

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
NINETEENTH JUDICIAL DISTRICT AT CLARKSVILLE

 **COPY**

FLETCHER WHALEY LONG,  
Petitioner,

vs.

Docket No.  
MC CH CV-MG-12-16

BOARD OF PROFESSIONAL  
RESPONSIBILITY of the Supreme Court  
of Tennessee,

Respondent.

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**ORDER**

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This matter came to be heard on the 6<sup>th</sup> day of March, 2013. A Petition for Certiorari was filed on behalf of Fletcher Whaley Long on July 30, 2012. An Answer was filed by the Board on September 5, 2012. Counsel for Mr. Long filed a copy of the hearing transcript with the Chancery Court on January 16, 2013. The Court finds Mr. Long has failed to demonstrate the Hearing Panel's conclusions were not supported by substantial and material evidence or the decision was arbitrary or capricious.

ISSUES PRESENTED

1. Did the Panel err when it allowed an amendment to Rule 9 be retroactively applied to Mr. Long's case?
2. Did the Panel err when it determined Mr. Long's conduct was unethical and set a punishment of public censure for disciplinary misconduct?
3. Did the Panel err when it determined the action against Mr. Long was not barred by the doctrine of res judicata/doctrine of laches?
4. Did the Panel err when it determined the alleged financial interest of the Office of Disciplinary Counsel was not a violation of the Due Process Clause?

## STANDARD OF REVIEW

The standard of review for this matter is found at Tennessee Supreme Court Rule 9, section 1.3, which states in pertinent part:

The respondent-attorney (hereinafter "respondent") or the Board may have a review of the judgment of a hearing panel in the manner provided by [Tennessee Code Annotated section] 27-9-101 et seq., except as otherwise provided herein. The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the panel are made, the Chancery Court is authorized to take such additional proof as may be necessary to resolve such allegations. The court may affirm the decision of the panel or remand the case for further proceedings. The court may reverse or modify the decision 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 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 the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.

Further, "[A]lthough the trial court may affirm, remand, reverse, or modify a hearing panel decision, the trial court may not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact." *Board of Professional Responsibility v. Allison*, 284 S.W.3d 316, 322 (Tenn. 2009)

A Court will not reverse the decision of a hearing panel so long as the evidence "furnishes a reasonably sound factual basis for the decision being reviewed." Hughes, 259 S.W.3d at 641 (quoting Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n, 876 S.W.2d 106, 111 (Tenn. Ct. App. 1993)).

#### FINDING OF FACTS

1. Mr. Fletcher Long was licensed to practice law in 1997 (announced in open court)
2. On May 19, 2003, Mr. Long agreed to represent Lawrence Earl Ralph, Sr., at the request of his brother, David Ferrell. (Tr. P. 30) Mr. Ralph had been confined in the Warren County jail having been sentenced on May 14, 2003, for misdemeanor offenses in Case No. F855255. (Tr. pp. 30-31) Mr. Long was hired to replace Mr. Ralph's prior lawyer, Mr. Leonard. (Tr. pp. 34, 96) Mr. Long was hired to secure Mr. Ralph's release on bond, file and argue a motion for new trial, and possibly represent Mr. Ralph in a new trial or an appeal. (Tr. p. 32) On May 19, 2003, Mr. Long's assistant, Ms. Etherly, drove to McMinnville in order to file certain documents, including a motion for substitution of counsel. Also, on May 19, 2003, Mr. Leonard drove to the clerk's office to sign the Agreed Order Substituting Counsel. (Tr. p. 188; Ex.3)
3. On May 19, 2003, David Ferrell entered into a contract with Respondent to represent Mr. Ferrell's brother, Lawrence Earl Ralph, Sr., on appeal in a criminal matter. (Petition for Discipline, p. 2)
4. Mr. Ferrell paid Respondent \$7,500.00 and Respondent agreed in writing the fee would be placed in his escrow account and drawn out as earned at the rate of \$200.00 per hour. (Petition for Discipline, p. 2)

5. On May 20, 2003, Mr. Long and Ms. Etherly drove to McMinnville. (Tr. pp. 34, 143) Mr. Long met Mr. Ferrell outside the Warren County Courthouse at which time they entered into a written fee agreement. (Tr. p. 35) It is undisputed that Mr. Long and Mr. Ferrell signed a hand-written fee agreement setting forth that Mr. Ferrell would pay Mr. Long \$7,500.00 which would be held in trust. (Tr. pp. 37, 72-73; Ex. 4) The agreement provided that Mr. Long would withdraw earned fees from the funds at a rate of \$200.00 per hour. (Tr. pp. 47, 72, 146; Ex. 4) Mr. Ferrell paid Mr. Long \$7,500.00 in cash. (Tr. p. 72)
6. Mr. Long entered the courthouse and he was able to obtain an Order permitting Mr. Ralph's release on bond. Mr. Ferrell was waiting in the parking lot. (Tr. pp. 44, 71) When Mr. Long met Mr. Ferrell in the parking lot again, he described his success to Mr. Ferrell. Mr. Ferrell was happy about the result. (Tr. p. 45) According to the testimony of Ms. Etherly, Mr. Long asked if Mr. Ferrell agreed that he had earned the money. (Tr. pp. 154-155) Ms. Etherly also testified that on the drive back to Nashville, Mr. Long mentioned that he should have gotten the "paper" back from Mr. Ferrell, which she took to mean the fee agreement. (Tr. pp. 154-155) Mr. Ferrell denies that he ever agreed to modify the fee agreement so that the \$7,500.00 paid on that date would be an earned fee for merely securing Mr. Ralph's release on bond. (Tr. p. 79) In fact, Mr. Long testified that he believed \$7,500.00 would not be an appropriate fee for such services. (Tr. pp. 31, 36)
7. Following Mr. Ralph's release from jail, Mr. Long drafted and filed a motion for new trial in the misdemeanor case (No. F8552). Mr. Long also undertook representation of Mr. Ralph in another case (No. F8958) with the assistance of another attorney, Gregory Clayton. Mr. Ferrell testified that he delivered legal fees to Mr. Clayton in the amount of \$5,700.00, in addition to \$300.00 already paid to Mr. Long for case No. F8958 (Tr. p. 124)
8. After the unsuccessful trial of case No. F8958, Mr. Ralph and Mr. Ferrell met with Mr. Long and Mr. Clayton. Mr. Ralph and Mr. Ferrell terminated the services of Mr. Long and Mr. Clayton. Also at that meeting, Mr. Ferrell asked Mr. Long to provide an accounting and refund of all unearned fees. (Tr. p. 80; Ex. 5)

9. Mr. Long contends, following the jury trial in the second matter, while the new trial motion in the original matter still remained under advisement, Mr. Ralph and Mr. Ferrell met with Mr. Long and advised him they no longer desired his services. Mr. Long asked if there was any dissatisfaction about the fee he had been paid, and both indicated he did not need to return or refund any money. (Mr. Herbison's letter dated August 12, 2009)
10. Mr. Long further contends, although his initial agreement with Mr. Ferrell called for him to deposit the \$7,500.00 in his escrow account, he acted pursuant to an oral modification of the initial contract or pursuant to the parties' novation. (Mr. Herbison's letter dated August 12, 2009)
11. Mr. Ferrell adamantly denies that he agreed to an oral modification of the written fee agreement which provided that \$7,500.00 would be placed in Mr. Long's trust account and withdrawn at an hourly rate of \$200.00. Mr. Ferrell requested, on more than one occasion, an accounting from Mr. Long for the use of the \$7,500.00 fee. Mr. Long never provided any such accounting and has not made a refund to Mr. Ferrell. (Tr. p. 84)
12. Mr. Long previously agreed to professional discipline by means of a public censure imposed on June 22, 2009. The original petition for discipline giving rise to the June 22, 2009 public censure and an amendment to that petition included allegations of six (6) different complaints.
13. A Petition for Discipline was filed against Mr. Long on August 28, 2011. Mr. Long filed an Answer on September 20, 2011. On March 30, 2012, Mr. Long filed a Motion for Summary Judgment. The Board responded on April 20, 2012. This Panel entered an Order denying Mr. Long's Motion for Summary Judgment on May 14, 2012.
14. A Pre-Hearing Conference was conducted on May 16, 2012, to discuss preliminary trial issues and objections. Upon the Board's oral motion in limine objecting to certain witnesses identified by Mr. Long, the Panel determined that William Hunt, John Hall and Patricia Burton should be excluded from testifying at trial. The final hearing of this matter was set for May 22-23, 2012.

15. Following the final hearing on May 22, 2012, and May 23, 2012, the Hearing Panel entered its Memorandum and Order on May 30, 2012, finding that Mr. Long should receive a public censure for disciplinary misconduct.
16. Mr. Long filed a Petition for Certiorari on July 30, 2012. The Board filed an Answer on September 5, 2012. On September 27, 2012, the Executive Secretary for the Board sent the Board's record to the Chancery Court. Mr. Long filed a copy of the hearing transcript with the Chancery Court on or about January 16, 2013.

## CONCLUSIONS OF LAW

### ISSUE 1

Effective November 2, 2004, Tenn. Sup. Ct. R. 9, §8, was amended to provide a Hearing Panel could consider public censure, suspension and disbarment. The revised version of the rule omitted private discipline as an option for public formal disciplinary proceedings. Both versions of the rule establish that formal disciplinary proceedings commence with the filing of a petition for discipline. (Tenn. Sup. Ct. R. 9, §8.2) Neither version of the rule imposes a statute of limitations on attorney disciplinary matters.

Tenn. Sup. Ct. R. 9, §8 does not retrospectively impair a contractual obligation or a vested right. In the *Estate of Bell* case cited by Mr. Long, the Supreme Court held that "...the Tennessee Constitution does not prohibit the retrospective application of remedial or procedural laws, unless the application of these laws impairs a vested right or contractual obligation." *Estate of Bell v. Shelby County Health Care Corp.*, 318 S.W. 3d 823, 823 (Tenn. 2010) (citations omitted).

In 2008, the Supreme Court considered retrospective application of another section in Tenn. Sup. Ct. R. 9. The Court found the amended version of § 1.3, which sets out the standard of review in disciplinary appeals, should be retroactively applied because the rule "focuses only on the way in which a trial court reviews a hearing panel's decision." *Bd. Prof'l Responsibility v. Love*, 256 S.W. 3d 644, 652 (Tenn. 2008) This newer standard of review limits the ability of appellants to introduce evidence on appeal. Regardless, the Court determined that "...because the new standard is procedural in nature and does not impair an obligation of contract, applying the new standard to trial court proceedings conducted after its effective date would not produce an unjust result." *Id.*

## ISSUE 2

First, the license to practice law in this state is not a right, but a privilege. *Milligan v. Bd. of Prof'l Responsibility*, 924 S.W. 2d 643,647 (Tenn. 1996)

Rule 9 of the Supreme Court of Tennessee governs the procedure by which allegations of attorney misconduct are investigated and disciplined. Rule 9, § 23.3 provides that except as otherwise provided in these Rules, the Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence apply in disciplinary cases. *See also, Rayburn v. Board of Professional Responsibility*, 300 S.W.3d 654, 662 (Tenn. 2009).

In furtherance of its duty to regulate the practice of law in Tennessee, the Tennessee Supreme Court licenses to those whom the Court deems qualified to engage in the practice of law, and, when appropriate, the Court disciplines attorneys who violate the rules governing the legal profession. It is, therefore, beyond dispute that all licensed attorneys within Tennessee are subject to the jurisdiction of the Supreme Court, and its agent, the Board of Professional Responsibility. The Board is charged under Rule 9 with investigating any alleged ground for discipline or alleged incapacity of any attorney, and to take appropriate action to effectuate the purposes of the disciplinary rules. *Doe v. Board of Professional Responsibility*, 104 S.W.3d 465, 470 (Tenn. 2003).

Penalties recommended or imposed for lawyer misconduct should also be considered in light of the American Bar Association's Standards for Imposing Lawyer Sanctions (2005) ("ABA Standards"), which the Board itself has adopted. ABA Standards § 3.0 states in imposing discipline after a finding of lawyer misconduct, the court should consider "(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." *Board of Professional Responsibility v. Curry*, 266 S.W.3d 379, 398 (Tenn. 2008).

The ABA Standards define negligence as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that reasonable lawyer would exercise in the situation." *ABA Standards, Definitions*.

In Mr. Long's case, he was on notice that a public censure was a possible outcome of the disciplinary proceeding in several aspects. Not only did he request the formal proceeding after rejecting the proposed public censure, but the past and present forms of the rule clearly provide that public censure is an available remedy.

### ISSUE 3

The doctrine of *res judicata* "bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit." *Cohn v. Bd. of Pro'l Responsibility*, 151 S.W.3d 473, 486 (Tenn. 2004), quoting *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 459 (Tenn. 1995) and *Goek v. Woods*, 777 S.W.2d 347, 349 (Tenn. 1989)). The doctrine does not apply to this matter.

One defending on the basis of *res judicata* or collateral estoppel much demonstrate (1) the judgment in the prior case was final and concluded the rights of the party against whom the defense is asserted, and (2) both cases involve the same parties, the same cause of action, or identical issues. *Richardson*, at 549.

Laches is an equitable defense based on a finding of inexcusable, negligent, or unreasonable delay on the party asserting the claim which results in prejudice to the defending party. It is an equitable defense which requires the finder of fact to determine whether it would be inequitable or unjust to enforce the claimant's rights. *Gleason v. Gleason*, 164 S.W.3d 588, 592 (Tenn. App. 2004).

### ISSUE 4

The hearing panel receives no compensation for sitting as the adjudicatory body in a disciplinary matter other than reimbursement for travel expenses. There is no direct, personal, substantial, pecuniary interest of any Panel Member which is dependent on the outcome of the case. They are not permitted to take part in any matter in which a judge, similarly situated, would have to recuse himself or herself. *See. Tenn. Sup. Ct. R. 9, §6.5.*



The hearing panel must conduct the hearing in accordance with Tenn. Sup. Ct. R. 9, §8. The hearing panel also should apply the Tennessee Rules of Evidence and the Tennessee Rules of Civil Procedure pursuant to Tenn. Sup. Ct. R. 9, § 23.3.

The Board is required to assess costs in informal proceedings; however, there are other situations in which the Board may also assess costs. The Board is required to charge costs when a public censure is issued without formal proceedings, when a private reprimand is issued, when a respondent-attorney is placed on disability inactive status, or when reinstatement is denied. *See Tenn. Sup. Ct. R. 9, §24.3* Further, salaries and expenses of staff are not dependent on collection of costs from formal proceedings. No costs or expenses are collected in the event the Board loses a case. Attorney registration fees, which are assessed to every active attorney in Tennessee (approximately 20,000), accounts for the overwhelming majority of funds used by the Board to exercise the powers and perform the duties conferred upon it by the Supreme Court.

Supreme Court Rule 9, § 24 states in relevant part:

**24.1 Expenses.** The salaries of Disciplinary Counsel and staff, their expenses, administrative costs, and the expenses of the members of the Board and of members of the district committees shall be paid by the Board out of the funds collected under the provisions of Rule 9.

**24.3 Reimbursement of Costs.** In the event a judgment of disbarment, suspension, public censure, private reprimand, temporary suspension, disability inactive status, reinstatement, or denial of reinstatement results from formal proceedings, the Board shall assess against the respondent the costs of the proceedings, including court reporter's expenses for appearances and transcription of all hearings and depositions, the expenses of the hearing panel in the hearing of the cause, and the hourly charge of Disciplinary Counsel in investigating and prosecuting the matter.

## HOLDING

In its first issue, the Petitioner complains about the retroactive amendment to Rule 9 which took place almost a year after the alleged misconduct. This Court finds specifically there was neither a statutory, constitutional, or procedural violation in regard to the conduct by the tribunal. Even if it was improper, the same range of punishments existed both before and after said amendment.

In the second issue, the Court finds the Panel did not abuse its discretion by determining a public censure was the appropriate action. Next, the Petitioner raises the issue the punishment for Mr. Long was too harsh. Instead, counsel for the Petitioner suggests an informal admonition or a private reprimand would have been more appropriate. Based upon the record, it seems obvious the Panel considered but declined the choice of an informal admonition or reprimand.

The Petitioner alleges this action by the Panel is barred by the doctrine of res judicata and laches. To support his theory, the Petitioner complains the events as the basis of the Inquiry (Filed in May, 2009) took place in 2003. Based upon the record, Mr. Long had an original petition for discipline filed prior to the inquiry involved in this case. He received a public censure for those activities on June 22, 2009. The Court finds the doctrine of res judicata does not apply here since the complaint involves different facts and a different client. The Court further finds the delay in filing the complaint and pursuing disciplinary action was appropriate based upon the time period in which the Board became aware of the alleged misconduct. Based upon the evidence, including Exhibit 5 to the initial hearing, the Petitioner was not prejudiced by the unavailability of Mr. Clayton.

Finally, the Petitioner attacks the constitutionality of Tenn. Sup. Ct. R. 9, §24 as he alleges it violates the due process guarantees. The basis for this attack is the supposed tainting of the process by a financial interest on the part of Office of the Disciplinary counsel. Tenn. Sup. Ct. R. 9, §24 discusses payment of salaries and staff plus the reimbursement of costs in the event an attorney is disciplined by the actions of the Panel. Counsel for the Petitioner believes these provisions create a financial incentive for Disciplinary Counsel to recommend and for the Board (the appointing authority for the

panels) to approve the institution of formal proceedings against attorneys. There is no basis in law to support this theory. The authorities cited by the Petitioner are not analogous to the proceedings in this case and there is no basis in law to support this theory.

CONCLUSION

The Court finds the hearing panel's findings of fact and conclusions of law are fully supported by the evidence presented in this matter and reversal or modification of the Hearing Panel's decision is simply not warranted.

Mr. Long has failed to demonstrate the hearing panel's conclusions were not supported by substantial and material evidence or their decision was arbitrary and capricious. The public censure is supported by the facts and this Court must not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact. Finally, Mr. Long has failed to demonstrate that Tenn. Sup. Ct. R. 9 is unconstitutional in any respect.

Costs are assessed to Mr. Long.

IT IS SO ORDERED, this the 21 day of March, 2013.


  
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DON R. ASH, Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served upon the following by U.S. Mail on this the 21<sup>st</sup> day of March, 2013:

John Herbison  
1310 Madison Street  
Clarksville, Tennessee 37040

Krisann Hodges  
10 Cadillac Drive, Suite 220  
Brentwood, Tennessee 37027

  
\_\_\_\_\_  
Merry Peach Martin  
Judicial Assistant to Judge Don R. Ash