

IN THE CHANCERY COURT OF TENNESSEE  
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

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R. SADLER BAILEY,	)	
	)	
	)	
Petitioner,	)	No.: CH-13-0157-2
	)	
v.	)	
	)	
BOARD OF PROFESSIONAL	)	
RESPONSIBILITY OF THE	)	
SUPREME COURT OF TENNESSEE,	)	
	)	
Respondent.	)	
	)	

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**ORDER**

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This case was heard on June 24, 2013, upon petition for writ of certiorari, pursuant to Rule 9, §§ 1.3, 1.4, & 8.3 of the Tennessee Supreme Court Rules, and Tenn. Code Ann. §§ 27-8-104(a), 27-8-106 and 27-9-101, seeking review of a judgment by a hearing panel of the Tennessee Board of Professional Responsibility (BOPR) in which petitioner was sanctioned by a sixty (60) day suspension from the practice of law.

For the reasons stated herein, this Court affirms in part and reverses in part the decision of the panel. The Court affirms the panel in finding that Mr. Bailey violated Rules 3.4(c), 3.5(e), 8.4(a) & 8.4(d), but reverses the hearing panel on the sanction of a sixty (60) day suspension from the practice of law. This Court finds that a public reprimand is an appropriate sanction for petitioner and remands back to the panel for action in conformity with this order.

## I. Standard of Review

The standard of review for this matter is found at Rule 9, § 1.3 of the *Tennessee Supreme Court Rules*, which states in pertinent part:

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 the evidence which is both substantial and material in 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 from that of the panel as to the weight of the evidence on questions of fact.

*Tenn. S. Ct. R. 9, § 1.3*

A tribunal abuses its discretion when it causes an injustice to the party challenging the decision by 1) applying the incorrect legal standard, 2) reaching an illogical or unreasonable decision or 3) basing its decision on a clearly erroneous assessment of the evidence. *Hanezlik v. Board of Professional Responsibility*, 380 S.W.3d 699, 676 (Tenn. 2012).

In determining the appropriate sanction to apply to a violation of the rules, the panel should consult the ABA Standards for Imposing Lawyer Sanctions. *Lockett v. BOPR*, 380 S.W.3d 19 (Tenn. 2012); *Rayburn v. BOPR*, 300 S.W.3d 654 (Tenn. 2009); *BOPR v. Allison*, 284 S.W.3d 316 (Tenn. 2009). Once a presumptive sanction is determined, the panel should then determine if there are applicable mitigating or aggravating factors. The factors enumerated in Standard 9 are "illustrative rather than exclusive." *Lockett*, 380 S.W.3d at 28 (overruling, *Threadgill v. BOPR*, 299 S.W.3d 792 (Tenn. 2009)).

Thus, any analysis of the proper discipline involves two steps: 1) identify the presumptively appropriate sanction applicable to the established misconduct, and 2) then consider whether that sanction should be increased or decreased due to aggravating and mitigating circumstances, if any. *Cowan v. BOPR*, 388 S.W.3d 264 (Tenn. 2012).

The Court must evaluate each instance of attorney misconduct in light of its particular facts and circumstances. *Maddux v. BOPR*, 148 S.W.3d 37 (Tenn. 2004); *See, e.g., Tenn.S.Ct.R. 9, § 8.4* (indicating that the appropriateness of the recommended punishment should be viewed under circumstances of each particular case). At the same time, the Court must consider the sanctions that have been imposed in prior cases that present similar circumstances so as to maintain consistency and uniformity in disciplinary proceedings. *Tenn. S. Ct. R. 9, § 8.4*.

## *II. Facts and Procedural History*

Petitioner was counsel for plaintiffs in the underlying medical malpractice case of *Watkins v. Methodist Healthcare*, Shelby County Cir. Ct. No. CT-002983-05. The case was contentious and bitterly disputed, with over 740 pleadings filed in the Shelby County Circuit Court. The animosity between counsel was vituperative throughout the seven years of the pending litigation. The record shows that the defendant filed five requests for extraordinary review, all of which were summarily denied by the court. There was even a sanction awarded to plaintiffs against defense counsel for discovery violations.

During the second day of trial, defense counsel accused Mr. Bailey of misleading the court during opening statements by stating that the birth mother did not have a doctor's appointment scheduled after October 16. Mr. Bailey countered that defense counsel was misleading the court about the date. The court later conceded that it was the defense counsel who was misleading by using only a partial reading of the plaintiff's deposition transcript.

At the end of the second morning of trial, the court held a hearing outside the presence of the jury. The hearing involved the parties' allegations as to each other's alleged misleading statements, as well as the enforcement of the court's previous ruling banning defense counsel from using any evidence which tended to show the comparative fault of the birth mother. During the course of the morning, Mr. Bailey made several comments to the court, all outside the presence of the jury, which were inappropriate under even the most harsh of circumstances. These included telling Judge Williams that she was "on pace to set the world record for reversible error." And at one point Mr. Bailey exclaimed: "They lie to you and you don't care. What do I do about a lawyer that will lie to a court and what do I do about a judge that doesn't care?"

After several additional inappropriate and disrespectful remarks, Mr. Bailey stated "Oh my God!" (allegedly under his breath, but out of the presence of the jury). After Mr. Bailey's final statement, Judge Williams found that Mr. Bailey's "contentious conduct" towards her reached the point that no independent person could conclude that she could remain impartial. She declared a mistrial and ordered that the parties return later in the afternoon. During the course of the recess, the plaintiff and defendant settled the case for a substantial amount which was later approved by the court.

When the parties returned after the two hour break, the court announced that it was charging Bailey with contempt of court. The court told Bailey to return for a hearing on April 2nd. When Bailey returned, he met an audience filled with the defense bar of Shelby County; was summarily held in criminal contempt of court; was placed in handcuffs and sent to jail. Mr. Bailey's picture being handcuffed quickly made it around the city, and the *Commercial Appeal*

later used the picture taken from inside the courtroom. Mr. Bailey's criminal contempt case was eventually reversed by the Court of Criminal Appeals.

### *III. Analysis*

The hearing panel's failure to consider the appropriate mitigating and aggravating factors and failure to determine the appropriate sanction for Mr. Bailey resulted in prejudice to the petitioner; the panel's findings and decision were arbitrary or capricious and characterized by abuse of discretion.

The panel determined that pursuant to ABA Standards 6.22 and 7.2, Mr. Bailey's appropriate sanction was suspension. In their determination, they incorrectly concluded that Mr. Bailey's conduct resulted in injury to party, client, the public or the legal system. All of Mr. Bailey's violations occurred out of the presence of the jury; and except for one attorney who witnessed a small portion of the inappropriate comments by Bailey, the public and the legal system as a whole did not witness the behavior or receive any injury. Mr. Bailey's client ended up with a settlement despite allegations in a later malpractice lawsuit, that Bailey's client and the trial court in the underlying case found were terms favorable to the client. Without injury, ABA Standards 6.22 and 7.2 do not favor the sanction of suspension for Mr. Bailey.

Once the hearing panel incorrectly determined that 6.22 and 7.2 favored the sanction of suspension, they incorrectly found aggravating factors with no mitigating factors. The panel found that an aggravating factor of prior discipline should apply. However, this is an abuse of discretion since that prior discipline occurred over 20 years ago and was a simple misunderstanding of his secretary when she used the wrong account when writing a check. The mistake was corrected by Mr. Bailey the next day, and then the matter was sent to the BOPR.

The remoteness of over 20 years between that action and the action at bar operate in favor of a mitigating factor, rather than an aggravating one.

In the hearing panel's decision, they either failed to make a determination, or made an improper determination, on whether there were any mitigating factors. First, Mr. Bailey's inappropriate behavior was evidenced by the absence of dishonest or selfish motive. Second, the dysfunction of the situation as a whole should have been used as a mitigating factor. The factors in Standard 9 are "illustrative rather than exclusive." *Lockett*, 380 S.W.3d at 28 (overruling, *Threadgill v. BOPR*, 299 S.W.3d 792 (Tenn. 2009)). When looking at the litigation as a whole, taking into account the likewise inappropriate behavior of opposing counsel and the frustration of years of legal combat accentuated by vitriol, the case's litigation environment mitigates Mr. Bailey's inappropriate and improper comments made to the court.

Imposing the sanction of a sixty day suspension also results in prejudice to the petitioner which is arbitrary, capricious and characterized by abuse of discretion when the other decisions are examined in which the Court determined when a suspension would be appropriate. One decision in which the Tennessee Supreme Court found that a thirty day suspension would be appropriate was *BOPR v. Maddux*, 148 S.W.3d 37 (Tenn. 2004).

In *Maddux*, the attorney sanctioned had converted funds from his law firm partnership on over fifty occasions for an amount exceeding \$92,500. The Supreme Court refused to impose sanctions of more than a thirty day suspension, despite the attorney's serious intentional misconduct which was dishonest and involved a selfish motive. *Id.*

In this case, there are no allegations that Mr. Bailey's conduct was criminal or involved dishonesty or a selfish motive. The established cases in this state have consistently held that this attorney's comments to a court, when not made in public, do not warrant a sixty day suspension


from the practice of law. Mr. Bailey should receive a public reprimand for his improper and inappropriate comments to the court.

*IV. Conclusion*

Mr. Bailey's comments to the court were inappropriate and in violation of Rules 3.4(c), 3.5(e), 8.4(a) & 8.4(d). While viewing the case as a whole may be an appropriate mitigating factor to use in the determination of the appropriate sanction, it does not justify Mr. Bailey's behavior. This court affirms that Mr. Bailey violated Rules 3.4(c), 3.5(e), 8.4(a) & 8.4(d).

While the violations of the Rules are affirmed, this Court reverses the sanction of a sixty (60) day suspension from the practice of law. Mr. Bailey should have received a public reprimand. This Court reverses the hearing panel on the issue of the sanction and remands the matter to the panel for the imposition of a sanction of public reprimand in conformity with this order.

Entered this 26<sup>th</sup> day of July, 2013.



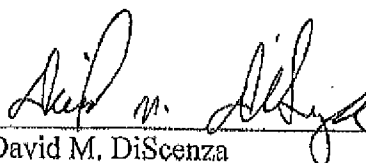
PAUL G. SUMMERS, Senior Judge

*Certificate of Service*

I hereby certify that a true and accurate copy of the foregoing has been forwarded to the following counsel via e-mail and/or U.S. Mail on this the 26<sup>th</sup> day of July, 2013.

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