

IN THE CHANCERY COURT FOR DYER COUNTY, TENNESSEE
AT DYERSBURG

AM. PM 1:00
WJ # 59
MAR 27 2012
H. STEVEN WALKER
CHANCERY CLERK ON DC

MARTIN L. HOWIE, an attorney
practicing law in Dyer County, Tennessee,
BPR #014120,

v.

THE TENNESSEE BOARD OF
PROFESSIONAL RESPONSIBILITY,

Respondent.

No. 11-CV-228

JUDGMENT

This case is before the court on a Petition for Certiorari and Supersedeas filed by the petitioner, Martin L. Howie.¹ The petition seeks a review and stay of the judgment of the hearing panel filed March 29, 2011, in a lawyer disciplinary proceeding against Mr. Howie.

The hearing panel found multiple violations of applicable rules of professional conduct as alleged in the Petition for Discipline filed on November 19, 2010, which were deemed admitted by an Order of Default Judgment entered on January 6, 2011. As a result, the hearing panel entered its judgment suspending Mr. Howie's license to practice law for a period of five years retroactive to the date of his temporary suspension on February 8, 2011, for the failure to respond to disciplinary complaints. The panel further found that Mr. Howie should make restitution to eight of his former clients, totalling \$5,743. Mr. Howie was also required to be assessed by the Tennessee Lawyers Assistant Program and enter into a peer assistance contract in compliance with TLAP's recommendations and program requirements. Proof of restitution and compliance with TLAP's recommendations were made prerequisites to reinstatement. Additionally, the panel required Mr. Howie, "as a condition of probation,"² to maintain a practice monitor for not less than one year following reinstatement. Finally, Mr. Howie was ordered to pay the Board's costs.

¹Since Mr. Howie is the petitioner in this case and was the respondent in the matter being reviewed, he will be referred to in this Order as Mr. Howie. The Board of Professional Responsibility will be referred to as the Board or BOPR.

²No probationary period was imposed by the hearing panel. Any probationary period in addition to the five year suspension, in the opinion of the court, would have exceeded the maximum sanction which could be imposed under Section 4.2, Rule 9, Rules of the Supreme Court.

STANDARD OF REVIEW

In reviewing the findings and conclusions of the hearing panel in a disciplinary proceeding, the court must be guided by Rule 9, section 1.3 of the Rules of the Supreme Court which provides in pertinent part 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 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.

Tenn. Sup. Ct. R. 9, §1.3 (2007)

In this case, the Board proceeded on the allegations of the Petition for Discipline that were deemed to have been admitted by the Order of Default Judgment. Mr. Howie asserts that his suspension was made upon unlawful procedure in that the hearing panel failed to hold a pre-hearing conference within 60 days as provided for in Section 23.2 of Rule 9, Rules of the Supreme Court. That provision has been held to be directional, not jurisdictional, and no relief need be given for the failure to schedule the pre-hearing conference unless a party can show prejudice as a result of that failure. See Sneed v. Board of Professional Responsibility, 301 S.W.3d 603, 613 (Tenn. 2010). Mr. Howie also asserts that the judgment of the hearing panel should be declared void because it fails to include a notice that the judgment may be appealed. The Supreme Court's Order amending Section 8.3 of Rule 9 to require such notice was signed on May 2, 2011, after the judgment in this case was rendered.

Mr. Howie alleges it was error for the hearing panel to deny his Rule 60 motion seeking to have the Order of Default Judgment set aside. This court's review of the hearing panel's denial of a Rule 60.02 motion for relief from a default judgment is under an abuse of discretion standard. Tenn. Dep't of Human Serv. v. Barbee, 689 S.W.2d 863, 866 (Tenn. 1985). In Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001), the Tennessee Supreme Court stated as follows regarding the abuse of discretion standard:

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." State v. Scott, 33 S.W.3d 746, 752 (Tenn. 2000); State v. Gilliland, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. Myint v. Allstate Ins. Co., 970 S.W.2d 920, 927 (Tenn. 1998).

Factors to be considered in determining whether a default judgment should be set aside pursuant to Rule 60 include: (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted. Henry v. Goins, 104 S.W.3d 475, 481 (Tenn. 2003); Vanderbilt Univ. v. New Hope Pharms., Inc., No. M2008-00362-COA-R3-CV (Tenn. Ct. App. Oct. 16, 2008). Neither before the hearing panel nor before this court has Mr. Howie refuted the allegations of the Petition for Discipline as they relate to the twelve complaints made against him. He simply has failed to show that he has a meritorious defense or that his failure to file an answer to the Petition for Discipline was anything other than willful. The court does not find that the hearing panel abused its discretion by denying Mr. Howie's motion to set aside the default judgment, made as it was on the date of the disciplinary hearing.

Mr. Howie asserts that service of the Petition for Discipline was improper. Section 12.1 of Rule 9, Rules of the Supreme Court provides as follows:

Service upon the respondent of the petition in any disciplinary proceeding shall be made by personal service by any person authorized by the Chair of the Board, or by registered or certified mail at the address shown in the most recent registration statement filed by respondent pursuant to Section 20.5 or other last known address.

According to Mr. Howie, he received a registered letter from the Board but it contained a petition relating to another attorney. Mr. Howie called the error to the attention of the Board who faxed him a copy of the correct petition. Mr. Howie acknowledges that he received notice of the allegations against him by the Board and acquiesced in proceeding in that fashion. In the opinion of the court, Mr. Howie has waived any defect in the service of the petition.

Finally, Mr. Howie challenges the propriety of a five year suspension. The court agrees with him that imposition of a five year suspension is arbitrary. Section 8.4 of Rule 9, Rules of the Supreme Court, provides that "[I]n determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the ABA Standards for Imposing Lawyer Sanctions." (ABA Standards). The ABA Standards provide, in Section 3.0 that in imposing a sanction after finding lawyer misconduct, a hearing panel 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.

The hearing panel, in this case, gave no indication what standards it considered in arriving at a five year suspension. It failed to specify any aggravating or mitigating factors it found applicable.

The Petition for Discipline sets forth twelve complaints the majority of which consist of Mr. Howie accepting fees over a relatively short period of time in 2009 for work to be done and then not performing the work, failing to communicate with the client and making restitution for the fees paid. In another case, he failed to file a brief on the appeal of the denial of post-conviction relief. In another he undertook the investigation of a medical malpractice action and failed to communicate with the client concerning it. Judge William Acree Jr., filed a complaint because Mr. Howie had been suspended from the practice law because of his failure to complete his continuing legal education requirements and did not notify the court in advance of a scheduled trial. It appears from the allegations of the Petition for Discipline that Mr. Howie violated the duty owed his clients of diligence and keeping them informed of his progress in the handling of their cases. He also violated a duty owed to the administration of justice by failing to inform the court of his status as a lawyer. In the opinion of the court, because of the number of occurrences, Mr. Howie had to know that he was accepting fees when he did not have the ability to complete the work he engaged to perform. While there is no evidence in this record that any of the complainants were actually injured by Mr. Howie's conduct other than the loss of the monies paid to him, there was the potential for injury.

As aggravating factors, the court notes a selfish motive in Mr. Howie's accepting fees knowing he was not able to complete work he had accepted in the past. He exhibited a pattern of misconduct in this regard committing multiple offenses. He had substantial experience in the practice of law. He failed to exhibit to the Board any willingness to make restitution. As mitigating factors, the court notes an absence of any disciplinary record prior to this period of time. According to Mr. Howie, he was experiencing depression and emotional problems due to the discovered unfaithfulness of his fiancée. He was also engaging in excessive drinking.

The court is instructed by Section 4.42 of the ABA Standards that provides as follows:

Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) a lawyer engages in a pattern of neglect causes injury or potential injury to a client.

While the court agrees that suspension is appropriate in this case, the five year suspension imposed by the hearing panel does not comply with the ABA Standards. Holding someone from the practice of law for a period of five years significantly increases the danger of malpractice upon reinstatement. The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged their professional duties to clients, the public, the legal system, and the legal profession. Section 1.1, ABA Standards. In the opinion of the court a five year suspension would serve to increase the danger to the public by an attorney who had been removed from practice for such a period of time rather than as a protection to the public. Public protection is better achieved through monitoring his practice upon reinstatement and his participation in rehabilitative programs. Moreover, Section 2.3 of the ABA Standards provides that "suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years."³ Inasmuch as the five year suspension was not made on specific findings required by the ABA Standards and exceeded the maximum recommended by those standards, the court finds it arbitrary.

The court does believe that the period of suspension should be at least one year. Any attorney having been suspended for one year or more may not resume practice until reinstated by order of the Tennessee Supreme Court. Tenn. Sup. Ct. R. 9, § 19.1. Petitions for reinstatement are to be filed no more than 90 days prior to the time the attorney is eligible for reinstatement and shall be filed with the Tennessee Board of Professional Responsibility and served upon its Disciplinary Counsel. The Board then refers the petition to a hearing committee, who shall schedule a hearing. At the hearing, the petitioner shall have the burden of demonstrating by clear and convincing evidence that the attorney has the moral qualifications, competency and learning in law required for admission to practice law in Tennessee and that the resumption of the practice of law within Tennessee shall not be detrimental to the integrity and standing of the bar or the administration of justice, or subversive to the public interest. Tenn. Sup. Ct. R. 9, § 19.3.

³The court is aware that Section 4.2 of Rule 9, Tennessee Supreme Court Rules provides that no suspension may be in excess of five years. This provision appears to be in conflict with the provision in Section 8.4 requiring consideration of the ABA Standards.

In deciding an appropriate sanction when an attorney is found to have breached the rules governing his or her profession, this court may review all of the circumstances of the particular case and also, for the sake of uniformity, sanctions imposed in other cases presenting similar circumstances. Bd. of Prof'l Responsibility v. Maddux, 148 S.W.3d 37, 40 (Tenn. 2004). While no cases have been cited to the court for comparison purposes, the court is aware of the case of Flowers v. Bd. of Prof'l Responsibility, 314 S.W.3d 882 (Tenn. 2009) where Mr. Flowers had numerous violations similar to those committed by Mr. Howie and received a one year suspension.

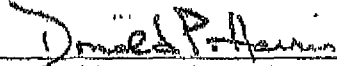
Considering all of the relevant factors and the purpose of discipline, the court is of the opinion the appropriate sanction is a three year suspension of Mr. Howie's license to practice law with a one year active suspension followed by a two year probationary period during which Mr. Howie may be reinstated upon compliance with Section 19 of Rule 9, Rules of the Supreme Court and the following prerequisites and conditions:

1. As a prerequisite to reinstatement, Mr. Howie shall be required to make the restitution required by the judgment of the hearing panel.
2. As a prerequisite to reinstatement, Mr. Howie shall be required to present himself to the Tennessee Lawyers Assistance Program for assessment and entry into a peer assistance contract with TLAP and comply with any recommended requirements of that program.
3. As a prerequisite to reinstatement, Mr. Howie shall have the approval of TLAP to re-enter the practice of law.
4. As a condition of probation, Mr. Howie shall maintain a practice monitor for not less than one year following reinstatement.
5. As a condition of probation, Mr. Howie shall continue to abide by the peer assistance contract with TLAP and comply with any recommended requirements of that program.

The period of active suspension shall be retroactive to the date of his temporary suspension on February 8, 2011.

It is, therefore, ORDERED and ADJUDGED that the judgment of the hearing panel filed March 29, 2011, be affirmed as modified herein. The cost of this cause shall be taxed one-half to the petitioner, Martin J. Howie, and one-half to the Tennessee Board of Professional Responsibility, for which execution may issue, if necessary.

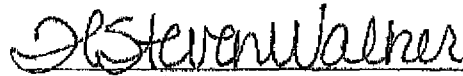
This 21st day of March 2012.



Donald P. Harris, Senior Judge
Sitting by Designation of the
Tennessee Supreme Court

CERTIFICATE

The undersigned certifies that a copy of the foregoing Judgment has been mailed to Sandy Garrett, Senior Litigation Counsel, 10 Cadillac Drive, Suite 220, Brentwood, TN 37027; and to Charles S. Kelly, Sr., P. O. Box 507, Dyersburg, TN 38025, on this the 21st day of March 2012.



Clerk and Master