

IN THE CIRCUIT COURT OF KNOX COUNTY, TENNESSEE

ROGER DAVID HYMAN,  
Petitioner,

FILED

2012 AUG 15 PM 2:29

v.

No. 3-55-12

CATHERINE F. QUIST  
CIRCUIT COURT CLERK

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE,  
Respondent.

FINDINGS AND CONCLUSIONS

This cause came to be heard on the 6th day of August 2012 upon the Writ of Certiorari filed by the Petitioner, and the entire record.

By Judgment entered December 12, 2012, a Hearing Panel found that the Petitioner had violated certain Rules of Professional Responsibility, suspended the Petitioner for six (6) months and imposed additional CLE requirements. From that judgment, the Petitioner timely filed this Writ of Certiorari.

The Complaints

This action stems from the filing of two complaints against the Petitioner which shall be referred to as the Kristy and Korten complaints.

The Kristy Complaint:

The Petitioner represented Ms. Kristy's husband in a divorce action. The parties had signed a prenuptial agreement and the litigation began as an uncontested matter. However after waiting for almost one year, the matter was unresolved and the litigation became contested. Prior to the litigation, Ms. Kristy was represented in a worker's

FAX RECEIVED  
8:45 EG  
AUG 20 2012

compensation matter by Mr. David McCord. When this matter assumed its contested posture, Mr. William Davis, a partner of Mr. McCord's assumed the representation of Ms. Kristy. Mr. Davis filed a Notice of Appearance. Nevertheless, it is uncontradicted that petitions were mailed directly to Ms. Kristy, and a motion for a default judgment listed Mr. Davis as "putative attorney." When Ms. Kristy received the default motion, she became extremely upset, believing that she would lose everything in the divorce. The Petitioner explains this obvious infraction of R.P.C. 4.2 as an oversight. The record does not support this assertion.

During the course of the Kristy litigation, a home inspection of Ms. Kristy's home was ordered. Prior to this inspection, Petitioner was notified of health issues regarding Ms. Kristy's child. At the inspection, Petitioner refused to use a hand sanitizer as requested by Ms. Kristy. He told her he would not be touching any items. However, the proof indicates he did touch items. Additionally, his behavior became disruptive and at one point, he threatened to have Ms. Kristy incarcerated. His behavior disrupted the inspection of the home and upset Ms. Kristy. This conduct violated Rule 4.4 a and b, R.P.C.

A deposition was taken of Ms. Kristy wherein Petitioner threatened Ms. Kristy with incarceration if she failed to pay a \$500 Court ordered attorney fee. He told Ms. Kristy that she was a "thief" and "liar." Petitioner claims that his comments were directed at Mr. Davis and not Ms. Kristy. During the course of the proceeding, the sports memorabilia became an issue. In an effort to recover that property, the Petitioner filed a million dollar lawsuit against Ms. Kristy and placed a lien lis pendens upon her separate property, her house. Ms. Kristy was in the process of obtaining a HELCO loan at the time and this lien obviously clouded her title. Mr. Davis successfully had the lien dismissed, but this litigation had no

purpose other than to vex and harass. This argument is specious.

The Korten's Complaint:

The Korten's litigation involved the construction of the Korten's home. Originally the lawsuit was brought by Mr. Sallas, the contractor, for the unpaid balance of the construction price. The Korten's filed a counter complaint for defective workmanship. The Korten's had made a DVD of the construction of the home's foundation. The DVD included sound. At Petitioner's advice, the Korten's erased the sound from the DVD. Petitioner ostensibly concluded that sound was not relevant. When opposing counsel finally got a copy of the DVD, counsel discovered that there was not sound and complained because of this erasure. Discovery was tedious in this case. Consequently, opposing counsel scheduled a Motion to Compel for October 3, 2012. Additionally, counsel sent a proposed discovery order and letter which proposed that if the discovery issues could be resolved, the October 3 hearing could be cancelled. The dispute was not resolved, although the Korten's were present in Petitioner's office and on a speaker phone when these issues were discussed. On October 3, opposing counsel appeared, but Petitioner did not. Instead of appearing, Petitioner called opposing counsel's office secretary and was abusive and threatening to her; continued his threatening and abusive behavior with another attorney in counsel's office and threatened to report counsel to the Board of Professional Responsibility. In addition, during the course of this litigation, he called Judge Young's secretary and reported that there was a conspiracy against him.

When counsel failed to appear on October 3, a sanctions motion was scheduled for October 17. At that hearing, the Korten's were ordered to pay over \$5,000 within 30 days. Although Petitioner had the funds to pay the sanctions to the plaintiff, he filed a motion for

interpleader and deposited the money in the Court. Consequently, the money was not paid within 30 days, which lead to the filing of a contempt petition.

The parties attempted to mediate the dispute unsuccessfully. At the mediation hearing, Petitioner's behavior was disruptive. He also was angry with Korten's daughter who was living with her parents.

Petitioner offers little proof in contradiction to these assertions, except that he was feeling bad on the day of the inspection.

### **Panel Findings**

The Hearing Panel found that Petitioner violated R.P.C. 4.2 (communication with a represented party); 4.4 a (threatening to present a criminal charge)(using means that have no substantial purpose other than to embarrass or delay); 3.5 e (engage in conduct intended to disrupt a proceeding); 3.4 (fairness to opposing party); and 8.4 (a) and (d) (violated a rule of professional conduct and engaged in conduct prejudicial to the administration of justice).

To support the sanctions imposed, the Panel found several aggravating circumstances which included (1) prior disciplinary offenses, including suspension; (2) a pattern of misconduct, multiple offenses and (3) substantial experience in the practice of law.

### **Discussion**

When reviewing a hearing panel's judgment, a trial court considers "the transcript of the evidence before the hearing panel and its findings and judgment." Tenn. Sup. Ct. R. 9 § 1.3. The trial court has the discretion to receive additional proof to resolve

"allegations of irregularities in the procedure before the panel." *Id.* Rule 9, Section 1.3 further sets forth the standard for trial court review of a hearing panel's decision. The same standard likewise applies to this Court's review of the trial court's decision. Bd. of Prof'l Responsibility v. Love, 256 S.W.3d 644, 653 (Tenn. 2008). Specifically, the hearing panel's factual findings may be reversed or modified only 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 provision; (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.

Tenn. Sup. Ct. R. 9 § 1.3. In reviewing the decision, "the [reviewing] court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact." *Id.* In determining whether "substantial and material" evidence supports the panel's decision, the Court evaluates whether the evidence "furnishes a reasonably sound factual basis for the decision being reviewed." City of Memphis v. Civil Serv. Comm'n of Memphis, 216 S.W.3d 311, 317 (Tenn. 2007) (quoting Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n, 876 S.W.2d 106 111 (Tenn. Ct. App. 1993)). The Court reviews conclusions of law de novo, without a presumption of correctness. Beard v. Bd. of Prof'l Responsibility, 288 S.W.3d 838, 854 (Tenn. 2009) (citing Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993)).

Petitioner complains that the appointment of the hearing panel by the Board of Professional Responsibility violates his constitutional rights of due process. There were actually two panels for this case. Originally Mr. Don Bosch was a member of the panel. At some point during the proceeding and after initial testimony, Mr. Bosch discovered a

conflict. A second panel was appointed. The crux of Petitioner's argument is that the practice of law is a property right and not a privilege and, consequently, the appointment of the hearing panel by the Chair of the Board of Professional Responsibility violates due process. The Tennessee Supreme Court in Sneed v. Bd. of Prof'l Responsibility, 301 S.W.3d 603, 618. (Tenn 2010) has defined the practice of law as a privilege and mandates to all attorney's the duty to conform to the Rules of Professional Conduct. The argument is without merit.

Petitioner claims that the panel erred in allowing other disciplinary actions to be admitted. Rule Tenn. Sup. Ct. R. 9 § 8.2 specifically provides for this procedure.

Petitioner complains that the panel's findings of multiple violations is not supported by evidence which is both substantial and material. The panel obviously accredited the testimony of the complainants and the Board's witnesses. The Petitioner's explanations for his behavior are disingenuous and lame. It is obvious that despite Petitioner's claim that he was only addressing Mr. Davis, his comments about incarcerating Ms. Kristy were directed to her. As was the filing of a lien lis pendens without any legal basis which was dismissed shortly after it was filed. At the home inspection, he disregarded Ms. Kristy's request for health measures for her child. The deposition entered as an exhibit clearly shows that Petitioner threatened to incarcerate Ms. Kristy. He further embarrassed her by asking if English was her native language.

The evidence is substantial and material that Petitioner failed to appear for the October 3 hearing. Additionally, he engaged in disruptive and embarrassing conduct by calling opposing counsel's office and law partner, and threatening to report counsel for disciplinary violations. His behavior toward Ms. Nolan was threatening, embarrassing and

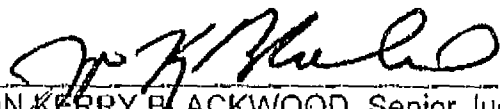
humiliating. He failed to deliver the sanctions payments as ordered. Consequently, the evidence is substantial and material in support of the panel's findings.

Petitioner claims irregularities in an audio tape introduced into the proceeding. However, this evidence was stricken from the record. He also argues without merit that one board member authorized her signature with permission.

Finally, Petitioner complains that the sanctions imposed by the Hearing Panel were arbitrary and capricious. The hearing panel found that the Petitioner had various disciplinary sanctions in the past, including suspension. The Panel found that there was a pattern of misconduct displayed by Petitioner. This pattern is characterized by the same abusive, threatening and embarrassing behavior in both these cases. The Petitioner seems incapable of controlling his anger. The Petitioner has practiced law for a substantial number of years and these are multiple offenses. The sanctions are not arbitrary nor capricious.

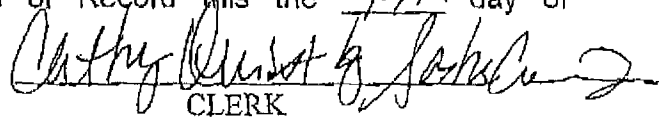
Consequently, the Petition for Writ of Certiorari is denied.

ENTER this the 15<sup>th</sup> day of August 2012.

  
\_\_\_\_\_  
JON KERRY BLACKWOOD, Senior Judge  
Sitting by Designation of the Supreme Court

CERTIFICATE OF SERVICE

I, Sasha Combs deputy, Court Clerk, hereby certify that I have mailed a true and exact copy of same to all Counsel of Record this the 17<sup>th</sup> day of August, 2012.

  
\_\_\_\_\_  
CLERK