

IN THE CHANCERY COURT FOR CARTER COUNTY, TENNESSEE

Board of Professional Responsibility)
of the Supreme Court of Tennessee,)
Petitioner,)
v.)
Thomas Ewing Cowan,)
Respondent.)

No. 27783

MEMORANDUM AND ORDER

This case arises out of a Petition for Discipline filed by the Board of Professional Responsibility ("Board") on March 4, 2010. The petition is based on Mr. Cowan's plea of guilty to tax evasion. *See* 28 U.S.C. § 7201.¹ Mr. Cowan was sentenced to 12 months incarceration.²

After a full hearing held on October 14, 2010 wherein the sole issue for consideration before the Hearing Panel ("Panel") was the extent of the discipline to be imposed. A majority of the Panel concluded that Mr. Cowan should be suspended for two years. The Chair dissented, believing that Mr. Cowan should be disbarred.

¹ 26 U.S.C. § 7201 provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

² Mr. Cowan represents himself in this case.

FILED THIS 23rd DAY OF
Jan 2012 AT 10:15
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MELISSA MORELAND
CLERK AND MASTER

The Board filed an appeal, contending that Mr. Cowan should be disbarred. A stay of proceedings was entered until Mr. Cowan's release from federal custody.³

The administrative record and transcript of the proceedings before the Panel were certified to the Court, and on January 13, 2012 the Court heard arguments in Elizabethton with reference to the record before the Panel. The Court took the case under advisement. Both the petitioner and the respondent have filed pretrial briefs.

Review before this Court is governed by Tennessee Supreme Court Rule 9, § 1.3 which states:

1.3 The respondent-attorney (hereinafter "respondent") or the Board may have a review of the judgment of a hearing panel in the manner provided by Tenn. Code Ann. § 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 trial 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 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 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. Either party dissatisfied with the decree of the circuit or chancery court may prosecute an appeal directly to the Supreme Court where the cause shall be heard upon the transcript of the record from circuit or chancery court, which shall include the transcript of evidence before the hearing panel.

³ The undersigned was assigned this case by the Chief Justice by Order entered January 28, 2011.

A reviewing court in an administrative law case must be careful to remember its role and to not substitute its judgment as to the weight of the evidence on questions of fact. On an issue of fact, this Court must affirm “unless the decision was either arbitrary or capricious, characterized by an abuse, or clearly unwarranted exercise of discretion or lacking in support by substantial and material evidence.” *Rayburn v. Board of Professional Responsibility*, 300 S.W.3d 654, 660 (Tenn. 2009); *Hughes v. Board of Professional Responsibility*, 259 S.W.3d 631, 641 (Tenn. 2008).

The petition before the Court filed by the Board contends that the decision of the Panel was arbitrary and capricious and not supported by the law. The Board asserts that while the Panel held that Mr. Cowan’s conviction was a willful act of dishonesty, “The Panel failed to apply ABA Standards 5.11 (a) and (b) and 7.1 when imposing the sanction.” The Board contends that if the Panel had applied the above standards, which were supported by the evidence, then disbarment would have followed rather than a two-year suspension.

The Panel decision states that Mr. Cowan had been convicted of a “willful attempt to defeat or evade the payment of taxes, in violation of 26 U.S.C. § 7201” in an amount of \$260,000.⁴

The Panel then stated:

. . . Pursuant to Tenn. S. Ct. R. 9, Section 14, the sole issue to be determined in this matter is the extent of final discipline.

After hearing arguments from the Board and Respondent, the Panel concludes that ABA Standard 5.11(a) is not applicable, since it recommends disbarment for attorneys who engage in serious criminal conduct only if the crime contains one of the following elements: intentional interference with the administration of justice; false swearing; misrepresentation; fraud; extortion; misappropriation; theft; the sale, distribution, or importation of controlled substances; the intentional killing of another; or an attempt or

⁴ The “willful failure to file income tax returns” is defined as a “serious crime” by SCR 9, § 14.2 and pursuant to Section 14.1 a lawyer convicted of a “serious crime” is automatically suspended.

conspiracy or solicitation of another to commit any of these offenses. The elements of the crime of tax evasion are a tax deficiency, an evasive act, and a willful act, none of which are included in the list of elements in Standard 5.11(a) rendering that Standard inapplicable.

Further, the Panel has determined that ABA Standard 5.11(b) is also inapplicable because "any *other* intentional conduct" applies to conduct other than "criminal offenses," since Standard 5.11(a) refers to criminal offenses. The Panel has determined, therefore, that the crime of tax evasion does not fit within either subsection of ABA Standard 5.11, but does fall within ABA Standard 5.12 which states that suspension is 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."

The Panel finds that ABA Standard 5.12, recommending suspension, does apply to Respondent's disciplinary misconduct because it specifically refers to "criminal conduct" and because the Panel finds that Respondent's conduct seriously adversely reflects on his fitness to practice law.

The Panel finds that there are several aggravating factors, including prior disciplinary history, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law under Standard 9.22. The Panel finds that the only mitigating circumstance under Standard 9.32 is the imposition of other penalties or sanctions, but that the aggravating circumstances outweigh the mitigating circumstance.

Accordingly, it is the decision of the Panel that Respondent should be suspended from the practice of law for two (2) years. As a condition of reinstatement, Respondent must demonstrate that he has completely and satisfactorily fulfilled the conditions of his plea agreement.⁵

The dissenting Panel member disagreed with the two-year suspension:

Panel Chair Staubus respectfully dissents from the findings and judgments of the majority of the Hearing Panel. It is the opinion of Mr. Staubus that ABA Standard 5.11(a)(b) applies and that disbarment is the appropriate sanction. Further, Mr. Staubus finds that ABA Standard 7.1 is also applicable.

This Court must disagree with the Panel majority. The Court is of the opinion that the crime the respondent pled guilty to clearly involved misrepresentation, fraud or deceit, and therefore ABA Standard 5.11(a) applies.

⁵ Mr. Cowan has been a practicing lawyer since 1968.

The crime was not mere tax evasion but willful tax evasion involving affirmative acts. Mr.

Cowan agreed when he entered his plea that:

Instead of fully paying his taxes, Cowan willfully attempted to evade or defeat his tax obligations. He did so by failing to file timely income tax returns, by not paying the IRS the amounts that he owed, and by willfully committing a number of affirmative acts that were intended to evade his tax obligations, including, without limitation, the use of nominee entities to conceal from the United States his ownership of assets.

Mr. Cowan pled guilty to Count One of the indictment. This count specifically sets forth affirmative acts as follows:

. . . by failing to pay to the Internal Revenue Service said income taxes, penalties and interest, as required by law, and by committing the following affirmative acts of evasion, among other things: concealing his true income and assets by diverting checks that had the inherent appearance of income into the checking account of a family member, cashing checks that had the inherent appearance of income, depositing earned income into his law firm trust accounts, and making personal payments from his law firm trust account, and by otherwise using his attorney trust account to conceal income and nominees to conceal the ownership of assets from the United States.

Before the Hearing Panel and also before this Court on January 13, 2012, Mr. Cowan attempted to explain that while he agreed with the above facts when he pled guilty, that his agreement was caused by the reality of plea bargaining. He could not now quite agree with these facts. He stated to the Panel that tax evasion is a “non-intentional thing” or “an omission to act” so “I don’t consider that to involve dishonesty, fraud, deceit and certainly misrepresentation because you’re not – you’ve misrepresented if you put down you had a thousand dollars of income and you had a hundred thousand dollars.” Transcript of Record pp. 47-48.⁶ In his brief, Mr. Cowan describes

⁶ Mr. Cowan was not charged in federal court with the misdemeanor crime of failure to file. See 26 U.S.C. § 7203. Filing false returns is a violation of 26 U.S.C. § 7206 but only carries a maximum of three years of incarceration.

the crime as follows:

. . . the agreed factual basis supporting said plea being: that Respondent earned income during the years of 1993-1997 on which federal income taxes were due; instead of *fully* paying said taxes, Respondent attempted to evade or defeat payment of said taxes by: failing to file *timely* income tax returns (a *passive act*), not paying the tax owed (a *passive act*), and taking acts intended to evade the tax obligation, namely placing effective ownership of assets in nominee entities.

Cowan Brief p. 2. Of course, this is an admission of "taking acts intended to evade the tax obligation." Further, Mr. Cowan failed to file tax returns only subsequent to 2000. He concentrates his testimony on his failure to file, not his conduct before 2000.

Here the record shows Mr. Cowan engaged in affirmative acts to hide income from the government, and this is conduct of a fraudulent nature, deceitful, and involving intentional misrepresentation.

In a discipline case involving tax evasion pursuant to 26 U.S.C. § 7201 by a lawyer, it was held that the lawyer was guilty of conduct involving dishonesty, fraud, deceit, or misrepresentation." *In re Grimes*, 326 N.W.2d 380, 383 (Mich. 1982). Grimes hid money owed him by clients, contending that they were loans and hiding the income in scam loan agreements. As in this case, Grimes engaged in affirmative acts to willfully evade taxes. He was disbarred.⁷

In *Attorney Grievance Committee v. Gary*, 452 A.2d 1221 (Md. 1982), the court held that a conviction for willful tax evasion (26 U.S.C. § 7201) is "a crime involving dishonesty, fraud, deceit or misrepresentation" and is "prejudicial to the administration of justice" and "adversely reflects on the respondent's fitness to practice law." The Court held disbarment to be the appropriate sanction.

⁷ A second count involved Grimes counseling a client to make misleading statements to the IRS.

In *Maryland State Bar v. Agnew*, Spiro Agnew was disbarred after he entered a nolo contendere plea to willful tax evasion in violation of 26 U.S.C. § 7201. The Maryland court stated:

This crime [26 U.S.C. § 7201], which involves moral turpitude, and is infested with fraud, deceit, and dishonesty, clearly comes within that category we have previously discussed that will result in automatic disbarment when the respondent fails to demonstrate by clear and convincing evidence a compelling reason to the contrary. For this conclusion, we rely in part on the concept that 'our method of filing income tax returns is fundamentally based upon the honor of the individual reporting his income . . . ' articulated by Judge Hoffman at the time he sentenced the respondent and in part upon our conclusion that willful tax evasion by a lawyer, while it may not directly injure a client, cheats and defrauds the government which, in our mind, is tantamount to defrauding his client or any other person. On the record before us, we perceive no mitigating circumstances - in fact, all that appears tends to aggravate the gravity of the offense.

Maryland State Bar v. Agnew, 318 A.2d, 811, 815-16 (Md. 1974).

In Tennessee, the ABA Standards for Imposing Lawyer Sanctions serve as a guideline for attorney discipline. *Rayburn v. Board of Professional Responsibility*, 300 S.W.3d 654, 664 (Tenn. 2009). When a lawyer is convicted of a crime, Sections 5.11 and 5.12 are implicated.

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely

reflects on the lawyer's fitness to practice.

5.12. Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.1 and that seriously adversely reflects on the lawyer's fitness to practice.

Disbarment is also addressed in Section 7.1 as follows:

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.

As referenced, aggravating or mitigating circumstances are also factors to be considered.

The Court finds incorrect the Panel's decision that Section 5.11 is not to be applied to willful tax evasion. Willful tax evasion, especially involving affirmative acts to hide income is a crime of deceit and/or misrepresentation and/or fraud, and it clearly reflects on the lawyer's fitness to practice. The finding by the Panel that Section 5.11 does not apply is unsupported by the evidence. Section 5.11 does apply.

The Court, having found the Panel's decision to be in error, must either modify or remand the decision.

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 evidence which is both substantial and material in the light of the entire record.

SCR 9, § 1.3.

Under the facts and circumstances in this case, the Court finds that modification is more appropriate.

Having found that Section 5.11 does apply, disbarment is "generally appropriate." The only thing that would moderate disbarment would be mitigating circumstances far outweighing aggravating circumstances.

Here, the aggravating circumstances are extremely strong. Mr. Cowan has a lengthy and weighty history of disciplinary violations. Mr. Cowan has been sanctioned for disciplinary misconduct on 20 separate occasions, including three public censures and two suspensions.

Mr. Cowan was publicly censured on November 28, 1991, for charging an excessive fee, neglecting a child support case, and failing to pay two doctors' deposition fees from settlement proceeds. He was publicly censured on June 22, 1995, for contempt of court. He was publicly censured a third time on February 12, 2000, for neglecting a client's case and for failing to respond timely to the disciplinary complaint. Mr. Cowan was suspended from the practice of law for 30 days on December 15, 2002, for a pattern of failing to timely submit divorce judgments for signature and of failing to timely file said judgments in divorce matters. Finally, Mr. Cowan is presently serving a three-year suspension due to misconduct involving pervasive neglect, misrepresentation, and failure to communicate with clients and the Board.

Mr. Cowan has also received 15 private informal admonitions dating from 1983 to 1999. The violations primarily consist of neglect, failure to communicate, failure to respond to disciplinary complaints, and delaying the administration of justice.

This prior disciplinary record carries substantial negative weight.

A lawyer with Sneed's extensive record of ethical infractions simply cannot be permitted to continue practicing law in our courts. He has not heeded lessons from facing numerous prior disciplinary proceedings and, in fact, continues to repeat the same mistakes. Furthermore, as far as this record shows, he has not acknowledged the wrongful nature of his conduct, and we

have been unable to find even a hint of remorse in the record before us. Perhaps worse, Sneed's repeated, intentional disregard of the ethical rules undermines the protection of the public and the preservation of the public's confidence in the legal system. Indeed, the pattern and pervasive nature of the unethical conduct committed by Sneed, coupled with his apparent unwillingness to abide by the rules of the profession despite years of disciplinary action taken against him, can do little but add to the cynicism about lawyers and foster disrespect for the administration of justice that ultimately does great harm to the public, the legal system, and the profession of law. In light of all these circumstances, we have concluded that the Panel and the trial court appropriately found that Sneed should be disbarred.

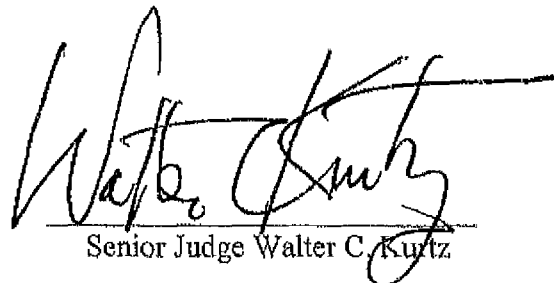
Sneed v. Board of Professional Responsibility, 301 S.W.3d 603, 618 (Tenn. 2010).

Mr. Cowan attempts to show some mitigation by referencing his service as a lawyer in the military during the Vietnam War and his work for Legal Aid. He also says that despite his guilty plea, his actions could be viewed as an act "to transfer value to family members" or "as nothing more than a purchase of an asset for the use and enjoyment of his family." Cowan Brief p. 3.

Mr. Cowan's past service can in no way mitigate his substantial history of disciplinary violations. His continuing explanation for his willful evasion of taxes shows a refusal to acknowledge the true nature of his misconduct, which is another aggravating factor. See ABA Standards Section 9.22. He has "a pattern of misconduct"; "multiple offenses"; and "substantial experience in the practice of law;" all of which are aggravating factors. *Id.*

For the reasons stated above, the decision of the Hearing Panel is MODIFIED and Thomas Ewing Cowan is disbarred. SCR 9, § 4.1.

This the 20 day of January, 2012,


Senior Judge Walter C. Kurtz

cc:

Krisann Hodges
Board of Professional Responsibility
10 Cadillac Drive, Suite 220
Brentwood, Tennessee 37027
Via facsimile: 367-2480

Thomas Cowan
111 South Main Street
Elizabethton, Tennessee 37643
Via U.S. Mail (signed copy)
Via e-mail (unsigned copy)

CERTIFICATE OF SERVICE

I, Melissa Moreland, Clerk and Master for the Chancery Court of Carter County, Tennessee, hereby certify that a copy of the foregoing Memorandum and Order was served upon the parties by depositing in the U.S. Mail with sufficient first-class prepaid postage addressed as follows:

Krisann Hodges
Board of Professional Responsibility
10 Cadillac Drive, Ste 220
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Walter C. Kurtz
Senior Judge
State of Tennessee
708 Metropolitan Courthouse
Nashville, TN 37201

This the 23rd day of January, 2012.


Melissa Moreland
Clerk and Master