

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

FILED

2011 DEC 12 PM 4:27

BOARD OF PROFESSIONAL
RESPONSIBILITY

Rew EXEC. SEC'Y

RE: ROGER D. HYMAN
BPR No. 011002, Respondent
An attorney licensed and admitted to the
practice of law in Tennessee
(Knox County)

BOPR DOCKET NO. 2010-1928-2-SG

JUDGMENT OF THE HEARING PANEL

I. STATEMENT OF THE CASE

The Board of Professional Responsibility (herein after "The Board"), filed a Petition for Discipline against the Respondent on May 12, 2010. In a pre-hearing Order filed August 18, 2010, the Hearing Panel ordered that the case be set for hearing on January 25 and 26, 2011. The Board subsequently filed a Motion to Continue Hearing which was granted by the Hearing Panel and an Order was entered rescheduling the hearing for May 23-24, 2011. This matter came on for a final hearing on May 23, 2011 by the Hearing Panel assigned at that time which included Bryan Capps, Chair, Donald Bosch and Carl McDonald. There were opening statements, several hours of direct and cross-examination and the introduction of twenty-seven (27) exhibits. Panel member Donald Bosch realized he had a conflict of interest in regard to one of the Board's listed witnesses. The Respondent filed a Motion for Mistrial or in the Alternative, Appointment of New Hearing Panel Members. The Board opposed the mistrial and supported replacing Mr. Bosch with an alternative panel member. The Panel denied Respondent's Motion for Mistrial and determined the proceedings should be continued to a later date.

However, the previous Panel on Respondent's Motion issued an Order on May 31, 2011 that Respondent be granted a new Hearing Panel. A Notice of Hearing Panel Change was issued on July 19, 2011. The new Hearing Panel consisted of Todd J. Moody, Chair, Danny Paul Dyer and Denise Terry Stapleton. A Notice of Hearing was filed on August 9, 2011 setting the Hearing for November 29-30, 2011. This cause came to be heard by the Hearing Panel of the Board of Professional Responsibility of the Tennessee Supreme Court on November 29-30, 2011. The Hearing Panel, consisting of Todd J. Moody, Chair, Danny Paul Dyer and Denise Terry Stapleton conducted a Hearing in this matter on November 29, 2011 continuing to November 30, 2011, pursuant to §19, Rule 9, Rules of the Tennessee Supreme Court of Tennessee. This Hearing Panel makes the following findings of fact and submits its Judgment in this cause.

II. FINDINGS OF FACT

The following findings of fact are based upon the Petition for Discipline filed by the Petitioner, The Board of Professional Responsibility, the Board of Professional Responsibility's Pre-Trial Brief, the Board's Proposed Findings of Fact and Conclusions of Law, the pleadings filed by the Respondent, the evidence presented at Trial and the record as a whole.

This matter concerns two separate complaints included in the same Petition for Discipline. With respect to the evidence presented, the Panel finds as follows:

File No. 31056-2-TH Complaint of Tamatha (Kristy) Tanner:

1. The Respondent represented Cory Kristy in litigation against the Complainant, Tamatha (Kristy) Tanner.

2. On June 9, 2006 Attorney William Davis filed a Notice of Appearance on behalf of Tamatha (Kristy) Tanner in Kristy v. Kristy, sending a copy of that Notice of Appearance to Respondent.

3. Attorney Davis wrote the Respondent on June 9, 2006 regarding Kristy v. Kristy.

4. Attorney Davis discussed Kristy v. Kristy with Respondent at some point in mid to late June, 2006.

5. On July 13, 2006, the Respondent filed a Motion for Default, sending it directly to Ms. Tanner with a Certificate of Service reflecting Attorney Davis as "putative attorney" for Ms. Tanner. The Respondent testified at Trial that although the above facts were true, that he simply made a mistake in sending the Motion for Default directly to Ms. Tanner. He stated that either he overlooked the Notice of Appearance filed by Attorney Davis and/or forgot that they had spoken regarding this case prior to mailing the Motion for Default. He does not dispute that he received the Notice of Appearance or that he may have spoken with Mr. Davis prior to mailing the Motion for Default, but stated that it was not his practice and he would never have knowingly contacted Mr. Davis' client.

6. The Respondent attended an inspection of Ms. Tanner's home on behalf of his client, Mr. Kristy.

7. At the home inspection Ms. Tanner requested everyone entering her home to use hand sanitizer for the health of her young infant.

8. Respondent was notified in advance via letter from Attorney Davis about special health concerns regarding Ms. Tanner's infant.

9. The Respondent initially refused to use the hand sanitizer, referring to it as "snake oil." He subsequently did use the hand sanitizer.

10. Mr. Davis, counsel for Ms. Tanner, indicated that they would not proceed with the home inspection without everyone using the hand sanitizer.

11. The Respondent stated at Ms. Tanner's home inspection that he would seek Ms. Tanner's incarceration for failure to cooperate with the home inspection. At the hearing Mr. Hyman testified that essentially these facts were true. However, he believed that his hands were clean, he was not going to touch anything, and therefore he did not need to use hand sanitizer. Furthermore, he thought hand sanitizer is not effective. He testified that Ms. Tanner and her counsel were being evasive and obstinate over the home inspection even though it had been ordered by the Judge. As a result, he made the incarceration threat which he believed could result from a Motion for Contempt. The Respondent also contended the threat of incarceration was directed at Mr. Davis rather than Ms. Tanner.

12. On January 8, 2007 the Respondent deposed Ms. Tanner.

13. At her deposition the Respondent asked Ms. Tanner if English was her native language. He was advised by Mr. Davis to "be respectful to this witness."

14. At Ms. Tanner's deposition the Respondent stated "she [Ms. Tanner] is a liar and a thief."

15. The Respondent again threatened Ms. Tanner with incarceration. Specifically, an excerpt of the transcript from the deposition memorializes the following exchange between the Respondent and Ms. Tanner:

So, according to your attorney, who is not facing a jail cell door, but you are if you're found in contempt, you not going to answer my question?

MR. DAVIS: She is not going to answer your question.

BY MR. HYMAN:

Q. See, he is not going to court – to jail. Now, tell us about –

16. Respondent does not deny that these facts are true but testified that Ms. Tanner was avoiding or refusing to answer his questions and “stone-walling.” She, in his view, was attempting to avoid answering questions relating to his client’s personal property left at the marital residence. He explained the threat of incarceration as being related to a possible motion for contempt. Respondent contended that the threat was not made to Ms. Tanner but instead to Mr. Davis.

17. On March 11, 2008 the Respondent filed a Complaint styled *Kristy v. Tanner* in the Circuit Court for Knox County seeking \$1,000,000.00 in compensation from Ms. Tanner.

18. The cause of action was for replevin, specifically the return of certain sports memorabilia and other personal property. Alternatively, the complaint sought a judgment for the value of the personal property.

19. The complaint did not contain any claim as to the title or ownership of real estate.

20. On approximately March 17, 2008 the Respondent prepared and filed an Abstract of Suit Claiming Notice of Lien Lis Pendens against Ms. Tanner’s real property based upon the *Kristy v. Tanner* lawsuit.

21. On June 12, 2008 Ms. Tanner filed a Motion for Removal of the Lien which was granted by the Circuit Court of Knox County, August 1, 2008, on the basis that the lien was “void.”

22. The Respondent testified at the hearing that these facts were true. However, he explained that his client, Mr. Kristy, alleged that Ms. Tanner had hundreds of thousands of dollars worth of his property at her residence and that she was either hiding, or had disposed of or done something with his property and was refusing to return it. A Special Master had

previously been appointed in the divorce action regarding these issues. The Special Master, Alan Schwartz, made findings regarding Mr. Kristy's personal property. that were favorable to Mr. Kristy and unfavorable to Ms. Tanner. The Judge in the divorce matter, according to Mr. Hyman, indicated that claims relating to the husband's personal property should be pursued in a separate action. That is why, according to this testimony, he filed the Complaint styled Kristy v. Tanner in Knox County Circuit Court. He stated that he further believed that the Notice of Lien Lis Pendens action was legitimate since the home owned by Ms. Tanner was her only significant asset and he and his client believed that Ms. Tanner might sell the home and leave the state.

File No. 32188-2-KS-Complaint of Diane Korten

1. On approximately March 26, 2008, Fred and Diane Korten retained the Respondent to represent them in Sallas d/b/a FGG Enterprises v. Fred Korten and wife, Diane Korten. The plaintiff was a contractor that had constructed a home for the Kortens. The Kortens counterclaimed for alleged defects in the construction.

2. Mr. Sallas' counsel, Mr. Alley, propounded discovery on the Kortens which they answered per the Respondent.

3. Subsequently Mr. Alley filed a Motion to Compel which was set for hearing on October 3, 2008.

4. The Respondent testified with regard to the Kortens that he had attempted to respond to Mr. Alley's discovery requests in the case; however he had to rely upon the Kortens for the information. He testified he sent on to Mr. Alley the information that he was provided. However, with respect to a video made by the Kortens which was part of the discovery dispute, he testified that he believed there was a legitimate argument and rationale for not including the audio to the video since the audio part of it might not be admissible evidence. Respondent also

claimed that his client did not want him to supply the audio to this video. Furthermore, he testified with respect to certain computer-generated photographs that were a subject of the discovery request. Specifically, his client had supplied him very small versions of the photographs.

5. With respect to the Motion to Compel, he explained that he did make good faith efforts to comply with discovery requests. He stated that the Kortens were reluctant to provide discovery and it was a very difficult process to get them to supply requested information.

6. Subsequent to the filing of this motion the Respondent and Mr. Alley had discussion resulting in an apparent resolution of the outstanding discovery dispute. Mr. Alley wrote to the Respondent and sent a proposed agreed order. The letter asked the Respondent to sign the order and return it to Mr. Alley no later than October 2.

7. Respondent testified that he had a telephone conversation with Mr. Alley and the Kortens in his office on the speaker phone. It was his understanding that based upon the telephone conversation that any discovery dispute was resolved and therefore the Motion to Compel would be withdrawn. Therefore, he thought that the October 3, 2008 court date would not be necessary. That is his explanation for why he did not appear at that hearing. His practice is to appear at scheduled hearings.

8. On October 3, 2008 Mr. Alley appeared in Circuit Court for Blount County to argue the Motion to Compel. The Respondent did not appear at this hearing.

9. Respondent testified that on October 3, 3008 in the morning he received a call indicating that Mr. Alley was in court on the Motion. He was very upset and panicked both because he believed that Mr. Alley had agreed to withdraw the Motion and because he believed

that he had been misled. The Respondent testified that he was sure the proposed agreed order had been signed.

10. It was later discovered that the agreed order signed by the Respondent was on his secretary's desk and had not been sent to Mr. Alley as the Respondent had believed.

11. The Respondent telephoned Mr. Alley's office on October 3, 2008 and spoke with Attorney Melanie Davis and Mr. Alley's assistant, Kimberly Gage. He yelled at Ms. Davis and threatened to both Ms. Davis and Ms. Gage to report Mr. Alley to the Board of Professional Responsibility.

12. Respondent did not deny that he called Mr. Alley's office and made the threats alleged by the Board.

13. On October 7, 2008 the Respondent filed a Motion for Sanctions, which he later withdrew.

14. On October 13, 2008 the Blount County Circuit Court entered an Order granting Mr. Sallas' Motion to Compel in part and reserving the issue of sanctions for hearing on October 17, 2008.

15. The Circuit Court entered an Order on October 28, 2008 granting discovery sanctions finding "there is no just reason for the Kortens and Attorney Hyman to have failed to appear in court on October 3, 2008."

16. The Court further found in the Order "the actions and inactions of the Kortens in failing to timely provide their full and complete responses to Sallas' requests were not substantially justified."

17. The Court's October 28, 2008 Order required the Kortens to pay to Mr. Sallas the sum of \$5,842.50 for fees and sanctions within thirty days from the entry of the October 28, 2008 Order.

18. On December 5, 2008 Mr. Alley filed a Motion for Contempt alleging the Kortens had failed to obey the Circuit Court's Order entered October 28, 2008 by failing to pay the sanctions to Mr. Sallas.

19. On December 5, 2008 the Respondent filed a Notice of Interpleader Deposit paying \$5,842.50 in sanctions to the Clerk of the Circuit Court for Blount County, Tennessee, rather than paying Mr. Salles directly.

20. By Order filed December 15, 2008 the Blount County Circuit Court found "no just cause exists for the delay in paying the sum directly to the Sallas'."

21. Mrs. Kortens testified that the Respondent yelled or was loud with them and tried to make them settle or "walk away." The Respondent also threatened the Kortens' daughter, an inactive attorney licensed in Nebraska, with a disciplinary complaint.

22. Mrs. Kortens further alleged that during a meeting in her home the Respondent pounded the table with his fist and yelled at Mrs. Kortens and her daughter that they would settle the case if he told them to settle.

23. Respondent admitted that he may have pounded his fist on the table a little too harshly as he said to Mrs. Kortens "so that's what is going to happen."

24. Despite the Respondent's advice, the Kortens did not settle the litigation which is still pending.

25. The Respondent further stated that he thought that the thirty days to pay the \$5,842.50 required by the Court ran on December 1. He testified that he gave the money to the

Kortens to pay to the Court. He further testified that they wanted him to pay the money into Court and delay making the payment to Mr. Alley as long as possible.

26. Furthermore, he explained that he only encouraged the Kortens to settle their case. They had a mediation in which he advised the Kortens to settle or "walk away" since they had been sued by their builder for failure to pay and at that point he testified that each party could have walked away from any claims that they had against the other. He believed that this would have been a good result for the Kortens.

27. On another occasion during the Kortens litigation Respondent appeared in Blount County Circuit Court only to be advised that Judge Dale Young had been hospitalized and the hearing had been cancelled. Respondent became irate with Judge Young's assistant, Amanda Nolan. He asserted to Ms. Nolan that he was being picked on and that there was a conspiracy against him.

III. CONCLUSIONS OF LAW

A. Tanner.

1. It was undisputed, even by the Respondent at the hearing, that via the motion for default judgment he directly communicated with Ms. Tamatha Kristy (now Tanner) who was known to be represented by counsel, in violation of Rules of Professional Conduct 4.2 and 8.4(a) and (d).

2. The Respondent's statements and conduct at the Kristy home inspection, based upon the testimony of Mr. Davis, Ms. Tanner and the Respondent himself were intended to disrupt the proceedings and had no substantial purpose other than to embarrass or burden Ms. Tanner and/or her counsel, Mr. Davis, in violation of Rules of Professional Conduct 4.4(a), and 8.4(a) and (d).

3. The Respondent's conduct and threat of incarceration made during the deposition of Ms. Tanner were in direct violation of Rule 4.4 and also in violation of Rules 3.5(e), 8.4(a) and (d).

4. The Respondent's filing the Lien Lis Pendens against Ms. Kristy, now Tanner, which was later declared void by Court Order on August 1, 2008 violated Rules 3.1, 4.4(a) and 8.4(a) and (d).

5. The Hearing Panel concludes that Respondent did not violate Rule 3.4 in connection with the Tanner complaint.

B. Korten.

1. In the Korten matter, the Respondent's direction to remove the audio from the DVD, which at least in part led to a motion to compel and sanctions, was without legal foundation and in violation of Rule 3.4 and 8.4(d).

2. The Respondent's failure to appear for the October 3, 2008 hearing was in violation of Rule 3.4(c) and 8.4(a) and (d).

3. By not paying the sanctions until December 5, 2008, the Respondent knowingly disobeyed the Blount County Circuit Court's October 28, 2008 Order in violation of 3.4(c) and 8.4(a)(d).

4. The Respondent's interactions with opposing counsel Keith Alley, Mr. Alley's co-workers, Attorney Melanie Davis and Assistant Kimberly Gage, and Blount County Circuit Court Judge Young's secretary Amanda Nolen were intended to disrupt the proceedings and had no substantial purpose other than to embarrass or burden these individuals in violation of Rules of Professional Conduct 4.4(a) and 8.4(a) and (d).

5. The Hearing Panel concludes that the Respondent did not violate Rules 1.2, 1.3, 1.4 or 3.5(e) in connection with the Korten complaint.

IV. FINDINGS OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

The Hearing Panel finds that §8.4, Rule 9, Rules of the Supreme Court, provides “in determining the appropriate type of discipline, the Hearing Panel shall consider the applicable provisions of the ABA Standards for Imposing Lawyer’s Sanctions.” The ABA Standards applicable to this case are as follows: 6.22, 3.2, 7.2, and 8.2.

Mitigating standards can include a lack of prior discipline. ABA Standard 9.1 provides that after misconduct, aggravating and mitigating circumstances may be considered in deciding what sanction to impose. Aggravating circumstances that can increase the discipline imposed against the Respondent include:

1. The Respondent’s prior disciplinary offenses which include suspension and a requirement to complete a year-long anger management course for misconduct similar to the facts in this case, including threatening individuals;
2. The Respondent’s pattern of misconduct;
3. Multiple offenses;
4. Substantial experience in the practice of law.

In mitigation, Respondent testified that during the Korten litigation he and his wife had a daughter born premature. Respondent’s daughter was hospitalized for an extended period of time after birth, and upon being released from the hospital was connected to various monitors. The monitors would sound at night disturbing the sleep of Respondent and his wife. At the time of the October 3 hearing in particular and other events during the Korten litigation, Respondent was not getting sufficient sleep.

V. JUDGMENT OF THE HEARING PANEL

In the case of *In re: Steven M. Brown* where Mr. Brown attempted to settle his client's dispute he used a means which had no substantial purpose other than to embarrass or burden other lawyers and parties, and where he had directly communicated on behalf of his client with a represented party without obtaining the consent of that party's lawyer, he received a forty-five (45) day suspension. In the case of *Gloria Jean Brown*, Ms. Brown neglected a criminal matter and failed to adequately communicate with her client. She was cited for contempt for failure to appear at a court hearing and failure to appear at a second civil matter where opposing counsel was unable to communicate with her. She filed a frivolous action against employees of a domestic violence crisis center and acted in a bizarre manner screaming or cursing these employees and employees of the disciplinary counsel's office. She received a one-year suspension. In the case of *Charles F. Galbreath*, Mr. Galbreath's law license was suspended for thirty (30) days where he filed a frivolous counter-claim in a lawsuit filed against him personally. He attempted to force the Judge to recuse himself by threatening to report the Judge in the case to the court of the judiciary and discussed the matter regarding the Judge on his radio show. In another matter, he referred to the Chancellor by an inappropriate reference in open court.

In the case of *In re: Curt Alexander Mueller*, the Illinois Supreme Court publicly censored Mr. Mueller and ordered him to complete a professionalism seminar for filing a frivolous *Lis Pendens* Notice; leaving offensive and threatening messages for opposing counsel and asking a deponent whether he engaged in prostitution. In mitigation, that Court found Mr. Mueller expressed remorse and had no prior discipline. In this case, the Respondent does have prior discipline for similar misconduct.

In Hughes v. Board of Professional Responsibility, 259 S.W. 3d at 648(Tenn. 2008) (citing Schoolfield v. Tennessee Bar Association, 353 S.W. 2d 401, 404 (Tenn. 1961)), the Tennessee Supreme Court reiterated the importance of attorney integrity:

It is the duty of an attorney to uphold the honor of the profession of law; to be honest, to be of good conduct in the discharge of his duties to the court, the public, and his clients.

Several of the violations in this case, the direct contact with Ms. Tanner, the interactions with the Kortens, and the interactions with Mr. Alley's partner and staff on October 3, 2008 are less egregious and likely worthy of only a private or public reprimand. However, several other violations clearly established by the evidence in this case evidence Respondent's complete disregard for the Rules. For example, Respondent's threats of incarceration in the Tanner matter were in blatant and intentional disregard of Rule 4.4. Particularly disturbing in regard to this incident was Respondent's testimony before the Hearing Panel that his threat of incarceration during the deposition of Ms. Tanner was not made to her but was instead made to Mr. Davis. The deposition transcript clearly contradicts Respondent's sworn testimony. Moreover, the identity of the intended recipient of the threat is not a defense. Rule 4.4 would prohibit making such a threat to counsel as well as to a party. The filing of the lien lis pendens in the Tanner matter was utterly and completely baseless and clearly done in an attempt to gain leverage over the opposing party.

The Respondent's admitted direction to remove the audio from the DVD in the Kortens litigation is similarly egregious. Respondent's only explanation, that the audio could have been deemed hearsay at trial, is specious at best. The Rules of Civil Procedure would inarguably have required the production of this material since it was the subject of a legitimate discovery request.

If unrestrained, the Respondent's conduct would pose a serious threat to the orderly administration of justice and the governance of the legal profession. The Respondent's actions in this case also fail to uphold the honor of the profession and fail to reflect a due appreciation of his duty to the profession and the public.

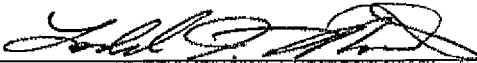
The Respondent's multiple offenses combined with his past disciplinary history must also be considered. In *Sneed v. Board of Professional Responsibility*, 301 S.W. 3d 603 (Tenn. 2010) the Tennessee Supreme Court found as an aggravating circumstance, "He [Respondent] has not heeded lessons from facing numerous prior disciplinary proceedings and, in fact, continues to repeat the same mistakes." The Respondent, like Mr. Sneed, has not benefitted from his previous discipline and also continues to make the same mistakes. Accordingly, the Hearing Panel is compelled to mete a meaningful penalty in this matter.

Based upon the evidence presented in the hearing and the record as a whole, the Hearing Panel concludes that the amount of discipline the Respondent shall receive shall be as follows:

1. That Respondent, Roger D. Hyman shall be suspended from the practice of law for a period of six (6) months; and,
2. In addition to the suspension for an additional six (6) months the Respondent shall be required to attend an additional six (6) hours of ethics or professionalism courses to be selected by the Board in addition to the normal CLE ethics requirement.

Enter this 12th day of December, 2011.

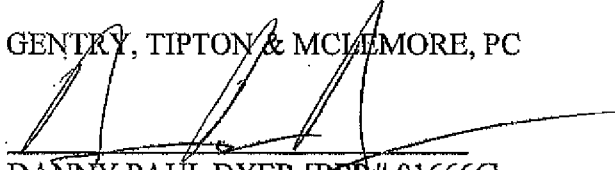
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