

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, TENNESSEE
AT CLARKSVILLE

PETER M. NAPOLITANO)

Petitioner,)

vs.)

BOARD OF PROFESSIONAL)
RESPONSIBILITY OF THE)
SUPREME COURT OF TENNESSEE)

Respondent.)

No. CC-15-CV-159

BPR Docket No. 2013-2272-6-AW

MEMORANDUM AND ORDER

On December 5, 2014, a hearing Panel of the Board of Professional Responsibility (BPR) filed a final order finding that Peter N. Napolitano violated various Rules of Professional Conduct. In a divided opinion on punishment the Panel imposed a five year sentence with four years to be spent on probation after serving one year on suspension. Mr. Napolitano was also ordered to pay \$7,500 as restitution to a former client. Mr. Napolitano filed a petition for certiorari. After the BPR filed the transcript of the proceedings before the Panel and Mr. Napolitano filed a transcript of the evidence, the parties filed briefs and the case came to be heard on January 21, 2016.

The parties, through briefs and argument, have raised the following issues:

Mr. Napolitano

1. That the Panel violated his constitutional right to due process by considering facts that were barred by the doctrine of res judicata.
2. That the Panel's decision was in excess of its jurisdiction.
3. That the decision was made upon unlawful procedure.
4. That the decision was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
5. That the decision was unsupported by evidence which is both substantial and material in light of the entire record.

The BPR

1. That the punishment was too lenient for the facts found.

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BOARD OF PROFESSIONAL
RESPONSIBILITY

Facts

With respect to the weight of the evidence, the Court finds the following facts as stated in the BPR brief are supported by substantial and material evidence in the record:

On or about December 23, 2005, Complainant, Gayle Connelly, retained Peter Napolitano to represent her regarding employment claims against the Department of the Army arising from her civil service position. Ms. Connelly signed a written fee agreement and paid \$5,000.00 to Mr. Napolitano on December 22, 2005. Ms. Connelly paid an additional \$8,000.00 to Mr. Napolitano on June 20, 2006, for a total of \$13,000.00. The retainer fees paid by Ms. Connelly were deposited into Mr. Napolitano's firm trust account and drawn down by Mr. Napolitano until the retainer was exhausted on July 21, 2006. Thereafter, Ms. Connelly paid an additional \$9,000.00 to Mr. Napolitano on or about September 4, 2006, for a total payment of \$22,000.00.

A bench trial was held on Ms. Connelly's employment action, and she was awarded \$25,000.00. Mr. Napolitano prepared a Motion for Attorneys Fees and Expenses and filed the same on July 27, 2007. Pursuant to the Motion for Attorneys Fees and Expenses, Mr. Napolitano represented his attorney fees to be \$49,957.50 and expenses incurred to be \$7,120.83 for a total of \$57,078.33. Thereafter, Ms. Connelly, Mr. Napolitano and the Army entered into settlement negotiations regarding a global settlement of the entire case which would include Ms. Connelly waiving her right to appeal, reimbursement of attorney's fees and expenses, reinstatement of compensatory time earned, and removal of a poor performance review from her personnel file.

On September 18, 2007, Mr. Napolitano sent an email to Ms. Connelly explaining how the global \$75,000.00 settlement with the Army would work and that Ms. Connelly would receive \$40,000.00 and Mr. Napolitano would receive \$35,000.00. Mr. Napolitano represented to Ms. Connelly she would owe nothing further to Mr. Napolitano if she accepted the \$75,000.00 offer from the Army and paid Mr. Napolitano \$35,000.00 of the settlement. Based upon her discussions with Mr. Napolitano and the representations contained in the email of September 18, 2007, Ms. Connelly authorized Mr. Napolitano to accept the Army's offer of settlement. Mr. Napolitano conveyed Ms. Connelly's acceptance of the \$75,000.00 offer to the attorney representing the Army, and the parties began work on a written settlement agreement.

On September 21, 2007, Ms. Connelly and Mr. Napolitano executed a written negotiated Release and Settlement Agreement which provided for a lump sum payment of \$75,000.00. The

negotiated Release and Settlement Agreement included Ms. Connelly's compensatory award of \$25,000.00 and reimbursement of attorney fees and expenses sought by Mr. Napolitano in Exhibit 6. As a further condition of the negotiated Release and Settlement Agreement, Ms. Connelly waived her right to appeal, received three hundred (300) hours of compensatory time, and a poor performance review was removed from her personnel record. The \$75,000.00 settlement proceeds were deposited into Mr. Napolitano's trust account on October 16, 2007. On October 16, 2007, Mr. Napolitano notified Ms. Connelly by email that he had received the \$75,000.00 settlement proceeds.

In the October 16, 2007 email, Mr. Napolitano requested Ms. Connelly modify their agreement and accept less than \$40,000.00. The requested modification was to reimburse Mr. Napolitano for an additional litigation expense he had failed to consider when he agreed to accept \$35,000.00 as his final fee balance. On or about October 23, 2007, Ms. Connelly rejected Mr. Napolitano's request to modify and demanded payment of \$40,000.00 as previously agreed and reflected in emails dated September 18, 2007, and October 16, 2007. As of October 16, 2007, and certainly by October 23, 2007, it was apparent to Mr. Napolitano a dispute had arisen between himself and Ms. Connelly regarding the division of the \$75,000.00 settlement proceeds. Although he disputed the exact date he learned of the October 23, 2007, email sent to his secretary, Mr. Napolitano acknowledged at the hearing that he was aware that Ms. Connelly was demanding payment of \$40,000.00 as her portion of the \$75,000.00 settlement proceeds.

Despite the unambiguous agreement between Mr. Napolitano and Ms. Connelly evidenced by the email of September 18, 2007, and reaffirmed by the email of October 16, 2007, Mr. Napolitano ignored Ms. Connelly's demand for payment and retained Ms. Connelly's \$40,000.00 in his trust account. When Ms. Connelly did not receive her agreed-upon share of the \$75,000.00 settlement from Mr. Napolitano, she wrote the Administrative Law Judge on October 29, 2007, to request assistance in repealing the settlement agreement. On November 7, 2007, Judge David R. Treeter declined to set aside the written negotiated Release and Settlement Agreement.

Ms. Connelly's letter to Judge Treeter clearly upset Mr. Napolitano, and he acknowledged as much in his testimony before the Hearing Panel. Ms. Connelly's letter of October 29, 2007, prompted Mr. Napolitano to unilaterally declare Ms. Connelly in breach of their previous agreement regarding the division of the \$75,000.00 settlement proceeds.

According to Mr. Napolitano, Ms. Connelly's request to set aside the settlement agreement relieved Mr. Napolitano of his obligation to pay Ms. Connelly \$40,000.00 and accept \$35,000.00 as payment in full of his fees and expenses. Thereafter, Mr. Napolitano asserted that he was free to charge Ms. Connelly for all of his time and expenses in accordance with Exhibit 1, the written fee agreement. According to Mr. Napolitano's calculations of his time and expenses, Ms. Connelly's portion of the \$75,000.00 settlement proceeds was reduced from \$40,000.00 to approximately \$22,000.00, and Mr. Napolitano represented as much to the Board on page 10 of his letter dated July 14, 2008.

Approximately twenty (20) months after his July 14, 2008 representation to the Board, Mr. Napolitano asserted to the Board that Ms. Connelly was entitled to receive only \$13,000.83 of the \$75,000.00 settlement proceeds. On February 24, 2010, Mr. Napolitano sent a check to the Board made payable to Gayle Connelly in the amount of \$13,000.83 and marked "payment in full." The Board held the check proffered by Mr. Napolitano and notified him that his billed fee appeared to be unreasonable and in violation of the Rules of Professional Conduct (RPC) 1.5. At the disciplinary hearing Mr. Napolitano was unable to adequately explain how he arrived at his figure of \$13,000.83.

Ms. Connelly filed a formal written complaint with the Board of Professional Responsibility on April 2, 2008, asserting Mr. Napolitano refused to return to her the portion of the settlement funds that had been agreed. Ms. Connelly testified before the Hearing Panel that she made verbal demands of Mr. Napolitano from time to time for payment of her \$40,000.00 and at least one written demand dated February 25, 2010. Mr. Napolitano ignored Ms. Connelly's demands for payment. Thereafter, Ms. Connelly retained counsel and filed suit in the Circuit Court for Montgomery County, Tennessee, at Clarksville, against Mr. Napolitano on March 25, 2011, asserting Mr. Napolitano breached an agreement regarding division of the \$75,000.00 settlement proceeds. Although Ms. Connelly's lawsuit against Mr. Napolitano was dismissed by the Circuit Court for Montgomery County as untimely on or about January 31, 2013, the parties reached a settlement of their legal dispute while the matter was on appeal. Ms. Connelly has received a payment from Mr. Napolitano pursuant to the settlement agreement in the amount of \$18,500.00. Any further payment is conditioned upon Mr. Napolitano maintaining an active license to practice law.

During the investigation of Ms. Connelly's April 2, 2008 complaint, Disciplinary Counsel for the Board of Professional Responsibility reviewed Mr. Napolitano's billing statements and concluded that Ms. Connelly was entitled to settlement proceeds of \$16,715.50. Accordingly, on June 4, 2010, Mr. Napolitano tendered a check for \$16,715.50 in full settlement of the outstanding dispute to Timothy H. Nichols, attorney for Ms. Connelly. Ms. Connelly, through her attorney, requested that she be allowed to negotiate the proffered check without waving her right to seek full payment of the \$40,000.00 from Mr. Napolitano. Mr. Napolitano refused to strike the "payment in full" language from the check, and Ms. Connelly, upon advice of counsel, refused the check as a full settlement of her portion of the September 21, 2007 settlement proceeds.

On June 3, 2013, the Board obtained issuance of a subpoena for the trust account records of Peter M. Napolitano from January 1, 2007, through April 31, 2013, and the same was served upon Bank of America. Pursuant to the subpoena, the Board received the requested trust account records. Summaries of Mr. Napolitano's trust account were prepared by the Board and entered into evidence. Mr. Napolitano also prepared and submitted a summary of his trust account, and the same was entered into evidence. On January 14, 2008, Mr. Napolitano wrote the Board and represented that he was retaining the balance of the settlement funds belonging to Ms. Connelly in his trust account until he received instructions from Ms. Connelly or advice from the Board or a judge regarding disposition. Less than one (1) month after he made the representation to the Board, Mr. Napolitano began removing disputed funds from his trust account. At the time he began removing disputed funds from his trust account, Mr. Napolitano had not received any instructions from the Board or a Judge. The only instruction he had received was from Ms. Connelly demanding payment of \$40,000.00. The only other arguable advice Mr. Napolitano ever received was in May of 2010, when the Board calculated Ms. Connelly was entitled to receive \$16,715.50 from Mr. Napolitano.

A review of Mr. Napolitano's trust account reflects the balance in his trust account fell below \$40,000.00 on February 11, 2008, less than four (4) months after the \$75,000.00 settlement proceeds were received by Mr. Napolitano and after he admitted he was aware Ms. Connelly was disputing any payment to her less than \$40,000.00. The trust account summaries prepared by the Board and Mr. Napolitano both reflect the trust account balance in February of

2008 fell briefly to \$33,073.03. Thereafter, beginning in April of 2008, the minimum balance in Mr. Napolitano's trust account varied from time to time, but rarely exceeded \$40,000.00.

Even if Mr. Napolitano is credited with a good faith belief that Ms. Connelly was entitled to only \$22,000.00 as represented to the Board on July 14, 2008, Mr. Napolitano's trust account records reflect a balance of less than \$22,000.00 on March 31, 2009. Similarly, crediting Mr. Napolitano with a good faith belief that Ms. Connelly was only owed \$13,000.83 as he represented to the Board on March 8, 2010, Mr. Napolitano's trust account records reflect a balance of less than \$13,000.00 on July 27, 2009.

In his Answer to the Petition for Discipline and in his testimony before the Hearing Panel, Mr. Napolitano indicated that his decision to remove money from his trust account was made in reliance upon the Board's determination that Ms. Connelly was entitled to \$16,715.50. A careful comparison of the timeline of material events reflected in the evidence presented to the Hearing Panel, the representations Mr. Napolitano made to the Board and the monthly trust account statements, demonstrates that the Board's calculation of \$16,715.50 in late May of 2010 played no part in Mr. Napolitano's decisions to remove disputed funds from his trust account and clearly no part in his decision to remove funds he knew belonged to Ms. Connelly. Mr. Napolitano's trust account records reflect the balance in his trust account fell below \$16,000.00 on June 4, 2009. Subsequent to receiving the Board's calculation of \$16,715.50 in May of 2010, Mr. Napolitano proceeded to remove portions of those funds from his trust account beginning in July of 2010.

In his testimony, Mr. Napolitano admitted \$40,000.00 of the \$75,000.00 settlement proceeds were in dispute and that he should not have removed the disputed funds. Mr. Napolitano further admitted he believed Ms. Connelly was always owed at least \$13,000.83 from the \$75,000.00 settlement proceeds. A careful review of Mr. Napolitano's trust account records reflected Mr. Napolitano effectively removed all of the \$75,000.00 settlement from his trust account as of January of 2012.

As a result of Mr. Napolitano's refusal to pay \$40,000.00, Ms. Connelly retained Timothy Nicholas and incurred litigation costs and expenses she would not have otherwise had to incur in the amount of \$25,000. Subsequent to filing the Circuit Court Complaint against Mr. Napolitano, Attorney Timothy Nichols, counsel for Ms. Connelly, obtained the sworn testimony of Mr. Napolitano at a deposition on September 26, 2012. During the Mr. Napolitano's

deposition Mr. Nichols observed Mr. Napolitano's demeanor while he testified about his New York law license and disciplinary history, tax liens, and personal or business bankruptcies. In Mr. Nichols' opinion, Mr. Napolitano appeared competent and to comprehend the questions being asked by Mr. Nichols.

While under oath, Mr. Napolitano was asked if he had received any bar complaints related to his New York law license, and Mr. Napolitano falsely stated he had no complaints. A bar complaint was filed previously against Mr. Napolitano resulting in his suspension from the practice of law for five (5) years on January 27, 1994, by the New York Supreme Court Appellate Division for misappropriating \$5,000.00 and providing false testimony under oath.

Mr. Napolitano was asked at his deposition if he had ever filed personal bankruptcy, and Mr. Napolitano testified falsely he had not filed bankruptcy. Mr. Napolitano's statement was false as he had filed two (2) separate Chapter 7 Petitions for Bankruptcy. The first Petition for Bankruptcy was filed by Mr. Napolitano on December 6, 1993, in the United States Bankruptcy Court for the Middle District of Tennessee. Mr. Napolitano filed his second Chapter 7 Petition for Bankruptcy on July 1, 2003, in the United States Bankruptcy Court for the Middle District of Tennessee. He received personal discharges in each bankruptcy.

Mr. Napolitano was asked at his deposition if any liens had ever been filed against him. Mr. Napolitano testified falsely he could not recall any liens being filed against him. A Notice of Federal Tax Lien was filed against Mr. Napolitano and duly recorded with the Register of Deeds for Montgomery County on August 6, 1993. A second unrelated Notice of Federal Tax Lien was filed against Mr. Napolitano and duly recorded with the Register of Deeds for Montgomery County on February 9, 2007. In his Voluntary Petition for Chapter 7 Bankruptcy filed on or about November 19, 1993, Mr. Napolitano disclosed an IRS attachment that had been issued within the past year. In Schedule E of the Voluntary Petition, the amount of the IRS's claim is listed as \$15,555.28 and is the same amount reflected in the Federal Tax Lien recorded with the Register of Deeds for Montgomery County on July 27, 1993, and entered in to evidence as Exhibit 26.

Based on the above facts, the hearing Panel concluded that Mr. Napolitano misappropriated his client's funds and failed to maintain her funds in his trust account. In addition, the Panel concluded that he testified falsely under oath on three occasions.

The Panel then considered the following aggravating factors:

1. The fact that Mr. Napolitano previously received a 5-year suspension for similar violations, i.e., inappropriate use of escrow funds and giving false testimony.
2. The motive for personal gain with regard to appropriation of client funds.
3. Mr. Napolitano's lack of candor with the Board in his repeated claims that he was maintaining the disputed Connelly funds in his trust account.
4. The outright perjury committed by Mr. Napolitano in his deposition.
5. Mr. Napolitano's unwillingness or inability to acknowledge the gravity of his perjury indicating only that he was sorry he had "shot from the hip" in his sworn testimony.
6. Mr. Napolitano's significant and substantial experience in the practice of law.

And the mitigating factors:

1. The high opinion local judges and members of the bar have of Mr. Napolitano in terms of his legal skills, his trial preparation, his helpfulness to the Courts, and his assistance to younger attorneys.
2. The fact that Mr. Napolitano and Ms. Connelly have reached a settlement agreement with regard to the funds due Ms. Connelly which Mr. Napolitano has thus far fulfilled.

The Panel then entered the following judgement:

Based on the record as a whole, the Panel finds that Mr. Napolitano's license to practice law should be suspended for five (5) yeears. He should never have control of his client's trust account. Management and control of Mr. Napolitano's client trust account must be conducted by an outside certified public accountant or other qualified person who is not employed by Mr. Napolitano. The balance of Mr. Napolitano's suspension may be probated after one (1) year, conditioned upon his payment of the remaining \$7,500.00 owing to Gayle Connelly and restitution to the Board for all costs of this proceeding. Napolitano shall perform 100 hours of public service work for each year that his sentence is probated.

Analysis

1. Res Judicata

Mr. Napolitano's primary complaint is that the hearing Panel ignored the doctrine of res judicata and considered facts and issues that had been decided in two prior BPR complaints against him.

It appears that Ms. Connelly, the complainant in this case, filed a complaint against Mr. Napolitano on April 2, 2008 concerning his failure to remit her part of the \$75,000 settlement

with the Department of the Army. Disciplinary counsel reviewed Mr. Napolitano's billing records and concluded that Ms. Connelly was due \$16,715. In reliance on that finding Mr. Napolitano tendered a check for that amount marked "payment in full." Ms. Connelly rejected that offer. Apparently the complaint was dismissed in 2010.

In 2012 Mr. Napolitano received a private reprimand for co-mingling his personal funds with client money in his trust account. The order does not show who the complainant was or anything specific about the charges. Mr. Napolitano stipulates that the complainant was not Ms. Connelly.

There are two troubling questions related to Mr. Napolitano's defense of res judicata.

The first is the Court has examined the pleadings in this case and cannot find where the defense was ever raised by the petitioner. At one point in the transcript of the evidence there is a long discussion about the relevance of a question asked by disciplinary counsel concerning how Mr. Napolitano arrived at how much he owed Ms. Connelly. But the objection was not raised on the ground of res judicata. Rather, it concerned Mr. Napolitano's request for discovery of disciplinary counsel's calculations in the prior investigation. Counsel for Mr. Napolitano argued that he was entitled to these calculations if disciplinary counsel wished to re-litigate the amount owed.

In addition, res judicata is an issue-preclusion doctrine, sometimes referred to as "estoppel by judgement," Garrett v. Corry Foam Products, Inc. 596 S.W.2d 808 (Tenn. 1980). "The doctrine bars a second suit between the same parties or their privies on the same claim with respect to all issues which were, or could have been, litigated in the former suit." Long v. Board of Professional Responsibility of the Supreme Court, 435 S.W.3d 174, 183 (Tenn. 2014).

There is nothing in this record (except the unsworn statements in the arguments of counsel) to inform this Court about what the issues were in the 2008 complaint, or how they were resolved. Apparently the complaint was about a simple fee dispute, but the complaint is not in the record and there is no judgement deciding anything. Mr. Napolitano argues that the complaint was dismissed, but being true, a voluntary dismissal is not a judgement on the merits that will support a defense of res judicata. See Garrett v. Corry Foam Products, Inc., 596 S.W.2d 808 at 810 (Tenn. 1980).

Some of the same reasoning applies to the discipline Mr. Napolitano received in 2012. The order is in the record, but the parties are not the same (apparently) and the facts recited in the

order refer to a simple co-mingling change - not a misuse of client funds and being untruthful under oath.

The Court finds that the record does not support a res judicata defense available to Mr. Napolitano.

2. Mr. Napolitano's Other Defenses

With respect to Mr. Napolitano's issues #3 and #5, the Court finds that they are without merit. The Court has already concluded that the facts recited above are supported by substantial and material evidence.

The argument about the decision being made upon unlawful procedure is based primarily on the res judicata issue. Otherwise, the proceedings before the Panel appear to be completely regular.

With respect to Mr. Napolitano's issue #2, the BPR concedes that a lifetime ban prohibiting Mr. Napolitano from controlling a trust account exceeded the Panel's jurisdiction. That part of the Panel's order is, therefore, reversed.

Mr. Napolitano also contends that the Panel exceeded its jurisdiction by ordering that as a condition of any future re-instatement Mr. Napolitano had to pay Ms. Connelly \$7,500 in restitution.

An order of restitution is clearly within powers given to a hearing Panel by the Supreme Court. See § 12.7 of the current version of S.Ct. Rule 9 (§4.7 of the 2006 version). The \$7,500 figure is apparently the balance of the \$25,000 settlement the parties arrived at by negotiation.

The BPR argues that the amount should have been \$40,000, the amount Mr. Napolitano originally agreed to pay Ms. Connelly out of the settlement. The Court, however, is not persuaded to try make any sense out of the labyrinth created by the parties during their troubled relationship.

The Court affirms the Panel's action including the restitution as a condition of re-instatement.

The Court also rejects Mr. Napolitano's contention that the Panel's decision was arbitrary, capricious or an abuse of discretion.

3. The Punishment

Mr. Napolitano argues that the Panel's imposition of a five year suspension was an abuse of discretion or an unwarranted exercise of discretion. The BPR argues that the imposition of only a five year suspension should have been disbarment.

Based on the findings of fact recited above and the ABA Standards considered by the Panel, the Court concludes that both parties are mistaken.

Although the Panel's findings would have justified a judgement of disbarment under ABA Standards 4.11 (knowingly converting client property and causing harm), 4.61 (knowing deception of a client causing potential serious injury), 5.11(b) intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice), 6.11(false statements with intent to deceive the Court causing potentially significant adverse effect on the legal proceeding), or 8.1(lawyer has been suspended for the same or similar conduct) the Standards say the disbarment is generally appropriate, not mandatory. The Panel is obligated to look at the aggravating and mitigating factors shown by the proof in arriving at its final judgement. After going through that exercise, the Panel arrived at a five-year suspension with one year to be served on active suspension. The Court is satisfied that the punishment is within the limits of the Panel's sound discretion.

Conclusion

With the exception of the order denying Mr. Napolitano the right to ever manage a trust account, the order of the Panel is affirmed.

It is, therefore, ORDERED that the Panel's decision that Mr. Napolitano should never have control of his client's trust account is reversed.

It is, further, ORDERED that the Panel's decision is in all other respects is affirmed.

Tax the costs to Mr. Napolitano.

Entered this 26th day of March, 2016.

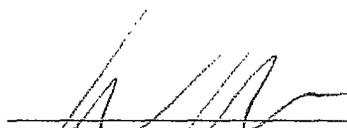
Ben H. Cantrell
Ben H. Cantrell, Senior Judge

Certificate of Service

The undersigned hereby certifies that a true and exact copy of the foregoing document has been served this 28 day of MARCH, 2016, via U.S. Mail with sufficient postage thereon, upon:

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