

IN DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

2015 DEC 17 PM 3:30

BOARD OF PROFESSIONAL
RESPONSIBILITY

M. McKnight
REC. STP

IN RE: JOHN ROBERT HERSHBERGER
BPR # 21519, Respondent
An Attorney Licensed and
Admitted to the Practice of
Law in Tennessee
(Shelby County)

DOCKET No: 2014-2381-9-WM

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter came on for hearing on November 5, 2015 before a Hearing Panel consisting of Gregory Dean Mangrum, Thomas P. Cassidy, Jr. and Max L. Ostrow, Chair. The Board of Professional Responsibility (the "Board") was represented by William C. Moody. Mr. Hershberger was present for the hearing and represented by Sam Muldavin. Because this matter was initiated before the Board prior to January 1, 2014, it is governed by the 2006 version of Tennessee Supreme Court Rule 9. All references to that rule are to the 2006 version.

FINDINGS OF FACT

1. On October 9, 2014, the Board filed a Petition for Discipline against Mr. Hershberger. On November 6, 2014, the Board filed an Amended Petition for Discipline. Mr. Hershberger filed an Answer and Affirmative Defenses of Respondent on September 10, 2015.

2. Mr. Hershberger is an attorney licensed to practice law in Tennessee since 2001.

3. Mr. Hershberger represented the appellant, Dedrick D. Campbell, in the case of *Campbell v. Tennessee, Ex Rel. Catania Spears*, in the Western Section of the Court of Appeals.

4. At the time *Campbell* was pending before the Court of Appeals, now Justice Holly Kirby was then a judge on the Western Section of the Court of Appeals.

5. On August 23, 2013, Mr. Hershberger went to Justice Kirby's home for the purpose of asking her a question in relation to the *Campbell* case, which was pending before the Western Section of the Court of Appeals at the time.

6. Justice Kirby was not home at the time of Mr. Hershberger's visit and he was greeted by her husband.

7. The evidence presented at the hearing in this cause consisted of the following:

a) A single sentence contained in the August 31, 2013 email from Mr. Hershberger to Disciplinary Counsel Betsy Garber, read into the record, in which the Respondent states that his choice to drop in on Justice Kirby "was not my shining moment of foresight, but nothing that transpired was untoward."

b) One paragraph from a two-page September 6, 2013 email from Mr. Hershberger to Disciplinary Counsel Betsy Garber, read into the record, and stated *verbatim* as follows:

I didn't intend to discuss any aspect of the case with Judge Kirby, except to relate that my client is indigent, the case(s) are complex, and he does not have a way to get enough of the record to make his appeal worthwhile. With the follow-up question of "what can I do?" It was an entirely administrative issue having to do with the practical aspect of handling the appeal effectively.

c) The testimony of the Respondent, Mr. Hershberger, who Mr. Moody chose not to cross-examine.

8. Mr. Hershberger left without speaking with Justice Kirby.

PRIOR DISCIPLINE OF RESPONDENT

9. On May 30, 2014, Mr. Hershberger received a two (2) year suspension, with sixty (60) days active and the remainder to be served on probation.

10. On July 27, 2012, Mr. Hershberger received a public censure.

11. On October 11, 2011, Mr. Hershberger received a private reprimand.

12. On June 22, 2011, Mr. Hershberger received a private informal admonition.

13. On January 6, 2011, Mr. Hershberger received a private informal admonition.

CONCLUSIONS OF LAW

14. Pursuant to Tenn. Sup. Ct. R. 9, § 3, the license to practice law in this state is a privilege, and it is the duty of every recipient of that privilege to conduct himself or herself at all times in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law. Acts or omissions by an attorney which violate the Rules of Professional Conduct of the State of Tennessee shall constitute misconduct and be grounds for discipline.

15. By visiting the home of Justice Kirby with the intent to relate to her that his client was indigent, the case was complex and his client did not have the means to obtain enough transcript to make the appeal worthwhile and to ask her “what can I do,” Mr. Hershberger attempted to engage in an ex parte communication with Justice Kirby in violation of RPC 3.5(b) (Impartiality and Decorum of the Tribunal).

16. The preponderance of the evidence establishes that Mr. Hershberger has committed a violation of RPC 8.4(a)(Misconduct) by attempting to violate RPC 3.5(b) (Impartiality and Decorum of the Tribunal).

17. The Board has the burden of proving violations of the Rules of Professional Conduct by a preponderance of the evidence. The Board has carried its burden and proven the aforementioned violation of the Rules of Professional Conduct by a preponderance of the evidence.

18. Once disciplinary violations have been established, the Panel shall consider the applicable provisions of ABA Standards for Imposing Lawyer Sanctions.

19. Prior to consideration of any aggravating or mitigating circumstances, the following ABA Standard applies to this case:

6.33 Reprimand¹ is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury to a party or interference or potential interference with the outcome of the legal proceeding.

20. Pursuant to ABA Standard 9.22, aggravating factors are present in this case:

- a) Prior disciplinary offenses.
- b) Substantial experience in the practice of law.

21. Pursuant to ABA Standard 9.32, one mitigating factor is present in this case:

- a) Absence of a dishonest or selfish motive.

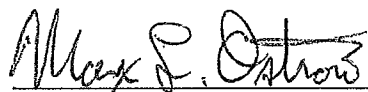
22. Based upon the evidence and admissions in the matter, the Panel finds that public censure is the appropriate discipline.

¹ ABA Standard 2.5 equates "reprimand" with "public censure."

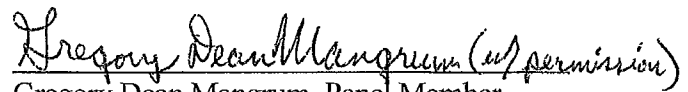
JUDGMENT

In light of the Findings of Fact and Conclusions of Law and the aggravating factors set forth above, the Hearing Panel hereby finds that Mr. Hershberger should be publicly censured.

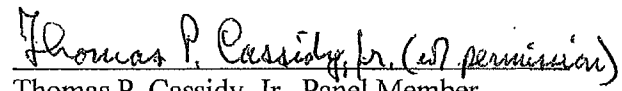
IT IS SO ORDERED.



Max L. Ostrow, Panel Chair



Gregory Dean Mangrum, Panel Member



Thomas P. Cassidy, Jr., Panel Member

NOTICE: This judgment may be appealed pursuant to Tenn. Sup. Ct. R. 9, § 1.3 by filing a Petition for Writ of Certiorari, which petition shall be made under oath or affirmation and shall state that it is the application for the Writ. See Tenn. Code Ann. §27-8-104(a) and 27-8-106.