

**IN DISCIPLINARY DISTRICT I
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE**

FILED

2016 NOV 15 AM 9:57

BOARD OF PROFESSIONAL
RESPONSIBILITY

RW
EXEC. SEC'Y

**IN RE: JERRY DEWAYNE KERLEY,
BPR #12685, Respondent,
An Attorney Licensed to
Practice Law in Tennessee
(Sevier County)**

DOCKET NO. 2012-2129-1-KB(14)

JUDGMENT OF THE HEARING PANEL

This matter came on for hearing before a duly appointed Hearing Panel on October 31, 2016 upon a Petition for Final Discipline filed by the Board pursuant to Tenn. Sup. Ct. R. 9, § 14.¹ Present were Kent Lee Chitwood, Panel Member; Steven Douglas Drinnon, Panel Member; Kenneth Clark Hood, Panel Chair; William C. Moody, Disciplinary Counsel; Richard L. Gaines, Attorney for Respondent and the Respondent, Jerry DeWayne Kerley. While no testimony was offered at the hearing, nine exhibits were introduced by agreement without objection and were considered by the panel. Upon statements of counsel, evidence presented, and upon the entire record in this cause, the Panel makes the following findings and judgment.

STATEMENT OF THE CASE

On June 21, 2012, the Tennessee Supreme Court suspended Respondent pursuant to Tenn. Sup. Ct. R. 9, § 14, due to Respondent's conviction of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349 and 18 U.S.C. § 1343; wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1343; bank fraud, in violation of 18 U.S.C. § 1344; false statements to a

¹ Because this matter was initiated before the Board prior to January 1, 2014, it is governed by the 2006 version of Tenn. Sup. Ct. R. 9. Therefore, all references to that rule herein are to the 2006 version.

financial institution, in violation of 18 U.S.C. § 1014; and money laundering, in violation of 18 U.S.C. § 1957, serious crimes, in the United States District Court for the Eastern District of Tennessee.

The June 21, 2012 order referred the matter to the Board of Professional Responsibility for the institution of formal proceedings. Accordingly, the Petition for Final Discipline was filed in this cause on September 10, 2012. The Respondent filed his Answer to Petition for Final Discipline on June 17, 2016.

FINDINGS

On May 18, 2012, the Respondent was found guilty by a jury of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349 and 18 U.S.C. § 1343; wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1343; bank fraud, in violation of 18 U.S.C. § 1344; false statements to a financial institution, in violation of 18 U.S.C. § 1014; and money laundering, in violation of 18 U.S.C. § 1957, serious crimes, in the United States District Court for the Eastern District of Tennessee. On June 14, 2013, a Judgment was entered ordering a prison sentence of forty-eight months, followed by a period of supervised release of three years, an assessment of \$1,400.00 and restitution of \$1,901,980.31. The Respondent was incarcerated from September 4, 2013 to August 21, 2014. Counsel for the Respondent and the Board agreed that fraud was an element of one or more of the crimes for which the Respondent was convicted.

The United States Supreme Court denied the Respondent's petition for writ of certiorari on October 13, 2015. Therefore, all appeals from the conviction have concluded.

The Panel finds that the Respondent's conviction is conclusive evidence of the commission of the serious crimes of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349 and 18 U.S.C. § 1343; wire fraud affecting a financial institution, in violation of 18 U.S.C. §

1343; bank fraud, in violation of 18 U.S.C. § 1344; false statements to a financial institution, in violation of 18 U.S.C. § 1014; and money laundering, in violation of 18 U.S.C. § 1957. Pursuant to Tenn. Sup. Ct. R. 9, § 14, the sole issue to be determined in this matter is the extent of final discipline.

The Panel further finds that the Respondent committed criminal acts which seriously adversely reflect on his fitness to practice law in violation of RPC 8.4(a), (b) and (c), (Misconduct). The Panel concludes that ABA Standard 5.11(a), recommending disbarment, applies to the Respondent's conduct. The Panel further finds that ABA Standard 5.12 governing suspension does not apply since fraud is an element of one or more of the crimes for which the Respondent was convicted.

Accordingly, the Panel must find that disbarment is the appropriate discipline unless there are mitigating factors that outweigh the aggravating factors in this case. The Panel unanimously finds that the evidence presented establishes five aggravating factors under ABA Standard 9.2:

1. There was a pattern of misconduct. The crimes committed by the Respondent involved 8 separate closing over a 6 to 12 month period. This was not a single, isolated instance of misconduct.

2. There were multiple offenses as reflected in the Judgment and Verdict form filed as Exhibits 1 and 2. However, since the underlying facts of this factor are the same as in the first, the Panel assesses no additional weight to this aggravating factor.
3. The Respondent had substantial experience in the practice of law, having been admitted to practice in this state in 1987.
4. The Respondent did not admit to wrongdoing either in the criminal case or in the proceedings before this Panel.

5. The Respondent's acts of wrongdoing constituted illegal conduct.

The Panel also finds that there are mitigating factors which must be weighed against the aggravating factors listed above in determining whether to reduce the generally recommended discipline of disbarment under ABA Standard 5.11(a) to a suspension. The Panel unanimously finds the following mitigating factors under ABA Standard 9.3:

1. The Respondent had no prior criminal or disciplinary history.
2. In the opinion of the trial judge presiding over the criminal trial, the Respondent does not pose a risk of similar future misconduct. (Ex. 9)
3. While not listed as an example of a mitigating factor in Standard 9.3, the Panel finds that the numerous letters reflected in Exhibit 3 from members of the community in which the Respondent practiced attesting to his character and reputation is a mitigating factor to be considered.

The Panel considered the Respondent's assertion that his misconduct was not involved with the practice of law. One of the panel members found this factor to have merit, but the majority of the Panel did not. The primary evidence on this proposed mitigating factor was Exhibit 6, which one panel member found to be persuasive. The other two panel members did not find this persuasive in the absence of the proof on which the judge's conclusion was predicated when he stated: *"The fact that the defendant is an attorney does not appear to have had an impact on this case..."* Moreover, the two panel members who did not find this statement persuasive were concerned because the trial judge went on to state: *"...Defendant's position as owner of Guaranty Land Title placed him in a position characterized by a **professional** or managerial discretion which facilitated the commission of the instant offenses."* (Emphasis added). In all other respects, the findings of the Panel

are unanimous.

The Panel finds that the other aggravating and mitigating factors proposed by the Board and the Respondent were not supported by the limited evidence offered at the hearing.

The Panel then weighed the aggravating factors against the mitigating factors to determine whether to adjust the level of discipline generally recommended by ABA Standard 5.11(a). The Panel agreed that the mitigating factors established by the Respondent were substantial and weighty, particularly the statement of support from the community set forth in Exhibit 6. However, the Panel unanimously agreed that the weight of the mitigating factors did not outweigh the aggravating factors established by the Board, even if the mitigating factor on which the Panel was divided was considered as a mitigating factor. Accordingly, the Panel finds that the generally recommended discipline of disbarment under ABA Standard 5.11(a) should be applied to the Respondent.

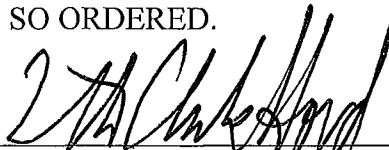
JUDGMENT

Accordingly, it is the decision of the Panel that Respondent should be disbarred. The disbarment is made retroactive to the date of the Respondent's summary suspension on June 21, 2012 as the Board requested.

The Panel declines to order restitution or to find that payment of restitution in full should be a condition precedent to filing a petition for reinstatement as requested by the Board. The United States District Court ordered the Respondent along with the other defendants in that action to pay restitution to Sun Trust Mortgage, Citizens Bank, and GMAC, and the Respondent is bound by that decision. Hence, it would be redundant for this Panel to "order" restitution. However, this Panel

recommends that if the Respondent applies for reinstatement, the Board and the Panel considering reinstatement should consider whether the Respondent has made a good faith effort to contribute to payment of restitution, but declines to make payment of restitution in full (which totals over \$1,900,000) as a condition precedent to the filing of a petition for reinstatement. In this regard, the Panel was persuaded by the opinion of the United States District Judge in the Respondent's sentencing hearing in which he opined, *"This defendant [the Respondent] did not engage straw borrowers to submit fraudulent loan applications. He did not falsify loan applications and he did not share in the equity that was milked from the properties. His role was serving as a closing attorney, creating the closing documents and distributing the funds which unfortunately included the early disbursement of loan proceeds and signing off on documents that misled the lending institutions regarding the amount of cash the borrowers brought to the closing. The evidence at trial showed that [the Respondent] only received his fees for serving as the closing attorney in these transactions, payments totaling approximately \$27,000, which is far less than that received by other defendants."* (Exhibit 8, emphasis added; admitted without objection from the Board) This observation by the trial judge when coupled with the overwhelming letters of support for the Respondent as set forth in Exhibit 3 persuaded this Panel that full restitution as a condition of reinstatement would be fundamentally unfair, would effectively forever bar the Respondent from being reinstated, and would thereby deprive him of his most likely source of revenue to contribute to restitution as ordered by the United States District Court.

IT IS SO ORDERED.



Kenneth Clark Hood, Panel Chair

Steven Douglas Drifnon by KCH w/ Permon
Steven Douglas Drifnon, Panel Member

Kent Lee Chitwood by KCH w/ Permon
Kent Lee Chitwood, Panel Member

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