

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, TENNESSEE

ROBERT L. BOOKER

Petitioner,

v.

BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE SUPREME
COURT OF TENNESSEE

Respondent.

No. CC-2018-CV-2324

BPR DOCKET NO. 2016-2608-6-AJ



ORDER

This matter came before the Court for final hearing on June 28, 2019 on the Petition for Appellate Review of the Petitioner, Robert L. Booker. After hearing the presentation and argument of Petitioner and counsel for the Board, as well as the record as a whole, this Court makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

1. Petitioner Robert L. Booker is an attorney admitted by the Supreme Court of Tennessee to practice law in the State of Tennessee in 2006.
2. Milton Hendrix possessed a collection of audio recordings and sheet music, which had belonged to his deceased brother, James Hendrix. Mr. Hendrix hired Petitioner to assist in selling the collection. Petitioner took possession of the collection and unsuccessfully attempted to negotiate its sale.

3. Mr. Hendrix filed a complaint against Petitioner with the Tennessee Board of Professional Responsibility on August 17, 2015.

4. On July 19, 2016, the Board filed a Petition for Discipline against Petitioner on based upon the complaint filed against him by Milton Hendrix (No 42813-6-BG). Petitioner filed a response on August 8, 2016.

5. The Board filed a Supplemental Petition for Discipline against Petitioner on November 22, 2016 based upon complaints filed by David Maland (No. 37811-6-BG), Judge Ron Clark (No. 36891-6-BG) and E. L. Jenkins (No. 40384-6-BG). Petitioner filed a response on January 25, 2017.

6. The Board moved for partial summary judgment regarding the complaints of David Maland, Judge Ron Clark and E. L. Jenkins. The Hearing Panel granted the motion on March 19, 2018 and later denied Petitioner's motion to alter and amend.

7. In granting the motion for partial summary judgment, the Hearing Panel found Petitioner had violated Texas Rules of Professional Conduct 1.01, 1.04, 8.01 and 8.03 in connection with his representation of clients in Texas. A disciplinary proceeding was instituted against Petitioner in the Federal District Court for the Eastern District of Texas and he was barred from practicing in such court for three years; the discipline was affirmed by the Fifth Circuit Court of Appeals. The Hearing Panel held offensive collateral estoppel precluded Petitioner from relitigating issues previously decided in Texas courts.

8. A disciplinary hearing was conducted on April 9, 2018.

9. On April 11, 2018, the Board filed a Motion to Amend to Conform to the Evidence to allege Petitioner violated RPC 1.7 (conflict of interest) in that he represented

multiple parties that were in conflict with each other and he threatened to sue Milton Hendrix while still representing him.

10. The Hearing Panel, in its Findings of Fact and Conclusions of Law found, by a preponderance of the evidence, Petitioner violated the following Rules of Professional Conduct: RPC 1.4 (communication); 1.7(a) (conflicts of interest); 1.16 (terminating representation); 8.1(a) (bar admission and disciplinary matters); and 8.4(a) and (c) (misconduct).¹

11. Pursuant to ABA Standard 9.22, the Board found the following aggravating factors present: (1) dishonest and selfish motive; (2) multiple offenses; (3) pattern of misconduct; (4) substantial experience in the practice of law; and (5) prior disciplinary offenses as set forth in the orders from the Texas courts.

12. The Hearing Panel stated Petitioner was “dishonest and deceitful with the Panel during this disciplinary proceeding.” The Hearing Panel found Petitioner presented no evidence in support of mitigating circumstances.

13. The Hearing Panel suspended Petitioner from the practice of law for three (3) years and, as a condition of reinstatement, required him to pay restitution to E. L. Jenkins in the amount of \$136,275.00.

14. Petitioner filed his Petition for Appellate Review on November 19, 2018. The Board filed its Response to Petition for Review on or about February 7, 2019.

15. In his Petition for Appellate Review, Petitioner alleges numerous “irregularities” and “substantive violations:” (1) material, prejudicial variance; (2) double jeopardy; (3) lack of jurisdiction; (4) arbitrary and capricious application of RPC 1.7 and 1.16; (5) violation of right to

¹The Hearing Panel found the Board did not meet its burden of proving Petitioner violated RPC 1.1 (competence) and 1.3 (diligence) in the Hendrix matter. However, as previously held in granting the Board’s motion for partial summary judgment, the Panel found the Board did meet its burden of proving Petitioner violated Texas Rules of Professional Conduct 1.01 (competent and diligent representation).

confront witnesses; (6) violation of the full faith and credit clauses; (7) wrongfully allowing Board counsel to testify as a fact witness; (8) excessive and unreasonable sanction; (9) allowing inadmissible hearsay; (10) surprise, bad-faith and unfair practices; (11) prosecutorial misconduct; and (12) selective prosecution.²

16. In his Appeal Brief, Petitioner raises various issues, as summarized: (1) whether the Board provided sufficient proof Mr. Hendrix initiated the Complaint and terminated his relationship with Petitioner; (2) whether there existed a conflict of interest; (3) whether the Hearing Panel's grant of partial summary judgment was proper; and (4) whether the evidence necessary to suspend an attorney's right to practice should be "beyond a reasonable doubt."³

B. CONCLUSIONS OF LAW

1. Having made the aforementioned findings of fact, this court makes the following conclusions of law. First, Tennessee Supreme Court Rule 9, section 33.1(b), states the standard of review for this matter, in pertinent part:

(b) 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 hearing panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The trial court may, in its discretion, permit discovery on appeals limited only to allegations of irregularities in the proceeding. The court may affirm the decision of the hearing panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the party filing the Petition for Review have been prejudiced because the hearing Panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the hearing 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

²This Court has previously addressed Petitioner's allegations involving material, prejudicial variance; double jeopardy; lack of jurisdiction; violation of right to confront witnesses; and violation of full faith and credit clauses. These issues will not be revisited herein.

³In his brief, Petitioner also alleges a violation of the full faith and credit clauses, which, as stated above, will not be considered herein.

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 Hearing Panel as to the weight of the evidence on questions of fact.

2. "In its broadest sense, the standard[s in (4) and (5)] require[] the court to determine whether the administrative agency has made a clear error in judgment. An arbitrary [or capricious] decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Hughes v. Bd. of Prof'l Responsibility*, 259 S.W.3d 631, 641 (Tenn. 2008) (quoting *City of Memphis v. Civil Serv. Comm'n of Memphis*, 216 S.W.3d 311, 316 (Tenn. 2007)) (emphasis in original).

3. Rule of Professional Conduct 1.4 (communication) provides:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

4. Rule of Professional Conduct 1.7(a) (conflicts of interest) provides:

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

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

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

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

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

- (1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and
- (2) each affected client gives informed consent.

5. Rule of Professional Conduct 1.16(d) (declining or terminating representation)

provides:

- (d) A lawyer who is discharged by a client, or withdraws from representation of a client, shall, to the extent reasonably practicable, take steps to protect the client's interests. Depending on the circumstances, protecting the client's interests may include: (1) giving reasonable notice to the client; (2) allowing time for the employment of other counsel; (3) cooperating with any successor counsel engaged by the client; (4) promptly surrendering papers and property to which the client is entitled and any work product prepared by the lawyer for the client and for which the lawyer has been compensated; (5) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse affect on the client with respect to the subject matter of the representation; and (6) promptly refunding any advance payment of fees that have not been earned or expenses that have not been incurred.

6. Rule of Professional Conduct 8.1(a) (bar admission and disciplinary matters)

provides:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or

7. Rule of Professional Conduct 8.4(a) and (c) (misconduct) provides:

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;

8. "If the hearing panel finds one or more grounds for discipline of the respondent attorney, the hearing panel's judgment shall specify the type of discipline imposed: disbarment (Section 12.1), suspension (Section 12.2), or public censure (Section 12.4). . . . In determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the ABA Standards for Imposing Lawyer Sanctions." Tenn. Sup. Ct. R. 9, § 15.4(a).

9. The ABA Standards for Imposing Lawyer Sanctions provide for "Failure to Avoid Conflicts of Interest[:]"

Absent aggravating or mitigating circumstances[:]. . .

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

Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

ABA Stds. Imp. Law. Sanct. 4.32, 4.33.

10. The ABA Standards for Imposing Lawyer Sanctions provide for "Lack of Candor[:]"

Absent aggravating or mitigating circumstances[:]. . .

Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

ABA Stds. Imp. Law. Sanct. 4.62, 4.63.

11. The ABA Standards for Imposing Lawyer Sanctions provide for “Failure to Maintain Personal Integrity[:]”

Absent aggravating or mitigating circumstances[:] . . .

Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer’s fitness to practice.

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.

ABA Stds. Imp. Law. Sanct. 5.12, 5.13.

12. The ABA Standards for Imposing Lawyer Sanctions provide for “Violations of Other Duties as a Professional[:]”

Absent aggravating or mitigating circumstances[:] . . .

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

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

ABA Stds. Imp. Law. Sanct. 6.12, 6.13.

13. “In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” ABA Stds. Law. Sanct. 3.0.

C. RULING

1. In review of the hearing panel’s decision, the Court does not find the Hearing Panel arbitrarily or capriciously applied Rule of Professional Conduct 1.7 by, as alleged by

Petitioner, finding a conflict of interest in the absence of any allegation or evidence regarding such. At trial, Petitioner testified he represented Mr. Hendrix and his three sisters. He further testified regarding the existence of a conflict of interest among his clients. Specifically, he acknowledged writing a letter to the Board investigator concerning the conflict of interest. The letter, which was submitted as an exhibit at trial, states in pertinent part:

[The] original reason [Petitioner] became involved was due to illegal or subversive actions of Milton Hendrix. Therefore, it was insisted that as part of the representation in this matter, [Petitioner] would take physical possession of the . . . music collection.

Since Milton Hendrix had already illegally sold some of the Music Collection without the permission of his sisters and against the integrity of the Master Recording Purchase Agreement, it was demanded that [Petitioner] take physical custody of this property; and all funds were required to be paid through his Attorney Trust Account. . . .

According to the owner of the Successor Record Company, they were forced to pay an additional Four Thousand Dollars (\$4,000.00), which amount was outside the Bulk Sales Agreement, to the Great Escape, in order to recover the Recordings and Promotional Materials that were illegally sold by Milton T. Hendrix. However, 1) Milton Hendrix did not obtain any consent or permission from his three (3) sisters; . . . 5) Milton T. Hendrix kept absolutely ALL of the monies from this illegal sale for himself.

.....

Milton T. Hendrix knows full-well that his three (3) Sisters, Ms. Owens, Ms. Harris and Ms. Claybrooks are entitled to receive EQUAL SHARES of the proceeds from the Bulk Sales Agreement; and Milton T. Hendrix knows full-well that the Carrie Records materials and James Hendrix Collection are presently under Contract. Yet, Mr. Hendrix continues with his dishonest and subversive attempts to both exclude his sisters from their fair share of the proceeds; and he continues his attempts to illegally sell portions of the Corpus from the Master Recording Purchase Agreement to other private music collectors for his own personal and selfish gain.

Despite Petitioner's knowledge of the conflict, he did not provide any documentation showing he obtained the informed consent of his clients in writing to continue the representation.

2. The Court does not find the Hearing Panel arbitrarily or capriciously applied Rule of Professional Conduct 1.16 regarding terminating representation. The August 17, 2015 Complaint Form submitted by Milton Hendrix indicates he sent to Petitioner, via certified mail, a letter discontinuing legal representation and requesting return of the music collection. However, Petitioner failed to return the property. Instead, he submitted a letter to Milton Hendrix demanding he execute a Written Authorization and Confirmation agreement for Petitioner to continue representing Hendrix. He further threatened, if Hendrix failed to execute the agreement, he would file a Declaratory Judgment Action and seek an increased attorney fee. Following discharge by Mr. Hendrix, Petitioner failed to "take steps to protect the client's interests."

3. The Court finds no procedural irregularity in allowing the Board to file a post-hearing motion to amend the pleadings to conform to the evidence to allege a conflict of interest. Insofar as Petitioner challenges the qualification of the Board's disciplinary counsel, this issue is moot given the prior substitution of Jerry Morgan for Alan Johnson. Insofar as Petitioner claims, in the Motion to Amend to Conform to the Evidence, disciplinary counsel became both a fact witness and prosecuting advocate, the Court finds no merit in this argument, as the to-be-conformed-with evidence is not testimony of disciplinary counsel.

4. Petitioner challenges the level of discipline imposed by the hearing panel. This Court finds the panel appropriately reviewed and applied the ABA Standards for Imposing Lawyer Sanctions as well as the relevant aggravating factors in determining the punishment of Petitioner.

5. Petitioner seems to allege the hearing panel erroneously admitted hearsay testimony. However, Petitioner fails to further identify the alleged error to allow review by this Court.

6. The Court finds no evidence to support Petitioner's vague allegation the Board engaged in surprise, bad-faith and unfair practices.

7. Petitioner alleges prosecutorial misconduct arising from three actions: (1) changing legal theories regarding hearsay admission on the eve of the hearing; (2) falsely alleging Milton Hendrix made the complaint; and (3) seeking consecutive punishment for conduct occurring in Texas. The Court finds no evidence of prosecutorial misconduct. The Board sufficiently proved Mr. Hendrix initiated the complaint, Petitioner has failed to specifically identify the allegedly-changed theories, and, as noted above, the Court will not again address Petitioner's double jeopardy claim.

8. The Court finds the Board successfully demonstrated Mr. Hendrix terminated Petitioner's representation and initiated the complaint against Petitioner. At trial, the Board submitted as exhibits the August 17, 2015 Complaint Form electronically signed by Milton Hendrix, the September 16, 2015 handwritten letter from Milton Hendrix to Board investigator Elizabeth Garber, and the November 7, 2015 signed letter from Milton Hendrix to Elizabeth Garber. The Court finds no merit in Petitioner's allegation regarding falsity.

9. Due to offensive collateral estoppel, the Hearing Panel found Petitioner was precluded from relitigating various facts found by the United States District Court for the Eastern District of Texas and the Fifth Circuit Court of Appeals. At the final hearing, the Hearing Panel allowed Petitioner to testify regarding his alleged inability to fully participate in the Texas proceedings; the Panel correctly noted the Texas disciplinary hearings were reviewed numerous

times and found Petitioner had failed to present sufficient evidence to demonstrate he was unable to appear in the Texas courts. Because the elements of offensive collateral estoppel have been met,⁴ the Court finds the Hearing Panel properly granted partial summary judgment to the Board.

10. The Court finds no evidence to support Petitioner's allegation he was "unfairly 'targeted' by an overzealous Disciplinary Counsel." As noted above, the Hearing Panel found Petitioner violated five of the seven rules alleged by the Board and, as outlined below, this Court has herein has affirmed the decision.

11. Finally, the Court finds without merit Petitioner's contention the evidence necessary to suspend an attorney's right to practice "must be of a quality and quantity akin to the proof beyond a reasonable doubt standard in criminal cases." Supreme Court Rule 9 provides, "In hearing on formal charges of misconduct, Disciplinary Counsel must prove the case by a preponderance of the evidence." Tenn. Sup. Ct. R. 9, § 15.2(h).

12. In review of the hearing panel's decision, this Court does not find the panel's findings, inferences, conclusions or decisions are arbitrary or capricious. The Court finds the hearing panel's findings of fact and conclusions of law are fully supported by the evidence presented in this matter and reversal or modification of the hearing panel's decision is not warranted.

4

To prevail with a collateral estoppel claim, the party asserting it must demonstrate (1) that the issue to be precluded is identical to an issue decided in an earlier proceeding, (2) that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding, (3) that the judgment in the earlier proceeding has become final, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded.

Mullins v. State, 294 S.W.3d 529, 535 (citations omitted).

13. Petitioner failed to demonstrate the hearing panel's decision was arbitrary and capricious. Petitioner's suspension is fully supported by the facts and this Court must not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.

14. This Court AFFIRMS the decision of the hearing panel and assesses costs to Petitioner.

It is so ordered this 12 day of August, 2019.



Senior Judge Don R. Ash

Certificate of Service

Robert L. Booker
P.O. Box 255
Downtown-Madison Station
Clarksville, TN 37041

Jerry Morgan
10 Cadillac Drive, Ste. 220
Nashville, TN 37027

Clerk



DON R. ASH
SENIOR JUDGE
500 North Walnut Street
Murfreesboro, TN 37130
Phone: (615) 295-2518
Fax: (615) 893-8838
Email: judge.don.ash@tncourts.gov

2019 AUG 20 AM 11:22
JERRY L. CASTLE
CLERK

WHITNEY Q. BLEVINS
Staff Attorney
Email: whitneyqblevins@gmail.com

August 13, 2019

Montgomery Court Circuit Court
Montgomery Co. Courts Center
2 Millennium Plaza, Suite 115
Clarksville, TN 37040

Re: *Booker v. BPR*
Montgomery County Circuit Court No. CC-2018-CV-2324

Dear Clerk:

Please find enclosed an Order for filing. Should you have any questions or concerns, please feel free to contact me.

With kindest regards,

Whitney Q. Blevins

Whitney Q. Blevins