

IN THE CHANCERY COURT OF GREENE COUNTY, TENNESSEE
AT GREENEVILLE

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT,)	
)	
)	
Petitioner,)	
)	No. 2018-CV-363
vs.)	
)	
EDWARD KERSHAW,)	
)	
Respondent,)	

MEMORANDUM AND ORDER

This cause came on to be heard on the 16th day of April 2019 before Robert E. Lee Davies, Senior Judge, upon the petition for review filed by Attorney Edward Kershaw. The Court has received a copy of the Hearing Panel transcript, the official record with exhibits, and the briefs filed by each party. After argument of counsel, the Court makes the following findings of fact and conclusions of law:

Procedural History

On April 2, 2018, a petition for discipline was filed to which Mr. Kershaw filed a response on May 1, 2018. Prior to the hearing in this case, Mr. Kershaw, during a telephone conference with the Panel, orally requested the recusal of Panel Member Steven Terry. The Panel denied Mr. Kershaw's request, and on June 7, 2018, Mr. Kershaw filed a motion to reconsider in which he set forth his argument in writing as to why Mr. Terry should recuse himself. On June 18, 2018 the Panel entered an order denying the motion to reconsider.

ENTERED MAY 10, 2019

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Clerk & Master

The hearing on the petition took place on August 22, 2018. The Panel heard testimony of witnesses, including Mr. Kershaw, took the case under advisement, and issued its written findings of fact and conclusions of law on September 20, 2018. Based upon its findings of fact and conclusions of law, in conjunction with the ABA Standards for imposing lawyer sanctions, the Panel decided that the appropriate final discipline in this case was to suspend Mr. Kershaw's license to practice law for a period of four months, with one month of active suspension and the remainder with Mr. Kershaw placed on probation subject to the following condition, that Mr. Kershaw fully comply with all laws, rules and regulations applicable to attorneys licensed to practice law in the State of Tennessee. In addition, the Panel recommended that the Board contact TLAP and request TLAP to conduct an evaluation of Mr. Kershaw, and if required by TLAP, that Mr. Kershaw cooperate with any recommendation by TLAP including a monitoring agreement.

Mr. Kershaw received his license to practice law in Tennessee in 1994 and has practiced for twenty-five years. His law office is located in Greeneville, Tennessee. The violations found by the Hearing Panel concern three events. Along with other defenses, Mr. Kershaw argues the protection under the First Amendment applies to all three.

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. S. Ct. R. 9 § 1.3. On questions of fact, the trial court may not substitute its judgment for that of the Hearing Panel. The same is true for weighing the evidence. Board of Professional Responsibility v. Allison, 284 S.W.3d 316, 323 (Tenn. 2009). However, the trial court reviews questions of law *de novo* with

no presumption of correctness. Board of Professional Responsibility v. Cowan, 388 S.W.3d 264, 267 (Tenn. 2012). Any modification to a Hearing Panel's decision must be based on one of the specific factors set forth in Tenn. S. Ct. R. 9, § 1.3. Board of Professional Responsibility v. Love, 256 S.W.3d 644, 652 (Tenn. 2008).

Accordingly, the trial court will only reverse or modify the decision of a Hearing Panel if the rights of the petitioner have been prejudiced because the Panel's findings, inferences, conclusions or decisions are: 1) in violation of constitutional or statutory provisions; 2) in excess of the Panel's jurisdiction; 3) made upon unlawful procedures; 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. S. Ct. R. 9, § 1.3, Board of Professional Responsibility v. Reguli, 489 S.W.3d 408, 417 (Tenn. 2015).

Finally, the trial court should conduct a review of comparable cases to ensure that the Hearing Panel's sanctions are consistent with sanctions ordered in other cases involving similar misconduct. Board of Professional Responsibility v. Reguli at 425.

The Gillum Preliminary Hearing

Mr. Kershaw represented Earl Gillum in a preliminary hearing before General Sessions Judge Bailey in the case of State v. Gillum, 17CR12090, a misdemeanor assault case. Mr. Kershaw also represented Mr. Gillum in State v. Gillum, 17CR2055, a felony theft case in which Mr. Gillum was accused by his former girlfriend, Belinda Wilson.

Mr. Gillum's preliminary hearing was scheduled along with other cases for a hearing before Judge Bailey on November 6, 2017. On that date, Ms. Wilson was being examined by

Attorney Elizabeth McClellan when Ms. Wilson became very emotional as she was questioned about alleged sexual abuse by Mr. Gillum. Ms. Wilson was still crying on the stand when Ms. McClellan completed her direct examination.

Before Mr. Kershaw began his cross examination, he stated "Can I have some tissue too, because I have to cry as well." Judge Bailey immediately admonished Mr. Kershaw explaining: "Mr. Kershaw, that's not appropriate. Not appropriate at all. Absolutely uncalled for."

During her direct testimony, Ms. Wilson stated Mr. Gillum had yanked her into a vehicle against her will. During his cross examination, Mr. Kershaw asked her "when he yanked you into the car, did angels magically protect you from getting marks?" Attorney McClellan objected, and Judge Bailey then stated "Mr. Kershaw, you're testing my patience today." Mr. Kershaw responded to Judge Bailey: "That goes both ways." Judge Bailey immediately held Mr. Kershaw in contempt, placed him in custody, and declared a short recess.

When the hearing resumed, Judge Bailey found Mr. Kershaw to be in criminal contempt and fined him fifty dollars. At that time Mr. Kershaw responded: "I appreciate your response your Honor. I also find that what you did was inappropriate. That you held me improperly and I'm going to do my best to take out a citizen's arrest warrant against you because that is permitted under the state of law. And I will also turn that into the judiciary board. I appreciate your comments."

Judge Bailey then made a final finding in which he declared:

Mr. Kershaw, your behavior towards this judiciary, in this courthouse, to me, and to other judges, has gotten to the point where it concerns me and other judges about your behavior in the courtroom, in that you believe you can make comments and you can engage in conduct that is not acceptable. It's very unfortunate. At one time, you were a very capable attorney, but your continued course of conduct of destruction is unfortunate. It is sad. And it just is bizarre why you continue to engage in conduct when other judges in this courthouse have cautioned you about your behavior, and me.

Mr. Kershaw appealed the criminal contempt to the Circuit Court of Greene County. Senior Judge Don Ash heard the appeal and entered an order July 11, 2018 affirming the finding of criminal contempt.¹

Attorney McClellan also filed a report with the Board on November 9, 2017. She reported that on Monday, August 7, 2017, she appeared with Mr. Kershaw before the court during a docket call where there were multiple breaks during the day. She had several conversations with Mr. Kershaw and stated that each time he returned from his office, Mr. Kershaw smelled strongly of alcohol. She also reported the same behavior which occurred on November 6, 2017 in the General Sessions Court for Greene County.

At the hearing, Mr. Kershaw called Ashley Davenport, who has known Mr. Kershaw for two years. Ms. Davenport testified she has never smelled alcohol on Mr. Kershaw. Mr. Kershaw also called his client, Earl Gillum. Mr. Gillum likewise confirmed that he never smelled alcohol on Mr. Kershaw during the hearing on November 6 or at the appeal of the contempt hearing in Knoxville before Judge Ash. Another former client of Mr. Kershaw, Jennifer Gaybee testified that they had spent the day together in court and that she never smelled alcohol on his breath.

The Hearing Panel found that Mr. Kershaw violated T.R.P.C. 4.4(a)(1) by his comment “Can I get some tissues too, because I have to cry as well.” The Panel found that this statement had no substantial purpose other than to embarrass the witness.

The Panel also found Mr. Kershaw violated T.R.P.C. 3.5(e) when he responded to Judge Bailey’s comment “Mr. Kershaw, you are trying my patience today” by stating in open in court

¹ Mr. Kershaw has requested this Court to expunge the finding of criminal contempt; however, that is a matter of properly raised before Judge Ash.

to Judge Bailey “That goes both ways.” The Panel found that this statement by Mr. Kershaw was intended to disrupt a tribunal and that even if Mr. Kershaw may have believed that Judge Bailey’s comment was abusive, Judge Bailey’s perceived default in this regard, was not justification for reciprocation by Mr. Kershaw. The Panel specifically explained that Judge Bailey’s finding of contempt was not relevant to its finding that Mr. Kershaw had violated Rule 3.5(e).

The violations found by the Hearing Panel occurred in open court during the preliminary hearing. Mr. Kershaw initially argues that he was only doing what his client asked him to do. The Court finds Mr. Kershaw’s argument that he had no choice but to pursue these tactics since he was required to zealously represent his client, is not a valid defense. Such a contention indicates a lack of understanding as to how the rules of professional conduct are interrelated with one another. The Hearing Panel found that Mr. Kershaw’s comments to the witness during the preliminary hearing were only made to embarrass the witness. The Court notes these comments were not questions on cross-examination. They were just statements made with the sole purpose of humiliating the witness. Zealous representation never justifies disrespectful conduct before the court. Bailey v. Bd of Prof. Responsibility, 441 S.W.3d 223 (Tenn. 2014).

Mr. Kershaw’s next argument is that he had a right to respond to what he perceived as discourteous conduct on the part of Judge Bailey towards him. This defense too is unavailing to Mr. Kershaw and is specifically addressed in comment 5 of Rule 3.5, “Impartiality and decorum of the tribunal”:

[5] The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and

preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.
(Supreme Court Rule 8, RPC 3.5, Comment 5)

The Panel reviewed the recording of the preliminary hearing before Judge Bailey and found no abuse by the judge. However, even if there was abuse, the comment to the Rule clearly provides that a judge's misconduct is no justification for a similar response by a lawyer.

The second violation found by the Panel was that Mr. Kershaw intended to disrupt the preliminary hearing in front of Judge Bailey after the judge had just admonished him regarding his conduct towards the witness. In Farmer v. Board of Professional Responsibility, 660 S.W.2d 490 (Tenn. 1983) the Supreme Court disciplined an attorney who called judges and opposing counsel liars in briefs filed with the Court of Appeals. The Court found that an attorney who deliberately chose to use language and tactics of that sort will not be tolerated in the legal profession. Id. at 493. Likewise, in Bailey v. Board of Professional Responsibility, 441 S.W.3d 223 (Tenn. 2014) the Supreme Court affirmed an attorney's misconduct in court where the attorney repeatedly violated the court's orders and admonishings during a jury trial. "Even if an attorney believes that the court has issued an erroneous ruling, zealous representation of a client 'never justifies the use of disrespectful, unprofessional or indecorous language to the court.'" Id. at 234. In Board of Professional Responsibility v. Slavin, 145 S.W.3d 538 (Tenn. 2004) the Court held that the derogatory and defamatory statements made by an attorney in court were not entitled to First Amendment protection. The court reasoned that a judicial proceeding severely limits whatever right to free speech an attorney may have. Id. at 549.

The statements made by Mr. Kershaw are undisputed, and the Court finds that the conclusions reached by the Hearing Panel regarding the violations which occurred in open court are valid.

The Ads Commenting on the Preliminary Hearing

One week after the Gillam hearing in November of 2017, Mr. Kershaw ran an ad in the local paper. In the ad Mr. Kershaw made the following representations:

- During the course of the trial, the trial judge yelled at the attorney in a manner that the attorney has never been yelled at like in his entire life and that is completely inappropriate in a courtroom.
- At one point the judge said that the attorney was testing the judge's patience and the attorney explained that the judge was also testing his patience because the judge was refusing to allow him to ask questions about clearly relevant evidence.

Mr. Kershaw admitted that the trial judge referred to in the advertisement is Judge Bailey, and the lawyer referred to is Mr. Kershaw. The Hearing Panel had the opportunity to listen to the recording of the preliminary hearing before Judge Bailey and specifically found that Judge Bailey did not yell at Mr. Kershaw. Having heard the recording, the Court agrees with the Panel. The Panel made no finding regarding the other portion of the ad which referred to the comment that the judge was testing the attorney's patience.

Mr. Kershaw raises the First Amendment regarding this publication which commented on the preliminary hearing. Initially, the Court notes that these statements were made **out-of-court**. In Ramsey v. Board of Professional Responsibility, 771 S.W.2d 116, 121 (Tenn. 1989), our Court applied the subjective "actual malice" standard established by the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 Sup. Ct. 710, 11 Law Ed. 2d 686 (1964) and held that an attorney's out-of-court statements were protected by the First

Amendment. In the recent case of Board of Professional Responsibility v. Parrish, 556 S.W.3d 153, 163 (Tenn. 2018) the Court explained its holding in Ramsey stating:

That after a case has concluded, an attorney has the right to make statements that criticize the court and the judiciary, ‘so long as the criticisms are made in good faith with no intent . . . to willfully or maliciously misrepresent the persons and institutions or bring them into disrepute.’

Parrish at 163.

Since the statements made by Mr. Kershaw in the newspaper ad were made after the conclusion of the preliminary hearing before Judge Bailey², the Court concludes that it should apply the subjective “actual malice” standard set forth in Ramsey, *supra*. Thus, the Board was required to prove that the statements made by Mr. Kershaw were false with the knowledge that they were false or with reckless disregard of whether they were false or not. (See footnote 8, Board of Professional Responsibility v. Parrish, at 163). Applying this standard, the Court finds that the statement that the trial judge yelled at the attorney in a manner that the attorney has never been yelled at like in his entire life was false as found by the Hearing Panel. Moreover, since the recipient of the statements made by Judge Bailey in open court was none other than Mr. Kershaw, he is charged with knowing whether or not the judge yelled at him. If Mr. Kershaw had any doubt, all he needed to do was request a copy of the recording of the preliminary hearing. At the very least, Mr. Kershaw’s actions were with reckless disregard of whether the statements were false or not. Accordingly, the Court affirms the Hearing Panel’s finding that Mr. Kershaw violated T.R.P.C. 8.2(a).

With regard to the second statement contained in the newspaper ad, the Hearing Panel made no finding as to any violation. However, the Court, applying the subjective “actual

² Since Judge Bailey was the General Sessions Judge, there were no more hearings before him; therefore, Judge Bailey’s role as judge was completed.

malice” standard, finds that the second statement was protected by the First Amendment and was not made with actual malice.

The Social Media Post

At some point in November 2017, Mr. Kershaw made several posts on his social media page. In those posts he claimed:

- Junior Judge Kenneth Bailey, Jr. is in my opinion the most unethical judge in the state.
- Did you know that several judges in Tennessee are unethical. Especially in Greene County.

Again, Mr. Kershaw relies on his First Amendment right to free speech. The Hearing Panel found that Mr. Kershaw’s support for such a statement about Judge Bailey was 1) that he was late every day to court; 2) that he would take breaks of indeterminate duration; 3) that he treated people like dirt in his courtroom; and 4) he “leaked stuff” to the press. The Hearing Panel found there was no evidence introduced that suggested that Judge Bailey leaked any information to the press. The Hearing Panel also determined that Mr. Kershaw was indifferent as to whether the public, after reading the Facebook postings, might come to the conclusion that Judge Bailey was corrupt.

As to the post regarding unnamed judges, Mr. Kershaw admitted he should not have lumped all of the judges together in Greene County when he made the statement that the Greene County judges were unethical. His only specific complaint referred to Judge Wright, who he claimed was unethical because he cursed in court, because he told Mr. Kershaw (who was late to court) to “get your ass here on time”, and for criticizing Mr. Kershaw in open court for indicating he only had one question when he had more than one question to ask the witness.

The statements made by Mr. Kershaw in these social media posts were different from the statements which he made in the local newspaper. These were not statements made by an attorney criticizing a court on its rulings at the conclusion of a particular case. Instead, these were out-of-court statements about judges in Tennessee, and in particular, the judges in Greene County, that were intended to bring these persons and the judiciary into disrepute. It is unclear how our Supreme Court will approach these types of statements; however, in Parrish, *supra* the Court provided some clues. The Court noted that “a majority of courts that have dealt with attorney’s speech and disciplinary proceedings have not drawn a distinction between in-court and out-of-court statements in considering the issue and have adopted an objective standard in determining whether attorney’s speech is entitled to First Amendment protection.” Id. at 165. The Court went on to note that the United States Supreme Court has never extended the Sullivan standard to attorney discipline, and “that the application of the subjective ‘actual malice’ standard of Sullivan to attorney discipline ‘would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts about their truth.’” Id. at 165 (Citing Matter of Holtzman, 78 N.Y. 2d 184, 573 NYS 2d 39, 577 N.E.2d 30, 34 (1991)).

Under the objective standard, the court assesses the statements in terms of ‘what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances . . . and focus[ing] on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made’.

Parrish at 165-166 (Citing Disciplinary Counsel v. Gardner, 99 Ohio ST. 3d 416, 793 N.E.2d 425, 431 (2003)).

It is true that there are different principles involved with a professional disciplinary action as opposed to a defamation case. A defamation lawsuit addresses a wrong directed against an individual person. In a professional disciplinary action, “the wrong is against society as a whole,

the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations . . .” Parrish at 166 (See In Re: Terry, 271 Ind. 499, 394 NW2d 94, 95 (1975)). Other courts have explained the rationale for adopting an objective standard in a disciplinary case as the responsibility which all attorneys owe to our legal system, the rule of law, and protecting the sanctity of our judiciary. Thus, an attorney will not be allowed to harass or intimidate others simply because the attorney’s feelings as expressed in his statements were “genuine” when it is determined that the attorney acted with reckless disregard as to the truth or falsity of his statements. In Re: Graham, 453 N.W.2d 313, 322-323 (Minn. 1990).

Mr. Kershaw’s attitude towards these posts was best summed up in the following exchange between counsel for the Board and Mr. Kershaw:

QUESTION: Would you agree that the lay public is liable to interpret an allegation that a judge is unethical as saying he’s corrupt?

ANSWER: You would have to ask the lay public that.

QUESTION: Okay. You wrote it. Did you consider whether or not the public might think that?

ANSWER: I did not. I didn’t care if they did think he was corrupt.

(Transcript 95-96)

Applying the objective standard to the social media posts made by Mr. Kershaw, the Court finds the statements made about the integrity of all the judges in Greene County, Tennessee, and Judge Bailey in particular, are statements that a reasonable attorney would believe to be false and that Mr. Kershaw made those statements with reckless disregard as to their truth or falsity. The internet, and in particular, social media, has made it much easier to attack and impugn the integrity of judges. These types of personal vendettas by attorneys can have serious and adverse effects on the public’s perception of the courts. While Mr. Kershaw’s purpose may have been to vent his frustrations, the consequences only served to erode the public’s trust in the judicial system – as can be seen from the responses to his posts.

Accordingly, for the reasons set forth above, the Court finds Mr. Kershaw's reliance upon the First Amendment as a defense to his out-of-court posts to be unavailing.

Recusal of Hearing Panel Member

Prior to the hearing in this case, Mr. Kershaw orally, and then later in a motion moved that Steven Wayne Terry, the Panel Chair, should recuse himself due to a conflict of interest. Mr. Kershaw alleged that he had knowledge that a cousin of Mr. Terry gave tickets to football games at the University of Tennessee to Judge Wright. Mr. Kershaw asserted that since Chairman Terry practiced before Judge Wright, he should not participate in the disciplinary proceeding against Mr. Kershaw. The Hearing Panel denied Mr. Kershaw's request, explaining that while the principals in the Terry Law Firm may be cousins of Steven Wayne Terry, Steven Wayne Terry had no knowledge of any such alleged conduct and that he does not practice, nor ever has he practiced, with the Terry Law Firm. This issue is without merit.

The Missing Witness Rule

Mr. Kershaw argues for the application of the "missing witness rule" because the Board did not call any of the judges from the Third Judicial District to testify at the hearing before the Panel. Under the missing witness rule, "if a party has it peculiarly within its power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." State v. Francis, 669 S.W.2d 85, 88 (Tenn. 1984) (Citing Graves v. Unites States, 150 U.S. 118, 14 Sup. Ct. 40, 37 Law Ed. 1021 (1893)). While the Graves court spoke of the missing witness rule in terms of

creating a “presumption”, the rule is now generally characterized as authorizing a permissive inference. State v. Francis, *supra* at 88.

The missing witness rule may be applied if the following elements are satisfied:

1. That it was within the power of a party to produce a witness on an issue in the case but that the party failed to do so;
2. That the witness was uniquely under the control of the party and could have been produced;
3. That the witness was not equally available to the adverse party;
4. That the witness’ testimony would not be cumulative;
5. That a reasonable person under the same circumstances would have produced the witness if the testimony would be favorable; and
6. No reasonable excuse for failure has been shown.

National Life and Accident Ins. Co. v. Eddings, 221 S.W.2d 695 (Tenn. 1949).

The Court finds the missing witness rule is not applicable under these circumstances. Here, none of the judges were under the Board’s control and could have been subpoenaed by Mr. Kershaw to testify at the trial, or their evidentiary depositions could have been taken prior to trial. Moreover, the rule “applies to a jury trial where the trial judge instructs the jury how to interpret the evidence or lack thereof.” In Re: Estate of Hamilton, 2011 W.L. 532296, *6 (Tenn. Ct. App. 2011); Nelson v. Justice, 2019 W.L. 337040 *19 (Tenn. Ct. App. 2019). The Court concludes Mr. Kershaw’s reliance upon the missing witness rule is without merit.

Sanctions

In order to determine the appropriate discipline in a given case, the Court looks to the ABA Standards for imposing lawyer sanctions. Maddux v. Board of Professional Responsibility, 409 S.W.3d 613, 624 (Tenn. Ct. App. 2013). 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. Id. 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 Standards, Theoretical Framework).

Here, the Panel found the following violations:

1. By making the comment during the preliminary hearing regarding the witness who was testifying when he said "Can I get some tissues too, because I have to cry as well," Mr. Kershaw used a means that had no substantial purpose other than to embarrass the witness in violation of T.R.P.C. 4.4(a)(1).
2. When Mr. Kershaw responded to Judge Bailey's warning, "Mr. Kershaw, you are trying my patience today," by replying back to the judge "[t]hat goes both ways," Mr. Kershaw intended to disrupt a tribunal in violation of T.R.P.C. 3.5(e).
3. In his advertisement in the local paper, when Mr. Kershaw stated that: "during the course of the [preliminary hearing] the judge yelled at the attorney in a manner that the attorney

has never been yelled at like in his entire life . . .”, Mr. Kershaw published a false statement. This was a violation of T.R.P.C. 8.2(a) which provides that a lawyer shall not make a statement that the lawyer knows to be false or that is made with reckless disregard to the truth concerning the qualifications or integrity of a judge.

4. When Mr. Kershaw made Facebook postings in which he claimed that several judges in Tennessee are unethical, especially in Greene County, and that Junior Judge Keith Bailey, Jr. is in my opinion the most unethical judge in the state, Mr. Kershaw made statements which were false or at a minimum, with reckless disregard as to their truth. Likewise, these statements were in violation of T.R.P.C. 8.2(a).

Although the Panel concluded that ABA Standards 5.0, 6.0 and 7.0 applied to this case, it failed to articulate any specific standard which applied. Mr. Kershaw’s conduct during the preliminary hearing falls within ABA Standard 6.32 which provides that:

Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

Mr. Kershaw’s conduct in front of Judge Bailey also falls under ABA Standard 6.22:

Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule and causes injury or potential injury to a client or a party or causes interference or potential interference with a legal proceeding.

The comment about needing a tissue was made with the purpose of humiliating the witness which is a violation of the Rules of Professional Conduct. Although it is certainly possible an attorney might make a comment in court such as this in a careless or negligent manner, Mr. Kershaw’s defense was that he intentionally set out to embarrass and humiliate the witness per the instructions of his client.

Mr. Kershaw's comments back to Judge Bailey after being admonished by the court falls under ABA Standard 7.2 which provides:

Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

As the Hearing Panel concluded, "while Mr. Kershaw may have subjectively believed that Judge Bailey's comment was abusive, Judge Bailey's perceived fault in this regard was not justification for reciprocation and dereliction by Mr. Kershaw." As our courts have held, even if an attorney believes that the trial court is in error, it is not acceptable for an attorney to respond in a disrespectful, impertinent, or unprofessional manner. Bailey v. Board of Professional Responsibility, 441 S.W.3d 223 (Tenn. 2014); Ward v. University of the South, 209 Tenn. 412, 354 S.W.2d 246, 249 (1962).

Turning to the advertisement in the local paper, ABA Standard 7.2 applies. Here, Mr. Kershaw knowingly placed an ad in the local paper which falsely accused the judge of discourteous behavior. This type of conduct is a violation of the duty which a lawyer owes to the integrity of the courts and can cause injury to the legal system.

Likewise, Mr. Kershaw's social media post that several judges in Tennessee are unethical, especially in Greene County, and that Judge Bailey is the most unethical judge in the state, is a clear violation of the duty which an attorney owes. More importantly, the injury to the integrity of our judicial system cannot be measured.

After applying the ABA Standards, the Court is then required to consider aggravating and mitigating factors to determine whether the presumptive sanctions should remain, decrease, or increase. Here the Panel found five aggravating factors:

1. A pattern of misconduct;
2. Multiple offenses;
3. Refusal to acknowledge wrongful nature of conduct;
4. Vulnerability of victim; and
5. Substantial experience in the practice of law.

The Panel also found two mitigating factors:

1. Absence of a prior disciplinary record; and
2. Cooperative and professional attitude during the Panel hearing proceedings.

The presumptive sanction for Mr. Kershaw's conduct is suspension. Considering the five aggravating factors found by the Hearing Panel, the Court finds that vulnerability of the victim does not apply. However, considering the remaining four aggravating factors and the two mitigating factors, the Court cannot disagree with the Panel's conclusion that suspension is the appropriate sanction.

The final analysis which the reviewing court must undertake is to determine whether the sanctions imposed in similar cases are consistent with the sanction imposed by the Hearing Panel in the case at bar. In Board of Professional Responsibility v. Parrish, 556 S.W.3d 153 (Tenn. 2018). Mr. Parrish was disciplined for pejorative statements made in motions to recuse three judges on the Tennessee Court of Appeals after an adverse decision. The Supreme Court affirmed a six-month suspension, with one month of active suspension. In Farmer v. Board of Professional Responsibility, 660 S.W.2d 490 (Tenn. 1983), the attorney was disciplined for scurrilous and improper language in briefs which he filed before the Court of Appeals. Mr. Farmer was suspended from practice for sixty days. In Bailey v. Board of Professional Responsibility, 441 S.W.3d 223 (Tenn. 2014) the Supreme Court affirmed the Hearing Panel's

judgement suspending Mr. Bailey for sixty days for derogatory and impertinent statements made to the trial judge during a jury trial.

Conclusion

In light of the sanctions imposed in prior cases involving pejorative and impertinent conduct by the attorney to the trial court, the Court cannot disagree with the Hearing Panel's finding that a four-month suspension (30 days active) is the appropriate sanction in this case.

TLAP Evaluation

Mr. Kershaw argues in his brief that the Hearing Panel wrongfully referred him to the Tennessee Lawyer's Assistance Program. The judgement issued by the Hearing Panel did not require Mr. Kershaw to partake in a TLAP evaluation. The Hearing Panel made a recommendation to the Board that it should contact TLAP to request an evaluation. Whether the Board acts on the recommendation, and if so what TLAP decides to do, is beyond this Court's purview. The Court declines make any further modification of the Hearing Panel's judgement on this topic.


Service of the Suspension

Mr. Kershaw argues that his one-month active suspension has already been completed. He claims that as of the date that the Hearing Panel entered its judgment on September 21, 2018, he notified all clients, co-counsel, and opposing counsel that he was suspended. He also refunded retainers because of the suspension and claims he did not practice law in any fashion from September 21, 2018 through October 23, 2018.

The issue is what is the effective date of an order of disbarment or suspension. Supreme Court Rule 9 Sect. 28.1 states that orders imposing disbarment, suspension or disability are effective upon entry. The "order" referred to in the Rule always is the order from the Supreme Court, not the Hearing Panel, and not a Circuit or Chancery Court. Even if there is no appeal from a Hearing Panel's judgment or a review by a Circuit or Chancery Court, the Supreme Court still reviews each case and has the authority to affirm or modify the discipline imposed. In Re: Walwyn, 531 S.W.3d, 131, 137 (Tenn. 2017). The Court finds Mr. Kershaw's argument to be without merit.

It is so **ORDERED**.

ENTERED this 8 day of May, 2019.


ROBERT E. LEE DAVIES, SENIOR JUDGE

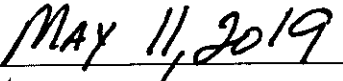
CLERK'S CERTIFICATE OF SERVICE

A copy of this Order has been served by U.S. Mail upon all parties or their counsel named below.

Jerry Morgan
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Edward Kershaw, *pro se*
131 South Main St., Ste. 102
Greeneville, TN 37743


Deputy Clerk


Date