IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE
AT KNOXVILLE

ENTERED
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HOWARD G. HOGAN

BOARD OF PROFESSIONAL RESPONSIBILITY,

Plaintiff,

v.

LORING E. JUSTICE,

Defendant.

DOCKET NO. 189418-3

ORDER

This matter came on to be heard on the 15th day of December, 2016, before R. E. Lee Davies, Senior Judge, upon the petitions for certiorari filed by the Tennessee Board of Professional Responsibility (sometimes referred to as "Petitioner") and Loring E. Justice (sometimes referred to as "Respondent"). The Court has received a copy of the Hearing Panel transcripts, the official record with exhibits, and the briefs filed by each party. After argument of counsel for Petitioner and Respondent the Court makes the following findings of fact and conclusions of law.

FACTUAL AND PROCEDURAL HISTORY

Statement of the Case

This case arose out of complaints filed with the Tennessee Board of Professional Responsibility as a result of a proceeding in the United States District Court for the Eastern District of Tennessee in which Mr. Justice presented a sworn fee petition for attorney's fees and expenses pursuant to a discovery sanction issued by Judge Phillips of the Eastern District for Tennessee.

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BOARD OF PROFESSIONAL RESPONSIBILITY

On September 25, 2013, the Board filed a Petition for Discipline against Mr. Justice pursuant to Tennessee Supreme Court Rule 9 (2006). Mr. Justice responded to the petition on December 3, 2013. Mr. Justice filed a motion to dismiss which was denied by order entered February 18, 2014. Mr. Justice filed a second motion to dismiss and for a more definite statement and a motion to compel discovery. An order was entered which granted Respondent's motion in part by ordering the Board to supplement its response to interrogatory number 6. Interrogatory number 6 requested the Board to identify each billing or expense entry in the fee petition that the Board alleged was fraudulent. The Board filed a supplemental response in which it set forth highlighted entries on exhibit B to interrogatory number 4 as being the entries which the Board contended were false.

On November 19, 2014, Benjamin Kerschberg, a witness in the case filed a motion for protective order with the Panel. The Panel denied the motion by stating it did not have jurisdiction to rule on the request and informed the attorney for the witness and the parties that such a motion needed to be filed with the appropriate court. The witness refiled the motion for protective order, with the Knox County Chancery Court. The Chancery Court granted the motion in part and denied the motion in part. On December 11, 2014, the Board filed a motion to compel Respondent to give a deposition after Respondent informed the Board that he intended not to testify and exercise his right against self-incrimination. On December 2, 2015, Respondent filed a response to the motion to compel and motion to dismiss on the grounds that the Board violated Respondent's rights under the United States and Tennessee Constitutions due to improper commentary by the Board to the Panel concerning Respondent's exercise of his right against self-incrimination. On January 5, 2015 the Panel granted the motion of the Board to compel Respondent to give his deposition. The Respondent's motion to dismiss was denied. A

hearing was conducted on January 20-23, 2015. The Hearing Panel entered its decision on March 9, 2015. It found Mr. Justice violated Rule 1.5(a), fees; Rule 3.3(a), candor toward the tribunal; Rule 3.4(a), fairness to opposing party and counsel; and Rule 8.4(a) (c), misconduct. After finding six aggravating factors and two mitigating factors, the Panel imposed a one year suspension and twelve additional hours of continuing legal education approved for ethics.

On April 13, 2015, the Board filed its petition for writ of certiorari. On May 8, 2015, Mr. Justice filed his petition for writ of certiorari.

Facts

Mr. Justice is an attorney licensed to practice law in Tennessee since 1998. He was representing a client named Scotty Thomas in a personal injury case filed in federal court against Lowes. Lowes denied Mr. Thomas was injured on its property. After three years of litigation, Mr. Justice discovered a former Lowes' employee who actually witnessed the injury to his client. He filed a motion for sanctions against Lowes for its failure to disclose the identity of this employee. The trial judge (Judge Phillips) issued an order granting the motion and directed Mr. Justice to file a claim, with supporting documentation, for fees and expenses incurred in locating and deposing this witness by the name of Mary Sonner.

In response to the trial court's order, Mr. Justice filed a preliminary Itemized Accounting of Services and a final Itemized Accounting of Services in April 2011. Mr. Justice's affidavit for fees consisted of a claim for his time at the rate of $300 per hour and $90 an hour for paralegal services. The total fee requested by Mr. Justice was $106,302. Lowes objected to the fee request, and the matter was referred to Judge Curtis Collier, District Judge for the Eastern District of Tennessee in Chattanooga pursuant to a show cause order. Judge Collier conducted a four day hearing on February 17, 21, 22 and 23, 2012. At this hearing Mr. Justice testified all of

the documentation he had filed with Judge Phillips were true and that he had kept a contemporaneous record of all of his time.

At the trial before the Hearing Panel, the first exhibit introduced into evidence was the deposition of Mr. Justice. In that deposition, Mr. Justice refused to answer any questions regarding any of the issues raised by the Board in its petition for discipline.[1]

Exhibit 2 was the deposition upon written questions of Benjamin Kerschberg taken on January 14, 2015 in Virginia. Mr. Kerschberg was a paralegal working on a contract basis for Mr. Justice. Mr. Kerschberg attached invoices he created for work he did for Justice. These invoices were created at the time he performed the work and were sent to Mr. Justice every two weeks for payment. Mr. Kerschberg testified he personally performed all the work set forth in these invoices. Kerschberg suffers from depression, anxiety and has been diagnosed as bi-polar II. He is under treatment by a psychiatrist who prescribes medication for his condition.

The next exhibit introduced by the Board was the trial testimony of Mr. Justice in U.S. District Court before Judge Collier. In that hearing, Mr. Justice denied that he wrongfully attributed to himself work actually performed by his paralegal, Mr. Kerschberg, and denied that he made any false certification or statements in his fee application. Instead, he claimed he personally performed all of the work reflected in the entries shown in his fee application.

Mr. Justice had a personal injury practice. He did not record his time and never had any billing software in his office. He admitted the Thomas v. Lowes case was the first fee application he had ever prepared, so when the District Court ordered him to supply the

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[1] Some of the questions which Mr. Justice refused to answer based on the Fifth Amendment are:

1. Do you contend that all of the attorney fees in the Itemized Accounting of Services filed in Thomas v. Lowes were reasonably related to locating and deposing Mary Sonner?
2. Did you keep a contemporaneous record of the time that you spent working on Thomas v. Lowes?
3. Did you make any false statements while testifying in In Re: Justice?
4. Did you adopt any of the work done by Mr. Kerschberg as if it were your own in making the Itemized Accounting of Services in Thomas v. Lowes?

supporting documents for his fee request, all Mr. Justice had was Microsoft Word entries. Mr. Justice testified he kept track of his time contemporaneously within a week or two of the time the work was actually performed. He also received invoices from Kerschberg which Justice kept in his own file. Because his computers were not networked, if Mr. Justice wanted to transfer the information from one computer to another to edit old entries or create a new entry, he would have been required to use a flash drive. However, Justice had no specific recollection of whether he transferred any documents from one computer to another. When it was suggested to Mr. Justice to allow a neutral forensic computer expert to go through his computer system, he declined, claiming there were sensitive documents on the computer that needed protecting. Mr. Justice hired his own expert to search his computer; however, neither his expert nor any of his employees were able to find any of the original time records before they were transformed into an early version of the fee petition filed with the District Court. When asked by Judge Collier for the name of the document in his computer under which he kept his time records, Mr. Justice could not recall.

Mr. Justice's relationship with Mr. Kerschberg went back to law school. Mr. Kerschberg stopped working for Mr. Justice in September 2009. During the same period of time in April 2011, when Mr. Justice was compiling and submitting his two petitions for fees and expenses, he sent an email to Mr. Kerschberg dated April 11, 2011, in which he stated:

> Thanks for the email Kersch. I billed a lot of the time for my reading your work rather than you doing it so you won't have to testify if it comes to that. Hope you are not mad about that. I really appreciate you. Tell me what you think of this. What a war.

After the show cause order was issued by Judge Collier, Mr. Justice conducted a search for any emails that were related to the Thomas v. Lowes case. He discovered three additional

versions of the initial Word document. He indicated that at times more than one Word document existed for the time he kept on this case but was later consolidated into one document. According to Mr. Justice, he was attempting to delete overlapping time. He met with his associate Chad Rickman and legal assistant, Caroline Vaughn, instructing them to delete any duplicative entries.

In the hearing before the Panel, Mr. Justice called his associate, Chad Rickman, as his first witness. Mr. Rickman began working for Mr. Justice in early 2010. His first work on the Thomas case began in July 2010 when Justice told him to start keeping his time. Mr. Rickman recorded his time on a legal pad which he would turn in to his legal assistant to enter it into the Word document. The first time Mr. Rickman ever saw the Word document was after they received the order from the District Court trial judge awarding them fees and expenses in the Thomas v. Lowe case.

As his last witness, Mr. Justice elected to take the stand and give his version of the facts before the Hearing Panel. His testimony was substantially the same as his testimony in Federal District Court.

The Board alleged seventeen specific time entries contained in Mr. Justice's fee petition which were false. The Board contended that on these specific entries, Mr. Justice claimed work performed by Mr. Kerschberg as his own. The Hearing Panel found these seventeen entries were in fact work performed by Mr. Kerschberg, not Mr. Justice, as he claimed. The seventeen entries are as follows:

6/13/09	Revision of Motion to Have Requests for Admission Deemed Admitted, **1.2**
6/14/09	Edits to Motion to Deem Requests for Admissions admitted Added section about Letter to Clint Woodfin and Motion to Supplement. Researched electronic filing rules for the E.D. Tenn. **2.2**

6/16/09	All final preparations of Amended Complaint and Motion to Deem Requests For Admissions Deemed Admitted. Preparation of all PDF exhibits. Compilation of files. Filing with E.D. Tenn. via ECF. Hard copies of everything for file. **2.5**
6/16/09	Preparation and editing of Motion to Compel Discovery and Memorandum in Support partially prepared by legal assistant. **3.0**
6/17/09	Talked to Angela Brush at district court to correct misunderstandings re our filings. **1.0**
6/17/09	Continued to research, revise and rewrite Motion to Compel Discovery. **4.0**
6/18/09	Continued research, revision and refinement of Motion to Compel Discovery. **4.5**
6/19/09	Letter to Bob Davies regarding additional materials needed from MSG about the project. **.5**
7/16/09	Reviewed notes from meeting with Clint Woodfin and calendared follow-up call to Corey Kitchen re: Clint's call. **.2**
7/22/09	Drafted and typed memo for trip to Florence, Alabama to meet with Plaintiff's MSG co-workers. This memo summarized the liability issues in the case and listed important questions to ask to try to understand whether it was plausible Lowe's could lack notice and to prove Lowe's indeed had notice and to gain physical descriptions of individuals of interest. **5.0**
7/27/09	Reviewed all notes from our trip to Alabama to meet with the MSG witnesses and compiled Master To-Do List. Drafted affidavits of Kitchen, Yeates, and McBride. Online research re: Teresa Beavers (Lowe's Manager). **4.5**
7/29/09	Revisions of affidavits of Kitchen, Yeate4s, and McBride. **.2**
8/8/09	Coordinated with Debi Dean of Alabama Head Injury Foundation to make sure that Randy, Bradley, and Corey will sign affidavits and get them back to us notarized. Reviewed legal assistant's research of FRCP and EDTN Rules re: timelines of Notice of Filing with respect to Hearing Date. Drafted Notice of Filing. Drafted Memorandum to accompany Notice of Filing for filing with the court this week. **3.0**

8/10/09	Coordination of all affidavit signings, etc. with Debi Dean. **.5**
8/27/09	Reviewed file and all FRCP related to discovery to look at options and obligations for supplementation before September 14 hearing, as well as the possibility of fee shifting and sanctions. **5.0**
8/31/09	Prepared outline as to action plan before September 14 hearing. Researched Lowes' Loss/Safety Prevention Manager. Drafted proposed interrogatory re: information on who held that position at the time of the accident. Revised and prepared cover letters to Clint Woodfin and Clerk's office. **2.0**
9/9/09	Detailed email to file and staff after reviewing supplemental documents of defendant and possible RFPs. Google search for the two other female managers mentioned by Clint Woodfin. **1.2**

The Panel cited the April 11, 2011 email written by Justice to Kerschberg and noted it contained no acknowledgement that Justice had performed any of the work. The Panel found Kerschberg's billing records were sent to Mr. Justice near the time Kerschberg's time was recorded; that Justice paid those invoices; and that at the time the invoices were paid, Justice did not question whether Kerschberg performed the work. The Panel found the entries on Justice's fee petition were identical or nearly identical to the Kerschberg bills and that Justice's explanation was not plausible or credible.

The Panel found that many of the entries on Mr. Justice's fee petition were not related to the fees approved in the District Court's order. It found that the submission of 371.5 hours of time went well beyond the scope of the order and that Justice knew he was requesting compensation for time which was not related to locating and deposing Mary Sonner. The Panel also found the corroborating testimony of Chad Rickman not to be credible. Specifically with regard to any potential fee awarded by the Court as a result of the discovery sanction motion, the Panel did not believe Rickman's testimony that he and Justice were required to pay the fee to the

client, Mr. Thomas. Finally, the Panel specifically found that the statements made by Justice to Judge Collier were false and that Justice knew they were false.

STANDARD OF REVIEW

When reviewing a Hearing Panel's judgment, a trial court must consider the transcript of the evidence before the Hearing Panel and its findings and judgment. Tenn. Sup. Ct. R9, § 1.3. On questions of fact, the trial court may not substitute its judgment for that of the Hearing Panel as to the weight of the evidence. Bd. of Prof. Responsibility v. Allison, 284 S.W.3d 316, 323 (Tenn. 2009). Any modification to a Hearing Panel's decision must be based on one of the specific factors set forth in Tenn. Sup. Ct. R9, §1.3. Bd. of Prof. Responsibility v. Love, 256 S.W.3d 644, 652 (Tenn. 2008).

Under Section 1.3, a trial court has the discretion to reverse or modify a decision of the Hearing Panel only if the petitioner's rights have been prejudiced by findings, inferences, conclusions, or decisions that 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 light of the entire record. Tenn. Sup. Ct. Rule 9 § 1.3. This Court reviews questions of law *de novo* but does not substitute its judgment for that of the Hearing Panel as to the weight of the evidence on questions of fact. Tenn. Sup. Ct. Rule 9 § 1.3; Maddux v. Board of Prof'l Responsibility, 409 S.W. 3d 613, 621 (Tenn. 2013).

ANALYSIS

In his petition for writ of certiorari, Mr. Justice raises a multitude of issues. For purposes of appeal, the Court will classify these issues into three groups: 1) procedural complaints against the Board and the Panel; 2) complaints about the sufficiency of the evidence presented by the Board; and 3) Justice's assertion of his Fifth Amendment privilege against self-incrimination. The Board raises one issue. It claims the Panel erred by not imposing disbarment.

I.

Fifth Amendment Privilege against self-incrimination

On January 20, 2015, a pretrial hearing was held by the Panel to address certain motions *in limine* filed by the parties. One of the motions filed by Justice pertained to the Fifth Amendment privilege against self-incrimination. In its order entered February 9, 2015, the Board ruled that it was entitled to take an adverse inference in an attorney disciplinary proceeding where an attorney refused to give testimony on the basis of the Fifth Amendment. The Panel ruled pursuant to Akers v. Prime Succession of Tennessee, Inc., 387 S.W.3d 495 (Tenn. 2002) that it was entitled to take an adverse inference if the elements set forth in Akers were met but that it would not make any ruling as to whether it would take an adverse inference until after the proof was presented. Justice argues the Panel coerced him to testify. His position is founded on the premise that an attorney facing a disciplinary proceeding has the same rights as a criminal defendant in this state.

Attorney disciplinary proceedings are "quasi-criminal" in nature. Moncier v. Bd. Prof'l Responsibility, 406 S.W.3d 139, 155 (Tenn. 2013) (citing In Re: Ruffalo, 390 U.S. 544, 551, 88

S. Ct. 1222, 20 L. Ed. 2d 117 (1968)). Accordingly, attorneys who are subject to discipline are entitled to procedural due process. Moncier, at 156. The question becomes what approach our Supreme Court will adopt regarding an attorney's assertion of the Fifth Amendment privilege against self-incrimination in a disciplinary proceeding. Thus, the task before this Court is to analyze this issue using the prior decisions of our Supreme Court as guidance.

Our Supreme Court has held that attorney disciplinary proceedings do not give rise to "the full panoply of [due process] rights afforded to an accused in a criminal case." Hyman v. Bd. of Prof'l Responsibility, 437 S.W.3d 435, 445 (Tenn. 2014). In Moncier, the Supreme Court cited with approval, the holding articulated by the Supreme Court of Colorado in People v. Harfman, 638 P.2d 745 (Co. 1981). Harfman argued he was entitled to the same constitutional safeguards as an accused in a criminal case. The Colorado Supreme Court held that disciplinary proceedings, which are *sui generis* will not be afforded the same constitutional rights as an accused in a criminal case, and refused to apply the exclusionary rule to shield an attorney charged in a disciplinary complaint. Id. at 747.

Justice points to Spevack v. Klein, 385 U.S. 511 (U.S. 1967) for the proposition that the U.S. Supreme Court has forbidden the imposition of any penalty upon an attorney for invoking the Fifth Amendment privilege in a lawyer disciplinary case. This Court disagrees. One year after its holding in Spevack, the Supreme Court stated, "[i]n Spevack, we ruled that a lawyer could not be disbarred solely because he refused to testify at a disciplinary proceeding on the ground that his testimony would tend to incriminate him." Gardner v. Broderick, 392 U.S. 273, 277 (U.S. 1968). The U. S. Supreme Court has not ruled whether an adverse inference can be drawn from an attorney's refusal to testify in a disciplinary proceeding; however, lower courts have considered this issue.

In U.S. v. Stein, 233 F.3d 6 (1st Cir. 2000). The Massachusetts Board of Bar Overseers (B.B.O.) conducted an investigation of professional misconduct against Attorney Golenbock. Golenbock's attorney became concerned about the possibility of a criminal proceeding and advised her to assert her Fifth Amendment privilege at a deposition. Golenbock declined to answer any questions asserting her Fifth Amendment privilege. After changing attorneys, Golenbock changed her position and when she appeared a subsequent time before the B.B.O., she chose to forego her Fifth Amendment privilege and testify. Later, Attorney Golenbock was charged with one count of bankruptcy fraud and one count of conspiracy to commit bankruptcy fraud. Golenbock moved to suppress the statements she made in front of the B.B.O. contending that she had been coerced to answer questions by the threat that assertion of her Fifth Amendment privilege would be used against her in the B.B.O. proceeding. On appeal, the Court of Appeals reviewed the denial of Golenbock's motion to suppress. Golenbock argued that her refusal to testify before the B.B.O. would be subject to an adverse inference as to the matters at issue in that proceeding, with the result being her disbarment. The First Circuit Court of Appeals held "The penalty of adverse inference and possible disbarment was too conditional to establish a conclusion that her B.B.O. testimony was compelled in contravention of the Fifth Amendment." The Court of Appeals acknowledged that the Supreme Court had made a distinction where the effect of invoking the Fifth Amendment by itself, would result in the loss of job or license as distinguished from where the invocation of the Fifth could result in damage to one's chances of retaining a job or license. (citing Lefkowitz v. Cunningham, 431 U.S. 801, 806 (U.S. 1977)).

> The B.B.O.'s own rules and practice make it plain that Golenbock was not faced with an automatic sanction. The B.B.O. makes its decisions based on a preponderance of the evidence, with the Bar Counsel bearing the Burden of Proof . . . Nothing in the record suggests that the B.B.O. has either a formal rule or an unwritten policy or practice to disbar or suspend attorneys simply for invoking Fifth Amendment privileges. Hence, the consequences of Golenbock's assertion

> of the privilege before the B.B.O. were the same as in any civil proceeding, in that the fact-finder could – but was not required to – draw an adverse inference from such an assertion. (citing Baxter v. Palmigiano, 425 U.S. 308, 317 (U.S. 1976)) . .
>
> As said, there is no evidence of any B.B.O. rule mandating that claiming one's constitutional right to remain silent must necessarily result in disbarment. Golenock could have asserted her Fifth Amendment privilege and later argued to the B.B.O. fact-finder that the evidence against her, as a whole, was inadequate to disbarment. We conclude that [n]either Garrity[2] nor any of its progeny brings defendant within the ambit of the coerced testimony doctrine.

U.S. v. Stein at 16.

Our Supreme Court has addressed the issue of a negative inference resulting from the assertion of a Fifth Amendment privilege. In Akers v. Prime Succession of Tennessee, 387 S.W.3d 495 (Tenn. 2012) the Court recognized the tension between the Fifth Amendment's protections in a civil trial and the other party's right to a fair proceeding. "[T]he majority of jurisdictions, including Tennessee, permit fact-finders to draw adverse inferences against parties who invoke their Fifth Amendment rights in a civil case." Akers, at 506. However, the Court refused to allow an adverse inference to be drawn from invocations of the privilege in every case. Instead, the Court took a balanced approach holding:

> We hold that the trier of fact may draw a negative inference from a party's invocation of the Fifth Amendment privilege in a civil case only when there is independent evidence of the fact to which a party refuses to answer by invoking his or her Fifth Amendment privilege. In instances when there is no corroborating evidence to support the fact under inquiry, no negative inference is permitted.

Akers, at 506.

The Court went further by requiring the plaintiff to present corroborating evidence regarding the specific fact to which the defendant refuses to answer. Thus, in determining whether a negative inference is permissible, the analysis must be on a question-by-question basis. Akers, at 507.

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[2] Garrity v. New Jersey, 385 U.S. 493 (U. S. 1967)

While our Supreme Court has indicated disciplinary proceedings are quasi-criminal in nature, these proceedings are civil cases. The punishment for a violation of the Rules of Professional Conduct range from reprimands, to suspension, to disbarment. The practice of law is a privilege, not a right, and there is nothing in Supreme Court Rule 9 which suggests the invocation of the Fifth Amendment will result in disbarment. The ruling of the Hearing Panel that it could draw a negative inference from Justice's invocation of his Fifth Amendment privilege is affirmed.

The prior testimony of Justice in federal court and the deposition testimony of Mr. Kerschberg and the exhibits introduced by the Board corroborate the specific facts to which Justice refused to answer in his deposition. Thus, the Panel was correct in finding that the Board met its burden under Akers but that Akers also left the discretion to the trier of fact whether to impose the adverse inference, which the Panel declined to do. Accordingly, Justice's claim that he was compelled to testify against his will is without merit.

II.

Procedural Complaints

In his petition and brief, Justice alleges several procedural errors by the Hearing Panel which he contends should result in the dismissal of the Board's petition.

Burden shifting

Justice contends the Hearing Panel improperly placed an undue burden on him, as the respondent, by requiring Justice to provide proof he performed the work detailed in the seventeen time entries set forth in the Panel's findings of fact and conclusions of law. The Panel

found Justice claimed he began keeping a record of his time in the Thomas case on December 10, 2008. He testified he made those entries on paper and later put them into a Word document. Although he maintained his time in a Word document, he could not recall the name of the document nor did he produce any of the hand-written time records. Justice was not able to produce a version of the Microsoft Word document until after the entry of Judge Phillip's order granting Justice attorney's fees in the Thomas v. Lowes case on March 15, 2011. The Panel then compared the seventeen entries on the Justice fee petition with the Kerschberg invoices. The Panel considered Justice's explanation regarding these seventeen entries and found his testimony on this issue not credible. The Panel then proceeded to set forth specific examples in the proof which contradicted Justice's explanation and ended by commenting on his demeanor on the witness stand. The Panel observed that questions from the Panel to Justice were often met with lengthy periods of silence prior to answering the questions and that his answers to other questions posed by the Panel regarding the fee petition were often evasive.

Since July 2009, Rule 52 of the Tennessee Rules of Civil Procedure requires the trial court to make specific findings of fact and conclusions of law, and our appellate courts have found that the failure to do so, will require reversal. Anil Const., Inc. v. McCollum, 2014 W.L. 3928726 (Tenn. Ct. App. 2014); Lake v. Haynes, 2011 W.L. 2361563 at 5 (Tenn. Ct. App. 2011). The Court finds the Panel followed the general rule in Tennessee that the burden of proof remained with the Board and did not shift. Stone v. City of McMinnville, 896 S.W.2d 548, 550 (Tenn. 1995). There is nothing in the Panel's findings to suggest it shifted the burden of proof to Respondent. Justice elected to testify in his defense. The Board found his testimony not to be credible and gave specific reasons for its findings as required under Rule 52 Tenn. R. Civ. P.

Trial Transcript

Justice has requested this Court to deem the transcript of the proceedings before the Panel as unreliable; and instead, order the audio be produced and entered into the record. As a practical matter there is no authority for ordering a court reporter's audio-recording of a trial to be placed into the record. Moreover, the affidavit of Ken Gibson (Gibson Court Reporting) indicates there is no audio for the January 21 day of trial. Rule 24 of the Tennessee Rules of Appellate Procedure governs this issue. Rule 24 (b) Tenn. R. App. P. provides that a transcript will be prepared of a stenographic report or other contemporaneously recorded evidence. In this case a transcript was prepared and submitted. No objection was filed with the clerk of the trial court within fifteen days after service of notice of the filing of the transcript. (Rule 24(b) Tenn. R. App. P.)

Rule 24(e) Tenn. R. App. P. provides that any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted and settled by the trial court, and absent extraordinary circumstances, the determination of the trial court is conclusive. Here, the trial court is the Hearing Panel as it is the entity that heard the evidence and conducted the trial.

In Antip v. Crilley, 688 S.W.2d 451 (Tenn. Ct. App. 1985) a judgment was entered in favor of the plaintiff. Defendant decided to appeal. The plaintiff had engaged the services of a court reporter who had taped the proceedings but had not transcribed the proceedings. Appellant's counsel sought to have the trial court order the tapes turned over to him. The trial court denied the request. Each party then submitted competing statements of evidence, and the trial court rejected appellant's statement. On appeal, the court stated that stenographers may err, and tapes can be altered. However, when a dispute arises, it is the trial judge who is the only one

who can resolve such issues absent extraordinary circumstances, such as the death of the trial judge. Antrip at 453.

Justice failed to timely object pursuant to Rule 24 Tenn. R. App. P., and never lodged any objection with the Hearing Panel (Trial Court) as required. This issue is without merit.

Lack of Specificity in the Pleadings

Justice contends the Panel failed to plead in its petition for discipline sufficient facts that put him on notice of the alleged violations. Justice filed a motion to dismiss or in the alternative for a more definite statement and to compel. The Panel denied his motion to dismiss and his motion for a more definite statement, but granted in part his motion to compel. Specifically, the Panel ordered the Board to supplement his response to Respondent's interrogatory number 6, requiring that it specify the specific time entries it contended were false. The Board complied with the Panel's order and identified the seventeen highlighted entries in its supplemental response. This list was ultimately admitted as Trial Exhibit 21. The Board correctly points out that Justice's motion for a more definite statement pursuant to Rule 12.05 of the Tennessee Rules of Civil Procedure was moot since Justice had already filed his answer.

Justice contends the Board failed to comply with Rule 9.02 Tenn. R. App. P. in that the Board failed to state with particularity its claim of fraud against Justice. Supreme Court Rule 9 § 23.3 provides that the Tennessee Rules of Civil Procedure apply unless otherwise provided for in Rule 9. Section 8.2 of Rule 9 Tenn. Sup. Ct. R. sets out the requirements for a petition. It provides that the petition shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. The Court finds Justice's reliance on Rule 9.02 Tenn. R. Civ. P. is misplaced. The Board's petition for discipline is not a civil complaint alleging fraud. In its

petition, the Board alleged specific violations of the Rules of Professional Conduct concerning fees, candor toward the Tribunal, fairness to opposing party and counsel, and misconduct. These were not bare allegations. The petition set out the history of Justice's conduct in the federal court case, Thomas v. Lowes. The petition attached the Itemized Accounting of Services filed by Justice that there were entries which Justice alleged were his that were actually performed by Kerschberg; that Justice testified falsely before Judge Collier; that he kept contemporaneous records of his time; and that his Itemized Accounting of Services was grossly exaggerated and unreasonable. The Court finds the petition sufficiently complies with Rule 9 § 8.2 Tenn. Sup. Ct. R.

Sufficiency of Service

Justice raises three separate issues regarding service. First he claims the Hearing Panel's findings of fact and conclusions of law were not properly served. Rule 9 § 8.3 Tenn. Sup. Ct. R. provides the Hearing Panel shall submit its judgment to the Board within fifteen days after the conclusion of its hearing. The Board shall immediately serve a copy of the judgment of the Hearing Panel upon the respondent and the respondent's counsel of record. At the time of the entry of the judgment, Mr. Pera was Justice's counsel of record. Rita Web, the Executive Secretary of the Board mailed a copy to Mr. Pera. Ms. Webb apparently did not mail a copy directly to Justice. Justice contends the failure of the Board to mail a copy of the judgment directly to him requires a dismissal of his case. Nothing in Rule 9 supports this outcome. The purpose of requiring service of the judgment is to make sure a respondent has adequate notice of the judgment so that he may appeal if he is dissatisfied. There is no doubt Justice had sufficient notice of the judgment since he filed his petition for writ of certiorari within the sixty day time

requirement. Thus, there was no prejudice to Justice.

Justice also contends he was not properly served with the petition for writ of certiorari which the Board filed. The Board's petition was filed in Chancery Court on April 13, 2015. The petition contains a certificate of service certifying it was mailed to Mr. Pera on April 8, 2015. On that same date, counsel for the Board emailed Mr. Pera inquiring if he would be accepting service of the petition. When Mr. Pera did not respond to the April 8, 2015 email, counsel for the Board emailed him again on April 28, 2015, once again inquiring as to service. Mr. Pera responded on that day that he would not accept service. As a result, counsel for the Board requested the clerk and master on April 28, 2015 to issue a summons for service on Justice. The summons was issued on April 30, 2015 and was returned by the sheriff on May 5, 2015. However, because the summons was signed by someone other than Justice, counsel for the Board issued an alias summons which was personally served on Justice on July 23, 2015.

Justice contends the delay in serving him with the Board's petition requires dismissal of the Board's petition, citing Rule 4.01(3) Tenn. R. Civ. P. which provides that if a party intentionally causes delay of prompt issuance of a summons, the filing is ineffective. The Court finds there is no evidence that counsel for the Board intentionally delayed the issuance of a summons. This issue is without merit as is Justice's claim that the second summons form used by the Board for the alias summons contained the $4,000 personal exemption rather than the current $10,000 personal property exemption.

III.

Sufficiency of the Evidence

Justice contends the Hearing Panel's findings of fact were arbitrary and unsupported by the evidence. Much of Justice's brief focuses on the testimony of Mr. Kerschberg, who was a paralegal working for Justice. Mr. Kerschberg testified by deposition upon written interrogatories. He submitted itemized statements for his services for work performed in the Thomas case which Justice paid. Kerschberg testified he personally performed the work itemized in his invoices. Although Kerschberg was working for Justice during much of the Thomas case, he had no knowledge of Justice ever documenting the time that Justice spent on the Thomas case.

Justice contends Kerschberg "recanted" in his testimony before Judge Collier in the federal disciplinary proceeding. In support of this position, Justice cites the following exchange:

> QUESTION: On the occasions when he [Justice] sent you hand written comments or gave you hand written comments, did you ever take those hand written comments and use them to create the narrative entries on your invoices?
>
> ANSWER: Yes. On some occasions, I did.

Whether Kerschberg may have used hand written comments from Justice on some occasions in creating narrative entries on Kerschberg's invoices to Justice does not come close to a repudiation of Kerschberg's testimony that he performed all of the work which he submitted on his invoices and for which he was paid. Justice's contention that this testimony supports a conclusion that Kerschberg copied Justice's time entries on the seventeen entries found by the Panel, is a *non sequitur.*

Justice also cites the testimony of Kerschberg "if Loring Justice did other work that could also be described by these entries, but without me there, there is no way that I could know that."

This testimony tends to bolster Kerschberg's credibility rather than impeach it as contended by Justice.

Justice contends the testimony of Chad Rickman completely contradicted Kerschberg. Mr. Rickman is an attorney who began practicing with Justice in 2010. He first worked on the Thomas v. Lowes case beginning in July 2010, when Justice told Rickman to start keeping his time. Rickman recorded his time on a legal pad which he then transmitted to staff members to enter into the Word document. However, the first time Rickman ever saw the Word document was after they received the order from the district court awarding fees and expenses. Rickman believed the district court order allowed them to recover fees back to the Rule 26 discovery conference. He discussed the Chamberlain case regarding the overlapping of time with Justice and attempted to delete those entries. Rickman did admit members of the firm did not keep records of their time in representation of their clients except on this one occasion. Rickman also confirmed their intention to give their client, Mr. Thomas any of the fees which they expected to receive from the district court.

The Panel correctly observed that Rickman was not working for Justice in 2009, and there were no independent records of Justice's time available at the time the fee petition was drafted. Therefore, Rickman was in no position to determine the accuracy of Justice's entries. Although Rickman testified he personally worked on the preparation and itemization of entries on the fee petition on many occasions, there is not a single entry claiming Rickman actually worked on the itemized fees and expenses submitted with the fee petition. Rickman's testimony regarding the scope of the district court's order of fees was identical to Justice's. The Panel concluded nothing contained in Judge Phillip's order would lead a reasonable attorney to believe that they were entitled to request Lowes to pay for work such as attending Rule 26 conferences,

drafting initial discovery, amending the complaint or reviewing hotel reservations. This Court agrees. Likewise, the Panel found both Rickman and Justice's testimony that Mr. Thomas was to receive any fee awarded unbelievable and illogical.

The findings of the Hearing Panel leave no doubt that it found Rickman's testimony not to be credible. The weight, faith and credit to be given to a witness' testimony lies with the trial court in a non-jury case where there is an opportunity to observe the manner and demeanor of the witness during their testimony. Roberts v. Roberts, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991). Thus, credibility findings and the Hearing Panel's weighing of evidence on questions of fact are binding on a reviewing court unless those findings are unsupported by the evidence in the record. Maddox v. Bd. of Prof'l. Responsibility, 409 S.W. 3d 613, 621 (Tenn. 2013). The Court finds the evidence in this case does not preponderate against the findings of fact by the Hearing Panel regarding the testimony of Kerschberg and Rickman.

Justice's next issue is that the Panel erred in refusing to allow Justice to introduce the declaration of his computer expert, Yalkin Demirkaya which was filed in the federal case before Judge Collier. Justice contends that the Board "opened the door" during its opening statement. Even if evidence is inadmissible, a party may "open the door" to admission of that evidence when that party introduces evidence or takes some action that makes admissible evidence that would have previously been inadmissible. State v. Gomez, 367 S.W.3d 237, 246 (Tenn. 2012) (citing 21 Charles Alan Wright, Federal Practice and Procedure § 5039 (2nd Ed. 1987). Opening statements are outlines of what attorneys expect the evidence to be. These statements are made only to assist the trier of fact in understanding the evidence that will be presented. Opening statements are not evidence, and the Board did not "open the door."

Next, Justice cites the rule of completeness found in Rule 106 Tenn. R. of Evidence. Rule 106 provides that when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. In this case, Respondent sought to introduce the declaration of his computer expert, Mr. Demirkaya based upon the Board's submission of Respondent's prior testimony in district court. There are no cases to suggest Rule 106 should be read this broadly. Moreover, it does not appear Rule 106 will affect the admissibility of evidence, only the timing of the evidence. Mr. Demirkaya's declaration is hearsay and inadmissible. United States v. Kostner, 684 Fed. 2d 370, 373 (6th Cir. 1982). The rule contemplates a high degree of discretion to be exercised by the trier of fact. There is no error in the Panel's exclusion of this evidence.

Finally, Justice claims that the email from Justice to Kerschberg (Exhibit 23) was admitted for identification only and never received into evidence. This is a misstatement of the evidence. Initially, the exhibit was pre-marked for identification purposes. However, the Chair of the Panel later stated Exhibit 23 was admitted, and there was no objection by counsel for Justice.

The Hearing Panel found that Justice made the following statements to Judge Collier in the federal court proceeding which were false and that Justice knew they were false:

1. He did not wrongly attribute any work to himself in the fee petition that had actually been performed by Kerschberg.

2. He made no false certifications or false statements in the fee petition.

3. He personally worked the time attributed to him in the fee petition.

4. He recorded his time and activities in a Microsoft Word document or on a note pad from which they were recorded in that Microsoft Word document

later.

5. He recorded his time and activities within approximately one week.

This Court finds that the record fully supports each of the findings of the Hearing Panel which are affirmed.

The Board's Writ of Certiorari

The Board also appealed the Hearing Panel's decision. It raised a single issue, whether the sanction of suspension was arbitrary and an abuse of its discretion. The Panel concluded Justice violated the following Rules of Professional Conduct:

1. That the fee petition submitted by Justice to the district court was unreasonable and greatly exceeded the time and labor required to locate and depose the witness.
2. That Justice adopted work actually performed by Kerschberg as work performed by himself in the fee petition that was submitted to the federal court under oath.
3. That Justice testified falsely in the show cause hearing before Judge Collier by a) making false certifications or statements in his fee petition; b) that he personally worked the time attributed to him in the fee petition; c) that he recorded his time activities in a Microsoft Word document close in time to the work being performed.

The Panel then considered aggravating and mitigating circumstances from which it concluded that Justice should be suspended from the practice of law for a period of one year.

The Board argues the Hearing Panel applied ABA Standards that are not supported by the evidence and the Panel's findings.[3] Rather than the suspension issued by the Hearing Panel, the Board submits that the application of the correct ABA Standards, along with the aggravating and mitigating factors, warrants disbarment from the practice of law. In order to determine the

[3] The Hearing Panel failed to articulate any standards in its Judgment.

appropriate discipline in a given case, the Court looks to the ABA Standards for Imposing Lawyer Sanctions. Maddux, 409 S.W. 3d at 624. These standards act as a guide rather than rigid rules, thereby providing courts with discretion in determining the appropriate sanction for a lawyer's misconduct. Maddux, 409 S.W. 3d at 624. The ABA Standards specify that when imposing a sanction, the court should consider:

> 1) What ethical duty did the lawyer violate (a duty to a client, the public, the legal system, or the profession?); 2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?); 3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?); and 4) Are there any aggravating or mitigating circumstances?

Id. (quoting ABA's Standards, theoretical framework).

In this case, the Hearing Panel never articulated the particular ABA Standard upon which it based its sanction of suspension. The standards which control for violation of duties owed to the public and duties owed to the legal system are found in 5.0 and 6.0 respectfully. ABA Standard 5.11 provides that:

> Disbarment is generally appropriate when:
> a. A lawyer engages in serious criminal conduct, a necessary element of which incudes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft . . . 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.

ABA Standard 6.11 provides that:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

The first question is what ethical duty did Justice violate? The first violation found by the Panel regarding fees does not apply to ABA Standard 5.11. However, the Panel went on to find Justice violated Rule 3.3 pertaining to candor toward the tribunal when he submitted a false fee petition to the federal court under oath and when he testified falsely in the show cause hearing before Judge Collier. The Court finds these violations could fall under ABA Standard 5.11(b). Here, Justice intentionally submitted a false fee petition in which he represented he was entitled to be paid for work he did not perform, and he continued to perpetrate his misrepresentation by testifying falsely in front of Judge Collier. Whether ABA Standard 6.11 is applicable is a more difficult question. Although Justice did intend to deceive both Judge Phillips and Judge Collier, made false statements, and submitted a false document, there was no serious injury to Lowes. In addition, it was Lowes' misconduct by failing to disclose the identity of a material witness in the underlying case, that lead to the discovery sanction in the first place. The Court finds that ABA Standard 6.11 is not applicable.

Here, the Panel failed to identify the specific duties violated by Justice and articulate the relevant ABA Standards. Maddux at 624. Pursuant to Maddux, the findings by the Panel require a conclusion that Justice acted intentionally to deceive both Lowes and the Federal District Court. This type of conduct by an officer of the court goes to the foundation of our system of justice. Therefore, the presumptive sanction is disbarment pursuant to ABA Standard 5.11(b).

The Panel identified six aggravating factors and two mitigating factors. The record supports the six aggravating factors found by the Panel and the two mitigating factors. This Court is reluctant to impose the sanction of disbarment upon a lawyer with no prior disciplinary offenses. The comments to ABA Standard 5.11 state "in imposing final discipline in such cases,

most courts impose disbarment of lawyers who are convicted of serious felonies." However, the intentional deceit by Justice on the opposing party, Judge Phillips and Judge Collier, along with the refusal to acknowledge the wrongful nature of his conduct and the total lack of remorse, leaves this Court with no alternative. The Respondent, Loring Edward Justice shall be disbarred.

CONCLUSION

The findings of fact and conclusions of law by the Hearing Panel regarding the misconduct of the Respondent are affirmed. The sanction imposed by the Hearing Panel is reversed. Mr. Justice is disbarred from the practice of law.

It is so **ORDERED.**

ENTER this 2 day of February, 2017.

ROBERT E. LEE DAVIES, SENIOR JUDGE

CLERK'S CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served upon the following by U.S. Mail on this the 6th day of February, 2017:

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