IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

ENTERED
AUG 30 2004
HOWARD G. HOGAN
942-272A

JAMES L. MILLIGAN, JR.,	)	
	)	
Petitioner,	)	
	)	
	)	**No. 156269-1**
BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE,	)	
	)	
Respondent.	)	

JUDGMENT

Pursuant to Rule 9 of the Rules of the Supreme Court of the State of Tennessee, this matter came on to be heard on June 1, 2004, following a Petition for Certiorari from the Judgment rendered by the Hearing Panel, filed on August 23, 2002, pursuant to certain Complaints filed with the Board of Professional Responsibility.

Based upon the record created in the underlying proceeding, as well as the evidence presented before this Court, and Briefs and arguments of counsel, this Court arrived at certain findings and conclusions that were set forth in its Memorandum Opinion, which is adopted and incorporated by reference herein.

Based upon those findings and conclusions, it is the Judgment of this Court that the Petitioner, James L. Milligan, Jr., shall receive a public censure for the disciplinary infractions set forth in the Memorandum Opinion, and shall pay the costs and expenses of the proceeding in accordance with Rule 9, Section 24.3. It is therefore

ORDERED, ADJUDGED AND DECREED that the Petitioner, James L. Milligan, Jr., shall be subject to public censure for the matters stated in the Memorandum

Opinion, and shall pay the costs and expenses of this proceeding. No other discipline or punishment relative to the matters before this Court shall be imposed.

ENTER this the 29 day of August, 2004.

William H. Inman

Judge William H. Inman, Senior Judge
By Designation of the Supreme Court

APPROVED FOR ENTRY:

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MEMORANDUM OPINION
Pursuant to Rule 9
Rules of the Supreme Court

On November 30, 1999, a complaint was filed with the Board of Professional Responsibility [hereinafter "BPR"], alleging that Mr. Milligan issued a check in the amount of $216.67 to Turner Howard, Attorney, which had been drawn by Mr. Milligan on a client's trust account, and returned unpaid owing to insufficient funds. Mr. Turner was an employee or associate of Mr. Milligan.

On April 25, 2000, another complaint was filed with the BPR alleging, *inter alia*, that Mr. Milligan, in a case styled ***Kerry Johnson v. Barry Loveday***, had "settled the claim for $16,000.00 without consulting the client [Johnson], forged the client's signature on the Release, misled a Notary Public he employed to notarize the document, and deposited the funds in his personal account."

On April 26, 2000, a Petition for Temporary Suspension of Mr. Milligan's law license was

filed by Disciplinary Counsel, alleging, *inter alia*, ethical violations involving: law firm finances and trust accounting; the Kerry Johnson Matter; and the commission percentage check to G. Turner Howard, Attorney. The petition was also based on the reports from Suzanne Rose, the TennBar Management Services Management Consultant, expressing dissatisfaction with the finances of Mr. Milligan's law practice.

Mr. Milligan's law license was suspended on May 5, 2000, by order of Justice Birch. The suspension continued for forty-five days, until June 19, 2000, when Justice Birch entered an order reinstating Mr. Milligan's law license pending a full disciplinary hearing. The reinstatement was conditioned upon, *inter alia*: Mr. Milligan retaining Terry Hall, CPA to oversee the finances of is law practice, and Leroy Bible, a Certified Fraud Examiner, to review and audit all existing law office accounts.

On May 22, 2001, another complaint was filed with the BPR alleging financial improprieties relating to Mr. Milligan's law firm accounts, based on the report by Leroy Bible.

The BPR filed a Petition for Discipline on August 17, 2000, reciting the complaints filed against Mr. Milligan, Appellant, including: (1) "The G. Turner Howard Matter"; and (2) "The Richard Baker (Johnson) Matter." A Supplemental Petition for Discipline was filed on August 23, 2001, based on, *inter alia*, "The Certified Fraud Examiner Report Matter."

The BPR panel hearing was conducted on August 19 to 20, 2002, and the Panel's judgment, recommending disbarment, was filed on August 23, 2002.

The Turner Howard Matter

For a period of time, Turner Howard practiced law in Mr. Milligan's office. This matter arose when Mr. Howard received a commission check drawn by Mr. Milligan upon the client trust

account in October 1999 which was returned by the drawee bank for insufficient funds. Mr. Howard, *in consultation with Mr. Milligan*, advised Tripp Hunt of the Board of Professional Responsibility of this episode, by letter followed by a telephone conference of November 16 between these two attorneys.

In that letter, Turner Howard explained in detail how he had received the check as part of his commission percentage, that it had been returned for insufficient funds, and that he had then been issued a cashier's check. Mr. Howard further explained that he was not fully familiar with the procedure of the bank used by Mr. Milligan's law office, Bank First of Knoxville, with respect to the amount of time for which checks were held. *Mr. Howard*, assumed that enough time had elapsed for the check to clear, but admitted that he was incorrect and *accepted full responsibility for not making sufficient inquiry*.

Mr Howard went on to advise Tripp Hunt that a "vigorous fail-safe procedure has been implemented at the Milligan firm since the above incident-at-issue occurred."

Notwithstanding that Mr. Milligan's office took the initiative to contact the BPR, and despite Mr. Howard's explanation and his assumption of part of the responsibility, the Hearing Panel found that Mr. Milligan had violated Disciplinary Rule 1-102(4)(5)(6), because he had engaged in conduct involving "dishonesty, fraud, deceit or misrepresentation . . ., conduct that is prejudicial to the administration of justice . . . [and] conduct that adversely reflects on his fitness to practice law."

This matter is *de minimis*, and need not be further noticed; it did not involve fraud or dishonesty or deceit.

The Baker Matter

This episode was identified by the Hearing Panel as "The Richard Baker Matter," wherein

Attorney Richard Baker was not involved in the occurrence, but merely was the conduit by which some of Mr. Milligan's ex-employees voiced their complaint to the Board.

Kerry Johnson, in the late 1990's, employed Mr. Milligan to represent him in his claim for damages arising out of a traffic accident. After the complaint was filed, Johnson advised Mr. Milligan that he was soon to be incarcerated in a federal facility having been convicted of both arson and drug possession. The question then arose about what action should be taken if the claim could be settled while Johnson was imprisoned.

According to Mr. Milligan, it was agreed that he would be authorized to use his discretion and experience to enter into settlement negotiations with the insurance adjustor and resolve the case on Kerry Johnson's behalf. In addition to agreeing upon a settlement range, Mr. Milligan testified that Kerry Johnson authorized him to execute any and all documents needed to effect the settlement, and further authorized Mr. Milligan to receive the settlement proceeds and to treat and use those proceeds as though they were Mr. Milligan's own, but with the specific understanding that the proceeds would be paid to Mr. Johnson once he had been released from prison, together with a reasonable rate of interest.

After this meeting, Kerry Johnson was incarcerated. Mr. Milligan eventually negotiated a settlement with the insurance adjustor for $16,000.00 which was within the range that he and Kerry Johnson had already agreed upon. After the settlement proceeds were received, Mr. Milligan signed Johnson's name to the release and negotiated the settlement check by depositing the proceeds in his personal account. He procured a notarial jurat on the release form.

In the meanwhile, there had been some communication between Mr. Milligan and his client, as well as with Kerry Johnson's wife, Kesha. Although Kerry Johnson later said that he was not

aware that the case had settled, his wife, Kesha, contradicted him. She testified:

Q: When Mr. Johnson was in prison, do you know whether or not he had had any conversations with Mr. Milligan?

A: Yes.

Q: What do you know about those?

A: That he's going to keep me informed, let me know everything that happened.

Q: Did you talk to Mr. Milligan, or was this your husband's doing?

A: *My husband had talked to him a couple of times in jail.*

Q: Talked to Mr. Milligan a couple of times while he was in jail?

A: Yes.

Q: Did he tell you that he had done that?

A: That he had done what?

Q: Talked to Mr. Milligan?

A: Yes.

Q: What did your husband tell you about Mr. Milligan's conversations with your husband while your husband was in jail?

A: *That the insurance was wanting to ahead and take a plea.*

Q: *The insurance was going to settle?*

A: *Yes*

Q: *And Mr. Milligan had told him that?*

A: *Yeah* . . . .[Italics added]

Upon being release to a halfway house, Kerry Johnson came to Mr. Milligan's office, as arranged, for the purpose of receiving his settlement proceeds together with interest. He was sufficiently pleased with the arrangement to voice his satisfaction to a fellow client of Mr. Milligan's, who was in the waiting area at the same time as were Kerry Johnson and his wife. He gave no indication that he had been treated unfairly and never complained.

When Kerry Johnson and his wife met with Mr. Milligan, he received his settlement funds and interest, as promised. At that time, both individuals executed affidavits essentially ratifying the previous oral agreement, *affirming under oath* that Mr. Milligan had been given full and specific approval to settle the case for a reasonable sum, to execute a release, to endorse the settlement check, ant to utilize the funds for his own until such time as Kerry Johnson was able to leave prison and receive them himself.

Kerry Johnson later executed another affidavit, recanting what he had sworn to in the affidavit executed in Mr. Milligan's office. He later learned that a federal court had levied a substantial fine on Kerry Johnson following his arson and drug conviction. Under oath, Kerry Johnson admitted that he owed a considerable amount of money to the United States in connection with this crime, and further testified that the affidavit he later executed, recanting what he had earlier said under oath, had been executed in the presence of a federal government official.

Mr. Milligan testified that he had no knowledge of any fine or lien imposed by the federal court at any relevant time, and has never been contacted by anyone from the United States Government making any kind of demand relative to Kerry Johnson's settlement. No lien or other legal procedure was initiated by the United States Government to sequester the settlement proceeds which were paid to Johnson's wife at his request.

Johnson is a convicted felon who, for reasons subject to speculation, executed conflicting affidavits. In his second affidavit, he stated that he had not read the affidavit he executed in Mr. Milligan's office. It is Johnson's credibility, more so than Milligan's, that is at risk here. The Hearing Panel, however, chose to question Mr. Milligan's credibility. As has been seen, in the first matter, (the check returned for insufficient funds), the Hearing Panel found disciplinary rule violations completely out of proportion to the event. And in the Johnson matter, the Hearing Panel apparently found him credible. Giving full weight to the fact that Johnson testified before the Panel, and not before the Court, curiosity is unbounded as to how the Panel was able to reconcile the conflicting affidavits, superimposed upon his subsequent testimony, with his truthfulness.

In sum, the arrangement entered into by Mr. Milligan and Kerry Johnson was unconventional, and the exercise of poor judgment on the part of Mr. Milligan. It was an arrangement that was authorized by Johnson, who was promptly paid upon his release from prison. According to his wife's testimony, Johnson was notified of the receipt of the funds, and Mr. Milligan testified that he sent a letter to the client's home at or about the time of the settlement. The end result was that Kerry Johnson received what was owed to him, as did everyone else. In any event, the arrangement was unethical and unprofessional.

Although Kerry Johnson stated in the later affidavit that he had not read the affidavit he signed in Mr. Milligan's office, his testimony before the Panel was less certain. At one point, when asked if he had read the affidavit, he replied, "Yes." Again, at another point, he was asked whether he executed all three of the affidavits while in the Knox County halfway house, and he responded that he had read them all.

Q: You said you read them all?

A: Did them all.

Later in his testimony he began to waffle which prompted one of the Hearing Panelists to ask this:

Q: I am unclear as to whether you read or did not read those two documents [i.e., the affidavits executed in Mr. Milligan's office] that I just read with you. I am unclear as to whether you read those at the time you signed them.

A: No.

Q: You did not.

A: No.

And then the Hearing Panelist asked this:

Q: Do you recall earlier today in response to a question from one of these attorneys that you indicated that you had read them?

A: I've seen them before.

Q: I mean at the time you signed them, when you were testifying earlier today do you recall that you said you had read them when you signed them?

A. Not exactly. I didn't read it all the way through like I did today.

Kerry Johnson testified that he read the affidavits at the time he signed them. Later, he testified that he did not read them "all the way through." The Hearing Panel accorded preferential treatment to the testimony of a convicted felon who had not only executed contradictory affidavits, but later gave conflicting testimony about those affidavits.

It is not disputed that Kerry Johnson recovered on his personal injury claim and sustained no loss as a result of the strange arrangement he had with Mr. Milligan. It is needless to observe that if the adjustor had known about Johnson's conviction and sentence, his claim would not have settled,

but Milligan was under no legal duty to tell him.

The CFE Matter

This file is referred to by the Hearing Panel as "the Certified Fraud Examiner Report Matter." Leroy Bible, CPA, is a certified fraud examiner, and his report resulted from an audit of Mr. Milligan's files opened in 1999.

The Bible audit covered only the year 1999, and it was conducted over a period of approximately 12 to 15 months. During that time, Mr. Bible met with Mr. Milligan three times, once during a brief initial meeting and then two later meetings when several needed items were discussed with Mr. Milligan and his former bookkeeper, Bob Pruett.

One of the "aggravating circumstances" cited by the Hearing Panel was Mr. Milligan's alleged lack of total cooperation with Mr. Bible, who prepared a short report concerning his audit of certain files, which contained numerous criticisms of Mr. Milligan's accounting practices. Those criticisms were addressed and satisfactorily explained by Terry Hall, CPA, who was appointed by the Tennessee Supreme Court to provide oversight for Mr. Milligan's office manager, Chrissey Stephens, in the performance of her duties. Ms. Stephens was also designated by the Supreme Court as Mr. Milligan's employee to provide day-to-day supervision of the trust account. Based upon the in-court testimony of Mr. Hall, CPA, and the audit by James Lloyd, CPA, whose testimony was impressive, it may be concluded that the report by Mr. Bible is substantially incomplete and a misleading representation of Mr. Milligan's financial accounting records.

A review of the findings by the Hearing Panel, reflects that the Panel ignored Mr. Hall's testimony. The findings refer only to Mr. Bible's report, and do not address Mr. Hall's subsequent investigation, review and his testimony, which reveals that most of the questions raised by Mr.

Bible's report were explained and many of his negative conclusions corrected. No reason appears why the Panel did not consider Mr. Hall's testimony. This is unacceptable, because it led to the Hearing Panel's conclusion that Mr. Milligan had violated a number of Disciplinary Rules. Again DR 1-102 is cited with no specification. Likewise, DR 2-106, in which Mr. Milligan is said to have agreed to charge or collected an illegal or clearly excessive fee, but again with no specification. The Panel did not have the benefit of the impressive testimony of Mr. Lloyd or Mr. Justus.

Disciplinary Rule DR-102 addresses the need of preserving the identity of funds and property of a client, which was violated on occasion. The majority of these violations were corrected by Mr. Hall after a thorough investigation. The record reveals that Mr. Milligan drew checks on his trust account which were paid from and debited against balances in other trust accounts. These actions were unacceptable and sanctionable.

Mr. Milligan was required to pay about $85,000.00 for Mr. Bible's investigation. He was criticized by the Panel for not cooperating fully with Mr. Bible, which was cited as an aggravating factor. Perhaps further study would have revealed a lack of common terminology and that communication was less than ideal. The inference was clear that the Panel believed that Mr. Milligan concealed information from Mr. Bible, but there is no convincing proof of this.

It should be emphasized that Mr. Bible *never* found that any client of Mr. Milligan's received less than what he or she was due. He was directly questioned about this, and admitted that his report contained no conclusion to that effect. Despite some accounting difficulties the proof is clear that every client received what was owed to him or her. This, of course, does not fully exonerate Mr. Milligan, but the impact of the violation is greatly lessened.

As an aggravating circumstance, the Hearing Panel found that Mr. Milligan had not been

completely cooperative with the office management consultant, Suzanne Rose, who had been assigned to his office. The Court finds that this conclusion has little support in the record.

In her appearance before the Hearing Panel, Ms. Rose testified:

> I actually found that Mr. Milligan was fairly organized in his client intake process, his case management process. He had implemented actually an impressive case management system that had been customized for his practice. He appeared to be fairly consistent and did a good job in my view of client communication from the engagement letter which explained the process the client was going to go through, through routine letters that his case management system would automatically generate or that would be triggered by dates set that would go out to clients asking them about their current medical condition. He also sent out client surveys on a regular basis.
>
> In many ways on the practice management side he was more organized than I've seen in most law firms actually that I've worked with. He had a large volume of cases. My concern for him on that part of his practice was that it seemed to be on his shoulders as to how those cases moved along. He–according to my reports and to my memory, I think he brought his associates in when cases went to trial. So up to that point it appeared to me that he had sole responsibility for moving those cases along, and that was a concern that I had. But by and large I think that he was well organized on the practice management side.

With reference to the problems Ms. Rose encountered with obtaining information from Mr. Milligan, she testified that she had asked for more detail throughout the course of working with his office, but that she "really began to realize that it was not going to be easily obtained because of the way–just the limitations of his system at that point."

Part of the problem was that Mr. Milligan's long-time bookkeeper, Bob Pruett, was using outdated software to prepare reports. Mr. Pruett was somewhat resistant to change, wished to do it "the old way," and this impeded Ms. Rose's efficiency.

Ms. Rose recommended a certain software package to Mr. Milligan. Rather than buying that

particular package, Mr. Milligan obtained another (QuickBooks Pro). When asked about that by the Hearing Panel, Ms. Rose stated: "I didn't object to it."

When asked if the QuickBooks Pro could accomplish what Ms. Rose wanted implemented. She answered, "Absolutely."

Progress in updating the office was admittedly slower than Ms. Rose had hoped. Part of her problem was with Mr. Pruett's pace. There was discussion with Mr. Milligan about possibly replacing Mr. Pruett. As Ms. Rose said:

> I think he [Mr. Milligan] acknowledged that he needed someone in that position who was--would be more aggressive and more willing to make those changes, but I think he felt a loyalty to Mr. Pruett because he had been with him for so long. In fact I think after my monitoring period he did hire a bookkeeper and Mr. Pruett was continuing as an employee by just in a lesser role.

With respect to Mr. Milligan's trust account, Ms. Rose did not review with Mr. Milligan how that should be managed. That was not an area of her concern.

As to Mr. Milligan's level of cooperation during the monitor period and Ms. Rose's diligence, the following exchange took place with Hearing Panelist Swanson:

> MR. SWANSON: In your September 20, 1999 correspondence to Mr. Milligan, on the second page of that letter down toward the bottom you said finally, I would like to meet with your attorney in a group meeting as well as the staff in a separate group meeting to discuss the changes that have recently been implemented and to ascertain what other ideas they might have as to how the firm can provide them the tools they need to best perform their jobs. Did that meeting ever occur?
>
> THE WITNESS: No.
>
> MR. SWANSON: Neither of those meetings?
>
> THE WITNESS: No.

MR. SWANSON: Why?

THE WITNESS: That was probably as much my fault as anyone's in terms of the time frame that I had when I–during my office visits. My recollection is that to some degree there might not have been a need for it in the end after talking with him a little bit, but I think as much of it had to do with my scheduling, having enough time to actually do that or to be able to be in his office on the day these meetings took place. I can't - I would not lay that totally at his feet.

MR. SWANSON: It's not a lack of cooperation on his part, that's just it didn't happen?

THE WITNESS: No, that's right.

The Panel found: "Respondent [Mr. Milligan] failed to comply with her recommendations concerning accounting procedures." This finding is overly broad.

The Hearing Panel also cited as an aggravating circumstance Mr. Milligan's alleged failure to cooperate fully with Leroy Bible, "in direct violation of the Order of the Tennessee Supreme Court." This finding has little or no support in the record.

It is this Court's responsibility to look at the evidence anew and decide what measure of discipline, if any, is called for. Mr. Milligan concedes that he made errors in judgment, and that his office procedures were in dire need of being reformed. He regrets his errors, and he has reformed his office practices.

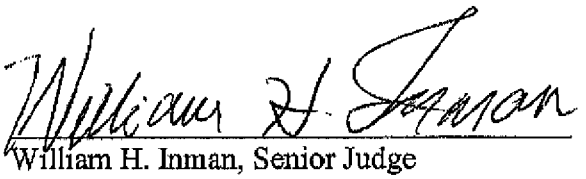
The testimony of CPA Lloyd, CPA Hall, and CPA Justus effectively negated the depositional testimony of Mr. Bible, whose written report is not fully supported and ought not to be the sole predicate of disciplinary action. Mr. Milligan's office procedures and records, and especially his trust accounts, have been reconfigured with plenary safeguards. Since 1999, when the records were in disarray, Mr. Milligan's accounting procedures, including his trust accounts, have been

meticulously maintained. CPA Bible was called as a witness by the Board at the trial to explain certain paradoxes in his depositional testimony and report; as he repeatedly said, hindsight has its advantages. The critiques of the other CPA's to the Bible report are significant, but all of the CPA's agree that Milligan *never* misappropriated clients funds and all of his clients received their proper remittances. This pivotal fact distinguishes this case from practically all reported disciplinary cases involving trust accounts.

The Johnson matter is troublesome. Mr. Milligan acknowledges that he suffered a serious lapse in judgment, and that the trust he reposed in Johnson was misplaced. Mr. Grimm perhaps said it best: "it was a dumb and stupid thing to do." But it was an isolated event, there was no pattern of similar conduct, and the ultimate penalty of disbarment, an occupational death sentence, is grossly disproportionate to the fact. The Panel made 52 findings of fact relative to the Johnson matter; Mr. Milligan, at the trial, twice explained the episode, and making all allowances for its lack of good sense, I cannot and do not credit Johnson's testimony in preference to Mr. Milligan's with respect to the basics of the matter. The described affixation of the notary seal was a major blunder, and cannot be condoned.

Mr. Milligan was suspended for 45 days when this disciplinary matter was initiated. Because of the adverse publicity engendered thereby, many of his clients demanded and received their files. The loss of these files, superimposed on the publicity, cost Mr. Milligan a great deal of money. Modification of his office procedures and the investigation of his trust accounts cost about $200,000.00, but this expense was mostly - but not entirely - of his own making. Since 1999 all has been well and after this disciplinary ordeal it may be presumed that Mr. Milligan's trust procedures will be in strict compliance with the Rules. At this point in the history of this disciplinary action,

a further suspension from practice is not justified. A public censure is appropriate. Mr. Milligan will pay the costs and expenses of this proceeding in accordance with Rule 9, Section 24.3. Judgment accordingly.



William H. Inman, Senior Judge
by Designation of the Supreme Court