

JUN 10 2013

THOMAS FLEMING MABRY  
Petitioner,

HOWARD G. HOGAN

vs.

Docket No.  
183743-I

BOARD OF PROFESSIONAL  
RESPONSIBILITY of the Supreme Court  
of Tennessee,

Respondent.

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**AMENDED ORDER**

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This matter came to be heard on the 15<sup>th</sup> day of March, 2013. A Petition for Certiorari was filed on behalf of Thomas Fleming Mabry and by the Board of Professional Responsibility. Both petitions are dismissed.

ISSUES PRESENTED

1. Did the Panel err in determining the Board presented insufficient proof Mr. Mabry violated Rule of Professional Conduct 3.1 in the Shore litigation?
2. Did the Panel err in determining the Board presented insufficient proof Mr. Mabry violated Rules of Professional Conduct 1.3, 1.4 and 3.2 in the French litigation?
3. Did the Panel violate Tennessee Supreme Court Rules, Rule 9 §1.3 (1-5) by supplying pleadings and unknown documents through alleged ex-parte communications, alleged violation of Rule 8.01 of TRCP, as well as denying the Petitioner a continuance when it had granted the Board one; by allowing a late supplemental motion and brief being filed 3 days before the hearing; and by denying the Petitioner's Motion to Dismiss and the Motion to Alter or Amend?

4. Did the Panel err in not allowing a continuance so the testimony of a TLAP representative could be considered and Mr. Mabry to testify as an expert in regard to appropriate disciplinary procedures and the Rules of Civil Procedure?

#### 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)

In particular, this 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. Velda Shore retained Mr. Mabry to represent her in two lawsuits, *Shore v. Fields and Goddard* filed in Blount County Circuit Court and *Shore v. Maple Lane Farms* in the Blount County Chancery Court. (Tr. p. 34; Ex. 1)
2. In the Complaint filed by Mr. Mabry in *Shore v. Fields*, Mr. Mabry alleged a civil conspiracy among Robert Goddard, an attorney representing Blount County; Roger Fields, Blount County Building Commissioner; representatives of Maple Lane Farms; and Jerry Cunningham, the County Mayor. (Tr. p. 37; Ex. 1) Although identified in the civil conspiracy claim, Mr. Mabry did not name Jerry Cunningham as a defendant in *Shore v. Fields*. (Tr. p. 38)
3. Less than one month after filing the Complaint in *Shore v. Fields*, Mr. Mabry filed an Amendment to Complaint and/or Notice of Voluntary Dismissal dismissing Mr. Goddard as a defendant. (Tr. p. 38; Ex. 2) After dismissing Mr. Goddard, Mr. Mabry took no action to dismiss his civil conspiracy claim. (Tr. p. 39)
4. On September 19, 2008, counsel for Mr. Fields filed a Motion to Dismiss and served Mr. Mabry with an unfiled Motion for Sanctions and safe-harbor letter. (Tr. p. 41; Ex. 4) Mr. Mabry still did not dismiss or amend the Complaint alleging a civil conspiracy. (Tr. p. 41)

5. On October 24, 2008, counsel for Mr. Fields filed an Amended Motion to Dismiss and Impose Sanctions against Mr. Mabry and his client, Velda Shore. (Ex. 5) Mr. Mabry did not file any Response to the Motion to Dismiss and Amended Motion to Dismiss and Impose Sanctions. (Tr. p. 41)
6. On December 4, 2008, Ms. Shore discharged Mr. Mabry. (Tr. p. 44) On approximately December 31, 2008, Mr. Mabry filed a Motion to Withdraw. (Tr. p. 45; Ex. 6) Attorney Kevin Shepperd was substituted as counsel for Ms. Shore. (Ex. 10, 37)
7. After Ms. Shore discharged Mr. Mabry, she retained subsequent counsel, Kevin Shepard, to represent her in her litigation. (Tr. pp. 50-51, 87; Ex. 10) Mr. Shepard filed a Motion to Amend Complaint deleting the civil conspiracy claim in the *Fields* litigation and subsequently filed an Amended Complaint without the civil conspiracy claim. (Tr. pp. 92-93; Ex. 38-39)
8. After a hearing on Defendant Fields' Motion to Dismiss and Impose Sanctions held on January 25, 2011, Mr. Mabry filed a Memorandum of Law Against Award of Sanctions acknowledging:

The civil conspiracy theory... became moot when Mr. Goddard was dismissed from the case, and no other Defendants were named while Mabry remained attorney for Velda J. Shore, or thereafter. (Ex. 7)
9. On March 4, 2011, the Blount County Circuit Court entered an Order finding Mr. Mabry had more than ample time to dismiss and/or correct the civil conspiracy allegation but did not do so. (Tr. p. 47-48; Ex. 8) Accordingly, the Blount County Circuit Court sanctioned Mr. Mabry by its March 4, 2011, Order.
10. In April 2012, a subsequent hearing was held wherein the Court entered an Order sanctioning Mr. Mabry and entering a judgment for \$5,000.00 in attorney's fees. (Ex. 9)

11. Mr. Jerry Cunningham, a licensed attorney and the county mayor, testified in the disciplinary hearing the media “picked up” on the allegations he had been involved in a conspiracy. (Tr. p. 77) Mr. Cunningham testified Mr. Mabry also indicated to the paper that he had no proof. (Tr. p. 77) Mr. Cunningham testified this was the kind of lawsuit an ethical lawyer would not file. (Tr. p. 77)
12. Additionally, on August 11, 2009, Mr. Shepard filed a Motion to Continue Ms. Shore’s Maple Lane Farms suit asserting in part that Mr. Mabry had failed to communicate with Mr. Shepard; failed to assist in timely filing an Order of Substitution of Counsel and failed to turn over Ms. Shore’s filed to Mr. Shepard. (Tr. pp. 90-91)
13. Gina French retained Mr. Mabry to represent her in a dispute with Allstate Insurance Company. (Tr. pp. 55, 115) On January 26, 2009, Mr. Mabry filed Ms. French’s Knox County General Sessions claim against Allstate Insurance Company. (Tr. p. 119; Ex. 40) Correspondence between counsel for Allstate and Mr. Mabry reflects opposing counsel’s repeated efforts to contact Mr. Mabry about Ms. French’s case. (Ex. 16-17)
14. On July 27, 2009, Allstate filed a Motion to Dismiss Ms. French’s case for lack of prosecution. (Tr. p. 60; Ex. 18)
15. On October 15, 2009, Ms. French wrote Mr. Mabry expressing concerns about Mr. Mabry’s communications with her and her “shock” in receiving Allstate’s request to reset their Motion to Dismiss. (Tr. p. 115; Ex. 41)
16. On October 28, 2009, Mr. Mabry non-suited Ms. French’s case. (tr. p. 123; Ex. 20) Mr. Mabry admitted that although he tried to contact Ms. French, he did not speak to her about the non-suit. (Tr. p. 61) Ms. French testified she did not give her consent to non-suit the case. (Tr. p. 123)
17. In November, 2009, Ms. French wrote Mr. Mabry stating her previous correspondence to Mr. Mabry had been returned after it was forwarded to an office address of which she was unaware. (Tr. p. 124)
18. In April, 2010, Ms. French again wrote Mr. Mabry asking him to explain why he dropped her lawsuit without her consent and stating that after he advised her, she would like the lawsuit re-filed. (Tr. pp. 126-127; Ex. 25)

19. In October, 2010, Ms. French wrote Mr. Mabry asking specific questions to determine whether to re-file her case. (Ex. 28)
20. Mr. Mabry has received seven (7) prior public and private disciplinary sanctions. On May 2, 1991, Mr. Mabry was publicly censured by the Board for lack of diligence and excessive fees. (Ex. 30)
21. Mr. Mabry received another public censure on September 22, 1993 for comingling client funds with personal funds. (Ex. 31)
22. On July 16, 2001, Mr. Mabry received a private informal admonition for not representing a client zealously. (Ex. 32)
23. On January 7, 2002, Mr. Mabry received a private reprimand for not representing a client zealously and misconduct. (Ex. 33)
24. On June 20, 2002, Mr. Mabry received a private informal admonition regarding an advertising violation and misconduct. (Ex. 34)
25. On July 15, 2008, Mr. Mabry was suspended from the practice of law for eleven (11) months and twenty-nine (29) days, with credit for sixty (60) days for lack of communication, failure to act diligently, and for improper communication with a represented party. (Ex. 35)
26. Finally, on July 7, 2011, Mr. Mabry received a private informal admonition for improper communication with a represented party.
27. The Board of Professional Responsibility ("the Board") filed a Petition for Discipline against Thomas Mabry on June 22, 2011, based upon three complaints received by the Board.
28. Mr. Mabry requested and received an Order extending the time within which to respond to the Petition for Discipline. The October 17, 2011, Order Extending the Time gave Mr. Mabry until September 6, 2011, to answer the Petition. On September 6, 2011, Mr. Mabry filed his Answer.
29. A Scheduling Order was entered on December 27, 2011, setting the final hearing for May 9, 2012. Both parties filed witness lists prior to the anticipated date of the hearing.

30. On May 1, 2012, the Board filed a Motion to Continue the case due to the unavailability of Ginna French, a complainant who was identified by the Board and by Mr. Mabry as a potential witness. A continuance was granted on May 2, 2012. The final hearing was reset for July 18, 2012.
31. On May 15, 2012, the Supreme Court of Tennessee reinstated Plaintiff's counsel in this matter, David A. Lufkin, Sr., to the practice of law.
32. On July 5, 2012, counsel for Mr. Mabry filed a notice of appearance. On July 12, 2012, Mr. Mabry filed a Motion for Continuance based upon "communication errors" which caused a witness, Laura McClendon, to not have notice of the hearing date and a request to allow additional discovery. Mr. Mabry first identified Ms. McClendon as a potential witness on his witness list filed May 2, 2012, prior to the first setting of this matter for final hearing.
33. The Board filed a pre-trial brief on July 13, 2012. The Motion for Continuance was summarily denied by the Hearing Panel. An Order denying Mr. Mabry's request for a continuance was entered on July 13, 2012.
34. On July 16, 2012, two (2) days prior to the final hearing, Mr. Mabry filed a "Motion to Strike Board of Professional Responsibility's Brief and the Board of Professional Responsibility's Supplemental Witness and Exhibit List and to Dismiss the Petition for Discipline." The motion was denied at the beginning of trial on July 18, 2012.
35. Following a full evidentiary hearing, the Hearing Panel entered its Judgment on August 2, 2012.
36. Mr. Mabry filed a Motion to Alter or Amend Judgment and/or Motion to Stay on August 27, 2012. The Motion was denied by the Panel on August 31, 2012.
37. Mr. Mabry filed a Writ of Certiorari and Motion for Supersedeas on September 14, 2012.
38. The Board filed a Petition for Writ of Certiorari and an Answer to Mr. Mabry's petition on September 28, 2012.
39. 39. The Board filed the transcript of the disciplinary proceedings on October 31, 2012.

40. Mr. Mabry filed an Answer to the Board's petition on November 27, 2012.
41. The Executive Secretary for the Board filed the Return to Writ on December 7, 2012.

Oral argument in this appeal was set to be heard on March 15, 2013, in Knoxville, Tennessee.

## LAW

### ISSUE 1 and 2

The Tennessee Supreme Court has previously held a decision is arbitrary and capricious if it is "not based on any course of reasoning or exercise of judgment, or ... disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Jackson Mobilphone Co. v. Tennessee Pub. Serv. Comm'n*, 876 S.W.2d 106, 110-111 (Tenn. Ct. App. 1993) (citing *State ex rel. Nixon v. McCanless*, 176 Tenn. 352, 354, 141 S.W.2d 885, 886 (1940); *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175, 180 (Neb. 1991); *Ramsey v. Department of Human Servs.*, 301 Ark. 285, 783 S.W. 2d 361, 364 (Ark. 1990)).

Further, decisions by an agency "with adequate evidentiary support may still be arbitrary and capricious if caused by a clear error in judgment." *Id.* at 110-111. (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284, 95 S. Ct. 438, 441-42, 42 L. Bd. 2d 447 (1974); *Girard v. City of Glenn Falls*, 577 N.Y.S.2d 496, 499 (App. Div. 1991); 5 Kenneth C. Davis, *Administrative Law Treatise* § 29:7, at 358 (2d ed. 1984)).

In order to assess the substantiality of evidence upon review, "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." *Tenn. Sup. Ct. R. 9, §1.3*. A reviewing court must determine whether substantial and material evidence supports a Hearing Panel's decision and "whether the evidence 'furnishes a reasonably sound factual basis for the decision being reviewed.'"



*Threadgill v. Bd. of Prof'l Responsibility*, 299 S.W.3d 792, 807 (Tenn. 2009) (quoting *City of Memphis v. Civil Serv Comm'n of Memphis*, 216 S.W.3d 311, 317 (Tenn. 2007)).

Tenn. Sup. Ct. R. 9 §8.4 provides “[I]n determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the *ABA Standards for Imposing Lawyer Sanctions*.” (hereinafter “ABA Standards”). ABA Standard 3.0 provides:

In imposing a sanction after finding of lawyer misconduct, a court should consider the following:

- (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.

The ABA Standards applicable to this case are:

4.42 Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

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

8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

The ABA Standards also sets forth a baseline for suspensions: “[G]enerally, suspension should be for a period of time equal to or greater than six months...” See *ABA Standard 2.3*

ABA Standard 9.1 states after misconduct has been established, aggravating circumstances may be considered in determining the sanction or discipline to be imposed. In fact, the Tennessee Supreme Court has opined that significant disciplinary history will have a significant impact on the determination of sanctions:

“In recommending that Sneed be disbarred, the Panel correctly considered and applied the ABA Standards. The Panel properly found that Sneed “has not benefitted from prior discipline and that the public would be endangered and the legal profession and administration of justice would be disserved if [Sneed] were permitted to continue the practice of law.”

...

“It is apparent to us, as it was to the Panel and the trial court, that Sneed has fallen far short of conforming to the legal profession’s ethical standards. A lawyer with Sneed’s extensive record of ethical infractions simply cannot be permitted to continue practicing law in our courts. He has not heeded lessons from facing numerous prior proceedings and, in fact, continues to repeat the same mistakes.”

...

“Indeed, the pattern and pervasive nature of the unethical conduct committed by Sneed, coupled with his apparent unwillingness to abide by the rules of the profession despite years of disciplinary action taken against him, can do little but add to the cynicism about lawyers and foster disrespect for the administration of justice that ultimately does great harm to the public, the legal system, and the profession of law. In light of all these circumstances, we have concluded the Panel and the trial court appropriately found Sneed should be disbarred.”

*Sneed v. Bd. of Prof’l Responsibility of the Supreme Court of Tenn.*, 2010 Tenn. LEXIS 66, 35-39 (Tenn. Jan. 26, 2010)

### ISSUE 3

#### The Motion for Continuance.

The decision whether to grant or deny a continuance is within the sound discretion of the trial court. *Sanjines v. Ortwein & Assocs., Inc.*, 984 S.W.2d 907, 909 (Tenn. 1998) (citing *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413, 415 (Tenn. 1997)). An appellate court cannot interfere with the trial court's decision unless the court's decision constitutes an abuse of discretion and causes prejudice to the party seeking the continuance. *Sanjines*, 984 S.W.2d at 909.

The Tennessee Supreme Court has stated "under the abuse of discretion standard, a trial court's ruling 'will be upheld so long as reasonable minds can disagree as to propriety of the decision made.'" *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)). The standard "reflects an awareness that the decision reviewed involved a choice among several acceptable alternatives." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (citing *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999)).

#### The Motion to Strike the Board's Brief and Supplemental Exhibit List.

This Court must also review the Panel's decisions on each of these motions using the abuse of discretion standard. An abuse of discretion would occur if the Panel's decision applied an incorrect legal standard or reaches a decision which is against logic or reasoning. See *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

Decisions regarding the admission or exclusion of evidence are also reviewed by an appellate court under an abuse of discretion standard. *Brown v. Crown Equip. Corp.*, 181 S.W.3d 121, 131 (Tenn. 2004). A reviewing court is required to uphold the trial court's ruling "as long as reasonable minds could disagree about its correctness." *Caldwell v. Hill*, 250 S.W.3d 865, 869 (Tenn. Ct. App. 2007). An evidentiary ruling will only be set aside "when the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence." *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

### The Motion to Dismiss.

In formal disciplinary proceedings, the Tennessee Rules of Civil Procedure apply only when not “otherwise provided for in these Rules”. See *Tenn. S. Ct. Rule 9*, §23.3. The Supreme Court has addressed the contents of a petition for discipline in *Tenn. S. Ct. Rule 9*, § 8.2. According to Section 8.2, formal disciplinary proceedings are initiated by filing a petition for discipline “which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct.” Unlike *Tenn. R. Civ. P. 8*, Section 8.2 does not require a demand for judgment for the relief the pleader seeks.

### The Motion to Alter or Amend.

TRCP Rule 59.04 Post-Trial Motions – Motion to Alter or Amend a Judgment

***Rule 59.04 §12-2 (t) Motion to Alter or Amend a Judgment.*** *A motion to alter or amend a judgment shall be filed and served within thirty (30) days after the entry of the judgment.*

***Rule 59.04 §12-2 (u)*** A motion seeking to alter or amend a judgment filed and served within 30 days of the judgment will be treated as a motion under Rule 59.04 even if the movant had denominated the motion as one under Rule 60, or as a motion to reconsider.

Courts and commentators have identified four basic grounds for the motion:

1. Manifest errors of law or fact upon which the judgment is based;
2. Newly discovered evidence;
3. An intervening change in controlling law; and
4. Other manifest injustice.

Although trial courts have considerable discretion in granting the motion, a motion to alter or amend a judgment should not be used to raise for the first time arguments that could have been raised before entry of judgment. *Local Union 760, IBEW v. City of Harriman*, No. E2000-00367-COA-R3-CV, 2000 Tenn. App. LEXIS 792, at \*10 (Tenn. App. E.S. Dec. 8, 2000), *perm. to appeal denied* (Tenn. May 14, 2001)

In *Harris v. Chern*, 33 S.W.3d 741 (Tenn. 2000), adopting a standard derived from federal decisions construing Federal Rule 59(e) (motion to alter or amend a final judgment), the Court stated under Rule 54.02, the trial court should decide whether to consider new evidence in opposition to its partial summary judgment by applying a “non-exclusive balancing test” considering:

1. “The movant’s efforts to obtain evidence to respond to the motion for summary judgment;
2. The importance of the newly submitted evidence to the movant’s case;
3. The explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment;
4. The likelihood the nonmoving party will suffer unfair prejudice; and
5. Any other relevant factor.”

The decision to deny a motion to alter or amend is reviewed under an abuse of discretion standard. *Stovall v. Clarke*, 113 S.W.3d 715, at 721 (Tenn. 2003). The Hearing Panel is only required to submit findings and judgment, in the form of a final decree of a trial court. See *Tenn. Sup. Ct. R. 9, § 8.3*

#### ISSUE 4

It is in the Court’s discretion whether to allow additional evidence in the event irregularities in the proceedings are alleged. (See Rule 9). Testimony was proffered by counsel for Mr. Mabry. This testimony included a representative from the Tennessee Lawyers Assistance Program.

Next, counsel for Mr. Mabry attempted to Mr. Mabry qualified as an expert based upon the Preamble of Professional Conduct:

A lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service and engaging in these pursuits as part of a common calling to promote justice and public good. Essential characteristics of the lawyer are knowledge of the law, skill in applying the applicable law to the factual context, thoroughness of preparation, practical and prudential wisdom, ethical conduct and integrity, and dedication to justice and the public good.

With regard to the testimony of experts, Courts are required to apply the appropriate Rules of Evidence (See Rules 702, 403, 401), plus consider the Daubert standard. This test requires a determination of the qualifications of said expert and whether their testimony would assist the trier of fact.

## HOLDING

First, while acknowledging the seriousness of Mr. Mabry's unethical actions, the Court does not find the ruling of the Panel to be arbitrary and capricious. It seems obvious from the record, the Panel considered the mitigating and aggravating factors in rendering its decision. The Court finds the Board failed to submit sufficient evidence showing the ruling by the Panel "is not based on any course of reasoning or exercise of judgment." (See *Jackson Mobile Phone Co. v. Tennessee Pub. Ser. Comm'n*, 876 S.W. 2d 106).

In issue three, Mr. Mabry complains the Hearing Panel did not follow the Tennessee Rules of Civil Procedure in regard to his case. This Court finds, based upon Rule 9, the Panel did comply with the Rules of Civil Procedure in conjunction with the Rules established by the Supreme Court in regard to attorney discipline. For example, Mr. Mabry complains the failure of the complaint to set out the proposed punishment results in violation of Rule 8 by not making a demand for judgment. The Court disagrees with Mr. Mabry's contention and finds the potential of discipline gives adequate notice. The Court further finds the rulings by the panel were appropriate and were not an abuse of discretion.

Finally, the Court allowed Mr. Mabry, through counsel, to make an offer of proof. The first witness was a representative of the Tennessee Lawyer Assistant Program. He testified Mr. Mabry had made several positive contributions to the program. The Court determines the exclusion of this evidence was appropriate. The work by Mr. Mabry to help individuals in the TLAP program is laudable but this evidence was presented to the panel through Mr. Mabry's own testimony. Based upon the lesser penalty than recommended by Disciplinary counsel, it is obvious this mitigating factor was considered. Next, testimony was offered regarding the procedures followed by the Panel. An effort was made to qualify Mr. Mabry as an expert in this area. The Court determined Mr. Mabry was not qualified as an expert even though he was a practicing attorney but allowed him to make an offer of proof. The Court finds the presentation by these witnesses would not have aided neither the Hearing panel nor Mr. Mabry. The court finds the Panel's decision to deny Mr. Mabry's continuance was appropriate and was not an abuse of discretion.

### 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. Mabry 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 discipline is fully 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. The Court further finds the panel did not abuse its discretion in regard to its various rulings, including the failure to allow the testimony from the TLAP Representative and Mr. Mabry as an expert witness.

Costs are assessed equally to the parties.

IT IS SO ORDERED, this the 16 day of June, 2013.

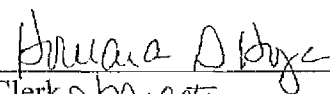
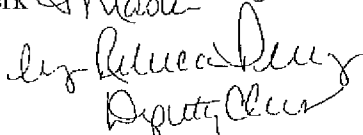
  
DON R. ASH, Circuit Judge

### CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served upon the following by U.S. Mail on this the 17<sup>th</sup> day of June, 2013:

David A. Lufkin  
5329 Browns Gap Road  
Knoxville, Tennessee 37918

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

  
Clerk ~~Master~~  
15   
Deputy Clerk

IN THE CHANCERY COURT KNOX COUNTY, TENNESSEE

4-21  
ENTERED

MAR 28 2013

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Docket No.  
183743-I

HOWARD G. HOGAN

1251-338

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BOARD OF PROFESSIONAL RESPONSIBILITY  
SUPREME COURT OF TENNESSEE



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In particular, this 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. Velda Shore retained Mr. Mabry to represent her in two lawsuits, *Shore v. Fields and Goddard* filed in Blount County Circuit Court and *Shore v. Maple Lane Farms* in the Blount County Chancery Court. (Tr. p. 34; Ex. 1)
2. In the Complaint filed by Mr. Mabry in *Shore v. Fields*, Mr. Mabry alleged a civil conspiracy among Robert Goddard, an attorney representing Blount County; Roger Fields, Blount County Building Commissioner; representatives of Maple Lane Farms; and Jerry Cunningham, the County Mayor. (Tr. p. 37; Ex. 1) Although identified in the civil conspiracy claim, Mr. Mabry did not name Jerry Cunningham as a defendant in *Shore v. Fields*. (Tr. p. 38)
3. Less than one month after filing the Complaint in *Shore v. Fields*, Mr. Mabry filed an Amendment to Complaint and/or Notice of Voluntary Dismissal dismissing Mr. Goddard as a defendant. (Tr. p. 38; Ex. 2) After dismissing Mr. Goddard, Mr. Mabry took no action to dismiss his civil conspiracy claim. (Tr. p. 39)
4. On September 19, 2008, counsel for Mr. Fields filed a Motion to Dismiss and served Mr. Mabry with an unfiled Motion for Sanctions and safe-harbor letter. (Tr. p. 41; Ex. 4) Mr. Mabry still did not dismiss or amend the Complaint alleging a civil conspiracy. (Tr. p. 41)

5. On October 24, 2008, counsel for Mr. Fields filed an Amended Motion to Dismiss and Impose Sanctions against Mr. Mabry and his client, Velda Shore. (Ex. 5) Mr. Mabry did not file any Response to the Motion to Dismiss and Amended Motion to Dismiss and Impose Sanctions. (Tr. p. 41)
6. On December 4, 2008, Ms. Shore discharged Mr. Mabry. (Tr. p. 44) On approximately December 31, 2008, Mr. Mabry filed a Motion to Withdraw. (Tr. p. 45; Ex. 6) Attorney Kevin Shepperd was substituted as counsel for Ms. Shore. (Ex. 10, 37)
7. After Ms. Shore discharged Mr. Mabry, she retained subsequent counsel, Kevin Shepard, to represent her in her litigation. (Tr. pp. 50-51, 87; Ex. 10) Mr. Shepard filed a Motion to Amend Complaint deleting the civil conspiracy claim in the *Fields* litigation and subsequently filed an Amended Complaint without the civil conspiracy claim. (Tr. pp. 92-93; Ex. 38-39)
8. After a hearing on Defendant Fields' Motion to Dismiss and Impose Sanctions held on January 25, 2011, Mr. Mabry filed a Memorandum of Law Against Award of Sanctions acknowledging:

The civil conspiracy theory... became moot when Mr. Goddard was dismissed from the case, and no other Defendants were named while Mabry remained attorney for Velda J. Shore, or thereafter. (Ex. 7)
9. On March 4, 2011, the Blount County Circuit Court entered an Order finding Mr. Mabry had more than ample time to dismiss and/or correct the civil conspiracy allegation but did not do so. (Tr. p. 47-48; Ex. 8) Accordingly, the Blount County Circuit Court sanctioned Mr. Mabry by its March 4, 2011, Order.
10. In April 2012, a subsequent hearing was held wherein the Court entered an Order sanctioning Mr. Mabry and entering a judgment for \$5,000.00 in attorney's fees. (Ex. 9)

11. Mr. Jerry Cunningham, a licensed attorney and the county mayor, testified in the disciplinary hearing the media "picked up" on the allegations he had been involved in a conspiracy. (Tr. p. 77) Mr. Cunningham testified Mr. Mabry also indicated to the paper that he had no proof. (Tr. p. 77) Mr. Cunningham testified this was the kind of lawsuit an ethical lawyer would not file. (Tr. p. 77)
12. Additionally, on August 11, 2009, Mr. Shepard filed a Motion to Continue Ms. Shore's Maple Lane Farms suit asserting in part that Mr. Mabry had failed to communicate with Mr. Shepard; failed to assist in timely filing an Order of Substitution of Counsel and failed to turn over Ms. Shore's filed to Mr. Shepard. (Tr. pp. 90-91)
13. Gina French retained Mr. Mabry to represent her in a dispute with Allstate Insurance Company. (Tr. pp. 55, 115) On January 26, 2009, Mr. Mabry filed Ms. French's Knox County General Sessions claim against Allstate Insurance Company. (Tr. p. 119; Ex. 40) Correspondence between counsel for Allstate and Mr. Mabry reflects opposing counsel's repeated efforts to contact Mr. Mabry about Ms. French's case. (Ex. 16-17)
14. On July 27, 2009, Allstate filed a Motion to Dismiss Ms. French's case for lack of prosecution. (Tr. p. 60; Ex. 18)
15. On October 15, 2009, Ms. French wrote Mr. Mabry expressing concerns about Mr. Mabry's communications with her and her "shock" in receiving Allstate's request to reset their Motion to Dismiss. (Tr. p. 115; Ex. 41)
16. On October 28, 2009, Mr. Mabry non-suited Ms. French's case. (tr. p. 123; Ex. 20) Mr. Mabry admitted that although he tried to contact Ms. French, he did not speak to her about the non-suit. (Tr. p. 61) Ms. French testified she did not give her consent to non-suit the case. (Tr. p. 123)
17. In November, 2009, Ms. French wrote Mr. Mabry stating her previous correspondence to Mr. Mabry had been returned after it was forwarded to an office address of which she was unaware. (Tr. p. 124)
18. In April, 2010, Ms. French again wrote Mr. Mabry asking him to explain why he dropped her lawsuit without her consent and stating that after he advised her, she would like the lawsuit re-filed. (Tr. pp. 126-127; Ex. 25)

19. In October, 2010, Ms. French wrote Mr. Mabry asking specific questions to determine whether to re-file her case. (Ex. 28)
20. Mr. Mabry has received seven (7) prior public and private disciplinary sanctions. On May 2, 1991, Mr. Mabry was publicly censured by the Board for lack of diligence and excessive fees. (Ex. 30)
21. Mr. Mabry received another public censure on September 22, 1993 for comingling client funds with personal funds. (Ex. 31)
22. On July 16, 2001, Mr. Mabry received a private informal admonition for not representing a client zealously. (Ex. 32)
23. On January 7, 2002, Mr. Mabry received a private reprimand for not representing a client zealously and misconduct. (Ex. 33)
24. On June 20, 2002, Mr. Mabry received a private informal admonition regarding an advertising violation and misconduct. (Ex. 34)
25. On July 15, 2008, Mr. Mabry was suspended from the practice of law for eleven (11) months and twenty-nine (29) days, with credit for sixty (60) days for lack of communication, failure to act diligently, and for improper communication with a represented party. (Ex. 35)
26. Finally, on July 7, 2011, Mr. Mabry received a private informal admonition for improper communication with a represented party.
27. The Board of Professional Responsibility ("the Board") filed a Petition for Discipline against Thomas Mabry on June 22, 2011, based upon three complaints received by the Board.
28. Mr. Mabry requested and received an Order extending the time within which to respond to the Petition for Discipline. The October 17, 2011, Order Extending the Time gave Mr. Mabry until September 6, 2011, to answer the Petition. On September 6, 2011, Mr. Mabry filed his Answer.
29. A Scheduling Order was entered on December 27, 2011, setting the final hearing for May 9, 2012. Both parties filed witness lists prior to the anticipated date of the hearing.

30. On May 1, 2012, the Board filed a Motion to Continue the case due to the unavailability of Ginna French, a complainant who was identified by the Board and by Mr. Mabry as a potential witness. A continuance was granted on May 2, 2012. The final hearing was reset for July 18, 2012.
31. On May 15, 2012, the Supreme Court of Tennessee reinstated Plaintiff's counsel in this matter, David A. Lufkin, Sr., to the practice of law.
32. On July 5, 2012, counsel for Mr. Mabry filed a notice of appearance. On July 12, 2012, Mr. Mabry filed a Motion for Continuance based upon "communication errors" which caused a witness, Laura McClendon, to not have notice of the hearing date and a request to allow additional discovery. Mr. Mabry first identified Ms. McClendon as a potential witness on his witness list filed May 2, 2012, prior to the first setting of this matter for final hearing.
33. The Board filed a pre-trial brief on July 13, 2012. The Motion for Continuance was summarily denied by the Hearing Panel. An Order denying Mr. Mabry's request for a continuance was entered on July 13, 2012.
34. On July 16, 2012, two (2) days prior to the final hearing, Mr. Mabry filed a "Motion to Strike Board of Professional Responsibility's Brief and the Board of Professional Responsibility's Supplemental Witness and Exhibit List and to Dismiss the Petition for Discipline." The motion was denied at the beginning of trial on July 18, 2012.
35. Following a full evidentiary hearing, the Hearing Panel entered its Judgment on August 2, 2012.
36. Mr. Mabry filed a Motion to Alter or Amend Judgment and/or Motion to Stay on August 27, 2012. The Motion was denied by the Panel on August 31, 2012.
37. Mr. Mabry filed a Writ of Certiorari and Motion for Supersedeas on September 14, 2012.
38. The Board filed a Petition for Writ of Certiorari and an Answer to Mr. Mabry's petition on September 28, 2012.
39. 39. The Board filed the transcript of the disciplinary proceedings on October 31, 2012.

40. Mr. Mabry filed an Answer to the Board's petition on November 27, 2012.
41. The Executive Secretary for the Board filed the Return to Writ on December 7, 2012.

Oral argument in this appeal was set to be heard on March 15, 2013, in Knoxville, Tennessee.

## LAW

### ISSUE 1 and 2

The Tennessee Supreme Court has previously held a decision is arbitrary and capricious if it is "not based on any course of reasoning or exercise of judgment, or ... disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Jackson Mobilphone Co. v. Tennessee Pub. Serv. Comm'n*, 876 S.W.2d 106, 110-111 (Tenn. Ct. App. 1993) (citing *State ex rel. Nixon v. McCanless*, 176 Tenn. 352, 354, 141 S.W.2d 885, 886 (1940); *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175, 180 (Neb. 1991); *Ramsey v. Department of Human Servs.*, 301 Ark. 285, 783 S.W. 2d 361, 364 (Ark. 1990)).

Further, decisions by an agency "with adequate evidentiary support may still be arbitrary and capricious if caused by a clear error in judgment." *Id.* at 110-111. (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284, 95 S. Ct. 438, 441-42, 42 L. Bd. 2d 447 (1974); *Girard v. City of Glenn Falls*, 577 N.Y.S.2d 496, 499 (App. Div. 1991); 5 Kenneth C. Davis, *Administrative Law Treatise* § 29:7, at 358 (2d ed. 1984)).

In order to assess the substantiality of evidence upon review, "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." *Tenn. Sup. Ct. R. 9, §1.3*. A reviewing court must determine whether substantial and material evidence supports a Hearing Panel's decision and "whether the evidence 'furnishes a reasonably sound factual basis for the decision being reviewed.'"

*Threadgill v. Bd. of Prof'l Responsibility*, 299 S.W.3d 792, 807 (Tenn. 2009) (quoting *City of Memphis v. Civil Serv Comm'n of Memphis*, 216 S.W.3d 311, 317 (Tenn. 2007)).

Tenn. Sup. Ct. R. 9 §8.4 provides “[I]n determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the *ABA Standards for Imposing Lawyer Sanctions*.” (hereinafter “ABA Standards”). ABA Standard 3.0 provides:

In imposing a sanction after finding of lawyer misconduct, a court should consider the following:

- (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.

The ABA Standards applicable to this case are:

4.42 Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

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

8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

The ABA Standards also sets forth a baseline for suspensions: “[G]enerally, suspension should be for a period of time equal to or greater than six months...” See *ABA Standard 2.3*



ABA Standard 9.1 states after misconduct has been established, aggravating circumstances may be considered in determining the sanction or discipline to be imposed. In fact, the Tennessee Supreme Court has opined that significant disciplinary history will have a significant impact on the determination of sanctions:

"In recommending that Sneed be disbarred, the Panel correctly considered and applied the ABA Standards. The Panel properly found that Sneed "has not benefitted from prior discipline and that the public would be endangered and the legal profession and administration of justice would be disserved if [Sneed] were permitted to continue the practice of law."

...

"It is apparent to us, as it was to the Panel and the trial court, that Sneed has fallen far short of conforming to the legal profession's ethical standards. A lawyer with Sneed's extensive record of ethical infractions simply cannot be permitted to continue practicing law in our courts. He has not heeded lessons from facing numerous prior proceedings and, in fact, continues to repeat the same mistakes."

...

“Indeed, the pattern and pervasive nature of the unethical conduct committed by Sneed, coupled with his apparent unwillingness to abide by the rules of the profession despite years of disciplinary action taken against him, can do little but add to the cynicism about lawyers and foster disrespect for the administration of justice that ultimately does great harm to the public, the legal system, and the profession of law. In light of all these circumstances, we have concluded the Panel and the trial court appropriately found Sneed should be disbarred.”

*Sneed v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn.*, 2010 Tenn. LEXIS 66, 35-39 (Tenn. Jan. 26, 2010)

### ISSUE 3

#### The Motion for Continuance.

The decision whether to grant or deny a continuance is within the sound discretion of the trial court. *Sanjines v. Ortwein & Assocs., Inc.*, 984 S.W.2d 907, 909 (Tenn. 1998) (citing *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413, 415 (Tenn. 1997)). An appellate court cannot interfere with the trial court's decision unless the court's decision constitutes an abuse of discretion and causes prejudice to the party seeking the continuance. *Sanjines*, 984 S.W.2d at 909.

The Tennessee Supreme Court has stated "under the abuse of discretion standard, a trial court's ruling 'will be upheld so long as reasonable minds can disagree as to propriety of the decision made.'" *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)). The standard "reflects an awareness that the decision reviewed involved a choice among several acceptable alternatives." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (citing *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999)).

#### The Motion to Strike the Board's Brief and Supplemental Exhibit List.

This Court must also review the Panel's decisions on each of these motions using the abuse of discretion standard. The Panel's decision applied an incorrect legal standard or reaches a decision which is against logic or reasoning. See *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

Decisions regarding the admission or exclusion of evidence are also reviewed by an appellate court under an abuse of discretion standard. *Brown v. Crown Equip. Corp.*, 181 S.W.3d 121, 131 (Tenn. 2004). A reviewing court is required to uphold the trial court's ruling "as long as reasonable minds could disagree about its correctness." *Caldwell v. Hill*, 250 S.W.3d 865, 869 (Tenn. Ct. App. 2007). An evidentiary ruling will only be set aside "when the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence." *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

### The Motion to Dismiss.

In formal disciplinary proceedings, the Tennessee Rules of Civil Procedure apply only when not “otherwise provided for in these Rules”. See *Tenn. S. Ct. Rule 9, §23.3*. The Supreme Court has addressed the contents of a petition for discipline in *Tenn. S. Ct. Rule 9, § 8.2*. According to Section 8.2, formal disciplinary proceedings are initiated by filing a petition for discipline “which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct.” Unlike *Tenn. R. Civ. P. 8*, Section 8.2 does not require a demand for judgment for the relief the pleader seeks.

### The Motion to Alter or Amend.

TRCP Rule 59.04 Post-Trial Motions ~ Motion to Alter or Amend a Judgment

***Rule 59.04 §12-2 (t) Motion to Alter or Amend a Judgment.*** *A motion to alter or amend a judgment shall be filed and served within thirty (30) days after the entry of the judgment.*

***Rule 59.04 §12-2 (u)*** A motion seeking to alter or amend a judgment filed and served within 30 days of the judgment will be treated as a motion under Rule 59.04 even if the movant had denominated the motion as one under Rule 60, or as a motion to reconsider.

Courts and commentators have identified four basic grounds for the motion:

1. Manifest errors of law or fact upon which the judgment is based;
2. Newly discovered evidence;
3. An intervening change in controlling law; and
4. Other manifest injustice.

Although trial courts have considerable discretion in granting the motion, a motion to alter or amend a judgment should not be used to raise for the first time arguments that could have been raised before entry of judgment. *Local Union 760, IBEW v. City of Harriman*, No. E2000-00367-COA-R3-CV, 2000 Tenn. App. LEXIS 792, at \*10 (Tenn. App. E.S. Dec. 8, 2000), *perm. to appeal denied* (Tenn. May 14, 2001)

In *Harris v. Chern*, 33 S.W.3d 741 (Tenn. 2000), adopting a standard derived from federal decisions construing Federal Rule 59(e) (motion to alter or amend a final judgment), the Court stated under Rule 54.02, the trial court should decide whether to consider new evidence in opposition to its partial summary judgment by applying a “non-exclusive balancing test” considering:

1. "The movant's efforts to obtain evidence to respond to the motion for summary judgment;
2. The importance of the newly submitted evidence to the movant's case;
3. The explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment;
4. The likelihood the nonmoving party will suffer unfair prejudice; and
5. Any other relevant factor."

The decision to deny a motion to alter or amend is reviewed under an abuse of discretion standard. *Stovall v. Clarke*, 113 S.W.3d 715, at 721 (Tenn. 2003). The Hearing Panel is only required to submit findings and judgment, in the form of a final decree of a trial court. See *Tenn. Sup. Ct. R. 9, § 8.3*

#### ISSUE 4

It is in the Court's discretion whether to allow additional evidence in the event irregularities in the proceedings are alleged. (See Rule 9). Testimony was proffered by counsel for Mr. Mabry. This testimony included a representative from the Tennessee Lawyers Assistance Program.

Next, counsel for Mr. Mabry attempted to Mr. Mabry qualified as an expert based upon the Preamble of Professional Conduct:

A lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service and engaging in these pursuits as part of a common calling to promote justice and public good. Essential characteristics of the lawyer are knowledge of the law, skill in applying the applicable law to the factual context, thoroughness of preparation, practical and prudential wisdom, ethical conduct and integrity, and dedication to justice and the public good.

With regard to the testimony of experts, Courts are required to apply the appropriate Rules of Evidence (See Rules 702, 403, 401), plus consider the Daubert standard. This test requires a determination of the qualifications of said expert and whether their testimony would assist the trier of fact.

## HOLDING

First, while acknowledging the seriousness of Mr. Mabry's unethical actions, the Court does not find the ruling of the Panel to be arbitrary and capricious. It seems obvious from the record, the Panel considered the mitigating and aggravating factors in rendering its decision. The Court finds the Board failed to show there is not sufficient evidence to determine the ruling by the Panel "is not based on any course of reasoning or exercise of judgment." (See *Jackson Mobile Phone Co. v. Tennessee Pub. Ser. Comm'n*, 876 S.W. 2d 106).

In issue three, Mr. Mabry complains the Hearing Panel did not follow the Tennessee Rules of Civil Procedure in regard to his case. This Court finds, based upon Rule 9, the Panel did comply with the Rules of Civil Procedure in conjunction with the Rules established by the Supreme Court in regard to attorney discipline. For example, Mr. Mabry complains the failure of the complaint to set out the proposed punishment and says this failure results in violation of Rule 8 by not making a demand for judgment. The Court disagrees with Mr. Mabry's contention and finds the potential of discipline gives adequate notice. The Court further finds, the rulings by the panel were appropriate and were not an abuse of discretion.

Finally, the Court allowed Mr. Mabry, through counsel, to make an offer of proof. The first witness was a representative of the Tennessee Lawyer Assistant Program. He testified Mr. Mabry had made several positive contributions to the program. The Court determines the exclusion of this evidence was appropriate. The work by Mr. Mabry to help individuals in the TLAP program is laudable but this evidence was presented to the panel through Mr. Mabry's own testimony. Based upon the lesser penalty than recommended by Disciplinary counsel, it is obvious this mitigating factor was considered. Next testimony was offered regarding the procedures followed by the Panel. An effort was made to qualify Mr. Mabry as an expert in this area. The Court determined Mr. Mabry was not qualified as an expert even though he was a practicing attorney but allowed him to make an offer of proof. The Court finds the presentation by these witnesses would not have aided neither the Hearing panel nor Mr. Mabry.

### 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. Mabry 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 discipline is fully 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. The Court further finds the panel did not abuse its discretion in regard to its various rulings, including the failure to allow the testimony from the TLAP Representative and Mr. Mabry as an expert witness.

Costs are assessed equally to the parties.

IT IS SO ORDERED, this the 28 day of March, 2013.


  
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 28<sup>th</sup> day of March, 2013:

David A. Lufkin  
5329 Browns Gap Road  
Knoxville, Tennessee 37918

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

  
Merry Peach Martin  
Judicial Assistant to Judge Don R. Ash