

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE,  
SIXTH JUDICIAL DISTRICT, KNOX COUNTY

|                                    |   |                                      |
|------------------------------------|---|--------------------------------------|
| <b>THOMAS FLEMING MABRY,</b>       | ) |                                      |
|                                    | ) |                                      |
| <b>Petitioner,</b>                 | ) |                                      |
|                                    | ) |                                      |
| <b>vs.</b>                         | ) | <b>No. 202551-2</b>                  |
|                                    | ) | <b>Senior Judge William B. Acree</b> |
| <b>BOARD OF PROFESSIONAL</b>       | ) |                                      |
| <b>RESPONSIBILITY OF THE</b>       | ) | <b>BOPR No. 2019-2984-2-WM</b>       |
| <b>SUPREME COURT OF TENNESSEE,</b> | ) |                                      |
|                                    | ) |                                      |
| <b>Respondent.</b>                 | ) |                                      |

**JUDGMENT**

Pursuant to Tenn. Sup. Ct. R. 9, section 33, Thomas F. Mabry appeals the decision of a Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee. In making his appeal, Mr. Mabry alleges procedural irregularities sufficient to vacate the decision of the Panel. The Panel conducted a virtual hearing on January 12, 2021—for which Mr. Mabry appeared only briefly—on the Petition for Discipline brought against him by the Board of Professional Responsibility of the Supreme Court of Tennessee. The Panel ultimately concluded that Mr. Mabry had violated a number of the Rules of Professional Conduct of both Tennessee and North Carolina—as well as North Carolina law. Specifically, the Panel found that Mr. Mabry failed to act with reasonable diligence and promptness; failed to advise a client that he was suspended and continued providing legal advice to her; charged an unreasonable fee; failed to refund unearned fees or expenses that were not incurred; failed to give reasonable notice to a client that he was suspended in order for her to obtain other counsel; practiced law without a license by providing legal services despite his suspension; charged a legal fee to provide notice to the IRS while suspended; provided legal services to clients in North Carolina where he was not admitted to practice law; committed professional misconduct by not accounting for advanced funds, failing

to provide his client's new counsel with a complete copy of his file, continuing to practice law despite a suspension, failing to notify his client, opposing counsel, and the court of his suspension, and failing to withdraw from the case despite his suspension; attempted to pay court costs with a check from a closed account; made misrepresentations to his client that he had provided notification to the IRS; misappropriated funds of at least \$8,000; committed a misdemeanor under North Carolina General Statutes § 84-8 by practicing law without a license; charged and accepted unreasonable legal fees in North Carolina without being admitted to practice there; held himself out as authorized to practice law in North Carolina despite not being admitted to practice there, and committed professional malpractice in North Carolina through the two preceding actions. The Panel also concluded that a number of aggravating factors were present in this case. The Panel found that Mr. Mabry had a number of prior disciplinary offenses, acted with a dishonest or selfish motive, engaged in a pattern of misconduct, committed multiple offenses, refused to acknowledge the wrongful nature of his conduct, had substantial experience in the practice of law, and demonstrated an indifference to making restitution. The Panel then determined that Mr. Mabry ought to be disbarred and ordered to pay restitution to several of his clients. Mr. Mabry urges the Court void the ruling of the Panel and allow him to undergo the disciplinary process with the procedural protections to which he is entitled. The Board, however, contends that despite "a litany of complaints claiming the COVID-19 pandemic should have been a sufficient basis to halt all proceedings in his case, Mr. Mabry has not provided any legal rationale for overturning the Hearing Panel's rulings."

Honorable William B. Acree, Jr., Senior Judge, sitting by designation over the Chancery Court of Knox County, heard oral arguments, reviewed the record and appellate briefs, and

considered applicable authorities. For reasons set forth below, the disciplinary decision of the Panel is **AFFIRMED**.

### Background

As Mr. Mabry is not directly contesting any particular finding or conclusion of the Panel, the factual and procedural history of the case will primarily be limited to the procedural deficiencies raised by Mr. Mabry and their context rather than the particulars of the allegations and violations. On March 27, 2019, the Board filed its Petition for Discipline. *See generally* Pet. for Discipline, Mar. 27, 2019. Disciplinary Counsel William C. Moody filed the Petition for Discipline on behalf of the Board, but Mr. Moody was replaced by Disciplinary Counsel Travis M. Lampley on June 18, 2019. Pet. for Discipline, at 18; Substitution of Counsel, at 1, June 18, 2019. Disciplinary Counsel Joseph K. Byrd replaced Mr. Lampley on May 26, 2020. Substitution of Counsel, at 1, May 26, 2020.

Following Mr. Byrd's substitution as counsel for the Board, the Board sought to depose three witnesses, only two of whom are relevant today, for proof at trial: Ronda Ingraham and Linda Russell. Mot. for Leave to Take Deps. of Unavailable Witnesses for Use at Trial, at 1–2, June 5, 2020. Both witnesses were complainants against Mr. Mabry. Petition for Discipline, at 6–8, 12–13. In the case of Ms. Ingraham, the deposition was requested to be telephonic because she resided in Maryland. Mot. for Leave to Take Deps., at 1. Mr. Mabry opposed the Board's motion, asserting inter alia a prior agreement<sup>1</sup> with Mr. Lampley that the Board would proceed without unavailable witnesses. Resp. to Mot. and Mot. for Judicial Notice and Continuance, at 1

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<sup>1</sup> The evidence of this agreement consists of an e-mail from Mr. Lampley, dated as Monday, January 27 (no year provided) 11:23 AM, informing Mr. Mabry of his motion to continue, and Mr. Mabry's e-mail, dated Monday, January 27 (no year provided) 2:12 PM, responding to a different e-mail about the motion to continue, stating that he would not object to the continuance so long as no additional witnesses or discovery would be permitted at the future hearing date. Resp. to Mot. and Mot. for Judicial Notice and Continuance, Unnumbered Exs.

& n.1, June 15, 2020. Mr. Mabry also requested the Panel take judicial notice of the facts that at the time of the Board's motion COVID-19 cases were increasing in Tennessee and Georgia (where Ms. Russell resided) and that Mr. Mabry was sixty-five years old and thus at a greater risk of harm from the COVID-19 virus. Resp. to Mot. and Mot. for Judicial Notice and Continuance, at 2-3. Mr. Mabry then requested for a stay of the proceedings until such time as the CDC declared the COVID-19 Pandemic over in Tennessee and Georgia. Resp. to Mot. and Mot. for Judicial Notice and Continuance, at 3. Two days later, Mr. Mabry filed an additional motion for continuance of the case, making the same arguments related to the COVID-19 Pandemic. *See generally* Motion for Continuance, June 17, 2020.

The Board responded to Mr. Mabry's motion for continuance, arguing that an indefinite continuation in light of Mr. Mabry's concerns was inappropriate and would prejudice the Board with respect to the witnesses' memories of the relevant events. Pet'r's Resp. to Resp't's Mot. to Continue, at 1, June 22, 2020. The Board pointed to the Tennessee Supreme Court's May 26, 2020 order directing courts to conduct business as much as possible by means other than in-person proceedings. Pet'r's Resp. to Resp't's Mot. to Continue, at 1-2. Thus, argued the Board, the appropriate way to proceed would be to conduct the final hearing remotely by video or telephonic conference calls. Pet'r's Resp. to Resp't's Mot. to Continue, at 2. With respect to Mr. Mabry's specific objections to the depositions of Ms. Ingraham and Ms. Russell, the Board rejected the existence of any purported agreement of the nature suggested by Mr. Mabry. Pet'r's Resp. to Resp't's Mot. to Continue, at 2-3. The Board explained that Mr. Lampley did not respond in any way to the conditions for a continuance offered by Mr. Mabry. Pet'r's Resp. to Resp't's Mot. to Continue, at 2; *see supra* note 1. The Board noted that the order issued by the Panel after the telephonic hearing on the Board's motion to continue, which Mr. Mabry claims was limited by his

agreement with Mr. Lampley, contains no limitations on discovery or taking depositions for proof. Pet'r's Resp. to Resp't's Mot. to Continue, at 3 & Ex. 4. The Board also explained that Mr. Mabry did not object to this order in any way for five months until the Board sought to depose the witnesses for trial. Pet'r's Resp. to Resp't's Mot. to Continue, at 3. Following a hearing on the matter, the Panel concluded that an agreement did exist between Mr. Mabry and the Board but that it applied only to additional discovery. Order, at 1-2, Aug. 11, 2020. A deposition for proof, the Panel concluded however, was outside the scope of this agreement and therefore permissible. Order, at 2. The Panel then ordered the Board to provide Mr. Mabry with a means to participate in the depositions if he did not feel comfortable attending in-person such as via Zoom or telephonically. Order, at 2.

The Board provided Mr. Mabry with notice of Ms. Ingraham's telephonic deposition for proof one week ahead of time. Notice of Telephonic Deposition, at 1, Aug. 20, 2020. The Board then sought clarification of the Panel's previous order. Motion, at 1, Aug. 2020. Mr. Mabry, upon receiving the aforementioned Notice, informed the Board that he would not participate in the telephonic deposition and would not be available for a deposition or any other matter until more than one month later. *See* Motion, at 1 & Ex. 2. Mr. Mabry subsequently filed his objection to the deposition and moved to take up the scheduling of depositions at the parties' previously scheduling September 29, 2020 hearing. *See generally* Objection to Taking of Dep. and Resp. to Mot. and Mot. to Set TRCP 16 Scheduling Conf. for Deps. and Other Pretrial Matters, Aug. 20, 2020. Mr. Mabry subsequently amended his objection and motion, requesting a protective order requiring all depositions for proof to be set by agreement between the parties. Amendment, at 1-3, Aug. 24, 2020. The Panel thereafter issued an order authorizing the telephonic deposition as originally planned by the Board. Order, at 1, Aug. 25, 2020. A companion order entered under

an identical title on the same date found Mr. Mabry's objection to be without merit. Order, at 1, Aug. 25, 2020.

On September 3, 2020, the Board filed a Notice of Deposition three weeks ahead of time for the in-person deposition for proof of Ms. Russell. Amended Notice of Deposition, at 1, Sept. 3, 2020. Mr. Mabry was given the option to appear via telephone. Amended Notice of Deposition, at 1.

The Panel eventually set the final hearing in this matter to be held virtually via Zoom on Tuesday and Wednesday, January 12–13, 2021. Order, at 1, Dec. 4, 2020; Notice of Hearing, at 1, Dec. 22, 2020. Two weeks before the hearing, Mr. Mabry filed another motion for a continuance in light of the COVID-19 Pandemic. *See generally* Mot. for Continuance and Mot. to Exclude Evidence, Dec. 29, 2020. The face of the motion states that Panel Chair John Eldridge, when advised by Mr. Mabry of the motion, issued a sua sponte order requiring the hearing to proceed as scheduled via Zoom. Mot. for Continuance and Mot. to Exclude Evidence, at 1. Mr. Mabry once again articulated his concerns with the proceedings going forward despite the risk posed by the COVID-19 virus and no exigent circumstances existing that required the immediate resolution of this matter. Mot. for Continuance and Mot. to Exclude Evidence, at 1. Mr. Mabry also renewed his objection to the testimonies obtained through the depositions for proof. Mot. for Continuance and Mot. to Exclude Evidence, at 1–2. The Board responded, opposing Mr. Mabry's motion and pointing out that the Tennessee Supreme Court's most recent order provided for all proceedings to continue by remote means—*not* an indefinite suspension of proceedings. Pet'r's Resp. to Resp't's Mot. for Continuance, at 1–2, Dec. 30, 2020. Responding specifically to Mr. Mabry's argument that he would be prejudiced by the inability to confront and cross-examine live witnesses, the Board argued that remote proceedings adequately addressed any due process

concerns. The Panel denied Mr. Mabry's motion for a continuance and once again rejected his arguments as to the depositions for proof. Order, at 1, Jan. 6, 2021. |

The final hearing was held on January 12, 2021. Ultimately, two failed efforts to have Mr. Mabry sign into the live hearing resulted in Mr. Mabry giving a statement and then hanging up. According to Mr. Mabry, he could not see anyone at the hearing, and he could not adequately participate under those circumstances, and so he terminated the connection following his statement. The hearing proceeded in Mr. Mabry's absence. The Panel thereafter issued its judgment, which concluded that Mr. Mabry violated Tennessee Rules of Professional Conduct 1.1, 1.3, 1.4(a), 1.5(a), 1.16, 5.5, and 8.4, committed a misdemeanor under North Carolina law by engaging in the unauthorized practice of law within that jurisdiction, and further violated North Carolina Rules of Professional Conduct 1.5(a), 5.5(b)(2), and 8.4. *See generally* Hearing Panel's Findings of Fact and Conclusions of Law, Mar. 29, 2021. The Panel recommended that Mr. Mabry be disbarred and ordered to pay restitution to several of his clients. Hearing Panel's Findings of Fact and Conclusions of Law, at 26.

#### **Scope of This Appeal**

The Board frames the issues in this appeal as whether the Panel erred in (1) admitting the depositions of Ms. Ingraham and Ms. Russell as evidence in the disciplinary hearing; and (2) holding the deposition of witness Ms. Ingraham could be taken by telephone pursuant to Tenn. R. Civ. P. 30.02(7). Respondent's Brief, at 12. As a general matter, however, it appears to this Court that Mr. Mabry is asserting that the Panel's decision was "made upon unlawful procedure" within the meaning of Tenn. Sup. Ct. R. 9, § 33.1(b)(3). Those specific procedures identified are the (1) lack of adequate notice for the depositions of Ms. Ingraham and Ms. Russell, (2) use of the depositions for Ms. Ingraham and Ms. Russell for proof, and (3) remote hearing on the Board's

Petition for Discipline in which Mr. Mabry was unable to meaningfully participate. Petitioner's Brief, at 1–3. The Court will examine the arguments in the manner presented by Mr. Mabry.

### Standard of Review

The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. . . . The court may affirm the decision of the hearing panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the party filing the Petition for Review have been prejudiced because the hearing panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the hearing 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 hearing panel as to the weight of the evidence on questions of fact.

Tenn. Sup. Ct. R. 9, § 33.1(b). A reviewing trial court is limited to those circumstances listed. *Bd. of Prof'l Responsibility v. MacDonald*, 595 S.W.3d 170, 181 (Tenn. 2020) (quoting *Hancock v. Bd. of Prof'l Responsibility*, 447 S.W.3d 844, 850 (Tenn. 2014)). It may neither re-weigh the evidence nor substitute its judgment in the place of that of the hearing panel. *Harris v. Bd. of Prof'l Responsibility*, --- S.W.3d ---, No. M2020-01113-SC-R3-BP, 2022 WL 1278034 (Tenn. Apr. 29, 2022) (citing *Bd. of Prof'l Responsibility v. Barry*, 545 S.W.3d 408, 420 (Tenn. 2018)). Based upon the nature of the parties' arguments and the evidence in the record, the Court did not find it necessary to take additional proof. *See* Tenn. Sup. Ct. R. 9, § 33.1(b) ("If allegations of irregularities in the procedure before the hearing panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The trial court may, in its discretion, permit discovery on appeals limited only to allegations of irregularities in the proceeding.").



### Analysis

Mr. Mabry asserts that “[a] significant amount of the[se] irregularities . . . resulted from the actions of subsequent disciplinary counsel following Mr. Moody’s departure from the case.” Petitioner’s Brief, at 2. Once the Panel set January 12, 2022, hearing date, Mr. Mabry claims Mr. Byrd and the Panel “worked diligently towards a result which disposed of the [Petition] but jointly obscured the pre-hearing irregularities in the [case].” Petitioner’s Brief, at 2. Mr. Mabry primarily focuses on the failure of the Board, acting through Mr. Byrd, to set up a Zoom conference call in a manner in which Mr. Mabry could meaningfully participate in the hearing. Petitioner’s Brief, at 2. Mr. Mabry also alleges the Board, acting through Mr. Byrd, failed to adequately provide notice for the depositions of Ms. Ingraham and Ms. Russell and was nevertheless permitted not only to take those depositions without Mr. Mabry but then to introduce those depositions as evidence before the Panel. Petitioner’s Brief, at 2–3. The Board responds that the Panel addressed each of these issues in a manner consistent with the orders of the Tennessee Supreme Court, and that in any case Mr. Mabry fails to identify any authority supporting his arguments. Respondent’s Brief, at 12–14.

Mr. Mabry on the whole argues that the alleged procedural deficiencies in this case effectively deprived him of his right to defend the Board’s disciplinary charges against him. Thus, this appeal only implicates the third ground for reversal or modification: if “the hearing panel’s findings, inferences, conclusions or decisions are . . . made upon unlawful procedure.” Tenn. Sup. Ct. R. 9, § 33.1(b)(3). The point of procedural protections is “to ensure ‘that litigants are ‘given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner.’” *Brooks v. Bd. of Prof’l Responsibility*, 578 S.W.3d 421, 428 (Tenn. 2019) (quoting *In re Walwyn*, 531 S.W.3d 131, 139 (Tenn. 2017)).

The overarching principle of procedural due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (citations omitted); see *Keisling v. Keisling*, 92 S.W.3d 374, 377 (Tenn. 2002) (citations omitted). Or, stated another way, procedural due process ensures that litigants are “given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner.” *Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006).

*Walwyn*, 531 S.W.3d at 138.

In the context of attorney discipline, “[a]ttorneys facing disciplinary proceedings are entitled to procedural due process, which includes notice of the alleged misconduct and an opportunity to be heard.” *Mabry v. Bd. of Prof'l Responsibility*, 458 S.W.3d 900, 908 (Tenn. 2014) (citing *Moncier v. Bd. of Prof'l Responsibility*, 406 S.W.3d 139, 156 (Tenn. 2013)). But such attorneys are *not* entitled to the same due process as criminal defendants. *Walwyn v. Bd. of Prof'l Responsibility*, 481 S.W.3d 151, 170 (Tenn. 2015). “Tennessee’s disciplinary process affords lawyers notice and an opportunity to be heard, as well as other protections, including the right to have counsel present, the opportunity to cross examine witnesses, and the right to present evidence.” *Moncier*, 406 S.W.3d at 156. The Court will address each alleged procedural deficiency presented by Mr. Mabry in turn.

I. Adequate Notice of the Depositions of Ms. Ingraham and Ms. Russell

Mr. Mabry first argues that he did not receive proper notice of the depositions of Ms. Ingraham and Ms. Russell. An attorney facing disciplinary charges in Tennessee is undoubtedly entitled to notice. *Moncier*, 406 S.W.3d at 156. Strictly speaking, notice in this context refers to notice of the charges against the attorney, not specifically a deposition. See *Mabry*, 458 S.W.3d at 908 (stating that “procedural due process . . . includes notice of the alleged misconduct”). But “[t]he concept of notice concerns notions of fundamental fairness, affording parties the opportunity

to be apprised when their interests are implicated in a given matter, and notice is not a rigid concept.” 58 Am. Jur. 2d *Notice* § 2. And “notice” in the sense relevant here is part of making the opportunity to be heard meaningful. This is especially true when a deposition is to be used as proof at trial. Mr. Mabry is entitled to be “able to cross-examine the witnesses the Board called against him,” *Mabry*, 458 S.W.3d at 908, and thus must receive adequate notice of the hearing, or in this case the depositions for proof. Indeed, our rules of civil procedure<sup>2</sup> contemplate as much by providing certain requirements for notice of a deposition:

A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall be served on the other parties at least five days beforehand when the deposition is to be taken in the county in which suit is pending. When the deposition is to be taken out of the county, at least seven days’ notice shall be given. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. . . .

Tenn. R. Civ. P. 30.02(1). With respect to notice, there is no difference in the requirements when the deposition is to be used for proof. *See* Tenn. R. Civ. P. 32.01(3).

Here, Mr. Mabry asserts he was not given adequate notice by the Board of the depositions for either Ms. Ingraham or Ms. Russell; Mr. Mabry does not, however, identify precisely what about each notice was inadequate. The Board responds that it provided Mr. Mabry with seven days’ written notice. An examination of the notices in the record leads the Court to conclude that indeed the notice given for both depositions was adequate. Both notices were given at least seven days in advance of the deposition and included the time, place, and date of the deposition, as well as the identity of the individual being deposed as required by Rule 30.02(1). The Board

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<sup>2</sup> The Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence apply to disciplinary matters unless the Tennessee Supreme Court Rules provide otherwise. Tenn. Sup. Ct. R. 9, § 34.3(a); *Mabry*, 458 S.W.3d at 907 (citation omitted).

additionally provided Mr. Mabry with notice of how to appear remotely for each deposition. Mr. Mabry's objection that he could not appear for a deposition for at least a month is dubious at best, and a vague reference to "previous work commitments scheduled for the time and date of the depositions and into the future" in Mr. Mabry's motion is hardly sufficient to render the notice provided inadequate. *See* Objection to Taking of Dep. and Resp. to Mot. and Mot. to Set TRCP 16 Scheduling Conf. for Deps. and Other Pretrial Matters, at 2. Accordingly, the Court finds Mr. Mabry's contention that he did not receive adequate notice of the depositions of Ms. Ingraham and Ms. Russell to be without merit.

## II. Use of The Depositions of Ms. Ingraham and Ms. Russell as Proof at Trial

Mr. Mabry next challenges the use of those same depositions at trial. "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is 'unavailable' as defined by Tennessee Rule of Evidence 804(a)." Tenn. R. Civ. P. 32.01(3). This rule "describes when a deposition can be used 'for proof' under the former testimony hearsay exception. Except with respect to some experts, a deposition is admissible as substantive evidence at trial if the deponent is unavailable to give live testimony." Tenn. R. Civ. P. 32.01, 2001 Advisory Comm'n cmt. "Unavailable," in the relevant part, is defined as follows.

(a) *Definition of Unavailability.* "Unavailability of a witness" includes situations in which the declarant:

(6) for depositions in civil actions only, is at a greater distance than 100 miles from the place of trial or hearing. . . .

Tenn. R. Evid. 804.

Here, Mr. Mabry once again does not specify the exact problem with using the depositions at trial. There is no dispute between the parties that Ms. Ingraham and Ms. Russell both resided more than 100 miles away from the place of the final hearing. Nor is there any dispute that Board

both sought and received orders from the Panel authorizing the depositions for proof and, in the case of Ms. Ingraham, the deposition to be conducted telephonically. In light of Mr. Mabry's concerns related to the COVID-19 Pandemic,<sup>3</sup> the Panel required the Board to provide Mr. Mabry with a means of appearing remotely for each deposition for proof. The Board did so. Mr. Mabry notes that the Panel allowed the depositions to be used despite his strenuous objection "follow[ing] the guidelines of T.R.C.P. 32.04(1) and (4).<sup>3</sup> The mere fact that the Panel heard, weighed, and rejected Mr. Mabry's concerns is of course no procedural error but due process itself—albeit with an unfavorable outcome. Accordingly, the Court finds Mr. Mabry's contention that the Panel improperly allowed the Board to use depositions for proof at trial to be without merit.

### III. The Use of a Remote Hearing in Which Mr. Mabry Could Not Meaningfully Participate.

Finally, the Court reaches the disciplinary hearing itself. Mr. Mabry is entitled to his opportunity to be heard. *Mabry*, 458 S.W.3d at 908 (citing *Moncier*, 406 S.W.3d at 156). And that opportunity must be meaningful. *See Moncier*, 406 S.W.3d at 161 (citing *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Heyne v. Metro. Nashville Bd. of Pub. Educ.*, 380 S.W.3d 715, 734–35 (Tenn. 2012); *Cooper v. Williamson Cnty. Bd. of Educ.*, 803 S.W.2d 200, 202 (Tenn. 1990)). Here, Mr. Mabry contends that he was deprived of his right to meaningful opportunity to be heard because he could not participate in the hearing. After two failed attempts at signing on for a live hearing, Mr. Mabry gave a statement and terminated the connection. At oral argument, the Board characterized Mr. Mabry's departure as simply hanging up on the hearing. Mr. Mabry concedes that he did hang up, but he argues it was because he could not see anyone. Further, Mr. Mabry argues, if the Panel was going to proceed

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<sup>3</sup> Rule 32.04 "is designed to bring together rules relating to the timing and method of presentation of objections based on errors and irregularities in depositions." Tenn. R. Civ. P. 32.04, Advisory Comm'n cmt.

with a remote hearing it should have sent someone to make sure that he could properly access Zoom.

Undoubtedly Mr. Mabry had an opportunity to be heard in a general sense; after all he made a statement to the Panel at the outset of his hearing. The question is whether that opportunity was meaningful. But Mr. Mabry points to no authority on this question. Nor does he explicitly argue what was deficient with the hearing other than it proceeded in his absence after he voluntarily terminated his remote connection. Perhaps the Court's analysis should end there. *See Brooks*, 578 S.W.3d at 431 (Lee, J., concurring in part) ("In short, Mr. Brooks failed to adequately make a procedural due process claim; at most, he only hinted at such a claim. That should have ended the discussion. . . . A party, not the Court, should identify the issues and provide adequate legal authority and argument. Tenn. R. App. P. 13(b). When a party fails to do so, it is not the Court's role to step in and fill in the gaps."). Nevertheless, this Court will examine the issue one step further.

When determining whether an opportunity to be heard was meaningful, the Tennessee Supreme Court has stated as follows:

To assure that this requirement is met, both the United States Supreme Court and [the Tennessee Supreme] Court require consideration of "three distinct factors." *Mathews v. Eldridge*, 424 U.S. [319,] 335, 96 S. Ct. 893 [(1976)]; *Smith v. State*, 357 S.W.3d 322, 357 (Tenn. 2011); *Phillips v. State Bd. of Regents*, 863 S.W.2d 45, 50 (Tenn. 1993). These factors include:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. at 335, 96 S. Ct. 893.

*Heyne*, 380 S.W.3d at 732. The private interest at stake is Mr. Mabry's law license. As our Supreme Court has stated many times, however, the right practice law in Tennessee is a privilege rather than a right. See, e.g., *Smith v. Bd. of Prof'l Responsibility*, 551 S.W.3d 712, 726 (Tenn. 2018) (citing *Hughes v. Bd. of Prof'l Responsibility*, 259 S.W.3d 631, 641 (Tenn. 2008)). And the Supreme Court's authority to regulate the practice of law is expansive. See *Beier v. Bd. of Prof'l Responsibility*, 610 S.W.3d 425, 435–36 (Tenn. 2020) (citing Tenn. Const. art. II, § 1; Tenn. Const. art. II, § 2; Tenn. Const. art. VI, § 1.). Thus, while Mr. Mabry's interest here is extant, it counts for comparatively little in this analysis. The risk of erroneous deprivation of an attorney facing disciplinary charges cannot participate in the hearing on those charges is both obvious and substantial. But the Tennessee Supreme Court had expressed a strong preference for remote proceedings due to the COVID-19 Pandemic. And Mr. Mabry himself had repeatedly expressed concerns over the risks to his health if he were to appear in-person. Moreover, Mr. Mabry was given more than a month's notice that the hearing would be conducted via Zoom by the Panel's December 4, 2020 order. It is inconceivable that Mr. Mabry could not have figured out some solution to his difficulties with Zoom in that time. Still further, the Panel's December 22, 2020 Notice of Hearing provided instructions on how to simply call into the hearing if he did not wish to use the video conference platform. Mr. Mabry easily could have called into the hearing from the start, or he could have called into the hearing after he encountered difficulties with Zoom. The Court recognizes of course that this would not have cured Mr. Mabry's complaint with being unable to see anyone.<sup>4</sup> But rather than working towards any sort of a solution, Mr. Mabry simply chose to end his participation. The risk of erroneous deprivation in this instance is therefore

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<sup>4</sup> In fact, due to the descriptions of the event at oral argument, it is not entirely clear to the Court whether Mr. Mabry made his statement to the Panel over Zoom or if he called into the remote hearing and then hung up again. The difference is ultimately immaterial.

entirely a consequence of his own actions. It is unlikely that efforts from an employee of the Board to instruct Mr. Mabry how to use Zoom could have alleviated an ignorance that was willful. Finally, the fiscal and administrative burden on the Board to send employees to make sure that every attorney facing disciplinary charges knows how to access a remote hearing is unknown. The Court suspects it would not be small, but of greater relevance is that it would subject the attorney (and the Board's employee(s)) to precisely the same risk from the COVID-19 virus Mr. Mabry sought to avoid from in-person proceedings. On the whole, the balancing of the *Mathews* factors weighs overwhelmingly against Mr. Mabry's preferred procedure. Accordingly, the Court finds Mr. Mabry's contention that the remote hearing was procedurally deficient because he could not fully participate in it to be without merit.

#### Conclusion

Because the Court has found Mr. Mabry's claims of procedural deficiencies to be entirely without merit, the decision of the Panel is **AFFIRMED**. Costs of this appeal are assessed against Mr. Mabry.

  
WILLIAM B. ACREE, SENIOR JUDGE

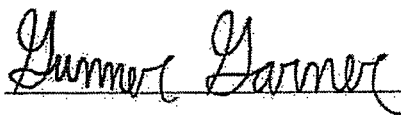


**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true and correct copy of this Judgment has been served upon Petitioner Thomas F. Mabry, Pro Se, and counsel for Respondent Board of Professional Responsibility for the Supreme Court of Tennessee via e-mail as provided above on this 10th day of June 2022.



CLERK