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

IN RE: THOMAS FLEMING MABRY, DOCKET NO: 2015-2500-2-WM(27)
BPR #9065, Respondent,
An Attorney Licensed to
Practice Law in Tennessee
(Knox County)

REPORT AND RECOMMENDATION OF HEARING PANEL¹

On October 27, 2015, this matter was referred to a hearing panel by order of the Tennessee Supreme Court. The Panel consisted of Michael J. King (Chair), Oliver Adams, and James G. O’Kane, Jr. Pursuant to Tenn. Sup. Ct. R. 9, ¶ 27.4(a), the Hearing Panel was asked to determine the Respondent’s capacity to continue to practice law and to respond to or defend against the pending disciplinary proceeding set forth in docket number 2015-2412-2-WM. As this issue was raised by Mr. Mabry via a notice filed with the Tennessee Supreme Court on October 20, 2015, the burden of proof rests upon Mr. Mabry. He must establish by a preponderance of the evidence that he suffers from a disability by reason of mental or physical infirmity or illness that prevents him from responding to or defending against the disciplinary proceedings that are currently pending.

A hearing was held on October 21, 2016. The evidence received by the Panel included the testimony of Mr. Mabry, records and reports from Dwight D. Ernst, a licensed medical social

¹ On January 5, 2017, the Hearing Panel issued a Report and Recommendation in this matter. Subsequently, it came to the Panel’s attention that the Respondent had timely submitted a “Post-Trial Brief.” Because the Panel had not considered the Respondent’s Brief prior to issuing a decision, the Panel withdrew its January 5, 2017 Report and Recommendation.

worker and mental health therapist at the Johnson City Community Health Center, certain emails to and from Mr. Mabry and photographs. No other evidence was presented.

Mr. Mabry testified that he has been a recovering alcoholic for 24 ½ years. He is a member of the Tennessee Lawyer Assistance Program (“TLAP”) and has been involved since TLAP was formed. He also remains involved with Alcoholics Anonymous.

Mr. Mabry testified that when dealing with the pending board investigation, he has suicidal ideations. The closer to the hearing date on the disciplinary matters, the worse the suicidal ideations became. When hiking in North Carolina, he contemplated jumping off a cliff. He states he feels shame, anger and depression from the complaints filed against him. He further testified that any time he has to deal with his law practice he goes into “anxiety mode.” He is very nervous about the disciplinary hearing. Mr. Mabry is not currently on any medications for mental health issues. He previously took anti-depressants; however, the last time he took them was in 2007.

Under cross examination, Mr. Mabry’s active interest in hiking and photography was brought forward. Various photos were introduced, many of which were taken after the institution of disciplinary proceedings. They show Mr. Mabry involved in hiking at difficult locations, sliding down natural waterfalls and jumping into rivers from heights. Mr. Mabry currently is involved in photography and relies on the largess of donors to support himself.

Mr. Mabry represented himself at this hearing and previously participated in two telephonic depositions in the disciplinary case. In addition, disciplinary counsel introduced a series of emails from Mr. Mabry that were sent after the scheduled hearing on his disciplinary matter wherein he appears to be providing guidance to a client on a legal issue.

Mr. Mabry introduced a letter and medical records from Mr. Ernst. The letter and records state that Mr. Mabry expressed feeling suicidal 2 or 3 times in the several months prior to September 22, 2016. It also states that Mr. Mabry has reported episodic depression a couple times monthly, lasting from hours to several days. The letter states that Mr. Mabry did not meet the criteria for admission to a psychiatric hospital for safety. The letter also states that Mr. Mabry denied he was experiencing suicidal thoughts on the date the letter was written. Neither the letter from Mr. Ernst nor the medical records introduced at the hearing state that Mr. Mabry suffers from a mental infirmity or illness that prevents him from responding to or defending against the disciplinary proceedings that are currently pending.

Tennessee cases do not specifically address the nature and extent of the evidence that must be presented by an attorney who raises the defense of mental or physical infirmity as a defense to avoid disciplinary proceedings. In the context of criminal cases, the Tennessee Supreme Court has held that, “[t]o be competent to stand trial, a defendant in a criminal case must have ‘the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense.’” *State v. Reid*, 164 S.W.3d 286, 306 (Tenn. 2005). Other states have directly examined the nature of the proof that must be presented in attorney disciplinary cases.

The Washington Supreme Court addressed the defense of mental infirmity in *In re: Keefe*, 154 P.3d 213 (2007). The court held:

An attorney is competent to appear in bar disciplinary proceedings where he is capable of properly understanding the nature of the proceedings against him and capable of rationally assisting his legal counsel in the defense of his cause.

Id. at 835. (quotations and citations omitted). The Supreme Court of Washington delineated a different standard in cases where an attorney is representing himself at a disciplinary hearing as opposed to being represented by counsel:

But a finding that the attorney is competent to appear is not equivalent to a finding that the attorney is competent to appear *pro se*. Attorneys appearing *pro se* must have the capacity to intelligently waive the services of counsel and adequately represent themselves by responding appropriately and raising legitimate defenses. Under this standard we have held that 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.

Id.

In *Ballard v. State Bar of California*, 35 Cal. 3d 274, 284 (1983), Ballard contended that disciplinary proceedings should be abated because testimony suggested that his misconduct was attributable to long-term stress and emotional disorders and that the continuing emotional problems adversely affected his competence. The California Supreme Court rejected this argument noting that Ballard did not assert that his alleged mental illness had adversely affected his ability to assist in the defense of the disciplinary proceeding nor would the record support such a contention. *Id.* at 235.

In *Attorney Grievance Commission of Maryland v. Kourtesis*, 437 Md. 436 (Md. Ct. App. 2014) the court held that Kourtesis had met his burden of proof to place his pending disciplinary proceeding in abeyance due to mental disability.

As grounds for his motion, Kourtesis asserted that he suffered from depression, making it impossible (indefinitely) to defend himself in a disciplinary matters or to assist his counsel in the defense against the charges. . . . Kourtesis included, in support of his assertion, letters from Walker Lyerly, M.D., who diagnosed Kourtesis as having a Major Depressive Disorder and Dan Schwartz, Psy.D. (a licensed clinical psychologist), who diagnosed Kourtesis with

Major Depression, Recurrent, Moderate. Both letters asserted that Kourtesis's depression rendered him unable to assist his counsel in defending himself in disciplinary proceedings in the District of Columbia.

Id. at 440. (Emphasis added).

The undisputed testimony in this case demonstrates that Mr. Mabry has suffered from suicidal ideations from time to time over the last several years. Respondent asserts (1) that the “suicidal ideations are directly related to his practice of law and defending the disciplinary complaints against him.” Respondent Brief, p.2. Respondent further asserts that Mr. Ernst “specifically considered both facets of Respondent’s ability to competently defend himself in an upcoming disciplinary hearing without harming himself and also Respondent’s ability to practice law.” *Id.*

Both of these assertions miss the point. 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.” Brief at p. 3. 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.

Respondent does not address the proof introduced by the Board regarding email communications between himself and a client around the time that the original disciplinary matter was set for hearing. These emails show Respondent providing legal advice to a client and further demonstrate he maintains the ability to understand and assist in legal matters.²

There is nothing in the record that would suggest Respondent does not contain the capacity to understand the nature and object of the proceedings against him, and to consult with counsel or to assist in preparing his defense. Even if applying the more rigorous standard set forth in *Keefe*, for attorneys appearing *pro se*, there is no evidence to establish that Mr. Mabry’s mental condition interferes with his understanding of the underlying situation or prevents him from responding appropriately and raising legitimate defenses.

Accordingly, this Panel finds:

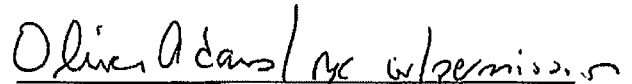
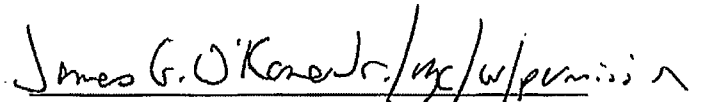
1. Mr. Mabry has failed to establish by preponderance of the evidence that he has a disability that makes it impossible for him to respond to or defend against the pending disciplinary proceeding;
2. Mr. Mabry has the capacity to respond and defend against the allegations in the pending disciplinary proceedings; and
3. Disciplinary proceedings against Mr. Mabry should proceed.

² Respondent prepared a cogent and reasoned argument in his Post-Trial Brief. Respondent notes that preparation of the Brief “was one of the most difficult mental and emotional tasks I have ever accomplished with lapsing into addictive and dangerous behavior.” Brief at p.4. While the task may have been emotionally difficult for Respondent, the work is a further indication of his ability to respond and defend against the pending disciplinary proceeding.

Entered this 17th day of January, 2017.



Michael J. King
Chair


Oliver Adams / mc w/permission
Oliver Adams
James G. O'Kane, Jr. / mc / w/permission
James G. O'Kane, Jr.