

IN THE CHANCERY COURT OF HAMBLLEN COUNTY, TENNESSEE

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF TENNESSEE,

Plaintiff,

vs.

DOUGLAS RALPH BEIER,

Defendant.

No. 2018-CV-177

MEMORANDUM AND ORDER

This cause came on to be heard on the 4th day of October 2018 before Robert E. Lee Davies, Senior Judge, upon the petition for review filed by the Board of Professional Responsibility and the petition for review filed by Attorney Douglas R. Beier. The Court has received a copy of the Hearing Panel transcript, the official record with exhibits, and the briefs filed by each party. After argument of counsel, the Court makes the following findings of fact and conclusions of law:

Procedural History

On January 12, 2017 a petition for discipline was filed which Mr. Beier answered on March 13, 2017. The Board then filed a supplemental petition on March 22, 2017 which Mr. Beier answered on May 10, 2017. On January 9, 2018 Mr. Beier filed a motion for judgment on the pleadings which the Panel denied by order entered January 23, 2018. The hearing on the petition took place on January 23, 2018. The Panel heard testimony of witnesses, including Mr. Beier, took the case under advisement and issued its written findings of fact and conclusions of law on February 27, 2018. Based upon its findings of fact and conclusions of law, in conjunction

with the ABA Standards for imposing lawyer sanctions, the Panel decided that the appropriate final discipline in this case was to suspend Mr. Beier's license to practice law for a period of two years, with three months of active suspension and the remainder with Mr. Beier subject to probation with the following conditions: a) Mr. Beier shall complete a practice in a professionalism enhancement program and be responsible for the cost; b) during the period of suspension and probation, Mr. Beier will incur no new complaints of misconduct that relate to conduct occurring during the period of suspension and probation.

Facts

Mr. Beier received his license to practice law in Tennessee in 1977 and has practiced the entire time in Morristown, Tennessee. Mr. Beier is a general practitioner. In the past, he has served as a juvenile court judge and a city judge. He practices in the area of domestic relations, personal injury, criminal, contracts, and probate.

The Weaver Matter

Mr. Beier was hired by his neighbor, Tim Weaver. He filed two petitions on behalf of Mr. Weaver, one in juvenile court and one in chancery court. The objective of both petitions was to modify a parenting plan under a previous divorce decree. The juvenile petition alleged abuse or neglect, and the chancery court petition requested a modification of the parenting plan. To support these petitions, Mr. Beier drafted and submitted the affidavits of his client, Tim Weaver and his mother, Diane Weaver, along with an affidavit by a child psychologist. However, Mr. Beier admitted that Diane Weaver never signed her name to the affidavit. Instead, Mr. Beier acknowledged that he signed Ms. Weaver's name to the affidavit, then notarized it and filed it with the petition.

Mr. Beier explained that he had prepared affidavits for Tim Weaver and his mother, Diane Weaver and left them in his office for them to come by and sign. He was leaving town when he realized Ms. Weaver had not signed her affidavit, so he called her, and she asked him to sign her name.¹ Mr. Beier did not produce any emails or other written communication from Ms. Weaver authorizing him to sign her name, nor did he indicate on the affidavit that he was signing on behalf of his client.

On the following Monday, Mr. Beier appeared in front of the Chancellor, who declined to exercise jurisdiction and directed Mr. Beier to file all of his pleadings in juvenile court. The mother of the child, Ms. Hyatt and her attorney, Mr. Sexton, were also present in court on that Monday. After reviewing the petition and supporting affidavits, the juvenile court judge, relying primarily on the affidavit of the psychologist who recommended that the child not be returned to the mother, entered an order leaving the child with Mr. Beier's client on a temporary basis. Mr. Beier admitted that he never informed the juvenile court judge that he (Mr. Beier) had signed Ms. Weaver's name to her affidavit; nor did he inform Mr. Sexton. Mr. Beier admitted that Diane Weaver was present for the initial hearing in juvenile court and could have resigned the affidavit, but he felt there was not enough time to get it filed and placed on the Court's docket. Ultimately, the juvenile court judge returned the child to the mother.

Diane Weaver also testified. She told the Panel that she was supposed to go with her son, Tim Weaver to see the psychologist for the first visit with his daughter and that she asked Mr. Beier to execute her affidavit. However, in her deposition in the underlying case in juvenile court, she testified that it was Mr. Beier who asked her if he could sign her name.

¹ According to Mr. Beier, he already had sent drafts of the affidavits to Tim and Diane Weaver and received a response from Ms. Weaver with requested changes, which he then made.

Matthew Sexton, the attorney for mother, testified regarding his deposition of Diane Weaver. The first time Mr. Sexton asked Ms. Weaver about her signature on the affidavit, she just sat and looked at it without answering. After she did not answer the first time, Mr. Sexton asked her a second time and again Ms. Weaver was unresponsive. When Mr. Sexton questioned Ms. Weaver a third time, Mr. Beier interjected and supplied the answer, which Ms. Weaver adopted.

The Jenkins Estate Matter

Mr. Beier indicated that he had experience in probate matters and that he typically opened two new estates each month. Normally, Mr. Beier charged by the hour for handling probate matters. His usual hourly rate is \$250. In this case, a widow named Audrey Jenkins died intestate. At the time of her death, Ms. Jenkins had no children. She was predeceased by her full sister, Earline Norton and her half-brother, Sheridan James. Earline Norton had one child, Ray Norton. Sheridan James had four children: Darrell, Kevin, Steven, and Lavonda James.

On September 13, 2013, Mr. Norton telephoned Mr. Beier regarding Mr. Beier's potential representation of him to probate Ms. Jenkins' estate. According to Mr. Beier, Mr. Norton was concerned he would be unable to pay an hourly rate and did not know the extent of the estate. Mr. Norton asked Mr. Beier if he could take the case on a contingent fee. At the time, Mr. Norton was sixty-two years old and was receiving social security supplemental security income (SSI) and benefits from the Department of Veterans Affairs as the "helpless child of a veteran". Mr. Norton explained he had received SSI all of his adult life as a result of his "nerves". To receive his SSI benefits, the Social Security Administration required that Mr.

Norton have a representative payee. Paul Barnes was Mr. Norton's representative payee, and Mr. Beier was made aware of these circumstances.

On September 16, 2013, Mr. Norton and Mr. Barnes met with Mr. Beier regarding the estate of Ms. Jenkins. Mr. Beier described Mr. Norton as "quirky" and "scattered", but capable of conducting his own business affairs. Mr. Norton explained that he wanted to handle his own money, but that his uncle wanted to put Mr. Norton's money in a special needs trust, which Mr. Norton did not want.

Mr. Beier prepared a contingent fee contract. However, prior to preparing the contract, he researched the propriety of charging a contingent fee in a probate case. In doing so, Mr. Beier familiarized himself with the case of White v. McBride, 937 S.W.2d 796 (Tenn. 1996).² Mr. Beier took notes of his meeting on September 16, 2013. His notes indicate Mr. Beier was told there were three properties. The first real property identified was worth \$116,500 and the second property on Roy Potter Road was worth \$20,000. There also was a phone message dated September 25, which Mr. Beier acknowledged took place in 2013 that memorialized a conversation he had with Nancy James, who informed Mr. Beier of the four siblings whose parent was Sheridan James. These surviving children would have been half-cousins, and Mr. Beier acknowledged Mr. Norton told him about these half-cousins.

Mr. Norton signed the contingent fee contract for a fee of one-third of the gross estate. Although Mr. Beier had never charged a one-third contingent fee to probate an estate, he justified this fee because Mr. Norton had no money to pay him and did not know if there would be sufficient assets in the estate to pay an hourly rate.

² In White, the Supreme Court found that a contingent fee of one-third of any gross recovery for an attorney representing a husband in the probate of his deceased wife's estate was unreasonable and was grossly in excess of an hourly rate charged for similar legal work. However, the Supreme Court did not find that contingent fee contracts were expressly prohibited in probate matters.

On September 19, 2013, \$49,748.94 was deposited into the estate account from Ms. Jenkins' Regions Bank account. Shortly thereafter, Ms. Jenkins' power of attorney, Hershel Ivey, brought Mr. Beier \$54,103 in cash which belonged to Ms. Jenkins.

On September 23, 2016, Mr. Beier paid himself \$2,900 out of the estate bank account which he testified was within his normal range for a retainer when handling an estate on an hourly basis. On November 29, 2013, Mr. Beier wrote another check to himself for an additional \$6,500 on the estate's account. Then on January 10, 2014, he paid himself \$3,000. All of these payments were made prior to the Statement in Lieu of Final Accounting filed by Mr. Beier.

Although Mr. Beier was aware of the relationship of Sheridan James and his children (Darrell, Kevin, Steven and Lavonda James) to Ms. Jenkins, he never gave them notice of the filing of the petition to probate Ms. Jenkins' estate. These children of a half-sibling were equally entitled to inherit as a child of a full sibling, but Mr. Beier testified he had no knowledge of this statute,³ and never researched this topic. Since Mr. Beier only included Ray Norton as the single beneficiary of the estate, he was not required to obtain court approval for his attorney's fee. However, Mr. Beier admitted he never informed the Court about the existence of the four half-cousins, and agreed if the James' children had been included, then he would have been required to obtain court approval.

The total amount of the estate of Ms. Jenkins, including the real estate amounted to \$239,124.94 and out of that amount, the real estate had a value of \$136,500. Mr. Beier included the real estate as part of his fee and charged Mr. Norton a total fee of \$78,614. Based on Mr. Beier's reconstruction of his time spent working on this estate, at his regular rate of \$250 an hour, his fee would have come to \$16,125.

³ Tenn. Code Ann. § 31-2-107 was enacted in 1977.

Mr. Beier closed the estate in August 2014. Approximately one year later, in September 2015, Mr. Beier received a letter from Attorney Vida Bell who was doing title research on the sale of real property by Ray Norton. At that point, Mr. Beier claims he realized his mistake and contacted Mr. Norton to explain that the estate would have to be reopened since the half-cousins had an interest. After the estate was reopened, Mr. Beier received a demand letter from Scott Reams, the attorney representing the new administrator of the estate. In his letter, Mr. Reams stated:

I have discussed the matter with the current administrator of the estate, Kevin James, and we believe that an appropriate starting point would be for you to refund your fee in its entirety plus interest at the rate of 5.25% .

It has been my experience that contingent fee arrangements in estate matters are highly unusual. The nature of the assets of this estate was such that there was absolutely no risk of not recovering the assets and virtually no work was required to collect the assets. In addition, you computed your fee on real estate which never became a part of the probate estate and valued one parcel of real estate at three times its appraised value for tax purposes. . .

In addition, and independent of the demand for refund of your fees, I have reluctantly concluded that I am obligated to report this matter to the Board of Professional Responsibility. Clearly, the fees charged and apparently paid were excessive. It appears that significant client monies were collected and not deposited into the estate account or a trust account. In addition, Clint Anderson on behalf of your former client, requested client records in February and you failed to furnish those to him. I have been trying for over two months to obtain those same records, and I have furnished a release signed by Mr. Norton. However, before filing with the Board, I want to give you the opportunity to self-report this matter.

On June 10, 2016, Mr. Beier through his attorney, Lucian Pera, informed the Board as requested.

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. S. Ct. R. 9 § 1.3.

On questions of fact, the trial court may not substitute its judgment for that of the Hearing Panel. The same is true for weighing the evidence. Board of Professional Responsibility v. Allison, 284 S.W.3d 316, 323 (Tenn. 2009). However, the trial court reviews questions of law *de novo* with no presumption of correctness. Board of Professional Responsibility v. Cowan, 388 S.W.3d 264, 267 (Tenn. 2012). Any modification to a Hearing Panel's decision must be based on one of the specific factors set forth in Tenn. S. Ct. R. 9, § 1.3. Board of Professional Responsibility v. Love, 256 S.W.3d 644, 652 (Tenn. 2008).

Accordingly, the trial court will only reverse or modify the decision of a Hearing Panel if the rights of the petitioner has 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 procedures; 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. Tenn. S. Ct. R. 9, § 1.3, Board of Professional Responsibility v. Reguli, 489 S.W.3d 408, 417 (Tenn. 2015).

Finally, the trial court should conduct a review of comparable cases to ensure that the Hearing Panel's sanctions are consistent with sanctions ordered in other cases involving similar misconduct. Board of Professional Responsibility v. Reguli at 425.

Analysis

Procedural Deficiency

The first issue raised by Mr. Beier is that the Board failed to place into the record that it reviewed the recommendation of disciplinary counsel before filing formal charges before a

Hearing Panel. Tenn. Sup. Ct. R. 9, § 15(d). Mr. Beier argues that this lack of proof jeopardizes the hearing and decision of the Hearing Panel. Although Rule 9 requires the Board consider and authorize the filing of formal charges, nowhere does the Rule require that this fact must be proved or placed into the record during a hearing. This issue is without merit.

Conduct of the Hearing Panel

Mr. Beier contends that the hearing was unlawful because of the attitude and conduct of the chairman of the Hearing Panel, Marvin Neil Smith. Specifically, Mr. Beier complains that Chairman Smith asked questions which Mr. Beier considered to be aggressive and which elicited evidence that was not introduced by disciplinary counsel. Rule 614(b) Tenn. R. Evidence specifically provides that the Court may interrogate witnesses, and our Supreme Court has approved this practice in disciplinary cases before the Hearing Panel. Board of Professional Responsibility v. Reguli, 489 S.W.3d 408, 419 (Tenn. 2015). Chairman Smith was engaged and questioned Mr. Beier; however, the Court concludes that Chairman Smith's conduct and his questions were reasonable and not an abuse of discretion.

Prior Private Discipline

Mr. Beier complains that the Board alleged in its petitions that his prior disciplinary offenses were aggravating circumstances. Mr. Beier had received two private informal admonitions and a private reprimand. Mr. Beier cites Supreme Court Rule 9, § 15.12 which prohibits a petition from including allegations of any private discipline. None of the paragraphs cited by Mr. Beier contained the allegations supporting the private discipline issued against Mr. Beier. More importantly, Mr. Beier has failed to address how the allegations contained in the Board's petition for discipline prejudiced him before the Hearing Panel when it specifically

found that his prior disciplinary history was not an aggravating factor. This issue is without merit.

Whether the Conclusions and Decisions of the Hearing Panel were Supported by the Evidence

The Weaver Matter

The proof regarding the Weaver matter came from the testimony of Mr. Beier, Diane Weaver, and Matthew Sexton. The Panel found that Mr. Beier admitted he signed "Diane Weaver" on the signature line of her affidavit and then notarized the affidavit representing that it had been sworn and subscribed before him as a notary public by Diane Weaver on August 26, 2015. The Panel found Mr. Beier failed to indicate on the affidavit in any manner that he had signed Ms. Weaver's name, nor did he disclose to the courts or to opposing counsel that he had signed Ms. Weaver's name. The Panel credited Mr. Sexton's testimony that when Ms. Weaver was first questioned about the affidavit during her deposition on October 14, 2015, she sat silently looking at it; that Mr. Sexton repeated his question three times as to whether it was Ms. Weaver's signature on the affidavit with no response, until Mr. Beier interjected during the deposition and stated "that's where I subscribed your signature, right there." Ms. Weaver then immediately adopted Mr. Beier's explanation. The Panel found both Mr. Beier and Ms. Weaver gave inconsistent statements and testimony regarding the circumstances surrounding Ms. Weaver's permission for Mr. Beier to sign her affidavit. The Panel found three different explanations given by Mr. Beier or Ms. Weaver. In her deposition, Ms. Weaver testified she was unable to sign her affidavit because her granddaughter was asleep in the car, and Mr. Beier asked her if he could sign her name to the affidavit. Before the Hearing Panel, Ms. Weaver testified

that the phone conversation with Mr. Beier occurred during the trip to Knoxville when she received a call from Mr. Beier while she was at the psychologist's office in Knoxville. In her affidavit dated October 24, 2016 prepared by Mr. Beier, Ms. Weaver claims she could barely walk and was having trouble "getting around" and therefore could not get to Mr. Beier's office and asked him to sign the affidavit. In Mr. Beier's letter to the Board dated July 7, 2016, Mr. Beier stated that after he discovered Diane Weaver had not signed her affidavit, he contacted Diane Weaver, who told him "she could not get in to sign" that they were taking her granddaughter to Knoxville and "told me to sign her name."

After hearing the testimony of Mr. Beier, Ms. Weaver, and Mr. Sexton, the Panel concluded that Mr. Beier's and Ms. Weaver's testimony were not credible. The Panel found that:

By signing Ms. Weaver's name to the affidavit without signifying that he was signing her name on her behalf, and by notarizing that signature, Mr. Beier represented to the Juvenile and Chancery Courts that Ms. Weaver had in fact signed the affidavit personally, a representation he knew to be false.

The Court finds that the above facts and conclusions by the Hearing Panel are fully supported by the record in this case.

The Jenkins Estate Matter

Mr. Beier challenges the findings of the Panel that he was aware of Mr. Norton's disability and that he took advantage of that disability.

The Panel found:

1. That Mr. Norton had received social security supplemental security income (SSI) all his adult life as a result of his "nerves";
2. That his representative payee, Paul Barnes, described Mr. Norton as "a trusting man" who needed someone to help him with his affairs;

3. That Mr. Beier took advantage of Mr. Norton's disability in order to obtain his agreement to the one-third fee;
4. That Mr. Norton did not know what a contingent fee was, or how much Mr. Beier would be paid;
5. That Mr. Beier had never charged a one-third contingent fee for the probate of an estate;
6. That Mr. Beier took advantage of Mr. Norton's disability to charge an unreasonable fee; and
7. That there was nothing extraordinary regarding the administration of the Jenkins estate that would justify such a fee and that the fee charged by Mr. Beier was not in keeping with those customarily charged in Hamblen County for similar services.

It is clear from Mr. Norton's testimony that he was under the impression he would have to retain Mr. Beier with his own money in order to hire Mr. Beier. Neither Mr. Norton nor his friend, Mr. Barnes, understood the nature of the contingent fee agreement. Mr. Barnes testified:

Well, he (Norton) told Mr. Beier about the estate, and Mr. Beier said my fee is a third. Which, you know, I've never had to do anything like this before, we didn't know, so, we agreed. . .

And Ray said, "I don't have the money." Mr. Beier said, "Well, I'll take care of that," you know. And next thing you know, he had his documents or whatever for administrator of the estate.

(Tr. Pgs. 192-193)

Mr. Barnes described Mr. Norton as a trusting man, who kept to himself, and who depended on Mr. Barnes. Although Mr. Barnes indicated Mr. Norton could read and add, it was Mr. Barnes who kept track of Mr. Norton's bank account. As the Panel found, for purposes of receiving SSI, an individual "is disabled" if he is unable to engage in any substantial gainful activity by reason of any medically determinable, physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 1382(c)(a)(3)(A). Mr. Norton was also receiving benefits from the Department of Veterans Affairs as a child of a veteran, and as such, the Panel cited the Code and Federal Regulations which indicated Mr. Norton would continue to receive benefits into adulthood if he was "permanently incapable of self-support".

The Court finds Mr. Norton had an intellectual disability which is an impairment of a person's mental functioning which normally manifests before the age of twenty-two and continues as a severe, chronic condition into adulthood. Black's Law Dictionary, 10th Ed. Pg. 559. Both parties cite White v. McBride, 937 S.W.2d 796 (Tenn. 1996) in support of their positions regarding the use of a contingent fee in the probate of an estate. While it is true our Supreme Court did not find that contingent fee contracts are explicitly prohibited in probate matters and that a contract for one-third of a recovery is not, in it of itself impermissible, the Supreme Court did find the attorney's one-third percentage was unreasonable and excessive under the circumstances of that case and that there was no true contingency. In rejecting the attorney's argument that his fee was reasonable, the Court found that the attorney should have suspected he was dealing with a sizable estate even though he was not aware of the exact value, and that "a cursory investigation . . . would have confirmed this fact." White v. McBride, *supra* at 801. In this case, at the initial meeting Mr. Beier was made aware of at least three properties owned by the deceased. As Mr. Beier indicated, it was very easy for him to contact the tax assessor's office to obtain the assessed value of those properties; and likewise, it would have been just as easy to contact the register of deed's office to ascertain whether any of the properties had liens. Had he done so, Mr. Beier would have discovered that the value of two of the real properties owned by Ms. Jenkins was far in excess of what a normal fee for probating a similar estate in Hamblen County would have been.

Mr. Beier also attempts to justify charging a contingent fee since he did not know if any creditor's claims exceeded the value of the estate, that a TennCare lien existed which exceeded the value of the estate, or other costs of administration which would cause the estate to be insolvent. The Court finds this argument to be without merit in that Tenn. Code Ann. § 30-2-317 provides

that the attorney's fees of the personal representative is in the first tier of priority of claims, even ahead of funeral expenses.

For the above reasons, the Court finds that the record fully supports the Panel's findings that Mr. Norton was suffering from an intellectual disability and that Mr. Beier took advantage of that disability in charging him an excessive and unreasonable fee.

Mr. Beier contends there is no material evidence to support the Panel's findings that he was informed of the four half-cousins who were the children of Sheridan James. The Hearing Panel found that during the meeting on September 16, 2013, Mr. Norton told Mr. Beier that Ms. Jenkins was predeceased by a half-brother with surviving children and that on September 25, 2013, Nancy James, the mother of the four half-cousins, telephoned Mr. Beier and told him of the relationship of Sheridan James and his four children to Ms. Jenkins. Mr. Norton testified that on the first day he met with Mr. Beier he told Mr. Beier about the James side of the family. Mr. Barnes also testified at the first meeting with Mr. Beier that Mr. Norton told Mr. Beier he had four half-cousins, one in Morristown and three in Oklahoma.

The Panel went on to find that Mr. Beier's testimony that he was unaware that Darrell, Kevin, Steven and Lavonda James were heirs to Ms. Jenkins was not credible to the extent he knew or should have known the James children were also heirs. The record fully supports these findings by the Panel.

Mr. Beier disputes the Panel's finding that his hand-written spreadsheet was insufficiently clear regarding the remittance to his client, Ray Norton. RPC 1.5(c) provides that upon conclusion of a contingent fee matter, the lawyer is required to 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 his determination. After reviewing Exhibit 22, the Court is unable to disagree

with the Panel's finding that the spreadsheet presented to Mr. Norton was insufficient in explaining the value of all of the property which Mr. Beier included in the estate and the various payments made by Mr. Beier. In fact, as pointed out by Attorney Reams in his letter of May 26, 2016 to Mr. Beier, Mr. Beier's proposed accounting reflected a fee of \$78,624.63, but Mr. Beier's worksheets showed a fee of \$80,021.43.

Whether the Conclusions Reached by the Panel are Arbitrary

Mr. Beier complains that the Panel failed to find any mitigating factors on his behalf. Mr. Beier argues he should be given credit for self-reporting to the Board in both cases and for returning his fee to the estate.

In the Weaver matter, Mr. Beier self-reported to the Board after he had received a motion for sanctions which accused him of forging Ms. Weaver's signature on her affidavit and referenced Ms. Weaver's deposition in which she was unable to provide an explanation until prompted by Mr. Beier. Likewise, in the Jenkins estate matter, Mr. Beier's attorney informed the Board of his conduct only after Mr. Beier had received a letter from the attorney representing the new administrator of the estate in which demand was made upon Mr. Beier to refund his entire fee and a deadline to self-report to the Board. Initially, the Court notes the mitigation factors do not include self-reporting. There is a mitigating factor for timely good faith efforts to make restitution or to rectify consequences of misconduct. In the Weaver case, Mr. Beier never notified the Court or adversary counsel of the affidavit until after it came to light in Ms. Weaver's deposition and motion for sanctions was filed. In the Jenkins estate, Mr. Beier only refunded his fee after receiving a demand letter from Attorney Reams. Mr. Beier contends the Panel did not give him credit for cooperating fully in the investigation and points to his

reconstruction of a time record at the request of disciplinary counsel in support of that conclusion. The Court assumes this was an effort by the Board for Mr. Beier to justify his fee. The fact he was unable to do so, is not a mitigating factor.

The Panel also found Mr. Beier misrepresented to the Court that his client, Mr. Norton, was the sole heir of the Jenkins' estate. Although Mr. Beier contends it is disputed whether he was informed of the existence of the four half-cousins of Mr. Norton, the Panel specifically found that he had this knowledge, and the proof supports that finding. The Panel went on to conclude that although Mr. Beier had knowledge of the half-sibling law he elected not to investigate whether these half-cousins were potential heirs. The Panel made an express finding that Mr. Beier's testimony was not credible to the extent that he knew or should have known the James children were heirs, and the circumstantial proof supports that finding. Mr. Beier has practiced law in this state for many years and has extensive experience in probate matters. He opens an average of two estates every month. The half blood law has been in effect for many years.⁴ The Panel was justified in drawing the conclusion that Mr. Beier left out these four half cousins because that would have exposed his one-third contingent fee to review by the other heirs and ultimately the Court.

Mr. Beier also objects to some of the aggravating factors found by the Panel:

1. Dishonest or selfish motive;
2. Multiple offenses;
3. Refusal to acknowledge wrongful nature of conduct;
4. Vulnerability of victim;
5. Substantial experience in the practice of law.

⁴ The Panel cited Kyle v. Moore, 35 Tenn. 183, a Tennessee Supreme Court case dating back to 1855 which acknowledged the statute providing for half bloods to inherit the same as whole bloods.

Mr. Beier contends the Panel acted arbitrarily when it concluded that Mr. Beier refused to acknowledge the wrongful nature of his conduct. Although the Panel found Mr. Beier admitted to signing the Weaver affidavit, it concluded Mr. Beier failed to acknowledge that by doing so he had engaged in a false representation to the Court. Likewise, the Panel concluded Mr. Beier refused to acknowledge that his fee arrangement with Mr. Norton was unreasonable and that he misrepresented to the Court that Mr. Norton was the sole heir of the Jenkins' estate. With regard to the Jenkins' estate, the Court finds it was completely improper to include the value of the real property in the estate when the title to that real property passed directly to the heirs of Ms. Jenkins by operation of law. The Panel found that the only work performed on Mr. Beier in relation to the real estate was the preparation of a single administrator's deed. The Panel also found there was nothing extraordinary regarding the administration of this estate but based on the amount of time Mr. Beier worked on behalf of Mr. Norton, his hourly rate would have been over \$1,200, based on the fee he charged. The Court notes that in his brief and in his argument to the Court, Mr. Beier continued to maintain his position that his fee was not unreasonable.

With regard to the Weaver case, it appears his execution of Ms. Weaver's affidavit would have never come to light had it not been exposed in Ms. Weaver's deposition. In his argument before this Court, Mr. Beier focused on the fact that the statements contained in the affidavit were accurate. That approach however, fails to acknowledge the fact that Mr. Beier knowingly made a false statement to the Court when he submitted an affidavit of a client which he signed and which he notarized. The Court finds that this conclusion is supported by the proof.

Sanctions

Both Mr. Beier and the Board argue the sanctions imposed by the Panel were not correct. Both contend the Panel used the wrong ABA Standards. Mr. Beier objects to the suspension

imposed and argues a private reprimand or public censure is the correct punishment. The Board contends the findings of the Panel should lead to the disbarment of Mr. Beier.

The Sanction Imposed

In order to determine the appropriate discipline in a given case, the Court looks to the ABA Standards for imposing lawyer sanctions. Maddux v. Board of Professional Responsibility, 409 S.W.3d 613, 624 (Tenn. Ct. App. 2013). 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. Id. 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 Standards, Theoretical Framework).

Here, the Panel found the following violations:

1. By failing to inform the Courts that Ms. Weaver's signature was made by himself on her behalf, he knowingly made false statements of fact to a tribunal in violation of RPC 3.3(a)(1)(Candor toward the tribunal);
2. In representing that the affidavit was signed by Ms. Weaver, Mr. Beier committed an act of deceit, dishonesty and misrepresentation in violation of RPC 8.4(c) (Misconduct);

3. By charging a one-third fee and including the value of the real estate for purposes of computing his fee, Mr. Beier charged and collected an unreasonable fee in violation of RPC 1.1(a)(Fees);

4. Exhibit 22 was insufficiently clear to communicate to Mr. Norton the remittance to him and the method of its determination and is a violation of RPC 1.5(c)(Fees);

5. By stating in the petition that Mr. Norton was the sole heir of the estate, Mr. Beier knowingly made a false statement of fact and law to the tribunal, in violation of RPC 3.3(a)(1)(Candor toward the tribunal);

6. By failing to inform the Court of the existence of the additional descendants, Mr. Beier knowingly failed to inform the Court in an ex parte proceeding of all material facts known to him that would have enabled the Court to make an informed decision regarding the heirs of the decedent in violation of RPC 3.3(a)(3)(Candor toward the tribunal);

7. By taking advantage of Mr. Norton's disability to charge and collect from him an unreasonable fee, Mr. Beier engaged in conduct involving dishonesty in violation of RPC 8.4(c)(Misconduct);

8. By failing to include the four decedents in the administration of the estate in order to charge and collect from Mr. Norton an unreasonable fee, Mr. Beier engaged in conduct involving dishonesty, fraud, deceit and misrepresentation in violation of RPC 8.4(c)(Misconduct).

The Panel found the following section of the ABA Standards applied:

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the Court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceedings or causes an adverse or potentially adverse effect on the legal proceeding.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system.

ABA Standards under 5.1 apply to violations of duties owed to the public and the failure to maintain personal integrity. In this case, the Panel determined Mr. Beier was dishonest with both the juvenile and chancery courts by signing Ms. Weaver's name to her affidavit and then notarizing her signature. The Panel also concluded Mr. Beier made a false statement of fact when he filed the petition in the Jenkins' estate indicating that Mr. Norton was Ms. Jenkins' sole heir and that he continued this misrepresentation to prevent the Court from reviewing his one-third attorney's fee. The two potential standards which could apply are ABA Standard 5.11(b) and 5.13. Both apply to conduct involving dishonesty or deceit. Standard 5.11(b) applies to intentional conduct that seriously adversely reflects on the lawyer's fitness to practice. Standard 5.13 applies when a lawyer knowingly engages in this type of conduct that adversely reflects on the lawyer's fitness to practice law. "Knowingly" means a person has the conscious awareness of the nature or circumstances of the conduct. Intentionally means that a person has the conscious objective or desire to engage in the conduct or cause the result. (TPI-Criminal). In this case, both Standards are applicable. In the Weaver case, Mr. Beier knowingly signed Ms. Weaver's name to the affidavit and notarized it, but there was no conscious objective or purpose to accomplish a particular result. (5.13) In the Jenkins' estate, Mr. Beier intentionally failed to inform the Court of the existence of the half blood James descendants. The Panel found that he

intentionally failed to contact the other descendants or notify the Court for the purpose of taking advantage of Mr. Norton to collect his one-third contingent fee which was found to be unreasonable. This conduct seriously adversely reflects on Mr. Beier's fitness to practice. These acts were all related to the practice of law and in the case of the Jenkins' estate, were for the personal gain of a fee of \$78,641.

The Panel also considered the Standards related to violations of duties owed to the legal system. The Panel applied Standard 6.12 which provides that:

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the Court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceedings or causes an adverse or potentially adverse effect on the legal proceeding. ABA Standard 6.12.

Mr. Beier argues that the reprimand standard found at 6.13 should apply for his negligence while the Board argues that the disbarment standard found at 6.11 is the proper standard. In this case, the Panel found Mr. Beier made a false statement to the chancery and juvenile courts when he signed Ms. Weaver's name and then notarized her affidavit. While it cannot be disputed that Mr. Beier submitted a false document and made a false statement, it is important to note that Mr. Beier did not submit false testimony in the judicial process. The fact pattern in the Weaver matter does not fit easily into either one of the standards regarding duties owed to the legal system, but the Court concludes that the Panel's choice of Standard 6.12 is probably the closest.

With regard to the Jenkins' estate, the Panel concluded that Mr. Beier failed to include the James heirs for the purpose of obtaining an unreasonable fee from Mr. Norton without having to bring his fee request before the Court. Although Mr. Beier argues his failure to include the

four James heirs in the petition was negligence, the Panel made a specific finding that it did not believe his explanation, and instead concluded his actions were intentional. Specifically, the Panel found that Mr. Beier made a false statement to the tribunal when he represented in the petition that Mr. Norton was Ms. Jenkins' sole heir. In this case, Mr. Beier was informed of the existence of these additional James' heirs, and the Panel concluded Mr. Beier either knew of the half-blood law or consciously decided not to research that issue, so he could keep his unreasonable fee from scrutiny. This conduct falls more closely in the disbarment standard of 6.11. The petition filed by Mr. Beier was false since he knew or came to know shortly after the filing of the existence of these additional heirs. He never contacted the additional heirs, he never amended his petition, and he closed the estate and kept his fee. His actions had a significant adverse effect on the four James' heirs until they discovered the existence of the estate and hired their own lawyer to reopen it. These were misrepresentations by Mr. Beier himself, not his client, Mr. Norton.

The final standard considered by the Panel pertained to violations of other duties as a professional. Again, the Panel applied Standard 7.2 which provides:

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

While the Board does not object to the use of the suspension standard in the Weaver case, it contends the proper standard for the Jenkins' estate is disbarment. Standard 7.1 provides:

Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potential serious injury to a client, the public, or the legal system.

The Court agrees the actions of Mr. Beier in the Jenkins' estate fall within the purview of ABA Standard 7.1. Based upon the findings of the Panel, Mr. Beier's intentional

misrepresentations and omissions were for the sole purpose of benefiting himself, i.e. collecting his fee.

After applying the ABA Standards, the Court is then required to consider aggravating and mitigating factors to determine whether the presumptive sanction should remain, be decreased, or increased. Here, the Panel found five aggravating factors:

1. Dishonest or selfish motive with regard to the affidavit of Diane Weaver;
2. Multiple offenses for misconduct for separate instances of misconduct in the Weaver matter and Jenkins' estate;
3. Refusal to acknowledge the wrongful nature of the conduct for his failure to acknowledge he charged an unreasonable fee in the Jenkins' matter and intentionally made a false representation to the Courts in the Weaver matter;
4. Vulnerability of victim, Mr. Norton was a man of limited education and suffering from a chronic mental disability;
5. Substantial experience in the practice of law. Mr. Beier practiced law for over forty years and is experienced in the areas of family law and probate.

The Panel found no mitigating factors.

The final analysis which the reviewing court must undertake is whether the sanctions imposed in similar cases are consistent with the sanction imposed in the case at bar. In Milligan v. Board of Professional Responsibility, 166 S.W.3d 665 (Tenn. 2005) the attorney admitted he settled a personal injury suit, affixed his clients' names to the settlement check and release, procured a notary in his office to falsely notarize the release document, placed the settlement funds directly into his personal account and used them for his personal use. The Hearing Panel concluded that the attorney had 1) settled the case without the clients' authority; 2) forged the

signatures of his clients on the settlement check; 3) forged the clients' signatures on the release document; 4) procured an employee to falsely notarize the forged signatures; 5) deposited one hundred percent of the settlement funds into his personal account; and 6) procured false affidavits from his clients in an effort to conceal his misconduct. The Hearing Panel concluded that the appropriate sanction was disbarment. The Trial Court concluded that public censure was appropriate. The Supreme Court found that the attorney's conduct seriously and adversely reflected upon the lawyer's fitness to practice law and that his conduct involved dishonesty and deceit. After considering the aggravating and mitigating factors, the Supreme Court found the appropriate sanction was a two-year suspension. Milligan, supra. In Napolitano v. Board of Professional Responsibility, 535 S.W.3d 481 (Tenn. 2017), an attorney who had previously received a five-year suspension, lied under oath in a deposition and committed misconduct involving a client's property for which the presumptive sanction was disbarment, received a five-year suspension.

Conclusion

In light of the sanctions imposed in prior cases involving fraud and deceit and the misappropriation of the client's property by the attorney for his own personal benefit, the Court cannot disagree with the Panel's finding that suspension is the appropriate sanction in this case. However, given the aggravating factors of dishonest or selfish motive, of multiple offenses, of his refusal to acknowledge the wrongful nature of his conduct, of his taking advantage of Mr. Norton, and his over forty years of experience, with no mitigating factors, the Court finds the Panel's imposition of suspension for two years, with all but three months deferred, amounts to an abuse of discretion. Based upon the above analysis, the Court affirms the term of suspension for two years; however, none of the suspension shall be deferred. The Court believes that this

increase in the sanction will serve to underscore the seriousness of the violations by Mr. Beier, protect the public from similar misconduct by members of the bar, and preserve the confidence of the public in the integrity and trustworthiness of lawyers in general. Hornbeck v. Board of Professional Responsibility, 545 S.W.3d 386 (Tenn. 2018).

It is so **ORDERED**.

ENTERED this 28 day of November, 2018.


ROBERT E. LEE DAVIES, SENIOR JUDGE

CLERK'S CERTIFICATE OF SERVICE

A copy of this Order has been served by ^{Email}~~U.S. Mail~~ upon all parties or their counsel named above.

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Katherine Jones-Jerry
Clerk & Master

12/3/18
Date