminal in nature, these proceedings are civil cases. The punishment for a violation of the Rules of Professional Conduct range from reprimands, to suspension, to disbarment. The practice of law is a privilege, not a right, and there is nothing in Supreme Court Rule 9 which suggests the invocation of the Fifth Amendment will result in disbarment. The ruling of the Hearing Panel that it could draw a negative inference from Justice's invocation of his Fifth Amendment privilege is affirmed.

The prior testimony of Justice in federal court and the deposition testimony of Mr. Kerschberg and the exhibits introduced by the Board corroborate the specific facts to which Justice refused to answer in his deposition. Thus, the Panel was correct in finding that the Board met its burden under Akers but that Akers also left the discretion to the trier of fact whether to impose the adverse inference, which the Panel declined to do. Accordingly, Justice's claim that he was compelled to testify against his will is without merit.

II.

Procedural Complaints

In his petition and brief, Justice alleges several procedural errors by the Hearing Panel which he contends should result in the dismissal of the Board's petition.

Burden shifting

Justice contends the Hearing Panel

improperly placed an undue burden on him, as the respondent, by requiring Justice to provide proof he performed the work detailed in the seventeen time entries set forth in the Panel's findings of fact and conclusions of law. The Panel found Justice claimed he began keeping a record of his time in the Thomas case on December 10, 2008. He testified he made those entries on paper and later put them into a Word document. Although he maintained his time in a Word document, he could not recall the name of the document nor did he produce any of the hand-written time records. Justice was not able to produce a version of the Microsoft Word document until after the entry of Judge Phillip's order granting Justice attorney's fees in the Thomas v. Lowes case on March 15, 2011. The Panel then compared the seventeen entries on the Justice fee petition with the Kerschberg invoices. The Panel considered Justice's explanation regarding these seventeen entries and found his testimony on this issue not credible. The Panel then proceeded to set forth specific examples in the proof which contradicted Justice's explanation and ended by commenting on his demeanor on the witness stand. The Panel observed that questions from the Panel to Justice were often met with lengthy periods of silence prior to answering the questions and that his answers to other questions posed by the Panel regarding the fee petition were often evasive.

Since July 2009, Rule 52 of the Tennessee Rules of Civil Procedure requires the trial court to make specific findings of fact and conclusions of law, and our appellate courts have found that the failure to do so, will require reversal. Anil Const., Inc. v. McCollum, 2014 W.L. 3928726 (Tenn. Ct. App. 2014); Lake v. Haynes, 2011 W.L. 2361563 at 5 (Tenn. Ct.

App. 2011). The Court finds the Panel followed the general rule in Tennessee that the burden of proof remained with the Board and did not shift. Stone v. City of McMinnville, 896 S.W.2d 548, 550 (Tenn. 1995). There is nothing in the Panel's findings to suggest it shifted the burden of proof to Respondent. Justice elected to testify in his defense. The Board found his testimony not to be credible and gave specific reasons for its findings as required under Rule 52 Tenn. R. Civ. P.

Trial Transcript

Justice has requested this Court to deem the transcript of the proceedings before the Panel as unreliable; and instead, order the audio be produced and entered into the record. As a practical matter there is no authority for ordering a court reporter's audio-recording of a trial to be placed into the record. Moreover, the affidavit of Ken Gibson (Gibson Court Reporting) indicates there is no audio for the January 21 day of trial. Rule 24 of the Tennessee Rules of Appellate Procedure governs this issue. Rule 24 (b) Tenn. R. App. P. provides that a transcript will be prepared of a stenographic report or other contemporaneously recorded evidence. In this case a transcript was prepared and submitted. No objection was filed with the clerk of the trial court within fifteen days after service of notice of the filing of the transcript. (Rule 24(b) Tenn. R. App. P.)

Rule 24(e) Tenn. R. App. P. provides that any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted and settled by the trial court, and absent extraordinary circumstances, the determination of the trial court is conclusive. Here, the trial court is the

Hearing Panel as it is the entity that heard the evidence and conducted the trial.

In Antip v. Crilley, 688 S.W.2d 451 (Tenn. Ct. App. 1985) a judgment was entered in favor of the plaintiff. Defendant decided to appeal. The plaintiff had engaged the services of a court reporter who had taped the proceedings but had not transcribed the proceedings. Appellant's counsel sought to have the trial court order the tapes turned over to him. The trial court denied the request. Each party then submitted competing statements of evidence, and the trial court rejected appellant's statement. On appeal, the court stated that stenographers may err, and tapes can be altered. However, when a dispute arises, it is the trial judge who is the only one who can resolve such issues absent extraordinary circumstances, such as the death of the trial judge. Antrip at 453.

Justice failed to timely object pursuant to Rule 24-Tenn. R. App. P., and never lodged any objection with the Hearing Panel (Trial Court) as required. This issue is without merit.

Lack of Specificity in the Pleadings

Justice contends the Panel failed to plead in its petition for discipline sufficient facts that put him on notice of the alleged violations. Justice filed a motion to dismiss or in the alternative for a more definite statement and to compel. The Panel denied his motion to dismiss and his motion for a more definite statement, but granted in part his motion to compel. Specifically, the Panel ordered the Board to supplement his response to Respondent's interrogatory number 6, requiring that it specify

the specific time entries it contended were false. The Board complied with the Panel's order and identified the seventeen highlighted entries in its supplemental response. This list was ultimately admitted as Trial Exhibit 21. The Board correctly points out that Justice's motion for a more definite statement pursuant to Rule 12.05 of the Tennessee Rules of Civil Procedure was moot since Justice had already filed his answer.

Justice contends the Board failed to comply with Rule 9.02 Tenn. R. App. P. in that the Board failed to state with particularity its claim of fraud against Justice. Supreme Court Rule 9 § 23.3 provides that the Tennessee Rules of Civil Procedure apply unless otherwise provided for in Rule 9. Section 8.2 of Rule 9 Tenn. Sup. Ct. R. sets out the requirements for a petition. It provides that the petition shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. The Court finds Justice's reliance on Rule 9.02 Tenn. R. Civ. P. is misplaced. The Board's petition for discipline is not a civil complaint alleging fraud. In its petition, the Board alleged specific violations of the Rules of Professional Conduct concerning fees, candor toward the Tribunal, fairness to opposing party and counsel, and misconduct. These were not bare allegations. The petition set out the history of Justice's conduct in the federal court case, Thomas v. Lowes. The petition attached the Itemized Accounting of Services filed by Justice that there were entries which Justice alleged were his that were actually performed by Kerschberg; that Justice testified falsely before Judge Collier; that he kept contemporaneous records of his time; and that his Itemized Accounting of Services was grossly

exaggerated and unreasonable. The Court finds the petition sufficiently complies with Rule 9 § 8.2 Tenn. Sup. Ct. R.

Sufficiency of Service

Justice raises three separate issues regarding service. First he claims the Hearing Panel's findings of fact and conclusions of law were not properly served. Rule 9 § 8.3 Tenn. Sup. Ct. R. provides the Hearing Panel shall submit its judgment to the Board within fifteen days after the conclusion of its hearing. The Board shall immediately serve a copy of the judgment of the Hearing Panel upon the respondent and the respondent's counsel of record. At the time of the entry of the judgment, Mr. Pera was Justice's counsel of record. Rita Web, the Executive Secretary of the Board mailed a copy to Mr. Pera. Ms. Webb apparently did not mail a copy directly to Justice. Justice contends the failure of the Board to mail a copy of the judgment directly to him requires a dismissal of his case. Nothing in Rule 9 supports this outcome. The purpose of requiring service of the judgment is to make sure a respondent has adequate notice of the judgment so that he may appeal if he is dissatisfied. There is no doubt Justice had sufficient notice of the judgment since he filed his petition for writ of certiorari within the sixty day time requirement. Thus, there was no prejudice to Justice.

Justice also contends he was not 'properly served with the petition for writ of certiorari which the Board filed. The Board's petition was filed in Chancery Court on April 13, 2015. The petition contains a certificate of service certifying it was mailed to Mr. Pera on April 8, 2015. On that same date, counsel for the Board emailed Mr. Pera

inquiring if he would be accepting service of the petition. When Mr. Pera did not respond to the April 8, 2015 email, counsel for the Board emailed him again on April 28, 2015, once again inquiring as to service. Mr. Pera responded on that day that he would not accept service. As a result, counsel for the Board requested the clerk and master on April 28, 2015 to issue a summons for service on Justice. The summons was issued on April 30, 2015 and was returned by the sheriff on May 5, 2015. However, because the summons was signed by someone other than Justice, counsel for the Board issued an alias summons which was personally served on Justice on July 23, 2015.

Justice contends the delay in serving him with the Board's petition requires dismissal of the Board's petition, citing Rule 4.01(3) Tenn. R. Civ. P. which provides that if a party intentionally causes delay of prompt issuance of a summons, the filing is ineffective. The Court finds there is no evidence that counsel for the Board intentionally delayed the issuance of a summons. This issue is without merit as is Justice's claim that the second summons form used by the Board for the alias summons contained the $4,000 personal exemption rather than the current $10,000 personal property exemption.

III.

Sufficiency of the Evidence

Justice contends the Hearing Panel's findings of fact were arbitrary and unsupported by the evidence. Much of Justice's brief focuses on the testimony of Mr. Kerschberg who was a paralegal working for Justice. Mr. Kerschberg testified by deposition upon written interrogatories. He submitted itemized statements for

his services for work performed in the Thomas case which Justice paid.Kerschberg testified he personally performed the work itemized in his invoices. Although Kerschberg was working for Justice during much of the Thomas case, he had no knowledge of Justice ever documenting the time that Justice spent on the Thomas case.

Justice contends Kerschberg "recanted" in his testimony before Judge Collier in the federal disciplinary proceeding. In support of this position, Justice cites the following exchange:

> QUESTION: On the occasions when he [Justice] sent you hand written comments or gave you hand written comments, did you ever take those hand written comments and use them to create the narrative entries on your invoices?
>
> ANSWER: Yes. On some occasions, I did.

Whether Kerschberg may have used hand written comments from Justice on some occasions in creating narrative entries on Kerschberg's invoices to Justice does not come close to a repudiation of Kerschberg's testimony that he performed all of the work which he submitted on his invoices and for which he was paid. Justice's contention that this testimony supports a conclusion that Kerschberg copied Justice's time entries on the seventeen entries found by the Panel, is a *non sequitur*.

Justice also cites the testimony of Kerschberg "if Loring Justice did other work that could also be described by these entries, but without

me there, there is no way that I could know that." This testimony tends to bolster Kerschberg's credibility rather than impeach it as contended by Justice.

Justice contends the testimony of Chad Rickman completely contradicted Kerschberg. Mr. Rickman is an attorney who began practicing with Justice in 2010. He first worked on the Thomas v. Lowes case beginning in July 2010, when Justice told Rickman to start keeping his time. Rickman recorded his time on a legal pad which he then transmitted to staff members to enter into the Word document. However, the first time Rickman ever saw the Word document was after they received the order from the district court awarding fees and expenses. Rickman believed the district court order allowed them to recover fees back to the Rule 26 discovery conference. He discussed the Chamberlain case regarding the overlapping of time with Justice and attempted to delete those entries. Rickman did admit members of the firm did not keep records of their time in representation of their clients except on this one occasion. Rickman also confirmed their intention to give their client, Mr. Thomas any of the fees which they expected to receive from the district court.

The Panel correctly observed that Rickman was not working for Justice in 2009, and there were no independent records of Justice's time available at the time the fee petition was drafted. Therefore, Rickman was in no position to determine the accuracy of Justice's entries. Although Rickman testified he personally worked on.the preparation and itemization of entries on the fee petition on many occasions, there is not a single entry claiming

Rickman actually worked on the itemized fees and expenses submitted with the fee petition. Rickman's testimony regarding the scope of the district court's order of fees was identical to Justice's. The Panel concluded nothing contained in Judge Phillip's order would lead a reasonable attorney to believe that they were entitled to request Lowes to pay for work such as attending Rule 26 conferences, drafting initial discovery, amending the complaint or reviewing hotel reservations. This Court agrees. Likewise, the Panel found both Rickman and Justice's testimony that Mr. Thomas was to receive any fee awarded unbelievable and illogical.

The findings of the Hearing Panel leave no doubt that it found Rickman' s testimony not to be credible. The weight, faith and credit to be given to a witness' testimony lies with the trial court in a non-jury case where there is an opportunity to observe the manner and demeanor of the witness during their testimony. Roberts v. Roberts, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991). Thus, credibility findings and the Hearing Panel's weighing of evidence on questions of fact are binding on a reviewing court unless those findings are unsupported by the evidence in the record. Maddox v. Bd. of Prof 1. Responsibility, 409 S.W. 3d 613, 621 (Tenn. 2013). The Court finds the evidence in this case does not preponderate against the findings of fact by the Hearing Panel regarding the testimony of Kerschberg and Rickman.

Justice's next issue is that the Panel erred in refusing to allow Justice to introduce the declaration of his computer expert, Yalkin Demirkaya which was filed in the federal case before Judge Collier. Justice contends that the Board "opened the door" during its

opening statement. Even if evidence is inadmissible, a party may "open the door" to admission of that evidence when that party introduces evidence or takes some action that makes admissible evidence that would have previously been inadmissible. State v. Gomez, 367 S.W.3d 237, 246 (Tenn. 2012) (citing 21 Charles Alan Wright, Federal Practice and Procedure § 5039 (2nd Ed. 1987). Opening statements are outlines of what attorneys expect the evidence to be. These statements are made only to assist the trier of fact in understanding the evidence that will be presented. Opening statements are not evidence, and the Board did not "open the door."

Next, Justice cites the rule of completeness found in Rule 106 Tenn. R. of Evidence. Rule 106 provides that when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. In this case, Respondent sought to introduce the declaration of his computer expert, Mr. Demirkaya based upon the Board;s submission of Respondent's prior testimony in district court. There are no cases to suggest Rule 106 should be read this broadly. Moreover, it does not appear Rule 106 will affect the admissibility of evidence, only the timing of the evidence. Mr. Demirkaya's declaration is hearsay and inadmissible. United States v. Kostner, 684 Fed. 2d 370, 373 (6th Cir. 1982). The rule contemplates a high degree of discretion to be exercised by the trier of fact. There is no error in the Panel's exclusion of this evidence.

Finally, Justice claims that the email from

Justice to Kerschberg (Exhibit 23) was admitted for identification only and never received into evidence. This is a misstatement of the evidence. Initially, the exhibit was pre-marked for identification purposes. However, the Chair of the Panel later stated Exhibit 23 was admitted, and there was no objection by counsel for Justice.

The Hearing Panel found that Justice made the following statements to Judge Collier in the federal court proceeding which were false and that Justice knew they were false:

1. He did not wrongly attribute any work to himself in the fee petition that had actually been performed by Kerschberg.
2. He made no false certifications or false statements in the fee petition.
3. He personally worked the time attributed to him in the fee petition.
4. He recorded his time and activities in a Microsoft Word document or on a note pad from which they were recorded in that Microsoft Word document later.
5. He recorded his time and activities within approximately one week.

This Court finds that the record fully supports each of the findings of the Hearing Panel which are affirmed.

The Board's Writ of Certiorari

The Board also appealed the Hearing Panel's decision. It raised a single issue, whether the sanction

of suspension was arbitrary and an abuse of its discretion. The Panel concluded Justice violated the following Rules of Professional Conduct:

1. That the fee petition submitted by Justice to the district court was unreasonable and greatly exceeded the time and labor required to locate and depose the witness.

2. That Justice adopted work actually performed by Kerschberg as work performed by himself in the fee petition that was submitted to the federal court under oath.

3. That Justice testified falsely in the show cause hearing before Judge Collier by a) making false certifications or statements in his fee petition; b) that he personally worked the time attributed to him in the fee petition; c) that he recorded his time activities in a Microsoft Word document close in time to the work being performed.

The Panel then considered aggravating and mitigating circumstances from which it concluded that Justice should be suspended from the practice of law for a period of one year.

The Board argues the Hearing Panel applied ABA Standards that are not supported by the evidence and the Panel's findings.[3] Rather than the suspension issued by the Hearing Panel, the Board

[3] The Hearing Panel failed to articulate any standards in its Judgment.

submits that the application of the correct ABA Standards, along with the aggravating and mitigating factors, warrants disbarment from the practice of law. In order to determine the appropriate discipline in a given case, the Court looks to the ABA Standards for Imposing Lawyer Sanctions. Maddux, 409 S.W. 3d at 624. These standards act as a guide rather than rigid rules, thereby providing courts with discretion in determining the appropriate sanction for a lawyer's misconduct. Maddux, 409 S.W. 3d at 624. The ABA Standards specify that when imposing a sanction, the court should consider:

> 1) What ethical duty did the lawyer violate (a duty to a client, the public, the legal system, or the profession?); 2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?); 3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?); and 4) Are there any aggravating or mitigating circumstances?

Id. (quoting ABA's Standards, theoretical framework).

In this case, the Hearing Panel never articulated the particular ABA Standard upon which it based its sanction of suspension. The standards which control for violation of duties owed to the public and duties owed to the legal ystem are found in 5.0 and 6.0 respectfully. ABA Standard 5.11 provides that:

Disbarment is generally appropriate when:

a. A lawyer engages in serious criminal conduct, a necessary element of incudes intentional interference with the administration of justice. false swearing, misrepresentation, fraud, extortion, misappropriation, or theft ... or

b. A lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA Standard 6.11 provides that:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

The first question is what ethical duty did Justice violate? The first violation found by the Panel regarding fees does not apply to ABA Standard 5.11. However, the Panel went on to find Justice violated

Rule 3.3 pertaining to candor toward the tribunal when he submitted a false fee petition to the federal court under oath and when he testified falsely in the show cause hearing before Judge Collier. The Court finds these violations could fall under ABA Standard 5.11(b). Here, Justice intentionally submitted a false fee petition in which he represented he was entitled to be paid for work he did not perform, and he continued to perpetrate his misrepresentation by testifying falsely in front of Judge Collier. Whether ABA Standard 6.11 is applicable is a more difficult question. Although Justice did intend to deceive both Judge Phillips and Judge Collier, made false statements, and submitted a false document, there was no serious injury to Lowes. In addition, it was Lowes' misconduct by failing to disclose the identity of a material witness in the underlying case, that lead to the discovery sanction in the first place. The Court finds that ABA Standard 6.11 is not applicable.

Here, the Panel failed to identify the specific duties violated by Justice and articulate the relevant ABA Standards. Maddux at 624. Pursuant to Maddux, the findings by the Panel require a conclusion that Justice acted intentionally to deceive both Lowes and the Federal District Court. This type of conduct by an offi er of the court goes to the foundation of our system of justice. Therefore, the presumptive sanction is disbarment pursuant to ABA Standard 5.1 l(b).

The Panel identified six aggravating factors and two mitigating factors. The record supports the six aggravating factors found by the Panel and the two mitigating factors. This Court is reluctant to impose the sanction of disbarment upon a lawyer with

no prior disciplinary offenses. The comments to ABA Standard 5.11 state "in imposing final discipline in such cases, most courts impose disbarment of lawyers who are convicted of serious felonies." However, the intentional deceit by Justice on the opposing party, Judge Phillips and Judge Collier, along with the refusal to acknowledge the wrongful nature of his conduct and the total lack of remorse, leaves this Court with no alternative. The Respondent, Loring Edward Justice shall be disbarred.

CONCLUSION

The findings of fact and conclusions of law by the Hearing Panel regarding the misconduct of the Respondent are affirmed. The sanction imposed by the Hearing Panel is reversed. Mr. Justice is disbarred from the practice of law.

It is so **ORDERED.**

APPENDIX D

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

IN RE: **Loring Edwin Justice**
BPR # 19446, Respondent
An Attorney Licensed to
Practice Law in Tennessee
(Knox County)

Docket No. 2013-2254-2-WM

Issued: March 9, 2015

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT OF THE HEARING PANEL

This matter came to be heard on January 20 through January 23, 2015 before a Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee consisting of Alyson A. Eberting, Timothy C. Houser and Michael J. King (Chair). Upon the conclusion of the testimony on January 23, 2015, the hearing was adjourned to provide the parties an opportunity to submit proposed findings of fact and conclusions of law. The parties submitted their proposals on

February 20, 2015 at which time the hearing was concluded.

The Panel was convened based on a Petition for Discipline filed by the Board, by and through disciplinary counsel. The Board alleges that the Respondent Loring Edward Justice (hereinafter "Justice") submitted false time entries for a fee application in the case of *Thomas v. Lowes, Inc.* in the United States District Court for the Eastern District of Tennessee, and that the time entries were false because Justice misappropriated the time entries of his paralegal contractor Benjamin Kerschberg (hereinafter "Kerschberg") as his own. The Board claims that the submission of these false entries constitutes a violation of Tennessee Rules of Professional Conduct 3.3(a) (1), 3.4(b), 8.4(a), and 8.4(c). The Board also alleges that Justice made a false written representation to the court in *Thomas* concerning the time records kept by his firm and that Justice falsely testified in a federal lawyer disciplinary proceeding arising out of the fee application. The Board contends these actions are in violation of Tennessee Rules of Professional Conduct 3.3(a)(l), 3.4(b), 8.4(a), and 8.4(c). Finally, the Board alleges that fees requested by Justice in the *Thomas* fee application were unreasonable because they greatly exceeded the scope of the court's order that awarded fees as a discovery sanction. The Board alleges this claim for fees constitutes a violation of Tennessee Rules of Professional Conduct 1.5(a) and 8.4(a).

I. STATEMENT OF THE CASE

1. The Petition for Discipline was filed in this matter on September 25, 2013.

2. Respondent, through his counsel, timely filed a Motion for Extension to Respond or for Alternative Relief on October 15, 2013. Petitioner filed a response to this Motion on October 15, 2013 and the Motion was granted by the Chair of the Board of Professional Responsibility on the same date pem1itting the Respondent up and through November 29, 2013 to file a response.

3. The Respondent filed an Answer/Response to the Petition and a Motion to Dismiss or in the Alternative to Stay the Proceedings on December 3, 2013. The Board filed a response to the Respondent's Motion to Dismiss or in the Alternative to Stay on December 9, 2013. The Panel denied Respondent's Motion to Dismiss or in the Alternative to Stay.

4. On June 6, 2014 the Petitioner filed a Motion to Dismiss Petition for Discipline or, in the Alternative, for a More Definite Statement and to Compel and for Protective ·Order. On June 16, 2014 the Board filed a Response to said Motion. The Panel denied the Motion to Dismiss, Motion for More Definite Statement and Motion for Protective Order. The Panel granted Respondent's Motion to Compel in part and ordered the Board to supplement its Response to Respondent's Interrogatory No. 6 by October 15, 2014 specifying the time entries it contended were false entries.

5. On November 19, 2014 Benjamin Kerschberg, a witness in the case filed a Motion for Protective Order with the Panel. The Panel denied the motion by stating it did not have jurisdiction to rule on the request and informed the attorney for

the witness and the parties that such a motion needed to be filed with the appropriate Court. The witness refiled the Motion for Protective Order, with the Knox County Chancery Court. The Chancery Court granted the motion in part and denied the motion in part.

6. On December 11, 2014 the Board filed a Motion to Compel Respondent to give a deposition after Respondent informed the Board that he intended not to testify and exercise his right against self-incrimination. On December 22, 2015 Respondent filed a Response to the Motion to Compel and Motion to Dismiss on the grounds that the Board violated Respondent's rights under the United States and Tennessee Constitutions due to improper commentary by the Board to the Panel concerning Respondent's exercise of bis right against self-incrimination. On January 5, 2015 the Panel granted the Motion of the Board to compel Respondent to give his deposition. The Respondent's Motion to Dismiss was denied.

7. Both the Board and the Respondent filed various Motions in Limine regarding the introduction of testimony and exhibits. The rulings on those Motions are found in the Record.

8. The case was tried before the hearing Panel commencing on January 20, 2015 and adjourning on January 23, 2015. The parties were directed to submit proposed findings of fact and conclusions of law by not later than February 20, 2015.

II. FACTS

A. BACKGROUND

9. Justice is an attorney licensed to practice law in Tennessee since 1998. At all times material hereto, Justice practiced law as Loring Justice, PLLC. Justice employed Benjamin Kerschberg as a contract paralegal between May and September of 2009. Kerschberg submitted bi-weekly invoices from BK Advisory Group, LLC to Loring Justice, PLLC for his work on behalf of Justice.

10. Justice represented the plaintiff, Scotty Thomas ("Thomas") *in* the case of *Thomas v. Lowe's, Inc.* in the United States District Court for the Eastern District of Tennessee. Justice was representing the plaintiff for a contingency fee. On June 21, 2005, Thomas was employed by a contractor and was working on the premises of a Lowe's, Inc. ("Lowe's") store, when a large bay of metal roofing sheets collapsed on his head, causing various injuries. Lowe's denied liability. In addition, Lowe's denied any knowledge of Thomas' presence in the store, denied having any knowledge or records regarding the incident on its premises, and denied knowledge of the remerchandising project on which Thomas was working. Three years into the litigation, Justice and his staff found a former Lowe's Hum.an Resources Manager, Mary Sonner, who was present when the incident occurred. She remembered the incident, confirmed that it occurred, remembered Thomas and his injuries, and remembered that she transported him to an urgent-care clinic.

11. Justice filed a motion for sanctions asserting that Lowe's had engaged in misconduct regarding its discovery obligations. A memorandum

and order was entered by Judge Thomas W. Phillips on March 15, 2011 which provided that Lowe's would pay the plaintiff all reasonable attorney's fees and expenses incurred in locating and deposing Mary Sonner. Specifically, the Order provided:

> Defendant shall pay Plaintiff all reasonable attorney's fees and expenses incurred in locating and deposing Ms. Sonner, including attorney's fees, transcription costs, court reporter fees, and other costs.
>
> Plaintiff must provide documentation evidencing the fees, expenses, and costs incurred, associated with the discovery of Ms. Sonner.

12. On April 11, 2011 Justice submitted a preliminary fee petition to the Court. Included with the fee petition was an Itemized Accounting of Services wherein he set out, under penalty of perjury, the fees and expenses being sought by Loring Justice, PLLC.

13. On April 22, 2011, Justice submitted the final version of the fee petition which included an Itemized Accounting of Services wherein he set out in amended fashion, and again under penalty of perjury, the fees and expenses being sought by Loring Justice, PLLC.

14. Justice sought an award in the amount of $106,302.00 for fees and expenses. The fee petition included 325.5 hours at the rate of $300 per hour for the services of Justice and 11.3 hours at the rate of $90 per hour for the services of

Kerschberg.

15. With respect to both the original April 11, 2011 fee petition and the revised April 22, 2011 fee petition, Justice asserted to the Federal Court, under oath, that he maintained records for the work performed on behalf of the plaintiff.

16. As a result of Mr. Justice's fee petition, a show cause hearing was held before the Hon. Curtis Collier, Chief Judge of the United States District Court for the Eastern District of Tennessee, beginning on February 17, 2012, Mr. Justice testified at that hearing under oath. During the hearing, Justice claimed he did not wrongly attribute work done by Kerschberg to himself, he made no false certifications or false statements in the fee petition; he personally worked the time attributed to him in the fee petition; he recorded his time and activities in a Microsoft Word document or on a notepad from which they were subsequently recorded in that Microsoft Word document; and that he recorded his time and activities within approximately one week of the time the work was performed.

B. TIME RECORDING PRACTICES AT LORING JUSTICE, PLLC

17. Loring Justice, PLLC does almost all contingency fee work, rarely bills hourly, and does not employ a more formal legal billing or timekeeping program.

18. Justice testified that at approximately the time of the Rule 26(f) discovery conference on December 10, 2008 he began keeping a record of his

time and activities in the *Thomas* case.[1] Justice testified he sometimes -wrote the entries on paper and later put them into the Word document. Justice did not produce any of the hand-written time records he purports to have made.

19. Justice testified that around the time of the Rule 26(f) conference, he directed all employees of Loring Justice, PLLC to maintain a record of their time and activities performed in *Thomas*.

20. Justice testified that he maintained his time in a Word document. Justice does not recall the name of the document.

21. Justice testified that Microsoft Word was also used to record time and activities of other employees of Loring Justice, PLLC.

22. In responding to the show cause order, Justice caused his office computers to be searched for earlier versions of the fee petition. One version of the document was located by Mr. Justice which originated in April of 2011. (Exhibit 7) Three additional versions were located by an outside computer consultant. These three versions also originated in April of 2011. (Exhibits 8-10) No version of the Microsoft Word document existing before Judge Phillips' March 15, 2011 memorandum and order was produced.

C. COMPARISON OF FEE PETITION

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[1] The references to Justice's testimony come from his testimony at the hearing before the panel on January 23, 2015 unless otherwise noted.

AND KERSCHBERG INVOICES

23. The Board alleged that seventeen specific time entries contained on Justice's fee petition were false. The Board asserts that on the specified entries, Justice claimed work performed by his paralegal Kerschberg as his own. The 17 entries on the fee petition where Justice claims to have performed the work are identical or nearly identical to the entries on the bills submitted by Kerschberg to Justice for work Kerschberg performed;

24. June 13, 2009:

a. Kerschberg billed Justice for 1.25 hours for "Revision of Motion to Have Requests for Admission Deemed Admitted."

b. Justice's Itemized Accounting of Services contains a billing entry for Justice for 1.2 hours for "Revision of Motion to Have Requests for Admission Deemed Admitted."

25. June 14, 2009:

a. Kerschberg billed Justice for 2.25 hours for 'Added Loring edits to Motion to Deem Requests for Admissions admitted. Added section about Letter to Clint Woodfin and Motion to Supplement. Researched electronic filing rules for the E.D. Tenn. Researched proper procedure for filing Amended Complaint (Local Rules;

Scheduling Order; FRCP)."

b. Justice's Itemized Accounting of Services contains a billing entry for Justice for 2.2 hours for "Edits to Motion to Deem Requests for Admissions admitted. Added section about Letter to Clint Woodfin and Motion to Supplement Researched electronic filing rules for the E.D."

26. June 16, 2009:

a. Kerschberg billed Justice for 2.5 hours for "All final preparations of Amended Complaint and Motion to Deem Requests for Admissions Deemed Admitted. Preparation of all PDF exhibits. Compilation of files. Filing with E.D. Tenn. via ECF. Hard copies of everything for file."

b. Justice's Itemized Accounting of Services contains a billing entry for Justice for 2.5 hours for "All final preparations of Amended Complaint and Motion to Deem Requests for Admissions Deemed Admitted. Preparation of all PDF exhibits. Compilation of files. Filing with E.D. Tenn. via

ECF. Hard copies of everything for file."

27. June 16, 2009:

    a. Kerschberg billed Justice for 3,0 hours for "Edited Motion to Compel Discovery and Memorandum in Support thereof prepared by Juliane Moore."

    b. Justice's Itemized Accounting of Services contains a billing entry for Justice for 3.0 hours for "Preparation and editing of Motion to Compel Discovery and Memorandum in Support partially prepared by legal assistant."

28. June 17, 2009:

    a. Kerschberg billed Justice for 4.0 hours for "Continued to revise and rewrite Motion to Compel Discovery."

    b. Justice's Itemized Accounting of Services contains an entry for Justice for 4.0 hours for "Continued to research, revise and rewrite Motion to Compel Discovery."

29. June 17, 2009:

    a. Kerschberg billed Justice for 1.0 hours for "Talked to Angela Brush at district court to

correct misunderstandings re our filings. Second conversation with LJ about Consent Motion to Amend with Clint Woodfin. Drafted Consent Motion for review by Clint Woodfin."

b. Justice's Itemized Accounting of Services contains an entry for Justice for 1.0 hours for "Talked to Angela Brush at district court to correct misunderstandings re our filings."

30. June 18, 2009:

a. Kerschberg billed Justice for 4.5 hours for "Motion to Compel Discovery."

b. Justice's Itemized Accounting of Services contains an entry for Justice for 4.5 hours for "Continued research, revision and refinement of Motion to Compel Discovery."

31. June 19, 2009:

a. Kerschberg billed Justice for .5 hours for "Letter to Bob Davies regarding additional materials needed from MSG."

b. Justice's Itemized Accounting of Services contains an entry for Justice for .5 hours for "Letter to Bob Davies regarding

additional materials needed from MSG about the project."

32. July 16, 2009:

    a. Kerschberg billed Justice for .25 hours for "Reviewed Loring's notes from meeting with Clint Woodfina (sic) and calendared follow-up call to Cory re: Clint's call."

    b. Justice's Itemized Accounting of Services contains an entry for Justice for .2 hours for "Reviewed notes from meeting with Clint Woodfin and calendared follow-up call to Cory Kitchen re: Clint's call."

33. July 22, 2009:

    a. Kerschberg billed Justice for July 22, 2009 for 5.0 hours for "Drafted and typed memo for trip to Alabama."

    b. Justice's Itemized Accounting of Services contains an entry for Justice for 5.0 hours for "Drafted and typed memo for trip to Florence, Alabama to meet with Plaintiffs MSG co-workers. This memo summarized the liability issues in the case and listed important questions to ask to try to understand whether it was plausible Lowe's could lack

notice and to prove Lowe's indeed had notice and to gain physical descriptions of individuals of interest."

34. July 27, 2009:

a. Kerschberg billed Justice for 4.5 hours for "Reviewed all notes from our trip to Alabama and compiled Master To-Do List for Loring and BG. Drafted Affidavits of Kitchen, Yeates, and McBride. Online -research re: Teresa Beavers (Lowe's Manager)."

b. Justice's preliminary Itemized Accounting of Services contains an entry for Justice for 4.5 hours for "Reviewed all notes from our trip to Alabama to meet with the MSG witnesses and compiled Master To-Do List for Loring and B. Griffith, summer clerk. Drafted Affidavits of Kitchen, Yeates, and McBride. Online research re: Teresa Beavers (Lowe's Manager)."

c. Justice's final Itemized Accounting of Services contains an entry for Justice for 4.5 hours for "Reviewed all notes from our trip to Alabama to meet with the MSG witnesses and compiled

Master To-Do List. Drafted Affidavits of Kitchen, Yeates, and McBride. Online research re: Teresa Beavers (Lowe's Manager)," and deleting "for Loring and B. Griffith, summer clerk."

35. July 29, 2009:

    a. Kerschberg billed Justice for .25 hours for "Revisions of Affidavits of Kitchen, Yeates, and McBride."

    b. Justice's Itemized Accounting of Services contains an entry for Justice for .2 hours for "Revisions of Affidavits of Kitchen, Yeates, and McBride."

36. August 8, 2009:

    a. Kerschberg billed Justice for 4.0 hours for "Coordinated with Debi Dean to make sure that Randy, Bradley, and Corey will sign Affidavits and get them back to us notarized. Prepared final versions with LJ edits. Two versions for Bradley and Cozy-one with and one without Teresa Beavers. Researched FRCP and EDTN Rules re; timeliness of Notice of Filing with respect to Hearing Date. Drafted Notice of Filing. Drafted Memorandum to accompany Notice of Filing with

the court this week."

b. Justice's Itemized Accounting of Services contains an entry for Justice for 3.0 hours for "Coordinated with Debi Dean of Alabama Head Injury Foundation to make sure that Randy, Bradley, and Corey will sign Affidavits and get them back to us notarized. Reviewed FRCP and EDTN Rules re; timeliness of Notice of Filing with respect to Hearing Date. Drafted Notice of Filing. Drafted Memorandum to accompany Notice of Filing with the court this week"

37. August 10, 2009:

a. Kerschberg billed Justice for .5 hours for "Coordination of all Affidavit signings, etc. with Debi Dean."

b. Justice's Itemized Accounting of Services contains an entry for Justice for .5 hours for "Coordination of all Affidavit signings, etc. with Debi Dean."

38. August 27, 2009:

a. Kerschberg billed Justice for 5.0 hours for "Reviewed file and all FRCP related to

discovery to look at options and obligations for supplementation before the September 14 hearing, as well as the possibility of fee shifting."

b. Justice's Itemized Accounting of Services contains an entry for Justice for 5.0 hours for "Reviewed file and all FRCP related to discovery to look at options and obligations for supplementation before the September 14 hearing, as well as the possibility of fee shifting and sanctions."

39. August 31, 2009:

a. Kerschberg billed Justice for 2.0 hours for "Prepared outline for Loring as to action plan before September 14 hearing. Researched Lowe's Loss/Safety Prevention Manager. Drafted proposed Interrogatory re: iinformation (sic) on who held that position at the time of the accident. Revised and prepared cover letters to Clint Woodfin and Clerk's office."

b. Justice's Itemized Accounting of Services contains an entry for Justice for 2.0 hours for "Prepared outline as to action

plan before September 14 hearing. Researched Lowe's Loss/Safety Prevention Manager. Drafted proposed Interrogatory re: information on who held that position at the time of the accident. Revised and prepared cover letters to Clint Woodfin and Clerk's office."

40. September 9, 2009:

a. Kerschberg billed Justice for 1.25 hours for "Reviewed our initial disclosures and discovery responses to see what needs to be supplemented. Reviewed all supplemental materials provided by Clint Woodfin. Detailed email to Loring reviewing thoughts on the supplemental documents and possible RFPs."

b. Justice's Itemized Accounting of Services contains an entry for Justice for 1.2 hours for "Detailed email to file and staff after reviewing supplemental documents of defendant and possible RFPs. Google search for the two other female managers mentioned by Clint Woodfin."

41. Justice testified that on the 17 time entries at issue, he personally worked the time

reflected in those entries and he did the work reflected in those time entries. Justice testified that he typically documented his time within seven to ten days of the work being performed.

D. JUSTICE'S TESTIMONY REGARDING THE TIME ENTRIES IS NOT CREDIBLE

42. With respect to each of the seventeen entries, Justice claimed he worked the amount of time reflected on the fee petition or more. The Panel finds his testimony in this regard is not credible.

43. Justice wrote Kerschberg acknowledging he had claimed time on the fee petition for himself that was work Kerschberg had actually done. Specifically, on April 11, 2011, Justice wrote an email to Kerschberg, that stated, "I billed a lot of the time for my reading your work rather than you doing it so you won't have to testify if it comes to that." (Exhibit 23). None of the time entries on the fee petition describe activities where Justice "read ' Kerschberg's work.

44. Justice testified that the email to Kerschberg reflects the "Chamberlain" principle that Justice applied to entries on the fee petition where multiple attorneys or paralegals worked on the same task. For the most part, where two or more persons performed the same task, Justice claimed the amount placed on the fee petition was based on the "highest billing attorney, lowest amount spent by anyone on a duplicative project." Justice's claim that this email was his way of telling Kerschberg that he was applying the "Chamberlain" principle is not plausible.

45. The email contains no acknowledgement that Justice had performed the work. The email did not reference Chamberlain. Kerschberg had graduated from Yale Law School with Justice and clerked for Judge Gilbert Meritt on the Sixth Circuit Court of Appeals. Time entries reference Kerschberg spent time to "moot" Justice in preparation for hearings and performing complicated legal work. If Justice intended to communicate to Kerschberg, a knowledgeable and well-trained paralegal an intention to apply a legal principle such as "Chamberlain", he would not have told Kerschberg that Justice billed for "reading" Kerschberg's work.

46. Justice provides different and contradictory reasons why the entries on the fee petition and Kerschberg bills were identical. He asserts that Kerschberg may have copied Justices entries. He asserts that his staff may have mistakenly entered the time. He asserts that the persons assisting in preparing the fee petition made mistakes, including his associate, Chad Rickman. ("Rickman") He asserts that errors on the petition may have resulted from inadvertent computer errors. In short, while offering numerous theories, Justice cannot provide any definitive explanation as to why entries attributed to him are identical (or nearly identical) to the entries on Kerschberg' s time records.

47. Justice claims that it was not improper for his office to copy Kerschberg' s language from the Kerschberg invoices on to the fee petition. Specifically, Justice argues if the time in Justice's entries was worked by Justice and the tasks described in them were performed by Justice, then similarity of

language is no ethics violation. Justice further asserts if a lawyer in Justice's position had intentionally copied another timekeeper's language used in time entries (and Justice has testified that he did not), that conduct would violate no ethics rule, if the copying lawyer worked the time and did that task described. The panel agrees with these assertions.

48. However, Kerschberg's billing records were sent to Loring Justice PLLC at or near the time Kerschberg's time was recorded. Loring Justice PLLC paid the invoices. At the time the invoices were paid, Justice did not question whether Kerschberg performed the work. The Panel finds that based on the evidence presented, Kerschberg actually performed the work set forth on his invoices.

49. With respect to the same descriptions and time entries being placed on the fee petition and credited to Justice, there is no independent proof that Justice also performed the same work for the same amount for time.

50. Justice was asked whether any of the 17 identical or nearly identical entries on the Kerschberg bills were incorrect or inaccurate. With minor exceptions, Justice did not find Kerschberg' s entries were incorrect or inaccurate. Instead, Justice asserted he and Kerschberg were performing the same or similar work at the same time including clerical tasks such as making copies. This explanation is also not plausible.

51. Justice testified that Rickman was "primarily" responsible for the itemization of entries on the fee petition. Given that Rickman was

not working at Loring Justice, PLLC in 2009 and there were no independent records of Justice's time available at the time the fee petition was drafted, Rickman could not determine the accuracy of Justice's entries. Moreover, entries on the fee petition itself claim Justice worked on the itemizations on the fee petition. There is not a single entry claiming Rickman actually worked on the itemized fees and expenses submitted with the fee petition.

52. Justice testified the document that later became the fee petition evolved over time and that various timekeepers input their time into the document. Rickman testified that while Justice told him that Justice was keeping time, the first time Rickman saw the document that later became the fee petition was after the order from the Court awarding fees was issued in March 2011.

53. The credibility of Justice's testimony regarding his work is further called into question by his demeanor on the witness stand. Questions from the panel to Justice were often met with lengthy periods of silence prior to answering the question. Justice's answers to other questions posed by the Panel regarding the fee petition were often evasive.

E. MANY OF THE ENTRIES ON THE FEE PETITION DO NOT RELATE TO THE FEES APPROVED IN THE COURT'S ORDER.

54. Judge Phillips' order provided the basis for the recovery of fees against Lowe's due to discovery abuse. The Order permitted plaintiff to recover "all

reasonable attorney's fees and expenses incurred in locating and deposing Ms. Sonner. . ." and required Plaintiff "provide documentation evidencing the fees, expenses, and costs incurred, associated with the discovery of Ms. Sonner."

55. The Panel finds the Order was specific and clear regarding the fees, costs, and expenses that should be submitted by Justice. Only fees, costs, and expenses that could be shown to relate to locating and deposing of Ms. Sonner should have been submitted. Even the most liberal reading of the Order required that any fees, costs, and expenses submitted on the fee petition must bear a relationship to the task of finding Ms. Sonner and deposing her.

56. Justice's Itemized Accounting of Services contains numerous entries that did not relate to locating or deposing the witness Mary Sonner. Numerous additional entries do not explain how they relate to locating or deposing Mary Sonner.

57. Justice asserts that Justice and Rickman each interpreted Judge Philips' order to encompass more than just physically locating Ms. Sonner and this interpretation was a reasonable one, even if ultimately rejected by the court. Justice points to the language of Magistrate Judge Guyton' s Report and Recommendation that states, "The court finds that the plaintiff should be compensated for the labor and costs incurred in finding Ms. Sonner, because these costs are necessitated by the defendant's failure to properly investigate the allegations of the suit." Both Justice and Rickman testified that when reviewing both Judge Guyton's Report and Recommendation and Judge Phillips' Order together, they were permitted to submit fees beyond time spent

locating and deposing Ms. Sonner.

58. The Panel does not find that Judge Guyton's Report and Recommendation changed, modified or added anything to Judge Phillips' Order. Moreover, nothing contained in Judge Guyton's Report and Recommendation would lead a reasonable attorney to believe that they were entitled to request Lowe's pay for tasks such as attending Rule 26 conferences, drafting initial discovery, amending the complaint or reviewing hotel reservations.

59. The Panel finds that the submission of 371.50 hours of time and $106,302.00 of fees goes well beyond the scope of the order and that Justice knew he was requesting compensation for time not related to "locating and deposing Mary Sonner."

60. The Panel further finds that with respect to the 17 entries at issue, Justice knew that he was representing to the Court that he had performed work that was in fact performed in whole or in part by other individuals and that he (a) did not perform the work or (b) did not work the time that was set forth on the fee petition.

61. In the fee petition, Justice attributed work to himself that had actually been performed by Kerschberg resulting in Justice requesting compensation at the rate of $300 per hour instead of $90 per hour.

62. Justice gave a false statement under oath in the fee petition in *Thomas v. Lowe's, Inc.* by claiming that work actually performed by Kerschberg was performed by himself.

63. Justice claims he intended to give

their client, Thomas, any fee awarded by the Court as a result of the sanction motion. Justice provides two reasons for giving any fee awarded to Thomas. First, Justice testified case law prohibits him from collecting a contingency fee and the fees awarded by the Court as a result of the discovery sanction. Second, Thomas needed it more.

64. Rickman claimed that the Court's order required that any fee awarded was required to be paid to Thomas.

65. The Panel finds this post-conduct rationale that Thomas was to receive any fee award as a basis for requesting in excess of $100,000 for locating and deposing Ms. Sonner unbelievable. The Order awarded Plaintiff "all reasonable attorney's fees and expenses *incurred."* If the Order was to be read literally (as Rickman purports to do), Thomas would not be entitled to any.attorney fees. Because the case was being handled on a contingent fee, Justice recovered no fees unless he prevailed or settled the case. At the time of the fee petition, Justice had neither prevailed nor settled the case. Accordingly, Thomas had not *incurred* any attorney fees.[2]

66. Justice's assertion that he could not keep any fees awarded by the Court because he was working for Thomas pursuant to a contingency fee contract is illogical. Nothing prevented Justice from deducting the fees awarded by the Court from any fee Justice collected if he prevailed or settled the matter.

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[2] The Panel acknowledges that Justice had advanced expenses on behalf of Thomas. Justice testified that he intended to keep any expenses awarded.

67. Justice provided no proof (other than the post-conduct testimony of Justice and Rickman) evidencing an agreement or intent to give the fee awarded by the Court to Thomas.

68. For the same reasons set forth *supra,* Justice's testimony regarding his intent to give the fee award to Thomas is not credible.

69. As. a result of Justice's fee petition, a show cause hearing was held before the Hon. Curtis Collier, Chief Judge of the United States District Court for the Eastern District of Tennessee, beginning on February 17, 2012, Justice testified at that hearing under oath.

70. Justice testified at that hearing to the following:

a. He did not wrongly attribute any work to himself in the fee petition that had actually been performed by Kerschberg.

b. He made no false certifications or false statements in the fee petition.

c. He personally worked the time attributed to him in the fee petition.

d. He recorded his time and activities in a Microsoft Word document or on a notepad from which they were recorded in that Microsoft Word document later.

e. He recorded his time and activities within approximately

one week.

71. The Panel finds these statements made to Judge Collier in the federal court proceeding were false and that Justice knew they were false.

III. CONCLUSIONS OF LAW

Pursuant to Tenn. S. Ct. R. 9, Section 3, the license to practice law in this state is a privilege and it is the duty of every recipient of that privilege to conduct himself at all times in conformity with the standards imposed up n members of the Bar as conditions for the privilege to practice law. Acts or omissions by an attorney which violate the Rules of Professional Conduct ("RPC") of the State of Tennessee shall constitute misconduct and be grounds for discipline. The Board must prove the allegations against Justice by a preponderance of the evidence, Tenn. S. Ct. R. 9, Section 15.201).

The Board alleges the fees requested by Justice in the fee application were unreasonable because they greatly exceeded the scope of the court's order in violation of Tennessee Rule of Professional Conduct l.5(a) and 8.4(a). The Board claims the submission of false entries in the fee petition constitutes violations of Tennessee Rules of Professional Conduct 3.3(a)(l), 3.4(b), 8.4(a), and 8.4(c). The Board also alleges that Justice made a false written representation to the court in *Thomas* concerning the time records kept by his firm and that Justice falsely testified in a federal lawyer disciplinary proceeding arising out of the fee application. The Board contends these actions violate Tennessee Rules of Professional Conduct 3.3(a)(l), 3.4(b), 8.4(a), and 8.4(c).

A. RULE 1.5: FEES

a. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

The Panel finds that the Board has proven by a preponderance of the evidence that the fee petition submitted by Justice to the District Court requested an unreasonable fee. The fee sought greatly exceeded the time and labor required to locate and depose Ms. Sonner. By including numerous items in the fee petition that far exceeded the scope of the order awarding fees reasonably incurred in locating and deposing Mary Sonner, Justice charged an unreasonable fee in violation of RPC l.5(a), Fees.

B. RULE 3.3: CANDOR TOWARD THE TRIBUNAL

a. A lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal…

The Panel finds that the Board has proven by a preponderance of the evidence that Justice's actions, including adopting work actually performed by Kerschberg as work performed by himself as set forth in the fee petition that was submitted to the federal court under oath, constitutes making a false statement of fact to a tribunal in violation of RPC 3.3(a)(l), Candor Toward the Tribunal.

In addition, by testifying falsely in the show case hearing before Judge Collier that he made no false certifications or false statements in the Fee Petition, personally worked the time attributed to him in the Fee Petition, recorded his time activities in a Microsoft Word document or on a notepad from which they were recorded in the Microsoft Word document later and that he recorded his time and activities within approximately one week of the work being performed constitute false statements of fact to a tribunal in violation of RPC 3.3(a)(l), Candor Toward the Tribunal.

C. RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

a. Falsify evidence, counsel or assist a witness to offer a false or misleading testimony...

The Panel finds that Board has proven by a preponderance of the evidence that Justice's actions in adopting work actually performed by Kerschberg as work performed by himself was the falsification of evidence and constitutes a violation of RPC 3.4(6), Fairness to Opposing Party and Counsel.

D. RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

a. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or

induce another to do so, or do so through the acts of another;

c. engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The Panel finds the Board has proven by a preponderance of the evidence that Justice's actions including adopting work actually performed by Kerschberg as work performed by himself, making false statements in the fee petition, testifying falsely at the show cause hearing and including numerous items in the fee petition that far exceeded the scope of Judge Phillip's order constitute violations of RPC 8.4(a) and (c), Misconduct.

E. ADVERSE INFERENCE

The Board requested the Panel take an adverse inference against Justice due to his assertion of his right not to testify pursuant to the 5th Amendment of the United States Constitution during his deposition. Justice objected to both the Panel being informed that Justice was exercising his 5th Amendment rights and the Board's request that the Panel take an adverse inference.

While recognizing that the Tennessee Supreme Court had called attorney disciplinary proceedings "quasi-criminal" in nature, the Tennessee Supreme Court and Tennessee Supreme Court Rule 9 recognize that these proceedings are civil cases. The Tennessee Supreme Court outlined the parameters

for when the trier of fact may draw an adverse inference from a party's invocation of his Fifth Amendment privilege in civil cases. In *Akers v. Prime Succession of Tennessee, Inc.,* 387 S.W.3d 495 (Tenn. 2012) the Court held:

> [T]he trier of fact may draw a negative inference from a party's invocation of the Fifth Amendment privilege in a civil case only when there is independent evidence of the fact to which a party refuses to answer by invoking his or her Fifth Amendment privilege. In instances when there is no corroborating evidence to support the fact under inquiry, no negative inference is permitted.

In this case, the Board met its burden under *Akers* that would have permitted the Panel to take an adverse inference with respect to the questions asked during the deposition. Nevertheless, the Panel declines to take the adverse inference requested by the Board. The Panel finds the Board met its burden of proof based upon the exhibits, the testimony of Justice and Rickman at the hearing before the Panel, the testimony of Justice during the federal show cause hearing and Kerschberg' s deposition.

F. AGGRAVATING AND MITIGATING CIRCUMSTANCES

When disciplinary violations are

established by a preponderance of the evidence, the appropriate discipline is to be determined upon application of the *ABA Standards for Imposing Lawyer Sanctions* ("ABA Standards"), pursuant to Section 8.4, Rule 9 of the Rules of the Supreme Court. The Panel finds the following aggravating factors are present in this case:

1. A dishonest or selfish motive;
2. Pattern of Misconduct;
3. Multiple offenses;
4. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
5. Refusal to acknowledge wrongful nature of conduct; and
6. Substantial experience in the practice of law.

The Panel finds the following factors in mitigation are present:

1. Absence of a prior disciplinary record; and

2. The imposition of other penalties or sanctions, in the form of Chief District Court Judge Collier's Order in the case of *In re: Loring Justice* which suspended Respondent from the practice of law in the United States District Court for the Eastern District of Tennessee for a period of six (6) months.

G. SPECIFICATION OF DISCIPLINE

Pursuant to Rule 9, §8.4 of the Rules of the

Supreme Court of Tennessee, having found one or more grounds for discipline of the Respondent, the Hearing Panel specifies the following discipline as appropriate:

1. That the Respondent, Loring Edwin Justice, be suspended from the practice of law for a period of one (1) year with proof of rehabilitation to be demonstrated in a reinstatement proceeding pursuant to Rule 9, §4.2 of the Rules of the Supreme Court of Tennessee.

2. That the Respondent, Loring Edwin Justice, be required to complete twelve (12) hours of continuing legal education approved for ethics, in addition to any other continuing legal education requirements, prior to reinstatement.

3. That the costs of these proceedings be taxed to the Respondent, Loring Edwin Justice.

IT IS SO ORDERED.

APPENDIX E

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE v. LORING EDWIN JUSTICE

Chancery Court for Knox County No. 189578-1, 189418-3

No. E2017-01334-SC-R3-BP

Issued: July 22, 2019

ORDER

On July 2, 2019, this Court filed an opinion affirming the trial court's decision disbarring attorney Loring Edwin Justice. Thereafter, Mr. Justice sought and obtained an extension of time to file a petition for rehearing pursuant to Tennessee Rule of Appellate Procedure 39. Mr. Justice timely filed his petition for rehearing on July 19, 2019.

After careful consideration, the petition for rehearing is DENIED. In accordance with Tennessee Supreme Court Rule 9, section 18.5 (2013), Mr. Justice's disbarment shall be effective ten days after the entry of this order. The provisions of this Court's

July 15, 2019 order granting Mr. Justice an extension until August 2, 2019, to comply with Rule 9, section 18.1 and until August 7, 2019, to comply with Rule 9, section 18.8 remain in effect.

It is so ORDERED.

PER CURIAM

APPENDIX F

Tennessee Supreme Court Rule 9 (2012)

MISCONDUCT

Section 1. Jurisdiction

1.1. Any attorney admitted to practice law in this State and any attorney specially admitted by a court of this State for a particular proceeding is subject to the disciplinary jurisdiction of the Supreme Court, the Board of Professional Responsibility, the district committees and hearing panels hereinafter established, and the circuit and chancery court.

1.2. Nothing herein contained shall be construed to deny to any court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit any bar association from censuring, suspending or expelling its members from membership.

Review

1.3. The respondent-attorney (hereinafter "respondent") or the Board may have a review of the judgment of a hearing panel in the manner provided by Tenn. Code Ann. § 27-9-101 et seq., except as otherwise provided herein. A petition filed under this section shall be made under oath or on affirmation and shall state that it is the first application for the writ. See Tenn. Code Ann. §§ 27-8-104(a) and 27-8-106. The review shall be on the transcript of the

evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The court may affirm the decision of the panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the panel's jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact. Either party dissatisfied with the decree of the circuit or chancery court may prosecute an appeal directly to the Supreme Court where the cause shall be heard upon the transcript of the record from the circuit or chancery court, which shall include the transcript of evidence before the hearing panel. Prior decisions of this Court holding that appeal of disciplinary proceedings must be taken to the Court of Appeals because Tenn. Code Ann. § 16-4-108 so requires are expressly overruled.

1.4. An appeal from the recommendation or judgment of a hearing panel must be filed in the circuit or

chancery court of the county wherein the office of respondent was located at the time the charges were filed with the Board.

1.5. The Chief Justice shall designate a trial judge or chancellor, regular or retired, who shall not reside within the geographic boundaries of the chancery division or circuit court wherein the office of the respondent was located at the time the charges were filed with the Board. It shall be this judge's or chancellor's duty to try the case and enter judgment upon the minutes of the circuit or chancery court of the county where the case is heard, and the judgment shall be effective as if the special judge were the regular presiding judge of said court. The duty is imposed upon the clerks and the regular trial judge to promptly notify the Chief Justice of the filing of an appeal in disciplinary cases.

1.6. The judgment of the hearing panel may be stayed in the discretion of the hearing panel, pending any judicial review pursuant to Section 1.3. Upon the filing of a petition for review pursuant to Section 1.3, and in the event the judgment is not stayed by the hearing panel, the trial court in its discretion may stay the hearing panel's judgment upon motion of a party.

The final judgment of the trial court may be stayed in the discretion of the trial court, pending an appeal. In the event the trial court does not issue a stay pending appeal, the Supreme Court may issue a stay upon motion of a party.

Section 2. Disciplinary Districts

Disciplinary jurisdiction in this State shall be divided into the following districts:

District I--the counties of Johnson, Carter, Cocke, Greene, Hancock, Grainger, Jefferson, Sullivan, Washington, Unicoi, Hawkins, Claiborne, Hamblen and Sevier.

District II--the counties of Campbell, Anderson, Roane, Blount, Morgan, Union, Knox, Loudon and Scott.

District III--the counties of Polk, Hamilton, Sequatchie, Bledsoe, Meigs, Monroe, Bradley, Marion, Grundy, Rhea and McMinn.

District IV--the counties of White, Van Buren, Pickett, Putnam, Overton, Clay, Franklin, Moore, Bedford, Rutherford, Wilson, Trousdale, Warren, Fentress, Cumberland, Smith, Jackson, Coffee, Lincoln, Marshall, Cannon, DeKalb and Macon.

District V--the county of Davidson.

District VI--the counties of Giles, Wayne, Lewis, Maury, Humphreys, Cheatham, Montgomery, Robertson, Lawrence, Perry, Hickman, Dickson, Houston, Stewart, Sumner and Williamson.

District VII--the counties of Henry, Carroll, Henderson, Hardeman, Hardin, Benton, Decatur, Chester, Fayette, McNairy and Madison.

District VIII--the counties of Weakley, Lake, Gibson, Haywood, Tipton, Obion, Dyer, Crockett and Lauderdale.

District IX--the county of Shelby.

Section 3. Grounds for Discipline

3.1. The license to practice law in this State is a continuing proclamation by the Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to act at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law.

3.2. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office or the Rules of Professional Conduct of the State of Tennessee 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.

3.3. Conviction of a serious crime shall similarly be grounds for discipline as set forth in Section 14.

3.4. Adjudication that a lawyer has willfully refused to comply with a court order entered in a case in which the lawyer is a party shall be grounds for discipline as set forth in Section 32.

Section 4. Types of Discipline

4.1. Disbarment; or

4.2. Suspension for an appropriate fixed period of time, or for an appropriate fixed period of time and an indefinite period concurrently or thereafter to be determined by the conditions imposed by the judgment. A suspension of less than one year shall not require proof of rehabilitation; a suspension of one year or more shall require proof of rehabilitation to be demonstrated in a reinstatement proceeding. No

suspension shall be ordered for a specific period less than thirty days or in excess of five years. All suspensions regardless of duration shall be public and shall be subject to the provisions of Section 18. The imposition of a suspension for a fixed period of time may be suspended in conjunction with a period of probation ordered pursuant to Section 8.5;

4.3. Temporary Suspension. On petition of the Disciplinary Counsel and supported by an affidavit demonstrating facts personally known to affiant, showing that an attorney has misappropriated funds to the attorney's own use, has failed to respond to the Board or Disciplinary Counsel concerning a complaint of misconduct, has failed to substantially comply with a contract entered into with the Tennessee Lawyer Assistance Program, or otherwise poses a threat of substantial harm to the public, the Supreme Court may issue an order with such notice as the Court may prescribe imposing temporary conditions of probation on said attorney or temporarily suspending said attorney, or both.

Any order of temporary probation which restricts the attorney maintaining a trust account shall, when served on any bank maintaining an account against which said attorney may make withdrawals, serve an injunction to prevent said bank from making further payment from such account or accounts on any obligation except in accordance with restrictions imposed by the Court. Any order of temporary suspension issued under this rule shall preclude the attorney from accepting any new cases but shall not preclude such attorney from continuing to represent existing clients during the first 30 days after issuance of such temporary order; however, any fees tendered

to such attorney during such 30 period shall be deposited in a trust fund from which withdrawals may be made only in accordance with restrictions imposed by the Court.

The attorney may for good cause request dissolution or amendment of any such temporary order by petition filed with the Supreme Court, a copy of which will be served on the Disciplinary Counsel. Such petition for dissolution shall be set for immediate hearing before the Board of Professional Responsibility or a panel of three members, at least two of whom shall be members of the Board of Professional Responsibility and one of whom may be a district committee member from the same disciplinary district as the respondent, designated by the Chair of the Board, or, in the Chair's absence, the Vice-Chair. No more than one non-lawyer Board member may serve on the panel. The Board or its designated panel shall hear such petition forthwith and submit its report and recommendation to the Supreme Court with the utmost speed consistent with due process. Upon receipt of the foregoing report, the Supreme Court shall modify its order if appropriate and continue such provision of the order as may be appropriate until final disposition of all pending disciplinary charges against said attorney;

4.4. Public Censure; or

4.5. Private Reprimand; or

4.6. Private informal admonition.

4.7. Restitution. Upon order of a hearing panel or court, or upon stipulation of the parties, and in addition to any other type of discipline imposed, the respondent may be required to make restitution to

persons or entities financially injured as a result of the respondent's misconduct.

Section 5. The Board of Professional Responsibility of the Supreme Court of Tennessee

5.1. The Supreme Court shall appoint a twelve member Board to be known as "The Board of Professional Responsibility of the Supreme Court of Tennessee" (hereinafter referred to as the "Board") which shall consist of:

(a) Three resident lawyers admitted to practice in this state and one public (non-lawyer) member appointed for an initial term of three years; and

(b) Three resident lawyers admitted to practice in this state and one public member appointed for an initial term of two years; and

(c) Three resident lawyers admitted to practice in this state and one public member appointed for an initial term of one year.

Subsequent terms of all members shall be for three years. No member shall serve for more than two consecutive three-year terms. Vacancies shall be filled by the Supreme Court. There shall be one lawyer member from each disciplinary district. There shall be one public member from each of the three grand divisions of the state.

5.2. The Supreme Court shall designate one member as Chair of the Board and another member as Vice-Chair.

5.3. The Board shall act only with the concurrence of seven or more members. Seven members shall constitute a quorum. Decisions of the Board to appeal

from the judgment of a hearing panel or of a trial judge, as provided in Section 1.3, may be made in accord with the following procedure. If Disciplinary Counsel recommends an appeal and time restraints are such that a regular or special meeting of the Board is impractical, Disciplinary Counsel shall circulate to the members of the Board in writing the reasons for the recommendation supported by a factual report. Board members may communicate their vote for or against appeal by telephone, facsimile, telegraph, or regular mail. Any member of the Board may request that Disciplinary Counsel convene a telephone conference of the Board, whereupon such conference must be convened with at least a quorum so conferring. An affirmative vote of seven (7) members of the Board shall be necessary to authorize an appeal. If an appeal has been authorized by the foregoing procedure, any member of the Board may demand that the question of whether or not the appeal should be dismissed be placed upon the agenda for consideration at any regular meeting of the Board or special meeting convened for other business.

5.4. Members shall receive no compensation for their services but may be reimbursed for their travel and other expenses incidental to the performance of their duties.

5.5. The Board shall exercise the powers and perform the duties conferred and imposed upon it by these disciplinary rules, including the power and duty:

(a) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be

appropriate to effectuate the purposes of these disciplinary rules.

(b) To adopt written guidelines to ensure the efficient and timely resolution of complaints, investigations, and formal proceedings, which guidelines shall be approved by the Court, and to monitor Disciplinary Counsel's and the hearing panels' continuing compliance with those guidelines. The Board shall quarterly file a report with the Court demonstrating substantial compliance with the guidelines.

(c) To assign members of the district committees appointed within each disciplinary district to conduct disciplinary hearings and to review and approve or modify recommendations by Disciplinary Counsel for dismissals or informal admonitions.

(d) To review, upon application by Disciplinary Counsel, a determination by the reviewing member of a district committee that a matter should be concluded by dismissal or by private informal admonition without the institution of formal charges.

(e) To privately reprimand attorneys for misconduct.

(f) To adopt rules of procedure not inconsistent with these rules.

(g) The Board shall, to the extent it deems feasible, consult with officers of local bar associations concerning any appointment it is authorized to make under these rules.

Section 6. District Committees

6.1. The Supreme Court shall appoint one district committee within each disciplinary district. Each district committee shall consist of not less than five members, nor more than thirty members of the bar of

this state who maintain an office for the practice of law within that district or, if not actively engaged in the practice of law, reside within that district. Members of district committees may be recommended by the Board of Professional Responsibility, or the president or board of directors of the local bar associations in each district.

6.2. Terms of members of each district committee shall be for three years, and such terms shall be staggered so that one third of the members rotate off the committee each year; provided that shorter terms may be designated where necessary to observe the above rotation practice. Members whose terms have expired shall continue to serve with respect to any formal hearing commenced prior to the expiration of their terms until the conclusion of such hearing, regardless of whether their successors have been appointed. A member who has served two consecutive three-year terms may be reappointed after the expiration of one year.

6.3. A member of the district committee shall approve or modify recommendations by Disciplinary Counsel for dismissals and informal admonitions.

6.4. Formal hearings upon charges of misconduct shall be conducted by a hearing panel consisting of three district committee members designated by the Board pursuant to Section 8.2. Such panel shall submit its findings and judgment to the Board. Each hearing panel shall elect its own Chair. The hearing panel shall act only with the concurrence of a majority of its members.

6.5. District committee members, whether acting as a reviewing committee member or as a hearing panel

member, shall not take part in any matter in which a judge, similarly situated, would have to recuse himself or herself.

Section 7. Disciplinary Counsel

7.1. The Court shall appoint a lawyer admitted to practice in the state to serve as chief Disciplinary Counsel, who shall serve at the pleasure of the Court. Following his or her appointment by the Court, the chief Disciplinary Counsel shall report to the Board, which shall conduct regular performance evaluations of the chief Disciplinary Counsel and report such evaluations to the Court. Neither the chief Disciplinary Counsel nor full-time staff Disciplinary Counsel shall engage in private practice; however, the Board and the Court may agree to a reasonable period of transition after appointment.

7.2. Disciplinary Counsel shall have the power and duty:

(a) With the approval of the Board, to employ and supervise staff needed for the performance of counsel's duties.

(b) To investigate all matters involving possible misconduct.

(c) To dispose of all matters involving alleged misconduct by either dismissal, informal admonition, or the prosecution of formal charges before a hearing panel. Except in matters requiring dismissal because the complaint is frivolous and clearly unfounded on its face or falls outside the Board's jurisdiction, no disposition shall be recommended or undertaken by Disciplinary Counsel until the accused attorney shall have been afforded the opportunity to state a position with respect to the allegations against the attorney.

(d) To prosecute in a timely manner all disciplinary proceedings and proceedings to determine incapacity of attorneys before hearing panels, trial courts, and the Supreme Court.

(e) To investigate, file pleadings, and appear at hearings conducted with respect to petitions for reinstatement of suspended or disbarred attorneys or attorneys transferred to inactive status because of disability, or with respect to petitions for voluntary surrenders of law licenses, and to cross-examine witnesses testifying in support of any such petitions, and to marshal and present available evidence, if any, in opposition thereto.

(f) To file with the Supreme Court certificates of conviction of attorneys for crimes.

(g) To maintain permanent records of all matters processed and the disposition thereof.

(h) To give advisory ethics opinions to members of the bar pursuant to Section 26.

(i) To implement the written guidelines adopted by the Board and approved by the Court pursuant to Section 5.5(b), and to file reports with the Board on a monthly basis demonstrating Disciplinary Counsel's substantial compliance with the guidelines.

PROCEDURE

Section 8. Investigation

8.1. All complaints must be submitted in writing. The Board, however, is authorized to investigate information coming from a source other than a written complaint if the Board deems the information sufficiently credible or verifiable through objective

means. The Board shall provide the respondent with a complete copy of the original complaint.

All investigations, whether upon complaint or otherwise, shall be initiated and conducted by Disciplinary Counsel. Upon the conclusion of an investigation, Disciplinary Counsel may recommend dismissal, informal admonition of the attorney concerned, or a private reprimand, public censure or prosecution of formal charges before a hearing panel.

If the recommended disposition is dismissal or informal admonition, it shall be reviewed by the reviewing member of the district committee in the appropriate disciplinary district who may approve or modify it. Disciplinary Counsel may appeal to the Board the action of the district committee member.

If the recommended disposition is private reprimand, public censure, or prosecution of formal charges before a hearing panel, the Board shall review the recommendation and approve or modify it. The Board may determine whether a matter should be concluded by dismissal or informal admonition; may recommend a private reprimand or public censure; or, may direct that a formal proceeding be instituted before a hearing panel in the appropriate disciplinary district and assign it to a hearing panel for that purpose.

A respondent shall not be entitled to appeal an informal admonition approved by the reviewing district committee member or imposed by the Board; similarly, a respondent may not appeal a recommended private reprimand or public censure by the Board. In either case, however, the respondent may, within twenty (20) days of notice thereof, demand as of right that a formal proceeding be

instituted before a hearing panel in the appropriate disciplinary district. In the event of such demand, the informal admonition shall be vacated or the recommended private reprimand or public censure shall be withdrawn, and the matter shall be disposed of in the same manner as any other formal hearing instituted before a hearing panel.

If Disciplinary Counsel's recommended disposition is dismissal or informal admonition, and if that recommended disposition is approved by the reviewing member of the district committee in the appropriate disciplinary district, notice of the disposition shall be provided by Disciplinary Counsel to the complainant. A complainant who is not satisfied with the disposition of the matter may appeal in writing to the Board within thirty (30) days of receipt of notice of the reviewing member's approval of the recommended disposition. The Board may approve, modify or disapprove the disposition, or direct that the matter be investigated further.

Formal Hearing

8.2. Formal disciplinary proceedings before a hearing panel shall be instituted by Disciplinary Counsel by filing with the Board a petition which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A petition to initiate a formal disciplinary proceeding shall not include allegations of any private discipline previously imposed against the respondent.

A copy of the petition shall be served upon the respondent. The respondent shall serve an answer upon Disciplinary Counsel and file the original with the Board within 20 days after the service of the

petition, unless such time is extended by the Chair. In the event the respondent fails to answer, the charges shall be deemed admitted; provided, however, that a respondent who fails to answer within the time provided may obtain permission of the Chair to file an answer if such failure to file an answer was attributable to mistake, inadvertence, surprise or excusable neglect. At the time of filing of the answer to the petition, the respondent shall simultaneously file a completed Licensing Information Statement in the form adopted by the Board of Professional Responsibility.

Following the service of the answer or upon failure to answer, the matter shall be assigned by the Chair to a hearing panel. In assigning the members of the hearing panel, the Chair shall select them on a rotating basis from the members of the district committee in the district in which the respondent practices law; if there is an insufficient number of committee members in that district who are able to serve on the hearing panel, the Chair may appoint one or more members from the district committee of an adjoining district to serve on the panel.

If there are any issues of fact raised by the pleadings or if the respondent requests the opportunity to be heard, the hearing panel shall serve a notice of hearing upon Disciplinary Counsel and the respondent, or the respondent's counsel, stating the date and place of the hearing at least 15 days in advance thereof. The notice of hearing shall advise the respondent that the respondent is entitled to be represented by counsel, to cross-examine witnesses and to present evidence in the respondent's own behalf.

In a hearing panel's hearing on the petition, Disciplinary Counsel may submit evidence of prior discipline against the respondent, including prior private discipline, as an aggravating circumstance. Such evidence may be introduced to the extent it is otherwise admissible under the Tennessee Rules of Evidence. Pursuant to Section 25.4, the respondent may apply for a protective order concerning the admission of evidence of prior private discipline.

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

8.3. The hearing panel shall, in every case, submit its findings and judgment, in the form of a final decree of a trial court, to the Board within 15 days after the conclusion of its hearing. The hearing panel's judgment shall contain a notice that the judgement may be appealed pursuant to Section 1.3 of this Rule by filing a petition for writ of certiorari, which petition shall be made under oath or affirmation and shall state that it is the first application for the writ. See Tenn. Code Ann. §§ 27-8-104(a) and 27-8-106. The Board shall immediately serve a copy of the findings and judgment of the hearing panel upon the respondent and the respondent's counsel of record. Any petition for certiorari therefrom must be filed in the circuit or chancery court having jurisdiction within 60 days of the mailing or service of such judgment.

8.4. If the hearing panel finds one or more grounds for discipline of the respondent, the panel's judgment shall specify the type of discipline imposed: disbarment (Section 4.1), suspension (Section 4.2), or public censure (Section 4.4). In the discretion of the

hearing panel, the imposition of a suspension for a fixed period of time (Section 4.2) may be suspended in conjunction with a period of probation ordered pursuant to Section 8.5. In addition to imposing one of the foregoing types of discipline, the hearing panel may order restitution (Section 4.7). Temporary suspension (Section 4.3), private reprimand (Section 4.5), and private informal admonition (Section 4.6) are not available types of discipline following a formal disciplinary proceeding. In determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the ABA Standards for Imposing Lawyer Sanctions.

If the judgment of the hearing panel is that the respondent shall be disbarred or suspended for any period of time in excess of three months and no appeal therefrom is perfected within the time allowed therefor, or if there is a settlement providing for a disbarment or suspension for any period of time in excess of three months, at any stage of disciplinary proceedings, the Board shall forward a copy of the judgment or settlement to the Supreme Court of Tennessee. The Court shall review the recommended punishment provided in such judgment or settlement with a view to attaining uniformity of punishment throughout the state and appropriateness of punishment under the circumstances of each particular case. The Court may direct that the transcript or record of any proceeding be prepared and filed with the Court for its consideration.

If the Court finds that the punishment appears to be inadequate or excessive, it shall issue an order advising the Board and the respondent that it proposes to increase or to decrease the punishment. If

the Court proposes to increase the punishment, the respondent attorney shall have twenty (20) days from the date of the order to file a brief and request oral argument; if the proposal is to decrease the punishment, the Board shall have twenty (20) days within which to file a brief and request oral argument. Reply briefs shall be due within twenty (20) days of the filing of the brief of the party upon whom the burden of persuasion rests. If oral argument is requested it shall be promptly granted. Upon termination of such proceedings as are requested the Court may modify the judgment of the hearing panel or the settlement in such manner as it deems appropriate.

If the judgment of a hearing panel is appealed to the circuit or chancery court and the trial court enters a judgment disbarring or suspending respondent for any period of time in excess of three (3) months and no appeal therefrom is perfected within the time allowed therefor, the trial court shall forward a copy of its judgment to the office of the clerk of the Supreme Court in the grand division in which the respondent maintains or maintained an office for the practice of law, and this Court shall enter an order of enforcement of said decree.

All other decrees of hearing panels or trial courts shall be duly recorded in permanent records to be maintained by the Board, and shall have the force and effect of an order of this Court. Should any respondent fail to fully comply with such decree, the Board shall immediately forward the decree of this Court for enforcement together with a report of noncompliance.

8.5. Probation. In the discretion of the hearing panel or a reviewing court, the imposition of a suspension

for a fixed period (Section 4.2) may be suspended in conjunction with a fixed period of probation. The conditions of probation shall be stated in writing in the judgment of the hearing panel or court. Probation shall be used only in cases where there is little likelihood that the respondent will harm the public during the period of rehabilitation and where the conditions of probation can be adequately supervised. A probation monitor may be designated to supervise the respondent's compliance with the conditions of probation. The respondent shall pay the costs associated with probation, including without limitation a reasonable fee for the probation monitor.

In the event the respondent violates or otherwise fails to meet any condition of probation, Disciplinary Counsel is authorized to file a petition to revoke probation. Upon the filing of such a petition, a revocation hearing shall be conducted in the same manner as a hearing on a petition to initiate a formal disciplinary proceeding filed pursuant to Section 8.2. The only issue in such a proceeding is whether probation is to be revoked; the original judgment imposing the fixed period of probation may not be reconsidered.

Probation shall terminate upon the expiration of the fixed period of probation. Probation may be terminated earlier by the tribunal (hearing panel or court) which imposed the period of probation upon the filing of a motion and an affidavit by respondent showing compliance with all the conditions of probation and an affidavit by the probation monitor, if one is designated, stating that probation is no longer necessary and summarizing the basis for that statement. Disciplinary Counsel shall file a response

to any such motion to terminate probation. The tribunal may conduct whatever hearings are necessary to decide the motion to terminate probation. The tribunal's ruling on the motion may be appealed pursuant to Section 1.3.

Section 9. Complaints Against Board Members, District Committee Members, or Disciplinary Counsel

9.1. (a) Complaints against Disciplinary Counsel or a district committee member alleging violations of the Attorney's Oath of Office or the Rules of Professional Conduct shall be submitted directly to the Board.

(b) Disagreement with the official decision of Disciplinary Counsel, a hearing panel, or a district committee member, taken in the course and scope of their responsibilities, shall not be grounds for the filing of a disciplinary complaint.

9.2. (a) Complaints against attorney members of the Board alleging violations of the Attorney's Oath of Office or the Rules of Professional Conduct shall be submitted directly to the Chief Justice of the Supreme Court.

(b) Disagreement with the official decision of the Board or a member, taken in the course and scope of their responsibilities, shall not be grounds for the filing of a disciplinary complaint.

9.3. Nothing herein contained shall be deemed to exempt any attorney admitted to practice in the State of Tennessee from complaints which present a violation of the Attorney's Oath of Office or the Rules of Professional Conduct.

9.4. The investigations of complaints submitted under Section 9.2 of Rule 9 against attorney members of the Board shall proceed in accordance with the procedures contained in Section 8 of Rule 9, with the following modifications:

(a) A special Disciplinary Counsel, whom the Chief Justice shall appoint, shall take the place and perform all of the functions of Disciplinary Counsel set forth in Section 8.1 of Rule 9, including all investigations, whether upon complaint or otherwise. Upon conclusion of an investigation, special Disciplinary Counsel may recommend dismissal, informal admonition of the attorney concerned, or a private reprimand, public censure, or prosecution of formal charges before a special hearing panel.

(b) One member of the Court, whom the Chief Justice shall designate, shall take the place and perform all of the functions of the Board in all investigations and proceedings governed by Rule 9, including the review of recommendations of dismissal or informal admonition of the attorney concerned, or a private reprimand, public censure or prosecution of formal charges, pursuant to section 8.1. The member so designated shall not participate with the Court in any subsequent proceedings in the same case.

(1) If special Disciplinary Counsels recommendation is dismissal or informal admonition, it shall be reviewed by the designated member of the Court (reviewing justice), who may approve or modify it. If the recommendation is approved by the reviewing justice, notice of the disposition shall be provided by special Disciplinary Counsel to the complainant. A complainant who is not satisfied with the disposition of the matter may appeal in writing to the Chief

Justice within thirty (30) days of receipt of notice of the reviewing justices approval of the recommended disposition. The Court may approve, modify, or disapprove the disposition, or direct that the matter be investigated further.

(2) If the recommended disposition is private reprimand, public censure, or prosecution of formal charges before a special hearing panel, the reviewing justice shall review the recommendation and shall approve, disapprove, or modify it. The reviewing justice may determine whether a matter should be concluded by dismissal or informal admonition; may approve or impose a private reprimand or public censure; or may direct that a formal proceeding be instituted before a special hearing panel.

(3) The respondent shall not be entitled to appeal an informal admonition approved by the reviewing justice; similarly, a respondent may not appeal a private reprimand or public censure approved or imposed by the reviewing justice. In either case, however, the respondent may, within twenty (20) days of notice thereof, demand as of right that a formal proceeding be instituted before a special hearing panel. In the event of such demand, the informal admonition shall be vacated or the recommended private reprimand or public censure shall be withdrawn, and the matter shall be disposed of in the same manner as any other formal hearing instituted before a hearing panel.

(c) If the recommendation, as approved or modified by the designated member of the Court, includes the institution of formal proceedings before a hearing panel, or if the attorney demands in writing to the Chief Justice such formal proceedings as of right, then

the Chief Justice shall at that time appoint three persons to act as a special hearing panel. The special hearing panel shall take the place and perform all of the functions of the hearing panel as provided in Sections 6 and 8 of Rule 9. The special Disciplinary Counsel shall continue to perform the functions of Disciplinary Counsel and shall proceed in accordance with the provisions of Rule 9 governing formal proceedings.

(d) The respondent or special Disciplinary Counsel may obtain review of the judgment of the special hearing panel as provided in Sections 1.3, 1.4, 1.5, and 8.3 of Rule 9.

Section 10. Refusal of Complainant to Proceed, Compromise, etc.

Neither unwillingness nor neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement or compromise between the complainant and the attorney or restitution by the attorney, shall, in itself, justify abatement of the processing of any complaint.

Section 11. Matters Involving Related Pending Civil or Criminal Litigation

Processing of disciplinary complaints shall not be deferred or abated because of substantial similarity to the material allegations made in other pending criminal or civil litigation or because the substance of the complaint relates to the respondent's alleged conduct in pending litigation, unless authorized by the Board in its discretion, for good cause shown.

Section 12. Service

12.1. Service upon the respondent of the petition in any disciplinary proceeding shall be made by personal service by any person authorized by the Chair of the Board, or by registered or certified mail at the address shown in the most recent registration statement filed by respondent pursuant to Section 20.5 or other last known address.

12.2. Service of any other papers or notices required by these Rules shall, unless otherwise provided by these Rules, be made in accordance with Rule 5.02, Tennessee Rules of Civil Procedure.

Section 13. Subpoena Power, Witnesses and Pre-trial Proceedings

13.1. Any member of a hearing panel in matters before it, and Disciplinary Counsel in matters under investigation, may administer oaths and affirmations and may obtain from the circuit or chancery court having jurisdiction subpoenas to compel the attendance of witnesses and the production of pertinent books, papers and documents. A respondent may, similarly, obtain subpoenas to compel the attendance of witnesses and the production of pertinent books, papers and documents before a hearing panel after formal disciplinary proceedings are instituted.

13.2. Subpoenas shall clearly indicate on their face that the subpoenas are issued in connection with a confidential investigation under these Rules and that it may be regarded as contempt of the Supreme Court or grounds for discipline under these Rules for a person subpoenaed to in any way breach the confidentiality of the investigation. The scope of the confidentiality of the investigation shall be governed

by Section 25. It shall not be regarded as a breach of confidentiality for a person subpoenaed to consult with an attorney.

13.3. The circuit or chancery court in which the attendance or production is required may, upon proper application, enforce the attendance and testimony of any witness and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as in the courts of this state.

13.4. Any attack on the validity of a subpoena so issued shall be heard and determined by the court wherein enforcement of the subpoena is being sought.

13.5. Discovery proceedings by the respondent-attorney, prior to institution of proceedings for a formal hearing, may be had upon the order of the Chair of the Board for good cause shown.

13.6. A pre-hearing conference shall be held within sixty (60) days of the filing date of any petition commencing a formal proceeding. The pre-hearing conference shall be conducted by the chair of the assigned hearing panel and at least one other member of the panel, but it may be conducted via telephone or video conference. In the pre-hearing conference, the panel shall schedule deadlines for discovery, the filing of motions, and the exchange of witness and exhibit lists, and it also shall set the trial date. The panel may discuss with and accept from the parties stipulations of fact and/or stipulations regarding the authenticity of documents and exhibits, may narrow the issues presented by the pleadings, and may address any other matter the panel deems appropriate in the management of the proceeding. Subsequent pre-

hearing conferences may be held in the discretion of the panel, acting on its own initiative or upon motion of a party. Within five (5) days of each pre-hearing conference, the chair of the hearing panel shall file an order reciting the actions taken by the panel during the conference, including any deadlines imposed and the date set for trial.

13.7. With the approval of the hearing panel, testimony may be taken by deposition or by interrogatories if the witness is not subject to service or subpoena or is unable to attend or testify at the hearing because of age, illness or other infirmity. A complete record of the testimony so taken shall be made and preserved, but need not be transcribed unless needed for appeal or certiorari.

13.8. The subpoena and deposition procedures shall be subject to the protective requirements of confidentiality provided in Section 25.

Section 14. Attorneys Convicted of Crimes

14.1. Upon the filing with the Supreme Court of a certificate demonstrating that an attorney who is a defendant in a criminal case involving a serious crime, as defined in Section 14.2 herein, has entered a plea of nolo contendere or a plea of guilty or has been found guilty by verdict of the jury, or the trial court sitting without a jury, the Court shall enter an order immediately suspending the attorney. Such suspension shall take place regardless of the pendency of a motion for new trial or other action in the trial court and regardless of the pendency of an appeal. Such suspension shall remain in effect pending final disposition of a disciplinary proceeding to be commenced upon such finding of guilt.

14.2. The term "serious crime" shall include any felony under the laws of Tennessee and any other crime a necessary element of which as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

14.3. A certificate of a conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.

14.4. Upon the receipt of a certificate of conviction of an attorney for a serious crime, the Court shall, in addition to suspending the attorney in accordance with the provisions of Section 14.1 of this Rule, also refer the matter to the Board for the institution of a formal proceeding before a hearing panel in which the sole issue to be determined shall be the extent of the final discipline to be imposed, provided that a disciplinary proceeding so instituted will not be brought to hearing until all appeals from the conviction are concluded.

14.5. Upon receipt of a certificate of a conviction of an attorney for a crime not constituting a serious crime, the Court shall refer the matter to the Board for whatever action it may deem warranted, including the institution of an investigation by Disciplinary Counsel, or a formal proceeding before a hearing panel, provided, however, that the Court may in its discretion make no reference with respect to convictions for minor offenses.

14.6. An attorney suspended under the provisions of Section 14.1 of this Rule will be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed but the reinstatement will not terminate any formal proceeding then pending against the attorney, the disposition for which shall be determined by the hearing panel and the Board on the basis of the available evidence.

14.7. The clerk of any court in this state in which an attorney is convicted of a crime shall within ten days of said conviction transmit a certificate thereof to this Court.

14.8. Upon being advised that an attorney subject to the disciplinary jurisdiction of this Court has been convicted of a crime, Disciplinary Counsel shall determine whether the clerk of the court where the conviction occurred has forwarded a certificate to this Court in accordance with the provision of Section 14.7 of this Rule. If the certificate has not been forwarded by the clerk or if the conviction occurred in another jurisdiction, it shall be the responsibility of the Disciplinary Counsel to obtain a certificate of the conviction and to transmit it to this Court.

14.9. An order suspending an attorney from the practice of law pursuant to this Rule shall not constitute a suspension of the attorney for the purpose of Section 18 unless this Court shall so order.

Section 15. Disbarment by Consent of Attorneys Under Disciplinary Investigation or Prosecution

15.1. An attorney who is the subject of an investigation into, or a pending proceeding involving,

allegations of misconduct may consent to disbarment, but only by delivering to the Board an affidavit stating that such attorney desires to consent to disbarment and that:

(a) The attorney's consent is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress; the attorney is fully aware of the implications of submitting consent;

(b) The attorney is aware that there is a presently pending investigation into, or proceeding involving allegations that there exist grounds for discipline the nature of which the attorney shall specifically set forth;

(c) The attorney acknowledges that the material facts so alleged are true; and,

(d) The attorney consents because the attorney knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, no successful defense could be made.

15.2. Upon receipt of the required affidavit, the Board shall file it with this Court and this Court shall enter an order disbarring the attorney on consent.

15.3. The order disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of 15.1(a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of this Court.

Section 16. Discipline by Consent

16.1. An attorney against whom formal charges have been served may at any stage of the proceedings before the Board, hearing panel or trial court,

thereafter tender a conditional guilty plea to the petition or to a particular count thereof in exchange for a stated form of punishment. Such a tendered plea shall be submitted to Disciplinary Counsel and approved or rejected by the Board upon recommendation of the hearing panel if the matter has been assigned for hearing, or shall be approved or rejected by the trial court if a petition for certiorari has been filed; subject, however, in either event, to final approval or rejection by this Court if the stated form of punishment includes disbarment, suspension or public reprimand.

16.2. A continuance in a hearing panel proceeding, or before a trial court, on the basis of such a tender shall be granted only with the concurrence of Disciplinary Counsel. Approval of such a tendered plea by the Board or trial court and, if required, by this Court shall divest the hearing panel or trial court of further jurisdiction. The final order of discipline shall be predicated upon the petition and an approved tendered conditional guilty plea.

Section 17. Reciprocal Discipline

17.1. All attorneys subject to the provisions of this Rule shall, upon being subjected to professional disciplinary action in another jurisdiction, promptly inform Disciplinary Counsel of such action. Upon being informed that an attorney subject to the provisions of these Rules has been subjected to discipline in another jurisdiction, Disciplinary Counsel shall obtain a certified copy of such disciplinary order and file the same with the Board and with this Court.

17.2. Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this State has been disciplined in another jurisdiction, this Court shall forthwith issue a notice directed to the attorney containing:

(a) A copy of said order from the other jurisdiction; and

(b) An order directing that the attorney inform the Court, within 30 days from service of the notice, of any claim by the attorney predicated upon the grounds set forth in Section 17.4 hereof that the imposition of the identical discipline in this state would be unwarranted and the reasons therefor.

17.3. In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this state shall be deferred until such stay expires.

17.4. Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of 17.2 above, this Court shall impose the identical discipline unless Disciplinary Counsel or the attorney demonstrates, or this Court finds that upon the face of the record upon which the discipline is predicated it clearly appears:

(a) That the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) That there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duty, accept as final the conclusion on that subject; or

(c) That the misconduct established warrants substantially different discipline in this state.

Where this Court determines that any of said elements exist, this Court shall enter such other order as it deems appropriate.

17.5. In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this state.

Section 18. Notice to Clients, Adverse Parties, and Other Counsel

18.1. Recipients of Notice; Contents. Within ten days after the date of the order of this Court imposing discipline, transfer to disability inactive status, or interim suspension, a respondent lawyer who has been disbarred, suspended, transferred to disability inactive status, or placed on interim suspension pursuant to Section 4.3 of this rule, shall notify or cause to be notified by registered or certified mail, return receipt requested,

(a) all clients being represented in pending matters;

(b) all co-counsel in pending matters; and

(c) all opposing counsel in pending matters, or in the absence of opposing counsel, the adverse parties, of the order of the Court and that the lawyer is therefore disqualified to act as lawyer after the effective date of the order. The notice to be given to the lawyer(s) for an adverse party, or, in the absence of opposing counsel, the adverse parties, shall state the last known address of the client of the respondent.

18.2. Special Notice. The Court may direct the issuance of notice to such financial institutions or

others as may be necessary to protect the interests of clients or other members of the public.

18.3. Duty to Maintain Records. The respondent shall keep and maintain records of the steps taken to accomplish the requirements of Sections 18.1 and 18.2 and shall make those records available to the Disciplinary Counsel on request.

18.4. Return of Client Property. The respondent shall deliver to all clients any papers or other property to which they are entitled and shall notify them and any counsel representing them of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property.

18.5. Effective Date of Order; Refund of Fees. Orders imposing disbarment, suspension, or transfers to disability inactive status are effective on a date ten days after the date of the order, except where the Court finds that immediate disbarment, suspension, or interim suspension is necessary to protect the public. The respondent shall refund within ten days after entry of the order any part of any fees, expenses, or costs paid in advance that has not been earned or expended, unless the order directs otherwise.

18.6. Withdrawal from Representation. In the event another lawyer does not become attorney of record on behalf of the client before the effective date of the disbarment, suspension, or interim suspension, it shall be the responsibility of the respondent to move in the court or agency in which the proceeding is pending for leave to withdraw. The respondent shall in that event file with the court, agency, or tribunal before which the litigation is pending a copy of the

notice to opposing counsel or adverse parties, including the place of residence and all mailing addresses of the client of the respondent.

18.7. New Representation Prohibited. Prior to the effective date of the order, if not immediately, the respondent shall not undertake any new legal matters. Upon the effective date of the order, the respondent shall not maintain a presence or occupy an office where the practice of law is conducted. The respondent shall take such action as is necessary to cause the removal of any indicia of lawyer, counselor at law, legal assistant, law clerk, or similar title.

18.8. Affidavit Filed with Board. Within ten days after the effective date of the disbarment or suspension order, order of transfer to disability inactive status, or interim suspension, the respondent shall file with the Board of Professional Responsibility an affidavit showing:

(a) Compliance with the provisions of the order and with these rules;

(b) All other state, federal, and administrative jurisdictions to which the lawyer is admitted to practice;

(c) Place of residence and all addresses where communications may thereafter be directed; and

(d) Service of a copy of the affidavit upon Disciplinary Counsel, which shall include proof of compliance with § 18.1.

18.9. Reinstatement. Proof of compliance with these rules shall be a condition precedent to any petition for reinstatement.

18.10. Publication of Notice. The Board shall cause a notice of the disbarment, suspension, disability inactive status, or interim suspension to be given to all state judges, to a newspaper of general circulation in each county in which the respondent attorney maintained an office for the practice of law, and in such other publications as the Board may determine to be appropriate.

Section 19. Reinstatement

19.1. No attorney suspended for one year or more or disbarred may resume practice until reinstated by order of the Supreme Court, except as provided in Section 20.4. Any attorney suspended for less than one year and an indefinite period to be determined by the conditions imposed by the judgment may resume practice without reinstatement after filing an affidavit with the Board showing that the attorney has fully complied with the conditions imposed by the judgment. Any attorney suspended for less than one year with no conditions imposed may resume practice without reinstatement.

19.2. A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least five years from the effective date of the disbarment.

19.3. Petitions for reinstatement by a disbarred or suspended attorney shall be filed under this Rule, regardless when or under what procedure the suspension or disbarment occurred. The qualifications and requirements for reinstatement existing when the suspension was entered shall apply to any subsequent reinstatement proceeding. No application for reinstatement shall be filed more than 90 days prior

to the time eligible for reinstatement. Such petitions shall be filed with the Board and served upon Disciplinary Counsel promptly. Upon receipt of the petition, Disciplinary Counsel shall investigate the matter and file a responsive pleading to the petition. The Board shall promptly refer the petition to a hearing panel in the disciplinary district in which the petitioner maintained an office at the time of the disbarment or suspension. The hearing panel shall schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that the attorney has the moral qualifications, competency and learning in law required for admission to practice law in this state and that the resumption of the practice of law within the state will not be detrimental to the integrity and standing of the bar or the administration of justice, or subversive to the public interest. The hearing panel shall within 30 days file a report containing its findings and decision and transmit same, together with the record, to the Board. Either party dissatisfied with the hearing panel's decision may obtain review thereof, as provided in Section 1.3 hereof.

19.4. If it is the decision of the hearing panel that petitioner be reinstated, the Board shall review the record and within 60 days either appeal as provided in Section 1.3 hereof or transmit to this Court the record of the proceedings before the hearing panel together with its report approving same. This Court will take such action upon the record so transmitted as it deems appropriate. No attorney will be reinstated except by order of this Court.

19.5. In all proceedings upon a petition for reinstatement, cross-examination of the respondent-

attorney's witnesses and the submission of evidence, if any, in opposition to the petition shall be conducted by Disciplinary Counsel.

19.6. Petitions for reinstatement under this Rule shall be accompanied by an advance cost deposit in an amount to be set from time-to-time by the Board to cover anticipated costs of the reinstatement proceeding. All advance cost deposits collected hereunder shall be deposited by the Board of Professional Responsibility with the State Treasurer; all such funds including earnings on investments and all interest and proceeds from said funds, if any, are deemed to be, and shall be designated as, funds belonging solely to the Board of Professional Responsibility. Withdrawals from those funds shall only be made by the Board of Professional Responsibility to cover costs of reinstatement proceedings, and reimbursement of advance cost deposits not expended. Such advance cost deposit funds shall be maintained, managed, and administered solely and exclusively by the Board of Professional Responsibility.

19.7. If the petitioner is found unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found fit to resume the practice of law, the judgment shall reinstate the petitioner; provided, however, that the judgment may make such reinstatement conditional upon the payment of all or part of the costs of the proceeding, and upon the making of partial or complete restitution to parties harmed by the petitioner's misconduct which led to the suspension or disbarment; and the reinstatement may be conditioned upon the furnishing of such proof of competency as may be required by the judgment, in

the discretion of the Supreme Court, which proof may include certification by the Board of Law Examiners of the successful completion of examination for admission to practice.

19.8. Successive Petitions. No petition for reinstatement under this Rule shall be filed within three years following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same person.

Section 20. Periodic Assessment of Attorneys

20.1. Every attorney admitted to practice before this Court, except those exempt under 20.2, shall pay to the Board of Professional Responsibility on or before the first day of the attorney's birth month an annual fee for each year beginning January 1, 2012.

All funds collected hereunder shall be deposited by the Board of Professional Responsibility with the State Treasurer; all such funds including earnings on investments and all interest and proceeds from said funds, if any, are deemed to be, and shall be designated as, funds belonging solely to the Board of Professional Responsibility. Withdrawals from those funds shall be made by the Board of Professional Responsibility only for the purpose of defraying the costs of disciplinary administration and enforcement of those rules, and for such other related purposes as this Court may from time to time authorize or direct.

The annual registration fee for each attorney shall be $140, payable on or before the first day of the attorney's birth month, and a like sum each year thereafter until otherwise ordered by the Court.

20.2 There shall be exempted from the application of this rule:

(a) Attorneys who serve as a justice, judge, or magistrate judge of a court of the United States of America or who serve in any federal office in which the attorney is prohibited by federal law from engaging in the practice of law.

(b) Retired attorneys.

(c) Attorneys on temporary duty with the armed forces.

(d) Faculty members of Tennessee law schools who do not practice law.

(e) Attorneys not engaged in the practice of law in Tennessee. The term, "the practice of law" shall be defined as any service rendered involving legal knowledge or legal advice, whether of representation, counsel, or advocacy, in or out of court, rendered in respect to the rights, duties, regulations, liabilities, or business relations of one requiring the services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document, or law.

20.3. Any attorney who fails to timely pay the fee required under 20.1 above shall be summarily suspended, provided a notice of delinquency has been forwarded to the attorney by certified mail, return receipt requested, addressed to the attorney's last known business address at least 30 days prior to such suspension, unless the attorney shall have been excused on grounds of financial hardship pursuant to procedures to be established by the Board.

20.4. Any attorney suspended under the provisions of 20.3 above shall be reinstated without further order upon payment of all arrears and a penalty of 20% of

the amount due from the date of the last payment to the date of the request for reinstatement.

20.5. To facilitate the collection of the annual fee provided for in 20.1 above, all persons required by this Rule to pay an annual fee shall, on or before the first day of their birth month, file with the Board of Professional Responsibility of the Supreme Court of Tennessee at its central office a registration statement, on a form prescribed by this Court, setting forth the attorney's current residence, office, and email addresses, and such other information as this Court may from time to time direct. In addition to such statement, every attorney shall file with the Board of Professional Responsibility of this Court a supplemental statement of any change in the information previously submitted within 30 days of such change. All persons first becoming subject to these Rules by admission to the practice of law before the courts of this state after January 1, 1976 shall file the statement required by this Rule at the time of admission; but no annual fee shall be payable for three months following their admission to the bar.

20.6. Within 30 days of the receipt of a statement or supplement thereto filed by an attorney in accordance with the provisions of 20.5 above, the Board, acting through Disciplinary Counsel, shall acknowledge receipt thereof, on a form prescribed by this Court in order to enable the attorney on request to demonstrate compliance with the requirements of 20.1 and 20.5 above.

20.7. Any attorney who fails to file the statement or supplement thereto in accordance with the requirements of 20.5 above shall be summarily suspended; provided a notice of delinquency has been

forwarded to the attorney by certified mail, return receipt requested, addressed to the attorney's last known business address at least 30 days prior to such suspension. The attorney shall remain suspended until the attorney shall have complied therewith, whereupon the attorney shall be reinstated without further order.

20.8. An attorney who claims an exemption under section 20.2(a), (b), (d), or (e) shall file with the Board of Professional Responsibility an application to assume inactive status and discontinue the practice of law in this state. In support of the application, the attorney shall file an affidavit stating that the attorney is not delinquent in paying the privilege tax imposed on attorneys by Tenn. Code Ann. § 67-4-1702, is not delinquent in meeting any of the reporting requirements imposed by Rules 9, 21, and 43, is not delinquent in the payment of any fees imposed by those rules, and is not delinquent in meeting the continuing legal education requirements imposed by Rule 21. The Board shall approve the application if the attorney qualifies to assume inactive status under section 20.2 and is not delinquent in meeting any of those obligations, the Board shall notify the applicant of the delinquency and shall deny the application unless, within ninety (90) days after the date of the Board's notice, the applicant demonstrates to the Board's satisfaction that the delinquency has been resolved. Upon the date of the Board's written approval of the application, the attorney shall no longer be eligible to practice law in Tennessee. The Board shall act promptly on applications to assume inactive status and shall notify the applicant in writing of the Board's action. If the Board denies an application to assume inactive status, the applicant

may request the Supreme Court's administrative review by submitting a petition to the Chief Justice within thirty (30) days of the Board's denial. The Court's review, if any, shall be conducted on the application, the supporting affidavit, and any other materials relied upon by the Board in reaching its decision.

An attorney who assumes inactive status under an exemption granted by section 20.2(a), (d), or (e) shall pay to Board of Professional Responsibility, on or before the first day of the attorney's birth month, an annual inactive-status fee set at one-half of the annual registration fee assessed under section 20.1. Such attorney shall file annually with the Board of Professional Responsibility at its central office a registration statement, on a form prescribed by the Board, setting forth the attorney's current residence, office, and email addresses, and such other information as the Board may direct. In addition to such statement, such attorney shall file with the Board a supplemental statement of any change in the information previously submitted within 30 days of such change.

An attorney who assumes inactive status under the exemption granted by section 20.2(e) and who is licensed to practice law in another jurisdiction shall not be eligible to provide any legal services in Tennessee pursuant to Tenn. Sup. Ct. R. 8, RPC 5.5(c) or (d).

20.9. Upon the Board's written approval of an application to assume inactive status, the attorney shall be removed from the roll of those classified as active until and unless the attorney requests and is granted reinstatement to the active rolls.

Reinstatement shall be granted unless the attorney is subject to an outstanding order of suspension or disbarment or has been in inactive status for five years or more, upon the payment of any assessment in effect for the year the request is made and any arrears accumulated prior to transfer to inactive status. Attorneys who have been suspended or on inactive status for over five years before filing a petition for reinstatement to active status may be required, in the discretion of this Court, to establish proof of competency and learning in law which proof may include certification by the Board of Law Examiners of the successful completion of an examination for admission to practice subsequent to the date of suspension or transfer to inactive status.

20.10. The courts of this state are charged with the responsibility of insuring that no suspended attorney be permitted to file any document, paper or pleading or otherwise practice therein.

20.11. Every lawyer who is required by section 20.5 to file an annual registration statement with the Board of Professional Responsibility is requested to also voluntarily file a pro bono reporting statement, reporting the extent of the lawyer's pro bono legal services and activities during the previous calendar year. In reporting the extent of the lawyer's pro bono legal services and activities, the lawyer is requested to state whether or not the lawyer made any voluntary financial contributions pursuant to Tenn. Sup. Ct. R. 8, RPC 6.1(c), but the lawyer shall not disclose the amount of any such contributions.

The pro bono reporting statement shall be provided to the lawyer by the Board of Professional Responsibility with the lawyer's annual registration statement. The

lawyer is requested to complete the pro bono reporting statement and file it with his or her annual registration statement.

The pro bono reporting statement shall be provided to the lawyer by the Board of Professional Responsibility in substantially the following format:

Many attorneys freely give their time and talents to improve our profession, our system of justice, and our communities. Gathering information about volunteer work done by attorneys is essential to efforts to obtain and to maintain funding for civil and criminal legal services for the indigent and for promoting the image of the legal profession. The Supreme Court of Tennessee requests that you estimate and voluntarily report the extent of your pro bono activities in the preceding calendar year. For further description of the categories described below, see Tenn. Sup. Ct. R. 8, RPC 6.1.

(1) I estimate that I worked the following hours in [year]

_____ Hours Providing Legal Services to Persons of Limited Means Without a Fee or at a Substantially Reduced Fee;

_____ Hours Providing Legal Services to Non-Profit Organizations Serving Persons of Limited Means Without a Fee;

_____ Hours Providing Legal Services to Groups or Organizations at a Reduced Fee when Payment of Standard Fees would create a Financial Hardship; and

_____ Hours Providing Legal Services to Improve the Law, the Legal System, or the Legal Profession.

(2) I voluntarily contributed financial support to organizations that provide legal services to persons of limited means:

_____ Yes; (Please do not disclose the amount.)

_____ No.

The Board of Professional Responsibility may promulgate such forms, policies and procedures as may be necessary to implement this rule.

The individual information voluntarily provided by lawyers in the pro bono reporting statements filed pursuant to this section shall be confidential and shall not be a public record. The Board of Professional Responsibility shall not release any individual information contained in such statements, except as directed in writing by the Tennessee Supreme Court or as required by law. The Board, however, may compile statistical data derived from the statements, which data shall not identify any individual lawyer, and may release any such compilations to the public.

[Adopted by Order filed November 2, 2009; amended by Order filed September 26, 2011; and amended by Order filed January 25, 2012, effective January 1, 2012.]

DISABILITY

Section 21. Proceedings Where an Attorney Is Declared to Be Incompetent or Is Alleged to Be Incapacitated

21.1. Where an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability or detained or placed in the custody of a center for the treatment of mental illness after a probable cause hearing

pursuant to the procedures set forth in Tenn. Code Ann. § 33-6-103, the Supreme Court, upon proper proof of the fact, shall enter an order transferring such attorney to disability inactive status effective immediately for an indefinite period until the further order of this Court. A copy of such order shall be served upon such attorney, the attorney's guardian, and/or the director of the institution to which the attorney had been committed in such manner as the Court may direct.

21.2. Whenever the Board shall petition this Court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, or whenever an attorney, with no disciplinary proceeding or complaint pending, shall petition to be transferred to disability inactive status, the Court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as the Court shall designate or assignment to a hearing panel for a formal hearing to determine the issue of capacity. If, upon due consideration of the matter, the Court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring the attorney to disability inactive status on the ground of such disability for an indefinite period and until the further order of this Court. If the Board files a petition pursuant to this section while a disciplinary proceeding is pending against the respondent, the disciplinary proceeding shall be suspended pending the determination as to the attorney's alleged incapacity.

21.3. If, during the course of a disciplinary investigation or proceeding, the respondent contends that the respondent is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which disability makes it impossible for the respondent to respond to or defend against the complaint, such contention shall place at issue the respondent's capacity to continue to practice law. The Court thereupon shall enter an order immediately transferring the respondent to disability inactive status for an indefinite period and until the further order of this Court. The Court may take or direct such action as it deems necessary or proper to make a determination as to the respondent's capacity to continue to practice law and to respond to or defend against the complaint, including the examination of the respondent by such qualified medical experts as the Court shall designate or the referral of the matter to a hearing panel for a formal hearing to determine the respondent's capacity to continue to practice law and to respond to or defend against the complaint.

If the Court or hearing panel shall determine that the respondent is incapacitated from responding to or defending against the complaint, the Court or hearing panel shall take such action as it deems proper and advisable, including a direction for the suspension of the disciplinary proceeding against the respondent.

21.4. The Board shall cause a notice of transfer to disability inactive status to be published in the legal journal and in a newspaper of general circulation in each county in which the disabled attorney maintained an office for the practice of law.

21.5. The Board shall promptly transmit a certified copy of the order of transfer to disability inactive status to the judges of all of the courts in the counties in which the disabled attorney maintained a law practice.

Whenever an attorney has been transferred to disability inactive status pursuant to either Section 21.1 or 21.3 of this Rule; or, whenever the Board, pursuant to Section 21.2, petitions this Court to determine that an attorney is disabled or incapacitated from continuing the practice of law, the Board shall request such action under the provisions of Section 22 as may be indicated in order to protect the interests of the disabled or alleged disabled attorney and the attorney's clients.

21.6. No attorney transferred to disability inactive status under the provisions of this rule may resume active status until reinstated by order of this Court. Any attorney transferred to disability inactive status under the provisions of this Rule shall be entitled to petition for reinstatement to active status once a year or at such shorter intervals as this Court may direct in the order transferring the respondent to disability inactive status or any modification thereof. The petition for reinstatement shall be filed with the Court in the form adopted by the Board. The petitioner shall serve a copy of the petition upon Disciplinary Counsel, who shall investigate the matter and file an answer to the petition; the answer shall include a recommendation as to whether the petition should be granted without a hearing or referred to a hearing panel for a hearing.

Upon the filing of a petition for reinstatement under this section, the Court may take or direct such action

as it deems necessary or proper to a determination of whether the attorney's disability has been removed, including a direction for an examination of the attorney by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the attorney, and that the attorney establish proof of competence and learning in law, which proof may include certification by the Board of Law Examiners of the successful completion of an examination for admission to practice. The Court also may refer the petition to a hearing panel for a hearing in which the petitioner shall have the burden of proof; the hearing shall be governed by sections 19.3 - 19.6 of this rule. Such petition shall be granted upon a showing by clear and convincing evidence that the attorney's disability has been removed and the attorney is fit to resume the practice of law.

Pending disciplinary complaints against the attorney, whether filed before or after the attorney's transfer to disability inactive status, must be resolved before the effective date of any reinstatement. Provided, however, that the Court may order reinstatement pending the completion of any conditional disciplinary action (e.g., probation or restitution) imposed upon the attorney or the final completion of the terms of any agreement executed by the attorney and the Tennessee Lawyers Assistance Program.

[Rule 9 § 21.6 changed in its entirety effective July 1, 2008]

21.7. Where an attorney has been transferred to disability inactive status by an order in accordance with the provisions of 21.1 above and, thereafter, in proceedings duly taken, the attorney has been

judicially declared to be competent, this Court may dispense with further evidence that the attorney's disability has been removed and may direct the attorney's reinstatement to active status upon such terms as are deemed proper and advisable.

21.8. In a proceeding seeking a transfer to disability inactive status under this Section, the burden of proof shall rest with the Board. In a proceeding seeking an order of reinstatement to active status under this Section, the burden of proof shall rest with the attorney.

21.9. The filing of a petition for reinstatement to active status by an attorney transferred to disability inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the attorney has been examined or treated since the transfer to disability inactive status, and shall furnish to this Court written consent to each to divulge such information and records as requested by court appointed medical experts.

Section 22. Appointment of Counsel to Protect Clients' Interests When Their Lawyer Has Been Transferred to Disability Inactive Status, Placed on Interim Suspension, Suspended or Disbarred, or Has Disappeared, Abandoned a Law Practice, or Died, or is Alleged to be Disabled or Incapacitated Pursuant to Section 21.2

22.1. Inventory of Lawyer Files. If a lawyer has been transferred to disability inactive status, placed on interim suspension, suspended, or disbarred, and there is evidence that he or she has not complied with Section 18 of this Rule; or if a lawyer has disappeared, abandoned a law practice, or died, or is alleged to be disabled or incapacitated from continuing the practice of law pursuant to Section 21.2; and no partner, executor, or other responsible party capable of conducting the lawyer's affairs is known to exist, the presiding judge in the judicial district in which the lawyer maintained a practice, upon proper proof of the fact, shall appoint a lawyer or lawyers to inventory the files of the lawyer, and to take such action as seems indicated to protect the interests of the lawyer and his or her clients.

22.2. Protection for Records Subject to Inventory. Any lawyer so appointed shall not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom the file relates, except as necessary to carry out the order of the court which appointed the lawyer to make the inventory.

Section 23. Additional Rules of Procedure

23.1. The transcript of a record shall be made available to the respondent at respondent's expense on request made to Disciplinary Counsel. However, if there is no appeal from the judgment of the hearing panel, the hearing shall not be transcribed unless requested by one of the parties, which party shall pay the expense of transcription. The court reporter shall preserve the shorthand record of the proceedings until the time for appeal has expired.

23.2. Except as is otherwise provided in these rules, time is directory and not jurisdictional. Time limitations are administrative, not jurisdictional. Failure to observe such directory time intervals may result in contempt of the agency having jurisdiction but will not justify abatement of any disciplinary investigation or proceeding.

23.3. Except as otherwise provided in these Rules, the Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence apply in disciplinary cases.

MISCELLANEOUS PROVISIONS

Section 24. Expenses, Audit, Reimbursement of Costs

24.1. Expenses. The salaries of Disciplinary Counsel and staff, their expenses, administrative costs, and the expenses of the members of the Board and of members of the district committees shall be paid by the Board out of the funds collected under the provisions of Rule 9.

24.2. Accounting. The Administrative Office of the Courts performs accounting functions for the Board, either directly or through its oversight and final approval of transactions performed by Board personnel.

24.3. Reimbursement of Costs. In the event that a judgment of disbarment, suspension, public censure, private reprimand, temporary suspension, disability inactive status, reinstatement, or denial of reinstatement results from formal proceedings, the Board shall assess against the respondent the costs of the proceedings, including court reporter's expenses for appearances and transcription of all hearings and depositions, the expenses of the hearing panel in the

hearing of the cause, and the hourly charge of Disciplinary Counsel in investigating and prosecuting the matter.

The respondent attorney may petition the Board for relief from costs within thirty days of receipt of the final bill of costs or on the termination of any action upon which the disciplinary proceeding was based, whichever occurs last. In seeking relief, the respondent attorney shall have the opportunity to appear and be heard before the Board or a duly constituted panel thereof. Having conducted such a hearing, the Board shall file an order within thirty days; this order must include the basis for the Board's decision. An order reflecting the decision shall be treated as a decree of the circuit or chancery court and, as such, is appealable to the Tennessee Supreme Court under Rule 9, § 1.3, Rules of the Supreme Court.

The hourly charges of Disciplinary Counsel on formal proceedings filed prior to January 27, 1992, shall be assessed at $20 per hour for investigative time and $30 per hour for trial time. The hourly charges of Disciplinary Counsel on formal proceedings filed on or after January 27, 1992, shall be assessed at $30 per hour for investigative time incurred prior to the filing of formal proceedings and $80 per hour in connection with formal proceedings.

Payment of the costs assessed by the Board pursuant to this rule shall be required as a condition precedent to reinstatement of the respondent attorney.

Section 25. Confidentiality

25.1. All matters, investigations, or proceedings involving allegations of misconduct by or the disability of an attorney, including all hearings and all

information, records, minutes, files or other documents of the Board, district committee members and Disciplinary Counsel shall be confidential and privileged, and shall not be public records, until or unless:

(a) a recommendation for the imposition of public discipline, without the initiation of a formal disciplinary proceeding pursuant to Section 8.2, is filed with the Supreme Court by the Board; or

(b) a petition to initiate a formal disciplinary proceeding is filed pursuant to Section 8.2; or

(c) the respondent-attorney requests that the matter be public; or

(d) the investigation is predicated upon conviction of the respondent-attorney for a crime; or

(e) in matters involving alleged disability, this Court enters an order transferring the respondent-attorney to disability inactive status pursuant to Section 21.

25.2. In disability proceedings referred to in Section 25.1(e), the order transferring the respondent-attorney to disability inactive status shall become a public record upon filing; however, all other documents relating to the respondent-attorney's disability proceeding, including any subsequent petition for reinstatement after transfer to disability inactive status, shall not be public records and shall be kept confidential. An order granting a petition for reinstatement after transfer to disability inactive status shall become a public record upon filing.

25.3. All work product and work files (including internal memoranda, correspondence, notes and similar documents and files) of the Board, district

committee members, and Disciplinary Counsel shall be confidential and privileged and shall not be public records.

25.4. In order to protect the interests of a complainant, respondent, witness, or third party, the Board of Professional Responsibility may, at any stage of the proceedings, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information or documents, or the closure of any hearing, and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application. After the initiation of a formal proceeding, any such application shall be filed with and decided by the assigned hearing panel.

25.5. All participants in any matter, investigation, or proceeding shall conduct themselves so as to maintain confidentiality. However, unless a protective order has been entered, nothing in this Section or these Rules shall prohibit the complainant, respondent-attorney, or any witness from disclosing the existence or substance of a complaint, matter, investigation, or proceeding under these Rules or from disclosing any documents or correspondence filed by, served on, or provided to that person.

25.6. In those disciplinary proceedings in which judicial review is sought pursuant to Section 1.3, the records and hearing in the circuit or chancery court and in this Court shall be public to the same extent as other cases.

25.7. The provisions of this rule shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates; or to other jurisdictions investigating qualifications for admission to practice; or to law enforcement agencies investigating qualifications for government employment; or to prevent the Board from reporting evidence of a crime by an attorney or other person to courts or law enforcement agencies; or to prevent the Board from reporting to the Tennessee Lawyer Assistance Program evidence of a disability that impairs the ability of a lawyer to practice or serve; or to prevent the Board or Disciplinary Counsel from defending any action or proceeding now pending or hereafter brought against either of them. In addition, the Board shall transmit notice of all public discipline imposed by the Supreme Court on an attorney or the transfer to inactive status due to disability of an attorney to the National Discipline Data Bank maintained by the American Bar Association.

25.8. Nothing in this Section is intended to limit or repeal any confidentiality or privilege afforded by other law.

Section 26. Ethics Opinions

26.1. The Board of Professional Responsibility shall be divided into three geographic ethics committees with each being responsible for issuing ethics opinions from time to time as designated by the Board.

26.2. Each committee shall act under the rules it may from time to time promulgate, but shall act only with the concurrence of two or more members.

26.3. Members of each ethics committee shall receive no compensation for their services but may be reimbursed for their travel and other expenses incidental to the performance of their duties.

26.4. Each ethics committee shall exercise the powers and perform the ordinary and necessary duties usually carried out by ethics advisory bodies. Each shall:

(a) By the concurrence of a majority of its members issue and publish Formal Ethics Opinions on proper professional conduct, either on its own initiative or when requested to do so by a member of the bar or by an officer or a committee or any other state or local bar association, except that an opinion may not be issued in a matter that is pending before a court or a pending disciplinary proceeding;

(b) Periodically publish its issued Formal Ethics Opinions to the legal profession in summary or complete form;

(c) On request, advise or otherwise help any state or local bar association in their activities relating to the interpretation of the Rules of Professional Conduct;

(d) Recommend appropriate amendments to or clarification of the Rules of Professional Conduct, if it considers them advisable;

(e) Employ such professional and/or clerical help necessary to carry out its duties; and

(f) Adopt such rules as it considers appropriate relating to the procedures to be used in considering inquiries and expressing opinions, including procedures for classifying opinions or declining requests for opinions.

26.5. (a) A Formal Ethics Opinion issued and published by the ethics committee shall bind the committee, the person requesting the opinion, and the Board of Professional Responsibility, and shall constitute a body of principles and objectives upon which members of the bar can rely for guidance in many specific situations.

(b) Requests for Formal Ethics Opinions shall be addressed to the Board of Professional Responsibility in writing, stating the factual situation in detail, accompanied by a short brief or memorandum citing the Rules of Court or Professional Conduct involved and any other pertinent authorities and shall contain a certificate with the opinion that the matters are not pending in any court or disciplinary proceeding.

(c) An advisory ethics opinion may be issued by Disciplinary Counsel orally when there is readily available precedent. The opinion shall not be binding on the ethics committee, the Board of Professional Responsibility, or the Court and shall offer no security to the person requesting it.

Section 27. Immunity

27.1. Communications to the board, district committee members or Disciplinary Counsel relating to lawyer misconduct or disability and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant or witnesses. Members of the board, district committee members, Disciplinary Counsel and staff shall be immune from civil suit for any conduct in the course of their official duties.

Section 28. Tennessee Lawyer Assistance Program

The Tennessee Lawyers Assistance Program (TLAP) was established by the Tennessee Supreme Court to provide immediate and continuing help to lawyers, judges, bar applicants, and law students who suffer from physical or mental disabilities that result from disease, disorder, trauma, or age and that impair their ability to practice or serve.

28.1. Referrals to TLAP.

(a) Pursuant to Rule 33.07(A) of the Rules of the Tennessee Supreme Court, the Board of Professional Responsibility, its Hearing Panels or Disciplinary Counsel may provide a written referral to TLAP of any attorney who the BPR, Hearing Panel, or Disciplinary Counsel (collectively, "the BPR") determines:

(1) has failed to respond to a disciplinary complaint;

(2) has received three or more complaints within a period of 12 months;

(3) has received a complaint that includes multiple failures to appear or to respond or to take any other action in compliance with established rules or time guidelines;

(4) has pleaded impairment or disability as a defense to a complaint;

(5) has exhibited behavior or has engaged in behavior that, in the BPR's determination, warrants consultation and, if recommended by TLAP, further assessment, evaluation, treatment, assistance, or monitoring.

(6) is seeking readmission or reinstatement where there is a question of either prior or present impairment or disability; or

(7) is requesting TLAP's involvement.

(b) The Executive Director of TLAP shall review any referral by the BPR. If the Executive Director of TLAP deems that assistance and monitoring of an attorney is appropriate, the Executive Director will make reasonable efforts to enter into a Monitoring/Advocacy Agreement ("Agreement") with the attorney pursuant to Rule 33.05(E) of the Rules of the Tennessee Supreme Court. If the Executive Director of TLAP determines that TLAP assistance is not appropriate, for whatever reason, the Executive Director shall report that determination to the BPR, without further elaboration and without disclosure of information otherwise confidential under Rule 33.10.

(c) The BPR will provide written notification to the Executive Director of TLAP that TLAP's assistance will be or has been recommended in any matter pending before the BPR or when TLAP has an ongoing relationship with an attorney who has a matter pending before the BPR. The BPR will provide such notification prior to the date of any hearing and will further provide notice of any hearing date. The Executive Director of TLAP or his or her representative may attend any such hearing.

(d) The BPR will provide written notification to the Executive Director of TLAP of any provision concerning the participation of TLAP included in any proposed order submitted by the BPR to the Tennessee Supreme Court. The Executive Director of TLAP will notify the BPR of any requested

modification of the order and may decline involvement. If the Executive Director of TLAP declines involvement of TLAP, the BPR shall not include TLAP's participation in any proposed order submitted to the Supreme Court.

(e) Pursuant to Rule 33.07 (B) of the Rules of the Tennessee Supreme Court, TLAP will provide the BPR with the following information:

(1) TLAP will notify the BPR of a referred attorney's failure to establish contact with TLAP or enter into a recommended Agreement.

(2) If the attorney enters into an Agreement with TLAP, TLAP will provide a copy of the Agreement to the BPR. Such Agreement will provide for notification by TLAP to the BPR of substantial non-compliance with any of the terms or conditions of the Agreement. Contemporaneously with any such notification, the Executive Director of TLAP may make such recommendation to the BPR as TLAP deems appropriate.

(3) Upon request of the BPR, TLAP will provide the BPR with a status report of monitoring and compliance pursuant to the Agreement. When appropriate, the BPR will obtain from TLAP's Executive Director a recommendation concerning the attorney's compliance with any Agreement.

28.2. Autonomy. The BPR and TLAP shall remain completely independent, and the activities of one shall in no way be construed to limit or impede the activities of the other.

Section 29. Detection and Prevention of Trust Account Violations

29.1. Maintenance of Trust Funds in Approved Financial Institutions; Overdraft Notification.

A. *Clearly Identified Trust Accounts in Approved Financial Institutions Required.*

(1) Attorneys who practice law in Tennessee shall deposit all funds held in trust in this jurisdiction in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts," and shall take all steps necessary to inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Attorney trust accounts shall be maintained only in financial institutions approved by the Board of Professional Responsibility, provided however nothing herein shall be construed as limiting any statutory provisions dealing with the investment of trust and/or estate assets, or the investment authority granted in any instrument creating a fiduciary relationship.

(2) Every lawyer engaged in the practice of law in Tennessee shall maintain and preserve for a period of at least five years, after final disposition of the underlying matter, the records of the accounts, including checkbooks, canceled checks, check stubs, vouchers, ledgers, journals, closing statements, accounting or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property of a client. The five year period for preserving records

created herein is only intended for the application of this rule and does not alter, change or amend any other requirements for record-keeping as may be required by other laws, statutes or regulations.

B. *Overdraft Notification Agreement and Acknowledgment of Authorization Required.* A financial institution shall be approved as a depository for attorney trust accounts if it files with the Board an acknowledgment of the attorney's constructive consent of disclosure of their trust account financial records as a condition of their admission to practice law, and the financial institution's agreement, in a form provided by the Board to report to the Board whenever any properly payable instrument is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Board shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that does not acknowledge constructive authorization by the attorney and agree to so report. Any such acknowledgment and agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty days notice in writing to the Board.

C. Overdraft Reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy

of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

D. *Timing of Reports.* Reports under paragraph C shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

E. *Consent by Lawyers.* Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed, under the financial records privacy laws, other similar laws, or otherwise, to have designated the Board of Professional Responsibility as their agent for the purpose of disclosure of financial records by financial institutions relating to their trust accounts; conclusively deemed to have authorized disclosure of financial records relating to their trust accounts to the Board of Professional Responsibility; and, conclusively deemed to have consented to the reporting and production of financial records requirements contemplated or mandated by Sections 29.1 or 29.2 of this rule.

F. *No Liability Created.* Nothing herein shall create or operate as a liability of any kind or nature against

any financial institution for any of its actions or omissions in reporting overdrafts or insufficient funds to the Board.

G. *Costs.* Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

H. *Definitions.* For the purpose of this rule:

(1) "Financial institution" includes a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by attorneys.

(2) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(3) "Notice of dishonor" refers to the notice that a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

29.2. Verification of Bank Accounts.

A. *Generally.* Whenever Disciplinary Counsel has probable cause to believe that bank accounts of a lawyer that contain, should contain or have contained funds belonging to clients have not been properly maintained or that the funds have not been properly handled, Disciplinary Counsel shall request the approval of the Chair or Vice-Chair of the Board to initiate an investigation for the purpose of verifying the accuracy and integrity of all bank accounts maintained by the lawyer. If the Chair or Vice-Chair

approves, counsel shall proceed to verify the accuracy of the bank accounts.

B. *Confidentiality.* Investigations, examinations, and verifications shall be conducted so as to preserve the private and confidential nature of the lawyer's records insofar as is consistent with these rules and the lawyer-client privilege; however, no assertion of attorney-client privilege or confidentiality will prevent an inspection or audit of a trust account as provided in this rule.

Section 30. Diversion of Disciplinary Cases

30.1. Authority of Board. The Board of Professional Responsibility is hereby authorized to establish practice and professionalism enhancement programs to which eligible disciplinary cases may be diverted as an alternative to disciplinary sanction.

30.2. Types of Disciplinary Cases Eligible for Diversion. Disciplinary cases that otherwise would be disposed of by a private informal admonition or a private reprimand are eligible for diversion to practice and professionalism enhancement programs.

30.3. Limitation on Diversion. A respondent who has been the subject of a prior diversion within five (5) years shall not be eligible for diversion.

30.4. Approval of Diversion. The Board of Professional Responsibility shall not offer a respondent the opportunity to divert a disciplinary case to a practice and professionalism enhancement program unless the Board or a combination of Disciplinary Counsel and a district committee member concur.

30.5. Contents of Diversion Recommendation. If a diversion recommendation is approved as provided in Section 30.4, the recommendation shall state the practice and professionalism enhancement program(s) to which the respondent shall be diverted, shall state the general purpose for the diversion, and that the costs thereof shall be paid by the respondent.

30.6. Service of Recommendation on and Review by Respondent. If a diversion recommendation is approved as provided in Section 30.4, the recommendation shall be served on the respondent who may accept or reject a diversion recommendation in the same manner as provided for in Section 8 of Rule 9. The respondent shall not have the right to reject any specific requirement of a practice and professionalism enhancement program.

30.7. Effect of Rejection of Recommendation by Respondent. In the event that a respondent rejects a diversion recommendation the matter shall be returned for further proceedings under these rules.

30.8. Authority of Hearing Panel to Refer a Matter to a Practice and Professionalism Enhancement Program. Nothing in this rule shall preclude a hearing panel from referring a disciplinary matter to a practice and professionalism enhancement program as a part of a disciplinary sanction.

30.9. Effect of Diversion. When the recommendation of diversion becomes final, the respondent shall enter the practice and professionalism enhancement program(s) and complete the requirements thereof. Upon respondent's completion of the practice and professionalism enhancement program(s), the Board

of Professional Responsibility shall terminate its investigation into the matter and its disciplinary files shall be closed indicating the diversion unless the diversion is ordered in addition to other discipline. Diversion into the practice and professionalism enhancement program shall not constitute a disciplinary sanction and shall remain confidential.

30.10. Effect of Failure to Complete the Practice and Professionalism Enhancement Program. If a respondent fails to fully complete all requirements of the practice and professionalism enhancement program(s) to which the respondent was diverted, including the payment of costs thereof, the Board of Professional Responsibility may reopen its disciplinary file and conduct further proceedings under these rules. Failure to complete the practice and professionalism enhancement program shall be considered as a matter of aggravation when imposing a disciplinary sanction.

Section 31. Attorneys Adjudged to have Willfully Refused to Comply with a Court Order

31.1. A certified copy of a court order adjudicating, upon notice and hearing, that a lawyer has willfully refused to comply with a court order, entered in a case in which the lawyer is a party, may be filed forthwith with the clerk of the Supreme Court by the clerk or judge of the court in which the order was entered, or by any party to the case in which the order was entered, or by any other party having an interest in the case, or by Disciplinary Counsel of the Board of Professional Responsibility. Upon the filing of such order, the Supreme Court will enter an order immediately suspending the lawyer from the practice of law. Such suspension shall remain in effect until

such time as this Court may determine that the lawyer has complied with the terms of the original order or until such time prior to compliance as the interest of justice may require. The lawyer may at any time make application for relief.

31.2. Summary suspension pursuant to Section 32.1 shall be in addition to any other proceeding and any other sanction or punishment imposed pursuant to law.

31.3. An order suspending a lawyer from the practice of law pursuant to this Section 32 shall not constitute a suspension of the lawyer for the purpose of Section 18 unless this Court shall so order.

[Amended by order filed April 25, 2006. Effective July 1, 2006, and by order filed December 20, 2006.]

Section 32. Attorneys Failing to Comply with Tenn. Code Ann. §§ 67-4-1701 - 1710 (Privilege Tax Applicable to Persons Licensed to Practice Law)

Tenn. Code Ann. § 67-4-1702 levies a tax on the privilege of engaging in certain vocations, professions, businesses and occupations, including "persons licensed as attorneys by the supreme court of Tennessee." Tenn. Code Ann. § 67-4-1704 provides that failure to pay the privilege tax can result in suspension or revocation of "any license or registration by the appropriate licensing board" and goes on to state that "the supreme court of Tennessee is encouraged to establish guidelines to suspend the license of an attorney who fails to comply with the requirements of this part." The Supreme Court hereby establishes the following procedures to promote compliance with Tenn. Code Ann. §§ 67-4-1701 - 1710,

as those sections apply to attorneys licensed by the Court.

32.1. The Court designates the Chief Disciplinary Counsel of the Board of Professional Responsibility ("Board") as the official to whom the Department of Revenue shall annually send a list of attorneys licensed by this Court who have failed, for two or more consecutive years, to pay the privilege tax imposed by Tenn. Code Ann. § 67-4-1702.

32.2. Upon receipt of the list of attorneys transmitted by the Department of Revenue, the Chief Disciplinary Counsel shall serve each attorney listed thereon with a Privilege Tax Delinquency Notice, stating that the Department of Revenue has informed the Board that the attorney has failed, for two or more consecutive years, to pay the privilege tax imposed by section § 67-4-1702 and that the attorney's license is therefore subject to suspension. The Notice shall be served upon the attorney by registered or certified mail, return receipt requested, at the address shown in the most recent registration statement filed by the attorney pursuant to Supreme Court Rule 9, Section 20.5 or other last known address.

32.3. Each attorney to whom a Privilege Tax Delinquency Notice is issued shall file with the Board, within sixty (60) days of the date of issuance of the Notice, an affidavit supported by documentary evidence showing that the attorney has paid the delinquent privilege taxes and any interest and penalties assessed by the Department of Revenue. In the event the attorney fails to submit such evidence to the Board, Disciplinary Counsel shall proceed according to the following provisions.

32.4. Within thirty (30) days of the expiration of the period for attorneys to respond, as required in section 32.3, to the Privilege Tax Delinquency Notices mailed to the attorneys listed by the Department of Revenue, the Chief Disciplinary Counsel shall prepare a proposed Suspension Order listing all attorneys who were issued Privilege Tax Delinquency Notices and who either failed to satisfactorily demonstrate to the Board that they had paid their delinquent taxes (and any interest and penalties) or failed to respond to the Notice. The proposed Suspension Order shall provide that the license to practice law issued to each listed attorney shall be suspended upon the Court's filing of the order and pending the attorney's payment of the delinquent privilege taxes and any interest and penalties.

32.5. Upon the Court's review and approval of the order, the Court will file the order summarily suspending the license to practice law of each attorney listed in the order. The suspended attorneys shall comply with the applicable provisions of section 18 of this rule. The suspension shall remain in effect until the attorney pays the delinquent privilege taxes and any interest and penalties, as well as any fees imposed by this rule, and he or she is reinstated pursuant to section 32.7.

32.6. Each attorney who is issued a Privilege Tax Delinquency Notice shall pay to the Board a fee in the amount of $100 to defray the Board's costs in issuing the Notice. Each attorney whose license to practice law is suspended by the Court pursuant to this rule shall pay to the Board a reinstatement fee in the amount of $200 as a condition of reinstatement of his or her law license after paying the delinquent

privilege taxes and any interest and penalties. The reinstatement fee shall be paid in addition to the fee for issuance of the Notice.

32.7. An attorney suspended by the Court pursuant to this rule may file with the Board an application for reinstatement demonstrating that he or she has paid all delinquent privilege taxes and any interest and penalties. If the application is satisfactory to the Board, if the attorney is otherwise eligible for reinstatement, and if the attorney has paid in full all fees due under this rule, the attorney shall be reinstated without further order.

[adopted by Order filed September 11, 2009.]

Section 33. Multijurisdictional Practice.

33.1. Any attorney practicing in this State under the authority of RPC 5.5(c) or (d) or otherwise subject to this Court's disciplinary jurisdiction under RPC 8.5 is subject to the disciplinary jurisdiction prescribed in Section 1.1 of this Rule 9 and the procedures for exercise of such jurisdiction prescribed in this Rule 9.

33.2. The authorization for practice granted in RPC 5.5(c) or (d) may be terminated or suspended. The grounds and processes for such termination shall be those provided in this Rule 9 for disbarment; and the grounds and processes for such suspension shall be those provided in this Rule 9 for suspension.

33.3. If an attorney is practicing in this State under authority of RPC 5.5(c), or if an attorney is practicing in this State under authority of RPC 5.5(d) and does not maintain an office in this State, hearing pmel proceedings shall occur in the disciplinary district, circuit or chancery court proceedings for review of Board action prescribed in this Rule 9 shall occur in

the county or disciplinary district, and unappealed final trial court judgments terminating or suspending the authorization for practice shall be forwarded to the office of the clerk of the Supreme Court for the grand division, where the conduct that forms the basis of the complaint against the attorney occurred.

33.4. The procedures and remedies for reciprocal discipline prescribed in Section 17 of this Rule shall apply to attorneys practicing in this State under authority of RPC 5.5(d)(1). Upon receipt of a certified copy of an order demonstrating that such an attorney has been disciplined in another jurisdiction, the Court shall employ the procedures prescribed in subsections 17.2 through 17.5.

33.5. The information filing, fee payment and other requirements and regulations prescribed in Section 20 of this Rule shall apply to attorneys practicing in this State under authority of RPC 5.5(6)(1).

[Amended by Order filed October 23, 2009; and amended by order filed May 2, 2011]

APPENDIX G

Tennessee Supreme Court Rule 8
(Pertinent Text)

RULE 1.5: FEES

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

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent;

(9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and

(10) whether the fee agreement is in writing.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

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

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or the award of custodial rights, or upon the amount of alimony or support, or the value of a property division or settlement, unless the matter relates solely to the collection of arrearages in alimony or child support or the enforcement of an order dividing the marital estate and the fee arrangement is disclosed to the court; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

(f) A fee that is nonrefundable in whole or in part shall be agreed to in a writing, signed by the client, that explains the intent of the parties as to the nature and amount of the nonrefundable fee.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (10) are not exclusive. Nor will each factor be relevant in each instance.

Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding. With respect to whether a writing is required when a lawyer seeks to change the terms of a fee agreement with a client, see RPC 1.8, Comment [1].

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the

factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. **See** RPC 1.16(d). The obligation to return any portion of a fee does not apply, however, if the lawyer charges a reasonable nonrefundable fee.

[4a] A nonrefundable fee is one that is paid in advance and earned by the lawyer when paid. Nonrefundable fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular nonrefundable fee is reasonable, or whether it is reasonable to charge a nonrefundable fee at all, a lawyer must consider the factors that are relevant to the circumstances. Recognized examples of appropriate nonrefundable fees include a nonrefundable retainer paid to compensate the lawyer for being available to represent the client in one or more matters or where the client agrees to pay to the lawyer at the outset of the representation a reasonable fixed fee for the representation. Such fees are earned fees so long as the lawyer remains available to provide the services called for by the retainer or for which the fixed fee was charged. RPC 1.5(f) requires a writing signed by the client to make certain that lawyers take special care

to assure that clients understand the implications of agreeing to pay a nonrefundable fee.

[4b] A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to RPC 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of RPC 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should discuss with the client alternative bases for the fee and explain their implications.

Prohibited Contingent Fees

[5a] In some circumstances, applicable law may impose limitations on contingent fees, such as a

ceiling on the percentage. For example, Tennessee law regulates contingent fees in medical malpractice cases. *See* Tenn. Code Ann. § 29-26-120. In these circumstances, charging unlawful fees or expenses may be considered unreasonable under paragraph (a) of this Rule and may violate RPC 8.4 or other rules. *See* RPC 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or an award of custody or upon the amount of alimony or support or property settlement to be obtained. This provision permits a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony, or other financial orders provided that the fee arrangement is disclosed to the court.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, and the agreement must be confirmed in writing. It does not require disclosure to the client of the share that each lawyer is to receive. Contingent fee agreements must be in a writing

signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails the obligations stated in RPC 5.1 for purposes of the matter involved. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. *See* RPC 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal; or

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) in an ex parte proceeding, fail to inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(b) A lawyer shall not offer evidence the lawyer knows to be false, except that a lawyer who represents a defendant in a criminal proceeding, and who has been denied permission to withdraw from the defendant's representation after compliance with paragraph (f), may allow the client to testify by way of an undirected narrative or take such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.

(c) A lawyer shall not affirm the validity of, or otherwise use, any evidence the lawyer knows to be false.

(d) A lawyer may refuse to offer or use evidence, other than the testimony of a client who is a defendant in a criminal matter, that the lawyer reasonably believes is false, misleading, fraudulent or illegally obtained.

(e) If a lawyer knows that the lawyer's client intends to perpetrate a fraud upon the tribunal or otherwise commit an offense against the administration of justice in connection with the proceeding, including improper conduct toward a juror or a member of the jury pool, or comes to know, prior to the conclusion of the proceeding, that the client has, during the course of the lawyer's representation, perpetrated such a crime or fraud, the lawyer shall advise the client to refrain from, or to disclose or otherwise rectify, the crime or fraud and shall discuss with the client the consequences of the client's failure to do so.

(f) If a lawyer, after discussion with the client as required by paragraph (e), knows that the client still intends to perpetrate the crime or fraud, or refuses or is unable to disclose or otherwise rectify the crime or fraud, the lawyer shall seek permission of the tribunal to withdraw from the representation of the client and shall inform the tribunal, without further disclosure of information protected by RPC 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.

(g) A lawyer who, prior to conclusion of the proceeding, comes to know that the lawyer has offered false tangible or documentary evidence shall withdraw or disaffirm such evidence without further disclosure of information protected by RPC 1.6.

(h) A lawyer who, prior to the conclusion of the proceeding, comes to know that a person other than the client has perpetrated a fraud upon the tribunal or otherwise committed an offense against the administration of justice in connection with the proceeding, and in which the lawyer's client was not implicated, shall promptly report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.

(i) A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.

(j) If, in response to a lawyer's request to withdraw from the representation of the client or the lawyer's

report of a perjury, fraud, or offense against the administration of justice by a person other than the lawyer's client, a tribunal requests additional information that the lawyer can only provide by disclosing information protected by RPC 1.6 or 1.9(c), the lawyer shall comply with the request, but only if finally 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 by the attorney-client privilege.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in connection with the proceedings of a tribunal, such as a court or an administrative agency acting in an adjudicative capacity. It applies not only when the lawyer appears before the tribunal, but also when the lawyer participates in activities conducted pursuant to the tribunal's authority, such as pre-trial discovery in a civil matter.

[2] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty to refrain from assisting a client to perpetrate a fraud upon the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily

present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare RPC 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in RPC 1.2(d) not to counsel a client to commit, or assist the client in committing a fraud, applies in litigation. Regarding compliance with RPC 1.2(d), see the Comment to that Rule and also Comments [1] and [7] to RPC 8.4.

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Ex Parte Proceedings

[5] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by

the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order or one conducted pursuant to RPC 1.7(c), there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. As provided in paragraph (a)(3), the lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Refusing to Offer or Use False Evidence

[6] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. The lawyer must similarly refuse to offer a client's testimony that the lawyer knows to be false, except that paragraph (b) permits the lawyer to allow a criminal defendant to testify by way of narrative if the lawyer's request to withdraw, as required by paragraph (f), is denied. Paragraph (c) precludes a lawyer from affirming the validity of, or otherwise using, any evidence the lawyer knows to be false, including the narrative testimony of a criminal defendant.

[7] As provided in paragraph (d), a lawyer has authority to refuse to offer or use testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections

historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer or use the testimony of such a client because the lawyer reasonably believes the testimony to be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

Wrongdoing in Adjudicative Proceedings by Clients and Others

[8] A lawyer who is representing a client in an adjudicative proceeding and comes to know prior to the completion of the proceeding that the client has perpetrated a fraud or committed perjury or another offense against the administration of justice, or intends to do so before the end of the proceeding, is in a difficult position in which the lawyer must strike a professionally responsible balance between the lawyer's duties of loyalty and confidentiality owed to the client and the equally important duty of the lawyer to avoid assisting the client with the consummation of the fraud or perjury. In all such cases, paragraph (e) requires the lawyer to advise the client to desist from or to rectify the crime or fraud and inform the client of the consequences of a failure to do so. The hard questions come in those rare cases in which the client refuses to reveal the misconduct and prohibits the lawyer from doing so.

[9] Paragraph (f) sets forth the lawyer's responsibilities in situations in which the lawyer's client is implicated in the misconduct. In these situations, the Rules do not permit the lawyer to report the client's offense. Confidentiality under RPC 1.6 prevails over the lawyer's duty of candor to the tribunal. Only if the client is implicated in misconduct by or toward a juror or a member of the jury pool does

the lawyer's duty of candor to the tribunal prevail over confidentiality. *See* paragraph (i).

[10] Although the lawyer may not reveal the client's misconduct, the lawyer must not voluntarily continue to represent the client, for to do so without disclosure of the misconduct would assist the client to consummate the offense. The Rule, therefore, requires the lawyer to seek permission of the tribunal to withdraw from the representation of the client. To increase the likelihood that the tribunal will permit the lawyer to withdraw, the lawyer is also required to inform the tribunal that the request for permission to withdraw is required by the Rules of Professional Conduct. This statement also serves to advise the tribunal that something is amiss without providing the tribunal with any of the information related to the representation that is protected by RPC 1.6. These Rules, therefore, are intended to preserve confidentiality while requiring the lawyer to act so as not to assist the client with the consummation of the fraud. This reflects a judgment that the legal system will be best served by rules that encourage clients to confide in their lawyers, who in turn will advise them to rectify the fraud. Many, if not most, clients will abide by their lawyer's advice, particularly if the lawyer spells out the consequences of failing to do so. At the same time, our legal system and profession cannot permit lawyers to assist clients who refuse to follow their advice and insist on consummating an ongoing fraud.

[11] Once the lawyer has made a request for permission to withdraw, the tribunal may grant or deny the request to withdraw without further inquiry or may seek more information from the lawyer about

the reasons for the lawyer's request. If the judge seeks more information, the lawyer must resist disclosure of information protected by RPC 1.6, but only to the extent that the lawyer may do so in compliance with RPC 3.1. If the lawyer cannot make a non-frivolous argument that the information sought by the tribunal is protected by the attorney-client privilege, the lawyer must respond truthfully to the inquiry. If, however, there is a non-frivolous argument that the information sought is privileged, paragraph (h) requires the lawyer to invoke the privilege. Whether to seek an interlocutory appeal from an adverse decision with respect to the claim of privilege is governed by RPCs 1.2 and 3.1.

[12] If a lawyer is required to seek permission from a tribunal to withdraw from the representation of a client in either a civil or criminal proceeding because the client has refused to rectify a perjury or fraud, it is ultimately the responsibility of the tribunal to determine whether the lawyer will be permitted to withdraw from the representation. In a criminal proceeding, however, a decision to permit the lawyer's withdrawal may implicate the constitutional rights of the accused and may even have the effect of precluding further prosecution of the client. Notwithstanding this possibility, the lawyer must seek permission to withdraw, leaving it to the prosecutor to object to the request and to the tribunal to ultimately determine whether withdrawal is permitted. If permission to withdraw is not granted, the lawyer must continue to represent the client, but cannot assist the client in consummating the fraud or perjury by directly or indirectly using the perjured testimony or false evidence during the current or any subsequent stage of the proceeding. A defense lawyer

who complies with these rules acts professionally without regard to the effect of the lawyer's compliance on the outcome of the proceeding.

False Documentary or Tangible Evidence

[13] If a lawyer comes to know that tangible items or documents that the lawyer has previously offered into evidence have been altered or falsified, paragraph (g) requires that the lawyer withdraw or disaffirm the evidence, but does not otherwise permit disclosure of information protected by RPC 1.6. Because disaffirmance, like withdrawal, can be accomplished without disclosure of information protected by RPC 1.6, it is required when necessary for the lawyer to avoid assisting a fraud on the tribunal.

Crimes or Frauds by Persons Other than the Client

[14] Paragraph (h) applies if the lawyer comes to know that a person other than the client has engaged in misconduct in connection with the proceeding. Upon learning prior to the completion of the proceeding that such misconduct has occurred, the lawyer is required by paragraph (e) to promptly reveal the offense to the tribunal. The client's interest in protecting the wrongdoer is not sufficiently important as to override the lawyer's duty of candor to the court and to take affirmative steps to prevent the administration of justice from being tainted by perjury, fraud, or other improper conduct.

Misconduct By or Toward Jurors or Members of Jury Pool

[15] Because jury tampering undermines the institutional mechanism that our adversary system of justice uses to determine the truth or falsity of

testimony or evidence, paragraph (i) requires a lawyer who learns prior to the completion of the proceeding that there has been misconduct by or directed toward a juror or prospective juror must reveal the misconduct and the identity of the perpetrator to the tribunal, even if so doing requires disclosure of information protected by RPC 1.6. Paragraph (i) does not require that the lawyer seek permission to withdraw from the further representation of the client in the proceeding, but in cases in which the client is implicated in the jury tampering, the lawyer's continued representation of the client may violate RPC 1.7. RPC 1.16(a)(1) would then require the lawyer to seek permission to withdraw from the case.

Crime or Fraud Discovered After Conclusion of Proceeding

[16] In cases in which the lawyer learns of the client's misconduct after the termination of the proceeding in which the misconduct occurred, the lawyer is prohibited from reporting the client's misconduct to the tribunal. Even though the lawyer may have innocently assisted the client to perpetrate the offense, the lawyer should treat this information as the lawyer would treat information with respect to any past crime a client might have committed. The client's offense will be deemed completed as of the conclusion of the proceeding. An offense that occurs at an earlier stage in the proceeding will be deemed an ongoing offense until the final stage of the proceeding is completed. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for an appeal has passed.

Constitutional Requirements

[17] These Rules apply to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these Rules is subordinate to any such constitutional requirement.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; or

(b) falsify evidence, counsel or assist a witness to offer false or misleading testimony; or

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists; or

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or

(e) in trial,

(1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence; or

(2) assert personal knowledge of facts in issue except when testifying as a witness; or

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or

(g) request or assist any person to take action that will render the person unavailable to appear as a witness by way of deposition or at trial; or

(h) offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his or her testimony or the outcome of the case. A lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for that witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured

by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] Although paragraph (f) broadly prohibits lawyers from taking extrajudicial action to impede informal fact-gathering, it does permit the lawyer to request that the lawyer's client, and relatives, employees, or agents of the client, refrain from voluntarily giving information to another party. This principle follows because such relatives and employees will normally identify their interests with those of the client. *See also* RPC 4.2.

[4] With regard to paragraph (h), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence a tribunal or a governmental agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity,

scope, meaning, or application of the law upon which the order is based.

Comment

[1] Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. Although under certain circumstances a single offense reflecting adversely on a lawyer's fitness to practice – such as a minor assault – may not be sufficiently serious to warrant discipline, a pattern of repeated offenses, even ones that are of minor significance

when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of RPC 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[5] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.

[6] The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. *See* RPC 4.4.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is

true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director, or manager of a corporation or other organization.

[8] Paragraph (f) precludes a lawyer from assisting a judge or judicial officer in conduct that is a violation of the rules of judicial conduct. A lawyer cannot, for example, make a gift, bequest, favor, or loan to a judge, or a member of the judge's family who resides in the judge's household, unless the judge would be permitted to accept, or acquiesce in the acceptance of such a gift, favor, bequest, or loan in accordance with RJC 3.13 of the Code of Judicial Conduct.

[9] In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions. Normally, a lawyer who knowingly fails to obey a court order demonstrates disrespect for the law that is prejudicial to the administration of justice. Failure to comply with a court order is not a disciplinary offense, however, when it does not evidence disrespect for the law either because the lawyer is unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.