

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

FILED

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BOARD OF PROFESSIONAL
RESPONSIBILITY

ICW EXEC. SECRETARY

IN RE: EDWARD LEE KERSHAW,
Respondent, BOPR No. 16775,
An Attorney Licensed to
Practice Law in Tennessee
(Greene County)

DOCKET NO. 2018-2846-1-WM

FINDINGS AND JUDGMENT OF THE HEARING PANEL

Pursuant to Rule 9 of the Supreme Court of Tennessee,¹ this matter was heard on August 22, 2018, in the Greene County, Tennessee courthouse (the "Panel Hearing"), before Steven Wayne Terry, Esq., Panel Chair; James Bruce Dunn, Esq., Panel Member; and, Richard Edward Ladd, Jr., Esq., Panel Member (collectively, the "Panel"). William C. Moody, Esq. ("Mr. Moody"), Disciplinary Counsel, appeared on behalf of the Board of Professional Responsibility (the "Board"), and the Respondent, Edward Lee Kershaw, Esq. ("Mr. Kershaw"), appeared *pro se*. Jennifer Short, LCR, of Elite Reporting Services, served as the reporter for the proceedings.

After considering: (1) the entire Board file in this matter;² (2) the sworn testimony of several witnesses, including Mr. Kershaw; (3) the exhibits provided and

¹ Unless specifically noted otherwise, the term(s) "Rule" or "Rules" in the Findings and Judgment of the Hearing Panel refer to the Rules of the Supreme Court of Tennessee. The use of the term "TRPC" herein pertains to the Tennessee Rules of Professional Conduct, which are set out in Rule 8.

² In reply to questions asked by the Panel during the Panel Hearing, Mr. Kershaw specifically indicated that he wanted the Panel to consider - as evidence - his Response to Petition for Discipline. (Tr., pp. 91-92; 102.)

introduced at the Panel Hearing by Mr. Kershaw, and by the Board; (4) the statements and arguments made by Mr. Kershaw, and by the Board, (5) the "Additional Closing Argument" filed by Mr. Kershaw with the Board on August 30, 2018; (6) the Board's Proposed Findings of Fact, Conclusions of Law and Judgment; (7) Mr. Kershaw's Response to the Board's Findings of Fact, Conclusions of Law and Judgment, filed by Mr. Kershaw with the Board on September 12, 2018; and (8) the verbatim transcript of the Panel Hearing,³ and after thorough deliberation, the Panel makes the following Findings of Fact, Conclusions of Law, and renders its Judgment in this cause.

STATEMENT OF THE CASE

Mr. Kershaw is, and has been at all times relevant to this matter, an attorney licensed to practice law in Tennessee. His Board of Professional Responsibility Number is 16775. A Petition for Discipline (the "Petition") against Mr. Kershaw was filed by the Board on April 2, 2018. Mr. Kershaw filed his Response to Petition for Discipline (the "Response") on May 1, 2018.

The Petition addresses three separate reports of alleged misconduct. The three reports are based upon: (1) events which took place during a preliminary hearing before Hon. Kenneth N. Bailey, Jr. ("Judge Bailey") in the General Sessions Court of Greene County on November 6, 2017 (the "Preliminary Hearing"); (2) an "advertisement" authored and placed by Mr. Kershaw in the Greeneville Sun (the "Advertisement") following the Preliminary Hearing; and (3) several comments

³ Citations to specific pages of the transcript of the Panel Hearing shall be referenced herein as "Tr., p.____."

authored and posted by Mr. Kershaw on Facebook, an online social media and social networking platform, following the Preliminary Hearing.

FINDINGS OF FACT

1. Mr. Kershaw is an attorney admitted by the Supreme Court of Tennessee to practice law in the State of Tennessee in 1994. (Petition, ¶ 1; Response, ¶ 1; Tr., p. 115.)

2. Mr. Kershaw's most recent primary/office address as registered with the Board is 131 South Main Street, Suite 102, Greeneville, Tennessee 37743. (Petition, ¶ 1; Response, ¶ 1.)

3. Mr. Kershaw's Board of Professional Responsibility number is 16775. (Petition, ¶ 1; Response, ¶ 1.)

4. On November 6, 2017, Mr. Kershaw represented a client in the Preliminary Hearing before Judge Bailey, the judge of the General Sessions Court for Greene County, Tennessee. (Petition, ¶¶ 15, 16; Response, ¶¶ 15, 16.)

5. A number of attorneys, parties, witnesses and spectators were present in the courtroom during the Preliminary Hearing. (Petition, ¶ 17; Response, ¶ 17; Tr., pp. 79-80.)

6. A true and exact audio-recording of the Preliminary Hearing was introduced, without objection, as Exhibit 3 during the Panel Hearing, and is also attached as Exhibit K to the Petition. (Petition, Exhibit K; Tr., pp. 18-20; 65-66.)

7. During the direct examination of the complaining witness by her attorney in the Preliminary Hearing, the complaining witness became emotional and began to cry when describing alleged physical abuse by Mr. Kershaw's client. (Petition, ¶ 19, Exhibit K.)

8. Mr. Kershaw stated during the Panel Hearing that the "whole courtroom" knew that the complaining witness was "putting on an act." (Tr., p. 64.)

9. Nonetheless, when the complaining witness was handed a box of tissues during the Preliminary Hearing, Mr. Kershaw said: "Can I get some tissues, too, because I have to cry as well."⁴ (Petition, ¶ 21; Response, ¶ 21; Tr., pp. 80-81.)

10. Mr. Kershaw also asked the complaining witness the following question during the Preliminary Hearing: "When he yanked you into the car, did the angels magically protect you from getting marks?" (Petition, ¶ 23; Response, ¶ 23; Tr., pp. 82, 83-85.)

11. Judge Bailey responded to Mr. Kershaw's question by saying: "Mr. Kershaw, you are trying my patience today." (Petition, ¶ 24; Response, ¶ 24; Tr., p. 85.)

12. Mr. Kershaw replied to Judge Bailey's statement by saying: "That goes both ways."⁵ (Petition, ¶ 25; Response, ¶ 25.)

⁴ During the Panel Hearing, Mr. Kershaw conceded that "maybe I should have just not mentioned it at all." (Tr., p. 81.)

⁵ At some point after this statement was made by Mr. Kershaw, but during the Preliminary Hearing, Judge Bailey said to Mr. Kershaw: "You [referring to Mr. Kershaw] used to be a capable attorney." (Tr., p. 102.)

13. Mr. Kershaw subsequently wrote and placed the Advertisement which ran in the November 13, 2017 edition of the Greeneville Sun. (Petition, ¶ 27; Response, ¶ 27; Tr. pp. 86-87.)

14. A true and exact copy of the Advertisement was introduced, without objection, as Exhibit 5 during the Panel Hearing, and is also attached to the Petition as Exhibit G. (Petition, Exhibit G; Tr., p. 86.)

15. The events described in the Advertisement pertain to the Preliminary Hearing. (Petition, ¶ 28; Response, ¶ 28.)

16. The trial judge referred to by Mr. Kershaw in the Advertisement is Judge Bailey, and the lawyer referred to is Mr. Kershaw. (Petition, ¶ 29; Response, ¶ 29; Tr., p. 87.)

17. The Advertisement reads, in part: "During the course of the [Preliminary Hearing] the judge yelled at [Mr. Kershaw] in a manner that [Mr. Kershaw] has never been yelled at like in his entire life" (Petition, ¶ 30, Exhibit G; Response ¶ 30; Tr., p. 88.)

18. Mr. Kershaw also authored and posted certain Facebook comments on the Internet in or about November, 2017 (the "Facebook Postings"). (Petition, ¶ 34; Response, ¶ 34; Tr., pp. 92, 97-98.)

19. True and exact copies of the Facebook Postings were introduced as Exhibits 6 and 7 during the Panel Hearing, and are also attached to the Petition as Exhibit E. (Petition, Exhibit E; Tr., pp. 90, 97.)

20. One of the Facebook Postings reads, in part: "Junior Judge Kenneth Bailey Jr. is in my opinion the most unethical Judge in this state." (Petition, ¶ 35, Exhibit E; Response, ¶ 35; Tr., pp. 92-93.)

21. Mr. Kershaw testified during the Panel Hearing that the factual basis for his statement that Judge Bailey was unethical was because Judge Bailey: (1) "was late every day to court;" (2) would take breaks of indeterminate duration; (3) "treated people like dirt in his courtroom;" and (4) leaked "stuff" to the Press.⁶ (Tr., pp. 93-95.)

22. Mr. Kershaw equates bad manners to unethical conduct. (Tr., p. 95.)

23. Mr. Kershaw did not care that the public at large, after reading the Facebook Postings, might come to the conclusion that Judge Bailey was corrupt. (Tr., p. 96.)

24. In the Facebook Postings authored and posted by him, Mr. Kershaw also queried: "Did you know that several Judges in [Tennessee] are unethical. Especially in Greene County." (Petition, ¶ 35, Exhibit E; Response, ¶ 35; Tr., p. 97.)

25. Mr. Kershaw did not specifically identify - in this Facebook post - which judges in Tennessee, or in Greene County, were, in his opinion, unethical or why he considered them to be unethical. (Tr., pp. 98, 106.)

26. Mr. Kershaw testified at the Panel Hearing, in response to a question posed by the Panel, that his [Mr. Kershaw's] public claims that certain judges were unethical was prejudicial to the administration of justice. (Tr., p. 105.)

⁶ There was no evidence introduced at the Panel Hearing that Judge Bailey leaked any information to the Press.

27. Mr. Kershaw testified at the Panel Hearing that, in hindsight, he should not have said that “several judges in [Tennessee] are unethical. Especially in Greene County.” (Tr., pp. 106, 107-108; 114-115.)

28. Mr. Kershaw called three witnesses to testify during the Panel Hearing, in part, about his use - or non-use - of alcohol: (1) Ashley Davenport; (2) Earl Gillam; and (3) Jennifer Gaybee. (Tr., pp.10-12; 12-18; 69-78.)

29. Improper and/or excessive alcohol use by Mr. Kershaw, while not a stated basis for discipline by the Board, was raised by the Board, as reflected in Exhibit C to the Petition. (Petition, Exhibit C; Tr., pp. 12-13.)

30. There have been no previous disciplinary actions taken by the Board against Mr. Kershaw. (Tr., p. 120.)

THE APPLICABLE TENNESSEE RULES OF PROFESSIONAL CONDUCT

TRPC 3.5: Impartiality and Decorum of the Tribunal

A lawyer shall not:

(e) [E]ngage in conduct intended to disrupt a tribunal.⁷

⁷ Comment 5 to TRPC 3.5 provides: “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.”

TRPC 4.4: Respect for the Rights of Third Persons

(a) In representing a client, a lawyer shall not:

(1) Use means that have no substantial purpose other than to embarrass ... a third person.

TRPC 8.2: Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows⁸ to be false or that is made with reckless disregard as to its truth or falsity concerning the qualifications or integrity of the following persons:

(1) A judge[.]⁹

TRPC 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) [V]iolate or attempt to violate the Rules of Professional Conduct[.]¹⁰

CONCLUSIONS OF LAW

Comment 6 to TRPC 3.5 provides: "The duty to refrain from disruptive conduct applies to any proceeding of a tribunal."

The General Sessions Court of Greene County, Tennessee is a "tribunal" as such is defined by TRPC 1.0 (m).

⁸ TRPC 1.0 (f) defines "knows" as actual awareness of the fact in question. A person's knowledge may be inferred from circumstances.

⁹ Comment 1 to TRPC 8.2 provides, in pertinent part: "[F]alse statements by a lawyer can unfairly undermine public confidence in the administration of justice."

¹⁰ Comment 1 to TRPC 8.4 states, in pertinent part: "Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct[.]"

Comment 9 to TRPC 8.4 provides, in pertinent part: "In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions."

The license to practice law in the State of Tennessee is a continuing proclamation by the Supreme Court of Tennessee (the "Court") that the holder of the license is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to act at all times, both professionally and personally, in conformity with the standards imposed upon members of the Bar as conditions for the privilege to practice law. (Rule 9, § 1.)

Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Tennessee Rules of Professional Conduct shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. (Rule 9, § 11.1.)

In hearings on formal charges of misconduct, Disciplinary Counsel must prove the case by a preponderance of the evidence. (Rule 9, § 15.2 (h).)

In the present case, the Panel concludes and finds that Disciplinary Counsel has proved the case against Mr. Kershaw by a preponderance of the evidence and, in accordance with such proof, the Panel further concludes and finds as follows:

1. Mr. Kershaw violated TRPC 4.4 (a) (1) by stating, during the direct examination of the complaining witness in the Preliminary Hearing: "Can I get some tissues too, because I have to cry as well." Mr. Kershaw disregarded the rights of the complaining witness during the Preliminary Hearing because his statement had no substantial purpose other than to embarrass the witness. The fact that Mr. Kershaw's

client may have directed him to take action(s) contrary to or inconsistent with the TRPC does not excuse or mitigate Mr. Kershaw's action(s) in this regard.

2. Mr. Kershaw violated TRPC 3.5 (e) in responding to Judge Bailey's comment, "Mr. Kershaw, you are trying my patience today[,]" by stating, in open court, "[t]hat goes both ways." This statement by Mr. Kershaw was intended to disrupt a tribunal. While Mr. Kershaw may have subjectively believed that Judge Bailey's comment was abusive, Judge Bailey's perceived default in this regard was not justification for reciprocation and dereliction by Mr. Kershaw.¹¹

3. Mr. Kershaw violated TRPC 8.2 (a) by stating in the Advertisement 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...." This statement is untrue. A review of the audible recording of the Preliminary Hearing by the Panel leads but to one conclusion: Judge Bailey did not yell at Mr. Kershaw, and reasonable minds could not differ on this point.¹²

¹¹ The fact that Mr. Kershaw was held in contempt by Judge Bailey during the Preliminary Hearing does not form the basis of the Panel's conclusion that Mr. Kershaw violated TRPC 3.5 (e) or TRPC 4.4 (a) (1). What is relevant is Mr. Kershaw's conduct and statements that ultimately led to the contempt finding.

¹² During the Panel Hearing, Mr. Kershaw stated that he sought guidance from the Board as to whether he could "defend himself" in response to the alleged actions taken and statements made by Judge Bailey during the Preliminary Hearing. According to Mr. Kershaw, the Board advised him only that he could publically defend himself "and pointed [him] to the rules." The permissible nature, medium, or substance of any such defense by Mr. Kershaw was not addressed by the Board. (Tr., pp. 39, 63-64.) Accordingly, the Panel need not consider whether Rule 9, § 5.4 (c) has any application to the facts of this matter as suggested by Mr. Moody during the Panel Hearing. (Tr., p. 59.)

4. Mr. Kershaw violated TRPC 8.2 (a) by stating in the Facebook Postings: (1) "Did you know that several judges in [Tennessee] are unethical. Especially in Greene County[;]" and (2) "Junior Judge Kenneth Bailey Jr. is in my opinion the most unethical Judge in this state." The alleged underlying comments and actions by two judges, not "several judges," as asserted by Mr. Kershaw, while they may have been considered by Mr. Kershaw to be rude and inappropriate, are not indicative or evidence of unethical conduct.¹³ The statements made by Mr. Kershaw in the Facebook Postings were made, at a minimum, with reckless disregard as to their truth, and such statements serve to unfairly undermine public confidence in the administration of justice.

The Panel is cognizant of Mr. Kershaw's argument that the actions and speech at issue are constitutionally protected. Having carefully considered the Court's recent holding in *Board of Professional Responsibility v. Larry Edward Parrish*, No. W2017-00889-SC-R3-BP (Tenn. 2018), and the cases cited therein, the Panel finds that, applying either an objective or subjective standard, such argument is without merit.

ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS

¹³ Even assuming the alleged underlying comments and actions of two judges were arguably unethical, Mr. Kershaw had actual knowledge of the appropriate means to address such asserted misconduct. This knowledge is objectively reflected by the two "Complaint[s] Against Judge under Code of Judicial Conduct" filed by Mr. Kershaw and attached to Mr. Kershaw's December 8, 2017 letter to Kevin D. Balkwill, Esq., *et al.* (Petition, Exhibit I.)

Pursuant to Rule 9, § 15.4 (a), the Panel has considered the *ABA Standards for Imposing Lawyer Sanctions* (“ABA Standards”). The ABA Standards provide, in pertinent part: “In imposing a sanction after a finding of lawyer misconduct, [the Panel] should consider the following factors: (a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors. (ABA Standards, § 3.0.)

The Panel concludes and finds, as to all TRPC violations, that Mr. Kershaw violated ethical duties owed by him to the public, to the legal system, and to the profession, and that Mr. Kershaw acted intentionally and knowingly, in violation of ABA Standards 5.0, 6.0, and 7.0. The nature of the injury caused by Mr. Kershaw’s conduct, while difficult to objectively quantify, posed potentially serious injury to the public, to the legal system, and to the profession.

Consistent with ABA Standards, § 9.22, the Panel has considered the following aggravation factors in reaching its Judgment: (1) A pattern of misconduct; (2) multiple offenses; (3) refusal to acknowledge wrongful nature of conduct;¹⁴ (4) vulnerability of victim; and, (5) substantial experience in the practice of law.

Consistent with ABA Standards, § 9.32, the Panel considered the following mitigation factors in reaching its Judgment: (1) absence of a prior disciplinary record; and, (2) cooperative and professional attitude during the Panel Hearing proceedings.

¹⁴ During the Panel Hearing, Mr. Kershaw did testify that, in hindsight, he probably should not have taken certain of the actions at issue; however, his testimony in this regard did not reflect any remorse or contrition.

JUDGMENT

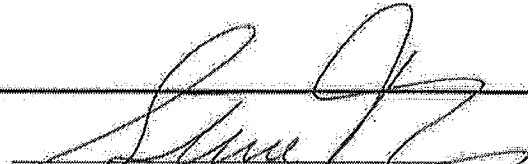
It is hereby **ADJUDGED, ORDERED** and **DECREED** that Mr. Kershaw's license to practice law in the State of Tennessee shall be, and is, **SUSPENDED** for a period of four (4) months, with one (1) month served on active suspension and the remaining three (3) months on probation. As a condition of his probation, Mr. Kershaw shall fully comply with all laws, rules and regulations applicable to attorneys licensed to practice law in the State of Tennessee.

Additionally, for the reasons stated herein, among others, the Panel believes that an evaluation of Mr. Kershaw by the Tennessee Lawyers Assistance Program ("TLAP") is warranted. The Panel recommends that the Board contact TLAP and request that TLAP conduct an evaluation of Mr. Kershaw. Should TLAP decide that an evaluation of Mr. Kershaw is warranted, Mr. Kershaw shall, as a specific term of his probation, fully and completely cooperate with TLAP with regard to such evaluation. Furthermore, if TLAP determines that a monitoring agreement is appropriate, Mr. Kershaw shall fully and completely comply with all terms and conditions of the TLAP monitoring agreement.


IT IS SO ORDERED.

ENTER this 2nd day of September, 2018.

In Re: Edward Lee Kershaw, BOPR No. 16775
Disciplinary District I
Board of Professional Responsibility of the Supreme Court of Tennessee
Docket No. 2018-2846-1-WM
Findings and Judgment of the Hearing Panel
Page 14 of 14


Steven Wayne Terry, Panel Chair


James Bruce Dunn


Richard Edward Ladd, Jr.

PURSUANT TO RULE 9, § 33.1 OF THE SUPREME COURT OF TENNESSEE, THE RESPONDENT OR THE BOARD MAY APPEAL THE JUDGMENT OF THE PANEL BY FILING WITHIN SIXTY (60) DAYS OF THE DATE OF ENTRY OF THE PANEL'S JUDGMENT A PETITION FOR REVIEW IN THE CIRCUIT OR CHANCERY COURT OF THE COUNTY IN WHICH THE OFFICE OF THE RESPONDENT WAS LOCATED AT THE TIME THE CHARGES WERE FILED WITH THE BOARD.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been sent to Respondent, Edward Lee Kershaw, 131 South Main Street, Suite 102, Greeneville, TN 37743, and hand-delivered to William C. Moody, Disciplinary Counsel, on this the 20th day of September, 2018.



Rita Webb
Executive Secretary

NOTICE

This judgment may be appealed by filing a Petition for Review in the appropriate Circuit or Chancery Court in accordance with Tenn. Sup. Ct. R. 9, § 33.