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BOARD OF PROFESSIONAL
RESPONSIBILITY
IN THE CHANCERY COURT FOR WILLIAMSON COUNTY, TENNESSEE
TWENTY-FIRST JUDICIAL DISTRICT AT FRANKLIN

DARREN T. COLE,)

Petitioner,)

vs.)

DOCKET NO. 41784

THE BOARD OF PROFESSIONAL)
RESPONSIBILITY OF THE)
SUPREME COURT OF TENNESSEE)

Respondent.)

MEMORANDUM AND ORDER

A. PROCEDURAL HISTORY

The Board of Professional Responsibility (BPR) filed its petition for discipline against the respondent, Darren C. Cole, on August 29, 2011. After Mr. Cole answered the petition, a hearing panel entered a scheduling order on December 9, 2011. The order set a hearing date on May 22 and 23, 2012. Pretrial briefs and exhibit / witness lists were due May 17, 2012. On May 18, 2012, counsel for Mr. Cole filed a motion for a continuance, alleging that Mr. Cole was unable to attend the hearing because he was under orders from three neurosurgeons not to fly or drive a vehicle. The panel granted the MOTION.

On August 21, 2012, the panel chair entered an order reflecting that in a conference call "the parties" agreed to reset the hearing for November 19, 2012.

The panel convened on the appointed date. Mr. Cole's counsel appeared and moved for another continuance. He explained that Mr. Cole had informed him the Friday before that he was "physically, spiritually, mentally and financially unable" to attend the hearing. Counsel for the board opposed the motion and the panel members denied it. The panel, however agreed to allow Mr. Cole to testify by telephone (he was residing in Utah).

At the close of the Board's proof, Mr. Cole's counsel attempted to reach him by telephone, but was unable to do so.

On December 4, 2012 the panel filed its order. The panel found the following facts:

2. The conduct giving rise to the hearing panel's findings is, to a great extent, not disputed. Respondent presented no evidence on his behalf to refute the charges. It is not disputed that Respondent's IOLTA account records evidence numerous transactions paid by debit card associated with Respondent's IOLTA

account for items such as internet games, office materials, software, airfare, hotel and rental car charges, restaurants and gasoline. In addition, Respondent made ATM withdrawals and transfers to another account from his IOLTA account. Respondent never produced a ledger for his IOLTA account to explain these purchases and ATM withdrawals.

3. It is a finding of the hearing panel that the Respondent failed to provide Mr. Campbell and Ms. Owens with an accounting of the fees and expenses paid to him and failed to maintain trust account records.

4. It is a finding of the hearing panel that Respondent's use of funds in his trust account reflects commingling on his part.

5. It is a finding of the hearing panel that the Respondent upon leaving Tennessee and without the consent of his client paid another attorney to represent his client.

6. It is a finding of the hearing panel that the Respondent engaged in the practice of law in California without a California license and without registering as required by the California Rules of Court.

7. It is a finding of the hearing panel that the Respondent made numerous misrepresentations/omissions on his Tennessee Board of Law Examiners Application.

8. Having determined that the above ethical rules were violated, the panel further determined that the Respondent acted knowingly when he committed these violations.

Based on these findings, the panel concluded that Mr. Cole had violated the following Rules of Professional Conduct:

1.15(a) - keeping client funds separate from the lawyer's own property.

1.15(b) - keeping records of client funds for a period of five years.

1.16(d) - protecting a client's interest when withdrawing from representation by giving notice in time for the client to secure other counsel; by cooperating with successor counsel and promptly turning over papers and work product for which the lawyer has been compensated.

1.5(e)(1) - The division of fees between lawyers without each lawyer assuming responsibility for the representation.

1.5(e)(2) - The division of fees between lawyers without an agreement in writing signed by the client.

5.5(a) - Practicing law in a jurisdiction in violation of the regulations in that jurisdiction.

8.1 - Making false statements of material fact in connection with an application for bar admission.

8.4(a) - Violating the rules of Professional Conduct,
and

8.4(c) - engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

The panel also found the following aggravating circumstances:

- a. Prior disciplinary conduct;
- b. Dishonest or selfish motive;

- d. Multiple offenses;
- g. Refusal to acknowledge wrongful nature of conduct; and
- j. Substantial experience in the practice of law, as the evidence presented established that the Respondent has been practicing law in some jurisdiction from 1994 through 2009.

Based on its findings, and considering the aggravating factors, the panel ruled that the proper punishment under the ABA Guidelines was disbarment.

On February 4, 2013, the petitioner filed a petition for certiorari seeking a reversal of the panel's decision. The petition alleged only that the panel's decision to deny him a continuance based on his health problems was arbitrary and capricious and that the punishment recommended was too harsh, even if the facts found by the panel were true.

B. ANALYSIS

Our Supreme Court Rules provide for a review of a BPR Panel's decision as follows:

The respondent-attorney (hereinafter "respondent") or the Board may have a review of the judgment of a hearing panel in the manner provided by [Tennessee Code Annotated section] 27-9-101 et seq., except as otherwise provided herein. The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the panel are made, the Chancery Court is authorized to take such additional proof as may be necessary to resolve such allegations. The court may affirm the decision of the panel or remand to the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because of the panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the panel's jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.

The Court's review of the panel's order is, therefore, limited to the items listed in the rule. See, *Board of Professional Responsibility v. Love*, 256 S.W.3d 644 (Tenn. 2008).

1. The Denial Of A Continuance

Mr. Cole asserts that the panel's denial of his motion for a continuance on the day of the hearing was arbitrary and capricious and/or an abuse of discretion.

The decision whether to grant or deny a continuance is within the sound discretion of the trial court. *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413 (Tenn. 1997). The decision should, therefore,

be upheld so long as reasonable minds can disagree as to the propriety of the decision. *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001).

In this case the matter had been set and continued once on Mr. Cole's motion. It was re-set by order entered on August 21, 2013. The order reflected that the date was agreed to by the parties. On October 18, 2012 a notice of hearing issued from the panel confirming the date and setting the time and place for the hearing.

There is no other entry in the record objecting to the hearing date until the day of the hearing. Mr. Cole's attorney appeared and related to the panel that the Friday before, Mr. Cole had informed him that he was unable to attend the hearing because of his physical, spiritual, mental and financial condition.

There is no evidence in the record that would support a finding of inability to attend the hearing based on any of the conditions Mr. Cole described to his attorney. Although Mr. Cole in his pre-hearing brief in this Court and his brief after the Court took the case under advisement described in great detail his disabilities as of November 19, 2012, he did not submit his own affidavit or an affidavit - or even a letter - from any of his care-givers describing his condition on the date of the panel's hearing.

The only thing in the Court's file bearing on his medical condition is a letter dated April 24, 2014 from a physician at a VA hospital in Utah stating that he was currently being evaluated for the causes of "episodic spells of transient alteration of consciousness, migraines, and chronic daily headaches." The letter does not address his condition as of November 19, 2012.

The Court finds that the Panel's refusal to grant a continuance on November 19, 2012 was not arbitrary or capricious or an abuse of discretion.

2. The Panel's Findings

After a thorough review of the record, the Court finds that the factual findings of the hearing panel are supported by substantial and material evidence.

Mr. Cole's deposition and his trust account records are in this record.

He admits that he made withdrawals from the trust account for personal expenses. His justification seems to be based on the fact that he was allowed to draw on the account because the clients owed him money for legal fees. When an attorney can draw on a trust account with a personal debit card it seems to the Court to be a classic case of co-mingling.

Another curious position he takes is that the individuals whose money he was holding were never his clients. His client, according to him, was the corporation that was the subject of the shareholder derivative action. There is no evidence to support that assertion, and the assertion simply begs the question of why he was drawing on the individual's funds for the work he did.

So far as this record shows, the individual clients never got a complete accounting for the \$81,000 that he had placed in his trust account. All they ever asked was an accounting; they did not accuse Mr. Cole of embezzling or mis-appropriating the funds. He explained his failure by blaming another attorney or the crash of his computer. Finally he threatened the clients with legal action if they did not quit asking him about the account.

In his application for a Tennessee law license, Mr. Cole answered the following specific questions "no."

1. Have you ever been a named party to any civil action?
2. Have sanctions ever been entered against you, or have you ever been disqualified from participating in any case?
3. Have you ever defaulted on any student loans?
4. Have you ever defaulted on any other debts?
5. [In any bankruptcy] a. Were any adversary proceedings instituted? b. Were there any allegations of fraud?
6. Is there any incident, event, act or condition not otherwise referred to in this entire application having any bearing upon your character or fitness for admission to the bar?

The answers to the questions listed above were false. The Court finds, however, that the details included in the application plainly show that the negative answers to questions 2, 3 and 4 were probably accidental or inadvertent. The truth of the matters involved was clearly shown by the other information in the application.

The false answers to questions 5 and 6 are, nevertheless, significant and material. Specifically, as to question 6, Mr. Cole and his wife were the subjects of an investigation by the IRS concerning their 2001 income taxes. The Commissioner of the IRS determined that they had significantly understated their income for 2001 and that they were subject to the fraud penalty.

Although the date of the Commissioner's determination is not in the record, the record shows that the investigation started in 2003 and that Mr. and Mrs. Cole were not cooperative. The

United States Tax Court finally affirmed the Commissioner's assessment in an order filed on February 22, 2010.

Although the final determination may not have been made until after Mr. Cole filed his application in 2006, the fact that he was the subject of a fraud investigation going back to 2003 should have been revealed in his answers to the catchall question repeated in No. 6 above.

The Court also finds that the Panel's finding of the five aggravating factors are also supported by substantial and material evidence.

3. The Panel's Conclusions

A. Code Violations

The facts found by the panel clearly show that Mr. Cole's actions violate the Code sections cited.

B. Appropriate Discipline

Mr. Cole asserts that disbarment is not warranted in this case, even under the facts found by the Panel. He does not cite any cases for that argument, nor does he refer to the ABA Standards for discipline. The Panel did not specify which of the Standards compelled the ultimate sanction of disbarment. The Court has reviewed the ABA Standards and finds that none of the individual acts of misconduct committed by Mr. Cole would demand the sanction of disbarment. There is no evidence he converted client property (Std. 4.11), disclosed confidential information of a client (Std. 4.21), had an interest adverse to a client (Std. 4.32), abandoned his practice, knowingly failed to perform services for his client or engaged in a pattern of neglect, any of which caused serious or potentially serious injury (Std. 4.41), was incompetent (Std. 4.51), knowingly deceived a client with the intent to benefit himself (Std. 4.61), engaged in serious criminal conduct (Std. 5.71), misused an official or governmental position (Std. 5.21), made false statements causing serious or potentially serious injury to a party or caused an adverse effect or legal proceeding (Std. 6.11), knowingly violated a court order or rule with the intent to obtain a benefit which caused injury to a party or serious interference with the legal proceeding (Std. 6.21), intentionally tampered with a witness, engaged in ex parte communication with a witness, a judge, a juror, or improperly communicated with someone else involved in the legal proceeding (Std. 6.31), or violated the terms of a prior disciplinary order (Std. 8.1).

Perhaps the Standard that is most troublesome to Mr. Cole is 7.1. It states:

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 potentially serious injury to a client, the public, or the legal system.

One could argue that Mr. Cole's false answers on his Tennessee Bar application violated his duty as a professional and that he had the intent to obtain a benefit for himself. The Court, however, finds that enough questions remain about Mr. Cole's intent to deceive that the section should not be applied to him. His conduct more appropriately fits Standard 7.2 which provides:

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.

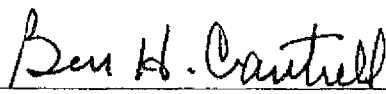
The Court further finds that the appropriate discipline for Mr. Cole, based on the Panel's findings would be a suspension for eighteen months. Applying the aggravating factors found by the Panel, the final punishment should be suspension for a three-year period dating from the date this Order is entered on the Court's minutes.

It is therefore Ordered that Mr. Cole be suspended from the practice of law in Tennessee for a period of three years from the date this Order is entered on the Court's minutes.

It is further Ordered that the costs of this cause be taxed to Mr. Cole.

IT IS SO ORDERED.

Entered, this 5th day of November, 2014.



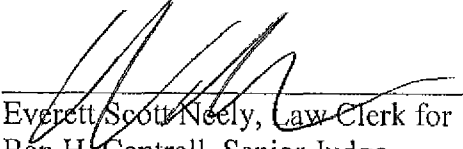
Ben H. Cantrell, Senior Judge

Certificate of Service

The undersigned hereby certifies that a true and exact copy of the foregoing document has been served this 5th day of November, 2014, via U.S. Mail with sufficient postage thereon, upon:

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