

IN THE CHANCERY COURT OF MONROE COUNTY, TENNESSEE

BOARD OF PROFESSIONAL)
RESPONSIBILITY OF THE SUPREME)
COURT OF TENNESSEE,)
)
Petitioner,)
)
vs.)
)
BARRY KEITH MAXWELL,)
BPR# 009572)
)
Respondent.)

FILED
SEP 05 2017
TIME 11:15
TERESA A. CHOATE
CLERK & MASTER MONROE CTY.

19,807
No. 2015-2477-3-AJ

ORDER

This matter came on to be heard on the 16th day of August, 2017, before Robert E. Lee Davies, Senior Judge, upon the Petition for Certiorari file by the Tennessee Board of Professional Responsibility (sometimes referred to as "Petitioner"). The Court has received a copy of the Hearing Panel transcript, the official record with exhibits, and the brief filed by the Board. Respondent, Barry Keith Maxwell, elected not to file a brief; however, Mr. Maxwell appeared for oral argument before the Court on the 16th. After argument of counsel for Petitioner and Respondent, the Court makes the following findings of fact and conclusions of law.

Factual and Procedural History

This case arose out of a petition for discipline filed with the Tennessee Board of Professional Responsibility on August 17, 2015. Respondent filed his answer to the petition on September 14, 2015. The trial before the Hearing Panel took place on December 1, 2016, and the Hearing Panel entered its decision by written order dated December 12, 2016. The order from the Hearing Panel found that Respondent had violated Rules of Professional Conduct 1.15

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and 8.4(a). The order also indicated the Panel reviewed aggravating factors set forth under ABA Standards 9.22. As a result, the Hearing Panel ruled that the law license of Mr. Maxwell be suspended for seventy-five days after which time he would be reinstated to the practice of law and placed upon probation for a period of six months. The conditions of Mr. Maxwell's probation were:

1. Enter into and comply with a monitoring agreement between himself and the Tennessee Law Assistant Program ("TLAP").

On March 13, 2017, the Board filed its petition for review with this Court.

Facts

Although the Panel failed to make any findings as to the facts of this case, they are largely undisputed. Karen Matheny is a resident of Madisonville, Monroe County, Tennessee. Ms. Matheny and Mr. Maxwell are neighbors. In August of 2012, Ms. Matheny retained Mr. Maxwell to represent her in connection with a construction project on her house. In September 2014, the case went to mediation and was settled. The Agreement required the defendant company to pay Ms. Matheny \$25,000, and the individual defendant, Mr. Falletti, owner of the company, was required to pay \$1,000. Under the terms of the Agreement, Mr. Falletti was to pay \$1,000 before October 1, 2014. In late September 2014, Mr. Falletti went to Mr. Maxwell's office and gave him \$500 in cash. Sometime after October 2, Ms. Matheny asked Mr. Maxwell if he had received the full payment of \$1,000. Mr. Maxwell informed her that Mr. Falletti needed a little bit more time and that he (Maxwell) was holding the first payment until he received the remaining \$500. Ms. Matheny agreed and waited.

Sometime after Mr. Maxwell had received the initial \$500, his wife, who was serving as his secretary, came to him and asked him to give her the \$500. At the time the Maxwells were

living with Ms. Maxwell's mother. The utilities had not been paid in two months and if they were not paid by the end of the following day they would be turned off. Mr. Maxwell told his wife the money was not his to give; however, before the end of the following day, Ms. Maxwell persuaded him to give her the money.

On November 6, 2014, Mr. Falletti brought in a check for the remaining \$500, and Mr. Maxwell signed an agreed order and filed it with the Court indicating that the judgment was satisfied. Mr. Maxwell did not call Ms. Matheny to tell her he had the money because he had already spent the first \$500 payment from Mr. Falletti. At approximately the same time, Mr. Maxwell was administratively suspended by the Supreme Court for his failure to complete his annual CLE requirements. Although Mr. Maxwell wrote his other clients and informed them of his suspension, he did not inform Ms. Matheny.

In December 2014, having heard nothing from Mr. Maxwell, Ms. Matheny went to his office and confronted him. At that meeting, Mr. Maxwell admitted he had received the entire \$1,000 but had spent the first \$500 for a personal emergency. Although Ms. Matheny was upset, she agreed to give Mr. Maxwell until after Christmas to pay her the \$500.

After approximately one month had expired from the date of the face-to-face meeting between Ms. Matheny and Mr. Maxwell in his office, Ms. Matheny began to worry since she still had not been paid, and she had no record that Mr. Maxwell owed her the \$500. Ms. Matheny went to another lawyer who recommended that she file a complaint with the Board of Professional Responsibility. After Ms. Matheny contacted the Board but before the Board took any action to notify Mr. Maxwell of her complaint, on January 19, 2015, Mr. Maxwell called Ms. Matheny on her cell phone and left her a message that he had her money. On January 20, 2015, Ms. Matheny went to Mr. Maxwell and collected her remaining \$500; however, she did not tell

Mr. Maxwell that she had already filed a complaint with the Board. By the time Mr. Maxwell received the Board's complaint, the \$500 had already been repaid.

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 nova* 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

In its petition for writ of certiorari, the Board takes issue with the discipline metted out by the Hearing Panel. Rather than suspension and probation, the Board argues the Panel should

have disbarred Mr. Maxwell from the practice of law. In order to prevail, the Board must demonstrate the Panel's decision was arbitrary or capricious.

The Board cites ABA Standard 4.11 which provides that:

Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

The Court agrees with the Board that Mr. Maxwell knowingly converted his client's funds. In fact, at the hearing, Mr. Maxwell admitted he knew it was wrong to take the \$500 and spend it. In its order, the Hearing Panel indicated it reviewed the aggravating factors in Standard 9.22. Although the Panel failed to articulate any particular aggravating circumstance, the Court finds there is evidence in the record to support a finding of the following factors:

1. Prior disciplinary expenses; and
2. Substantial experience in the practice of law.

Mr. Maxwell's prior disciplinary history includes a public censure in November 2013 for not promptly refunding an advanced payment of fees when it became clear that the work for which he had been retained was unnecessary. In October 2014, Mr. Maxwell received a private reprimand for failing to promptly return an unearned fee after being discharged, and in January 2016, Mr. Maxwell received a public censure for practicing law after being suspended for failing to comply with his CLE requirements. Mr. Maxwell has been practicing law since 1981. He testified regarding his employment with a law firm in Knoxville, where he was the head of litigation department.

At oral argument before the Court, Mr. Maxwell pointed out that counsel for the Board took the position before the Hearing Panel that this was not a case for disbarment. In his closing argument before the Panel, counsel for the Board made the following statement:

Looking back at my brief, a pretty harsh brief I wrote last spring, part of that stems from the Board's view of misusing client money. I think under this case, however, with the mitigating circumstances, this is not a disbarment case. I think from the Board's perspective, being the partisan advocate that I am, some period of active suspension would be appropriate.

(TR. Pg. 70)

Thus, the Board through its attorney took the position that this was a case for suspension rather than disbarment. The general rule is that stipulations are regarded as contracts or agreements, and they can be rescinded only upon grounds justifying the setting aside of such agreements or contracts generally. Naylor v. Naylor, 2016 W.L. 3923790 (Tenn. Ct. App. 2016, citing Prater v. Louisville and NR Co., 62 Tenn. App. 318, 329, 462 S.W.2d 514, 518 (1970). In Prater, *supra* the Court of Appeals quoted with approval Tennessee Procedure and Law Cases, Higgins and Crownover, Sec. 1131:

1131. Effective Stipulations – So long as stipulations remain unmodified, they will be controlling in the future disposition of the case. They cannot be receded from, nor can there be a change of attitude respecting the same, after the case is transferred to another court, or comes up again for review even in the same court. Stipulations deliberately entered into must be enforced. Nor will change in representation have any affect upon valid stipulations previously entered into. The stipulation entered into in one court by an attorney, then employed, cannot be departed from in an appellate court by a new or substitute attorney.

The Court finds that the Board is bound by the stipulation of its attorney when he argued to the Panel that this is not a disbarment case because of the mitigating circumstances. Moreover, the Court agrees with counsel for the Board that this is not a disbarment case even though Mr. Maxwell knowingly converted his client's \$500.

Although the Hearing Panel failed to acknowledge there were mitigating circumstances in this case (even though the Board's attorney admitted that there were), the proof supports the finding of mitigating factors. In this case, there is an absence of a dishonest or selfish motive. It

was not Mr. Maxwell's idea to convert his client's funds. In fact, when his wife first asked him for the money he told her "no". It was only after his wife pleaded with him the following day for the money so that her elderly mother would not have to go without heat that Mr. Maxwell acquiesced.

There is also evidence of personal or emotional problems. Mr. Maxwell testified that he experiences extreme anxiety and stress, that he has trouble showing up for work and going to court. These symptoms surfaced while he was working for a Knoxville law firm which resulted in his termination in 2004.

Another mitigating factor which supports the Panel's sanction of suspension is the fact that Mr. Maxwell paid his client her money before he was even aware that she had filed a complaint with the Board. By the time Mr. Maxwell received the petition from the Board, Ms. Matheny had already been repaid. Finally, both in front of the Hearing Panel and during argument before this Court, Mr. Maxwell expressed genuine remorse for his conduct.

Considering the above mitigating factors along with the aggravating factors the Court cannot conclude that the Panel's decision to suspend Mr. Maxwell was arbitrary and capricious. However, because of Mr. Maxwell's prior disciplinary offenses, the Court finds the Panel's probationary period was too short. The Court finds that it is not only in the public's best interest but also Mr. Maxwell's interest that his probation be extended to one year.

It is therefore **ORDERED** and **DECREED** that the judgment of the Hearing Panel is affirmed as modified. Barry Keith Maxwell shall be suspended for seventy-five days. Upon completion of his suspension, Mr. Maxwell shall be placed on probation for one year subject to the condition that he submit to an evaluation by TLAP and comply with any monitoring

requirement TLAP deems necessary. Costs of this appeal are taxed to the Board of Professional Responsibility.

ENTERED this 31 day of August, 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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Deputy Clerk and Master
Chancery Court

9-5-17
Date