

IN THE CHANCERY COURT OF KNOX COUNTY, TENNESSEE  
AT KNOXVILLE

ENTERED

OCT 27 2017

THOMAS F. MABRY,

Petitioner,

vs.

BOARD OF PROFESSIONAL  
RESPONSIBILITY OF THE SUPREME  
COURT OF TENNESSEE,

Respondent.

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HOWARD G. HOGAN  
1404-122

No. 193376-1 ✓

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**MEMORANDUM AND ORDER**

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This matter came on to be heard on the 18<sup>th</sup> day of October, 2017, before Robert E. Lee Davies, Senior Judge, upon the petition for certiorari filed by Thomas F. Mabry, (sometimes referred to as "Petitioner"). The Court has received a copy of the Hearing Panel transcript, the official record with exhibits, and the briefs filed by both parties. After argument of Petitioner and counsel for Respondent, the Board of Professional Responsibility, the Court makes the following findings of fact and conclusions of law.

**Factual and Procedural History**

This case began with a petition for discipline filed by the Board against Mr. Mabry. Mr. Mabry was representing himself during this proceeding; however, prior to the scheduled hearing on the disciplinary proceeding, Mr. Mabry submitted a notice of disability pursuant to Tennessee Supreme Court Rule 9 § 27.4. In his notice, Mr. Mabry contended that he was suffering from a disability by reason of mental or physical infirmity or illness that prevented him from responding to or defending against the disciplinary proceeding which was pending against him. On October

27, 2015, the Supreme Court issued an order which immediately transferred Mr. Mabry to disability inactive status for an indefinite period. The Supreme Court then referred this matter to a hearing panel for a formal hearing to determine Mr. Mabry's capacity to continue to practice law and to respond to or defend against the complaint and the Court directed that Mr. Mabry would have the burden of proof by a preponderance of the evidence.

The competency hearing was set for July 7, 2016; however, on June 27, 2016, Mr. Mabry moved for a continuance on the grounds that he had been unable to obtain a report regarding his mental disability. The motion was not opposed by the Board, and the Panel entered an order resetting the hearing for October 21, 2016. Mr. Mabry represented himself at the hearing on October 21, 2016. Mr. Mabry is an avid hiker. He takes clients on trips through the mountains in Tennessee and North Carolina. Mr. Mabry is also a recovering alcoholic with twenty-four years of sobriety. As the date for the hearing approached, Mr. Mabry began to experience thoughts of killing himself. He even considered jumping off a cliff during one of his many hikes.

To support his claim of disability, Mr. Mabry introduced the report of Dwight Ernst. Mr. Ernst is a licensed clinical social worker. His diagnosis of Mr. Mabry was "generalized anxiety disorder". Mr. Mabry claimed his inability to defend himself from the disciplinary charge has been a gradual progression. On cross examination, Mr. Mabry admitted the last time he had been prescribed an antidepressant was 2007 and that he had not seen a medical professional for a very long time. He admitted to cross-examining two adverse witnesses in this case in two telephone depositions just prior to being placed on disability inactive status. He also admitted he had advised a woman by the name of Rhonda Ingraham in North Carolina in dissolving a domestic partnership with property division, and that he wrote a letter on behalf of Ms.

Ingraham. The Board also introduced correspondence between Mr. Mabry and a former client from Blount County. The correspondence was dated November 8, 2015 and suggested that Mr. Mabry might be expecting a fee if she wanted him to help her.

Mr. Mabry was asked to explain why he needed a secretary at this point since his license was suspended. His response was that his secretary owed him some money, and she would occasionally step in on his behalf when he did not want to practice law or deal with clients. Finally, the Board introduced photographs of Mr. Mabry hiking through the mountains of North Carolina and jumping off a waterfall in South Carolina after he was transferred to disability status.

The Panel Chairman asked Mr. Mabry if he had presented any medical professional who indicated that Mr. Mabry suffers from a disability by reason of mental or physical infirmity or illness which disability makes it impossible for him to respond to or defend against the complaint. Mr. Mabry admitted that Mr. Ernst did not specifically address this issue, nor did Mr. Ernst indicate any further recommendations for treatment of Mr. Mabry.

#### **Standard of Review**

When reviewing a Hearing Panel's judgment, a trial court must consider the transcript of the evidence before the Hearing Panel and its findings and judgment. Tenn. Sup. Ct. R9, § 1.3. On questions of fact, the trial court may not substitute its judgment for that of a Hearing Panel as to the weight of the evidence. Bd. of Prof. Responsibility v. Allison, 284 S.W.3d 316, 323 (Tenn. 2009). Any modification to a Hearing Panel's decision must be based on one of the specific factors set forth in Tenn. Sup. Ct. R9 § 1.3. Bd. of Prof. Responsibility v. Love, 256 S.W.3d 644, 652 (Tenn. 2008).

Under section 1.3, a trial court has the discretion to reverse or modify a decision of the Hearing Panel only if the petitioner's rights have been prejudiced by findings, inferences, conclusions, or decisions that 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 light of the entire record. Tenn. Sup. Ct. Rule 9 § 1.3. This Court reviews questions of law *de novo* but does not substitute its judgment for that of the Hearing Panel as to the weight of the evidence on questions of fact. Tenn. Sup. Ct. Rule 9 § 1.3; Maddux v. Board of Prof'l Responsibility, 409 S.W.3d 613, 621 (Tenn. 2013).

#### **Analysis**

The first issue for the Court to consider is the standard of proof that is required under a proceeding pursuant to Tenn. S. Ct. Rule 9 § 27.4(a). From a review of the decisions from our Supreme Court, it does not appear that the Court has specifically considered the standard of proof when determining whether an attorney suffers from a mental or physical infirmity or illness which makes it impossible for him or her to respond to or defend against a complaint for discipline. The Court concludes that the standard used in competency proceedings pursuant to Tenn. S. Ct. Rule 9 § 27.4(a) is the same standard to determine whether a criminal defendant is competent to stand trial in Tennessee. Tennessee has adopted the standard for competency of a criminal defendant set forth in Dusky v. U.S., 362 U.S. 402, 80 S.Ct 788, 789 (1960). Both Tennessee decisions and the Federal Constitution prohibit the trial of a defendant whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense. Mackey v. State, 537

S.W.2d 704, 707 (Tenn. Crim. App. 1975). “A competency hearing is a very narrow inquiry aimed at determining whether one who is charged with a criminal defense is presently competent to stand trial. In this state, a defendant is considered competent to stand trial if he has mind and discretion which would enable him to appreciate the charges against him, the proceedings thereon, and enable him to make a proper defense.” State v. Stacy, 556 S.W.2d 552, 553 (Tenn. Crim. App. 1977).

However, in the event an attorney elects to represent himself, a heightened standard should apply for a disciplinary hearing. “Attorneys appearing *pro se* must have the capacity to intelligently weigh the services of counsel and adequately represent themselves by responding appropriately and raising legitimate defenses. Under this standard . . . Attorneys are not competent to defend their disciplinary actions where their mental condition interferes with their understanding of the underlying situation and prevents them from responding appropriately and raising legitimate defenses.” In Re: Keefe, 159 Wash.2d 822, 835, 154 P3d 213 (2007). Applying the standard used by the Supreme Court of Washington, Mr. Mabry has the burden of demonstrating he did not have the mental ability to represent himself by responding appropriately and raising legitimate defenses to the disciplinary charges against him.

In this case, the Hearing Panel made the following findings:

Mr. Ernst’s letter and records clearly set forth that respondent has reported suicidal ideations; however, neither the letter from Mr. Ernst nor the medical records presented from Mr. Ernst’s evaluation of Mr. Mabry contain any reference or suggestion that Mr. Mabry is unable to defend against the allegations contained in the disciplinary complaint. Moreover, there is no evidence elsewhere in the record that Mr. Mabry suffers from a mental infirmity rendering him unable to respond or defend against the pending disciplinary proceeding.

To the contrary, Mr. Mabry’s activities demonstrate that he is capable of responding to and defending against the complaint. He is actively

involved in the hiking community and regularly engages in difficult and demanding hikes. In his testimony, Mr. Mabry clearly expressed an understanding and appreciation of the dangers of these hikes. In his Post-Trial Brief, Mr. Mabry argues that his willingness to participate in such dangerous activities is “tantamount to a death wish, especially when thoughts of the complaints and his law practice permeated his thought process during the extreme activity period.” Respondent asserts these concerns were related to Mr. Ernst. Nevertheless, Mr. Ernst made no findings that would suggest respondent is incapable of understanding or defending himself in these proceedings.

(Report of Hearing Panel entered January 17, 2017).

Undoubtedly, any attorney faced with a disciplinary proceeding will experience a great deal of anxiety, and the Court can take judicial notice that every attorney faced with a similar situation would want to avoid having to respond to the allegations. However, the proof in this case supports the findings of the Panel that Mr. Mabry has the capacity to respond and defend against the allegations in the pending disciplinary proceeding. The decision of the Hearing Panel is hereby **AFFIRMED**, and the disciplinary proceedings against Mr. Mabry shall proceed.

ENTERED this 27 day of October, 2017.

  
ROBERT E. LEE DAVIES, SENIOR JUDGE

**CLERK'S CERTIFICATE OF SERVICE**

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

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*Howard G. Hogan*  
\_\_\_\_\_  
Clerk and Master

by: *Sandy J. Johnson*  
*Deputy Clerk*

*10/31/17*  
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Date