

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

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BOARD OF PROFESSIONAL  
RESPONSIBILITY

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EXEC. SEC.

IN RE: ROBERT SADLER BAILEY, Jr., Respondent DOCKET NO. 2008-1774-9-KH  
BPR No. 11230, An Attorney  
Licensed to Practice Law  
in Tennessee (Shelby County)

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FINAL DECISION OF HEARING PANEL

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This cause came on for hearing before a Hearing Panel of the Tennessee Board of Professional Responsibility. The Hearing Panel ("Panel"), consisting of Dan M. Norwood, Michael J. Banks and G. Coble Caperton, conducted the hearing on July 23, 2012 at the Shelby County Courthouse. The Board of Professional Responsibility ("Board") was represented by Krisann Hodges, Disciplinary Counsel of the Board. The Respondent, Robert Sadler Bailey, Jr. ("Respondent" or "Bailey") was represented by Donald Capparella and Tyler Yarbrow. Witnesses at the proceeding were the Honorable Karen Williams, Judge of Division 3, Shelby County Circuit Court, ("Judge Williams") Robert Sadler Bailey, Amy Mrva, Amy Mitchell and Loys A. "Trey" Jordan (by deposition).

On August 22, 2008 the Board filed a Petition for Discipline against Respondent. A Supplemental Petition for Discipline was filed on April 27, 2009. The Panel was assigned to this matter. The proceedings on the Petition were stayed pending a resolution of the criminal contempt matter against the Respondent. That matter was decided by the Tennessee Court of Appeals. The Court of Appeals remanded the case to the trial court for another hearing before a

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different judge. The Board ultimately moved the Panel for a trial date which was granted for July 23, 2012, and the matter was heard on that day. The Panel finds the following facts.

**FACTS RELATING TO ORIGINAL PETITION**

On April 4, 2008, Judge Karen Williams sent a complaint of misconduct to the Board concerning Bailey's alleged misconduct in her courtroom during a hearing of the *Watkins v. Methodist Healthcare* matter, No. CT-002983-05. The Board also received a letter sent by Lee J. Chase, III, Esquire, which was written on April 4, 2008 describing the alleged actions and misconduct of Bailey during various hearings and conferences of the above-referenced *Watkins* case. On August 22, 2008 the Board filed a Petition for Discipline against Respondent. A Supplemental Petition for Discipline was filed on April 27, 2009.

Bailey was Plaintiff's counsel in the *Watkins* matter, a medical malpractice case filed in Shelby County Circuit Court. The Defendant was represented by Lee J. Chase, III., John Hall, and Robert Shannon. As of March 2008, the case had been pending before the Court for several years and the trial began on March 17, 2008, and proceeded through jury selection and opening statements. A mistrial was declared during opening statements by Judge Williams.

The *Watkins* case was a hotly contested case in which both sides aggressively represented their clients. The parties filed approximately 740 pleadings including five interlocutory or extraordinary appeals. Both sides accused the other of making misrepresentations and lying to the Court.

Prior to the opening statements, Judge Williams directed the attorneys to refrain from speaking objections. Specifically, the Court stated:

....Once more from the top, no speaking objections. Stand up, say I object, and sit down. Do not interrupt each other. Let's go, Mr. Bailey.  
(Exhibit 9, pg. 460)

According to Judge Williams, she was trying to move the case along and manage the constant arguing between the attorneys.

Despite this instruction from the Court regarding the procedure she expected to be followed, Bailey continued to make speaking objections during the defense's opening statement after being so warned. (Exhibit 10, pp. 563, 572, 579, 587, 589, 595, 622) Bailey's objections were intrusive and disrupted the opening statement of defense counsel. Although Bailey asserted that the defense objected during his opening statement, defense counsel objected only four (4) times as compared to Bailey's twelve (12) objections. Further, each objection by defense counsel was compliant with the Court's earlier instruction regarding speaking objections.

Between Bailey's opening statement and the opening statement of the defense, Bailey engaged in a dialogue with the Court. During this dialog he made several comments directed to the Court demonstrating disrespect and sarcasm for the Court's understanding of its own rulings.

He said the following:

Now, do you want this case to be about whether there was an appointment between the 16<sup>th</sup> and the 21<sup>st</sup>? Do you want the case to be about whether Regina called the doctor or whether she kept an appointment? If that's what you want, then you can save me and this child a hundred thousand dollars, you know, because – let's just take the mistrial now that we're all going to get because, you know, we don't -- we need to try the case on the issues here.

(Exhibit 10, pg. 549)

The next day, Bailey's confrontational statements toward the Court continued. On the morning of March 27, 2008, Bailey engaged in a number of statements about the Court's decisions and conduct.

Bailey made the following statements to the Court:

- a) "It is bizarre to me that this court somehow feels that I should be in any way limited, inhibited, or proscribed from telling the jury the correct standard of law..." (Exhibit 4, pg. 645)
- b) "I've said to you so many times if you have time to read, if you have time to hear from both sides to think about it, you generally get it right. Quite frankly, Judge, when you don't have that, you almost always get it wrong..." (Exhibit 4, pg. 647)
- c) "You know what, they can object all they want. We are on pace here to set a world record for reversible error if we don't straighten this out." (Exhibit 4, pg. 647)
- d) "And I'm not worried about \$50.00 dollars that you want to waive in front of me on a salmon-covered card." (Exhibit 4, pg. 647)
- e) "Do you want to set a world record for error?" (Exhibit 4, pg. 650)
- f) "For crying out loud, in essence, your Court's analysis is because a lawyer tries to engage in discovery and do his job, he is therefore assisting the Defendant in making a case. That's crazy. That's crazy." (Exhibit 4, pg. 655)
- g) "You know, another thing, when is this Court going to take offense to a lawyer lying to you? I mean, is it ever going to happen?" (Exhibit 4, pg. 656)
- h) "What's so offensive to me is they make it up all the time and you don't seem to care that they make it up all the time. I don't get that." (Exhibit 4, pg. 656)
- i) "They lie to you and you don't care. What do I do about a lawyer that will lie to the Court and what do I do about a Judge that doesn't care." (Exhibit 4, pg. 657)

Defense counsel then moved the Court to grant a mistrial based upon Bailey's abusive conduct towards the Court. (Exhibit 4, pp. 658-666) Following defense counsel's oral motion, Bailey began his argument again and continued with the following statements about the Court:

a) "I ask you to reconsider when you're doing something that is so patent, so obviously wrong that it just – it defies my sense of right and wrong as to how I can't get that through you...." (Exhibit 4, pg. 667)

b) "Where you got that idea, I don't know. I mean, it really is so far off the wall, so bizarre." (Exhibit 4, pg. 668)

c) "You see, it doesn't matter because they believe that it doesn't matter what you rule because they believe they can just do whatever they want because this Court has never, at any time, demonstrated a willingness to enforce your rulings. You've never done it. Not one single time have they been rebuked?" (Exhibit 4, pg. 669)

Judge Williams then granted the mistrial. When asked during the disciplinary hearing why she granted the mistrial, she stated, "I declared a mistrial because the situation had developed where no one, no independent third party would have believed that a judge could rule fairly having been addressed as I had been that morning." (TR 10).

The Board offered two independent witnesses, Amy Mitchell, a court clerk, and Loys A. "Trey" Jordan, a trial attorney. According to Ms. Mitchell, formerly the principal court clerk assigned to Judge Williams' court, Bailey has always been a strong advocate for his clients and she normally liked having him in the Court. However, Ms. Mitchell testified that Bailey's conduct on the morning of March 27, 2008 was an inappropriate attack on the Court. According to Ms. Mitchell, Bailey's comments were disrespectful to the Court and caused her concern as an employee of the Court. She asked the courtroom deputy to intervene by speaking with the Judge.

Loys A. "Trey" Jordan, is an attorney who was present in the courtroom the morning of March 27, 2008. Mr. Jordan was at court on business unrelated to the *Watkins* case and he had no involvement in the *Watkins* case. (Exhibit 31, pp. 9-10) Mr. Jordan sat in the courtroom gallery and he was in a position to observe Bailey and the Court. (Exhibit 31, pg. 10) Mr. Jordan was not paying attention to the argument until Bailey made a statement about the Court

setting a world record for error. (Exhibit 31, pg. 13) It was at that point that Mr. Jordan believed Bailey's argument became "frenetic." (Exhibit 31, pg. 14) Mr. Jordan testified that he would not have addressed a Court in the same manner as Bailey nor would he have used the same kind of tone used by Bailey in addressing a Court. (Exhibit 31, pg. 14) Mr. Jordan testified that the tone was "snarky" and "harsh". (Exhibit 31, pg. 14) Mr. Jordan thought that Bailey could have been more respectful to the Court. (Exhibit 31, pg. 14) According to Mr. Jordan, he could not understand why Bailey was "doing what he was doing" and that "what was happening in Court was something that I don't think as a lawyer you should be doing as far as the comments being made." (Exhibit 31, pg. 15) Mr. Jordan said that the Court was being "stoic" and "deliberative" in her reaction to Bailey. (Exhibit 31, pg. 20)

#### **FACTS RELATING TO SUPPLEMENTAL PETITION**

In the Supplemental Petition for Discipline, the Board alleged that Bailey improperly advertised to the public that he was certified as a civil trial specialist by the Tennessee Commission on Continuing Legal Education and Specialization ("CLE Commission"). On April 20, 2004, Bailey became Board Certified in Civil Law by the National Board of Trial Advocacy. Bailey applied to the CLE Commission for certification in 2004. He submitted all of the required documents and a check for \$100.00 which was cashed by the CLE Commission.

Bailey received a letter from Dave Shearon of the CLE Commission dated October 5, 2004, indicating that the Commission was proceeding forward with the application while awaiting receipt of client referral letters. The CLE Commission was to obtain the letters.

The next thing that Bailey heard about the certification was five years later in 2009 when he was contacted by Preston Shipp, counsel for the Board of Professional Responsibility. An

anonymous complaint had been filed with the Board alleging that Bailey was not certified by the CLE Commission but was advertising on his letterhead and website that he was certified. As a result of that conversation, Bailey re-applied for certification which was denied due to the pendency of the supplemental disciplinary matter. When Bailey was notified that he needed to remove the certification language from his letterhead and his website, he did so.

### **CHARGES**

The Board alleged violations of the following sections of the Rules of Professional Conduct.

- 3.1 Meritorious Claims and Contentions**
- 3.2 Expediting Litigation**
- 3.3(a)(1) Candor to the Tribunal**
- 3.4(c) Fairness to the Opposing Party and Counsel**
- 3.5(e) Impartiality and Decorum of the Tribunal**
- 7.1(a) Communications Regarding a Lawyer's Services**
- 7.4(b) and (d) Communication of Fields of Practice**
- 7.5(a) Firm Names and Letterhead**
- 8.2(a)(1) Judicial and Legal Officials**
- 8.4(a), (b), (c) and (d) Misconduct.**

### **DECISION**

As a preliminary matter, the Parties stipulated that the Respondent had not violated Rule 8.4b of the Rules of Professional Conduct (the Rules).

Based on the facts recited above as applied to the Rules of Professional Conduct, the Panel unanimously finds that the Board has not proven by a preponderance of the evidence violations of the following provisions of the Rules of Professional Conduct:

**3.1 Meritorious Claims and Contentions.**

The Panel does not find by a preponderance of the evidence any position taken by Respondent that would violate this section of the Rules.

**3.2 Expediting Litigation.**

The Panel does not find by a preponderance of the evidence that the Respondent attempted to delay the litigation.

**3.3(a)(1) Candor to the Tribunal.**

The Panel does not find by a preponderance of the evidence that the Respondent made false statements of fact or law to the tribunal.

**7.1(a) Communications Regarding a Lawyer's Services**

**7.4(b) and (d) Communication of Fields of Practice**

**7.5(a) Firm Names and Letterhead**

The Panel does not find by a preponderance of the evidence that the Respondent violated any of the above-stated rules regarding his certification for the reasons stated hereafter.

**8.2(a)(1) Judicial and Legal Officials**

The Panel does not find by a preponderance of the evidence that the Respondent violated this provision of the Rules.

**8.4(c) Misconduct.**

The Panel does not find by a preponderance of the evidence that the Respondent violated this provision of the Rules.

Based on the facts recited above as applied to the Rules of Professional Conduct, the Panel unanimously finds that the Board has proven by a preponderance of the evidence that



Respondent has violated the following Rules of Professional Conduct:

**3.4(c) Fairness to the Opposing Party and Counsel**

**3.5(e) Impartiality and Decorum of the Tribunal**

**8.4(a) and (d) Misconduct.**

### ANALYSIS

#### ORIGINAL PETITION

This Hearing Panel was not assigned to make a judgment about the conduct of the Watkins trial, the trial judge or the defense attorneys. It was not assigned to make any judgment as to the issue of criminal contempt or the manner and method of prosecuting the Respondent for criminal contempt. This Panel was only required to make a judgment about the conduct of the Respondent and whether the conduct, as alleged in the Petition for Discipline and the Supplemental Petition for Discipline filed by the Board, violated the Rules of Professional Conduct.

It was obvious from the facts presented that the *Watkins* case was an extremely contentious litigation. The parties together filed over 740 pleadings including five requests for interlocutory or extraordinary appeals. A motion to “trifurcate” the trial was filed. There was evidence that one of the defense counsel, Mr. Hall, had been sanctioned for serious misconduct in another case by another judge. (Exhibit 24) Counsel for both Plaintiff and Defendant accused each other of misrepresenting the facts.

There were accusations that Judge Williams had not adequately maintained “control” of the attorneys and the progress of the litigation. There were accusations that Judge Williams did not adequately enforce her rulings and punish those who violated them. Even Judge Williams

admitted in her testimony that she should have been more aggressive in controlling the attorneys, stating:

“I should have enforced it. I should have gaveled these guys down much earlier. Looking back I wish I had. Nowadays I do.”  
(TR 70).

The primary issue before this Panel is whether, even under very difficult circumstances, an attorney can justify making rude, insulting, disrespectful and demeaning statements to the Judge during open Court. We do not believe that such conduct can be justified no matter how worthy or vulnerable the attorney’s client may be, or how poorly the Judge may be performing, or how difficult or unethical the adversary counsel may be. Our system of justice has avenues for appeal and for discipline as may be needed in those circumstances. But simply abusing or insulting the Court to get rulings in your favor cannot ever be endorsed or justified by our rules and our system of professional conduct.

Respondent testified at length during the hearing before this Panel. Even during his testimony in *this* matter, he continued to insult Judge Williams, such as:

“I can tell you this, that regardless of what she may have said on a particular line somewhere, it didn’t matter because the Judge says inconsistent things all the time. The only thing consistent is inconsistency. The Judge never, never applied anything, any ruling, any decision to anybody ever. If she said don’t make speaking objections the probability is that the very next words out of one of the lawyers’ mouths would have been a speaking objection, in which she would have said nothing. (TR 115)

Respondent continued his testimony talking about the problems he had with the adversary attorneys. He complained that they were not truthful with him and not candid with the Court. He complained that the Court would not sanction the defense counsel when they were caught committing a sanctionable act. Without doubt, Respondent feels justified in his conduct and

without any remorse.

Respondent clearly believes that the ends justify the means. He was representing a very disabled and injured child against an adversary who he considered unethical, in a courtroom he felt was out of control. He felt that he had to use any and all tactics available to him to zealously represent his client. He even acknowledged that he intentionally attacked the Judge asserting that it was necessary to obtain favorable rulings for his deserving client.

In response to a question from Disciplinary Counsel asking Respondent if he owed the same courtesy and respect to the Judge even in the face of adverse rulings, Respondent answered as follows:

You do. I was getting favorable rulings from the Court. I was getting favorable rulings from the Court because this Judge will not make a decision. Every one of you knows that. You've heard about her. She won't make a decision, okay? You have to basically push and push and push to get the Judge to make a decision and I did that over and over and over and I would ultimately prevail and I would get the correct ruling. (TR 120)

It is apparent that the insulting, abusive and critical things said to the Judge in this case by Bailey were intentional and calculated to influence her decision-making. Ultimately, those statements caused the Court to grant the defense motion for a mistrial.

Comment 5 to Rule 3.5 of the Rules of Professional Conduct echoes the feeling of this

Panel:

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Whatever Respondent's frustration with the Court may have been, he violated his duty to the profession when he insulted the integrity of the Court with statements that were intended to demean, scold, and chide the Court. This Panel finds the opinion of the Tennessee Supreme Court in *Ramsey v. Board of Professional Responsibility* to be instructive:

It is the duty of an attorney to refrain from doing anything which will tend to destroy the confidence of the public in the courts, or to bring the courts into disrepute...

It is the duty of the lawyer to maintain toward the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance....

This is a duty which the attorney owes to his profession; an obligation to which he should subordinate his personal animus toward the particular individual who happens to be filling the office.

*Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116, 122 (Tenn. 1989) (quoting *In re: Hickey*, 258 S.W.417, 430 (Tenn. 1923)).

The Board offered two independent witnesses, Amy Mitchell, a court clerk, and Loys A. "Trey" Jordan, an experienced trial attorney. Both witnesses felt that Bailey's conduct on the morning of March 27, 2008 was an inappropriate attack on the Court. However, the witnesses' opinions were of little influence on the Panel. The transcript of the Respondent's words during the trial and his testimony before this Panel were evidence enough.

#### SUPPLEMENTAL CHARGES

The Board filed a Supplemental Petition for Discipline citing violations of the following Rules of Professional Conduct:

**7.1(a) Communications Regarding a Lawyer's Services**

**7.4(b) and (d) Communication of Fields of Practice**

**7.5(a) Firm Names and Letterhead**

**ANALYSIS**

**SUPPLEMENTAL PETITION**

The proof before the Panel was that Respondent was qualified to be a Civil Trial Specialist having completed the requirements for certification including taking the examination with the National Board of Trial Advocacy. Bailey's office submitted the results of the NBTA test along with the other necessary documentation. There appeared to be a breakdown in communication between the CLE Commission and Bailey's office. The final certification was never granted by the CLE Commission for unknown reasons.

The criteria to achieve national certification is more stringent than the requirements of the CLE Commission. Upon Bailey obtaining national certification, he subsequently applied for the Tennessee certification in October of 2004. Bailey turned in the application form, the cover page of his malpractice insurance policy, a list of names and addresses of five (5) recent clients, a completed signed law practice management checklist, as well as a check in the correct amount payable to the CLE Commission. David Shearon, Executive Director of the CLE Commission, sent a letter on October 11, 2004 to Bailey, stating that they would be moving forward with the application while the Tennessee CLE awaited the client referral letters. It was the CLE Commission's responsibility to obtain these letters. Bailey's check was cashed by the CLE Commission.

This Panel finds that although Bailey did not get the final stamp of approval from the CLE Commission, Bailey was certainly qualified as a specialist and errors were made by both Bailey and the CLE Commission. Upon Bailey being requested to remove it from his letterhead he did so. The panel finds that because Bailey was qualified and met all of the requirements for the Tennessee certification in 2004, his use of the advertisement was not a material misrepresentation. The Panel finds that Bailey's actions with regard to his certification do not amount to professional misconduct.

#### Application of the ABA Standards

The Panel has determined that disciplinary violations have occurred and the Panel is required to apply the ABA Standards for Imposing Lawyer Sanctions to determine the appropriate disciplinary sanction.

The Panel must consider aggravating and mitigating factors. Based upon the facts and the Code of Professional Conduct set forth above, and the aggravating factors, the Hearing Panel finds that the following ABA Standards are applicable.

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a party or causes interference or potential interference with a legal proceeding.

7.1 Suspension is generally appropriate when knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

The ABA Standards define "knowledge" as the "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or

purpose to accomplish a particular result.” Bailey testified that his statements to the Court were intentional. He exhibited little respect for the Court or her rulings. He expressed no remorse about his conduct towards the Court. Bailey’s conduct is not acceptable trial advocacy. It is disruptive and causes actual injury to the legal system and profession. Bailey has received prior discipline from the Board. Specifically, he received a private informal admonition on August 21, 1990.

After misconduct has been established, aggravating circumstances may be considered in deciding what sanction to impose.

In this case, the Panel finds five (5) aggravating factors.

1. Bailey has substantial experience in the practice of law.
2. Bailey has demonstrated a pattern of misconduct.
3. Bailey has a prior disciplinary sanction.
4. There are multiple offenses in that Bailey has violated several Rules of Professional Conduct.
5. Bailey has refused to acknowledge the wrongful nature of his misconduct.

#### JUDGMENT

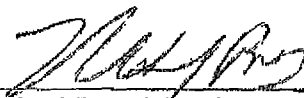
Therefore, in light of the facts and analysis set forth above and the aggravating factors the Panel unanimously finds that the Respondent, Robert Sadler Bailey, should be suspended from the practice of law for a period of sixty (60) days.

IT IS SO ORDERED.

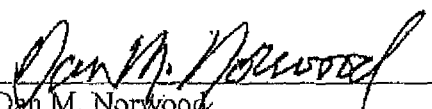
DATE: 12/4/12



G. Coble Caperton, Panel Chairman  
Attorney at Law  
275 Jefferson Avenue  
Memphis, TN 38103



Michael Joseph Banks  
Attorney at Law  
108 S. Washington Avenue  
Brownsville, TN 38012



Dan M. Norwood  
Attorney at Law  
1407 Union Avenue, Suite 807  
Memphis, TN 38104

cc:

Krisann Hodges  
Disciplinary Counsel  
TN Board of Professional Responsibility  
1101 Kermit Drive, Suite 730  
Nashville, TN 37217

Donald Capparella  
Tyler Chance Yarbro  
Attorneys at Law  
1310 Sixth Avenue North  
Nashville, TN 37208