

IN THE CIRCUIT COURT FOR SHELBY COUNTY, TENNESSEE
AT MEMPHIS

WILLIAM B. PENN,

Petitioner,

vs.

BOARD OF PROFESSIONAL RESPONSIBILITY]
OF THE SUPREME COURT OF TENNESSEE,]

Respondent.]

No. CT-004970-08

JUDGMENT

This cause came on to be heard on the 29th day of September 2009, upon the Petition for Certiorari filed by the petitioner, William B Penn. The petition seeks a review of the Judgment of the Hearing Panel filed June 9, 2008, in a lawyer disciplinary proceeding. For the reasons stated in a memorandum filed simultaneously with this Judgment and incorporated herein by reference, the court affirms the hearing panel's finding of a violation of DR 1-102(A)(1)(5) and (6) and DR 4-101(A) regarding File No. 23523-9-lc. The finding of a violation of DR 1-102(A)(4) and DR 7-102(A)(1) are not sustained by the evidence and are set aside. As to File No. 23403-9-lc, the court affirms hearing panel's finding of a violation of DR-9-102(A) and (B) and DR-1-102(1), (5) and (6). The finding of a violation of DR 7-102(A)(1) is not sustained by the evidence and is set aside. With regard to File No. 23404-9-lc, the court affirms the hearing panel's finding that Mr. Penn violated DR 1-102(A)(1)(4)(5)(6), DR 2-110(A)(2)(B)(4), and DR 9-102(A)(B). The court is of the opinion its alteration of the hearing panel's findings would not have affected the discipline recommended and the recommendations of the hearing panel with regard to discipline are affirmed in their entirety.

It is, therefore, ORDERED that the findings of the hearing panel with regard to violations of the disciplinary rules of the Code of Professional Responsibility be amended as set forth above and the recommendations of the hearing panel with regard to discipline be affirmed in their entirety. The costs of this cause shall be taxed to the petitioner, William B. Penn, for which execution may issue, if necessary.



Donald P. Harris, Senior Judge
Sitting by Designation

CERTIFICATE

The undersigned hereby certifies that a true copy of the foregoing Judgment has been forwarded to Sandy Garrett, Deputy Chief Disciplinary Counsel, Board of Professional Responsibility, 1101 Kermit Drive, Suite 730, Nashville, TN 37217, and to Cary C. Woods, 100 North Main Building, Suite 406, Memphis, TN 38103, this the _____ day of November 2009.

Circuit Court Clerk

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WILLIAM B. PENN,

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Respondent.]

No. CT-004970-08

MEMORANDUM

This case is before the court on a Petition for Certiorari filed by the petitioner, William B Penn.¹ The petition seeks a review of the Judgment of the Hearing Panel filed June 9, 2008, in a lawyer disciplinary proceeding against Mr. Penn.

The hearing panel found violations of certain disciplinary rules of the Code of Professional Responsibility. As a result, the hearing panel entered its judgment recommending Mr. Penn be suspended from the practice of law in Tennessee for a period of three years with all time suspended except twelve months upon the condition that he make restitution and pay all costs incurred by the Board.

Standard of Review

In reviewing the findings and conclusions of the hearing panel in a disciplinary proceeding, the court must be guided by Rule 9, section 1.3, of the Rules of the Supreme Court which provides in pertinent part as follows:

The Respondent-attorney (hereinafter "Respondent") or the Board may have a review of the judgment of a hearing panel in the manner provided by [Tennessee Code Annotated section] 27-9-101 et seq., except as otherwise provided herein. The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before

1. Because Mr. Penn is the petitioner in the proceeding before the court and was the respondent in the proceeding before the hearing panel, he will be referred to in this memorandum as "Mr. Penn." The Board of Professional Responsibility will be referred to as the "Board."

the panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The court may affirm the decision of the panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the panel's findings, inferences, conclusions or decisions 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 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 panel as to the weight of the evidence on questions of fact.

Tenn. Sup. Ct. R. 9, §1.3 (2007).

With that standard in mind, the court has carefully reviewed the entire record. The court's findings with regard to the allegations made by Mr. Penn in his Petition for Certiorari are set forth below.

Findings

On March 15, 2002, the Board filed a Petition for Discipline against Mr. Penn. The petition alleged that two complaints had been filed against him. In the first, File No. 23403-9-lc, it was alleged Mr. Penn executed a medical lien in favor of Dr. Wade Spurling on behalf of Vladimir Birg who Mr. Penn represented in a personal injury case. Mr. Birg's case was settled, but the monies owing Dr. Spurling were not paid. The Petition for Discipline alleged Mr. Penn's conduct violated DR 1-102(A)(1)(4)(5)(6); DR 7-102(A)(1); and DR 9-102(A)(B).² In the second complaint filed by Wendy Dabbous, File No. 23523-9-lc, it is alleged that Mr. Penn, "during a custody hearing, cross examined his former client with a journal the client had prepared during a divorce proceeding at the request of [Mr. Penn]. By these actions [Mr. Penn] violated the confidentiality provisions of the Code of Professional Responsibility and took a position adverse to his former client in a matter closely related to or arising out of this prior representation." The petition alleged this conduct violated DR 1-102(A)(1)(4)(5)(6); DR 4-101(A)(B), and DR 5-105(A)(B).³

² Prior to March 1, 2003, the Code of Professional Responsibility with its disciplinary rules were in effect. On March 1, 2003, the Rules of Professional Conduct became effective.

³ A Supplemental Petition for Discipline was filed on November 6, 2003, and a Second Supplemental Petition for Discipline was filed January 7, 2004. The hearing panel found the complaints alleged in these supplemental petitions were not sustained by the evidence and they will not be discussed here.

On April 2, 2002, a Petition for Discipline was filed against Mr. Penn and his mother, Patricia Penn, who also is an attorney. One of the allegations in this petition concerned a complaint, File No. 23404-9-1c, filed by William M. Monroe, an attorney, who had been attempting to obtain the file of his client, Patricia Pashby. The Penns are alleged to have settled a claim for Ms. Pashby for \$100,000,00, but had failed or refused to provide Ms. Pashby with an accounting of that settlement. The petition asserts these acts are violations of DR 1-102(A)(1)(4)(5)(6), DR 2-110(A)(2)(B)(4) and DR 9-102(A)(B).⁴

In his petition for review, Mr. Penn alleges that the requirements of due process were violated because the hearing panel did not determine until the day before the hearing the scope of the charges to be heard. From the record, it appears there was a Petition for Discipline filed against Mr. Penn's mother, a Petition for Discipline filed against Mr. Penn, and a Petition for Discipline filed against both Mr. Penn and his mother. These petitions had been consolidated for hearing. Prior to the date of the hearing, however, a petition for disability had been filed as to Ms. Penn but no order had been entered by the Supreme Court. The hearing panel determined the day prior to the hearing to proceed only against Mr. Penn. The record does not support a conclusion that Mr. Penn was in any way prejudiced by the determination that the hearing would proceed only against him. This allegation appears disingenuous, since Mr. Penn had previously moved the hearing panel that the allegations against him be heard separately from those filed against his mother.

Mr. Penn alleges that the hearing panel acted in excess of its jurisdiction by undertaking substantial negotiations and then ruling against him. There simply is no evidence in the record that would support this allegation and no proof that members of the hearing panel had participated in settlement negotiations was offered or presented at the hearing of the petition for review. A conditional guilty plea was filed August 22, 2006, which appears to have resolved all the complaints against Mr. Penn. An order signed by the chair of the hearing panel approving the conditional guilty plea was entered January 23, 2007. There is an indication in the record that Mr. Penn refused to sign or allow his attorney to sign the order of discipline that was prepared incident to this plea. Consequently, the conditional guilty plea was not effectuated. These matters were a part of the Board's record in this case. There is no evidence the hearing panel members were privy to any information that would not have been available to a newly appointed hearing panel had one been ordered.

Mr. Penn alleges the determination of the hearing panel was made upon unlawful procedure in that documents filed in the record were not allowed into evidence. Specifically, Mr. Penn alleges that the hearing panel refused to admit the affidavit of Vivian Pike, the supplemental affidavit of Vivian Pike, and the affidavit of Michael Alpha Pike. The affidavit of Vivian Pike was attached to Mr. Penn's response to the original complaint of Wendy S. Dabbous. The court has been unable to locate the other two affidavits referred to in the Board's file. With

⁴A second complaint was addressed in this petition and a Supplemental Petition of Discipline was filed on January 21, 2003. The hearing panel found, however, that these complaints were not sustained by the evidence.

regard to the affidavit of Vivian Pike, it is unclear whether the board excluded the evidence. When it was offered by Mr. Penn's attorney during the hearing there was an objection by disciplinary counsel based on hearsay. The hearing panel chair asked if it was part of the record and stated, "if its part of the record then we're going to consider the record, but otherwise an Affidavit is not admissible." Disciplinary counsel confirmed that it was part of Mr. Penn's response to the Board's initial Petition for Discipline. The affidavit was then marked as an exhibit for identification.

Rule 9, section 23.3, of the Rules of the Supreme Court provides that the Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence apply in disciplinary cases except as otherwise provided. Thus affidavits offered in evidence during a disciplinary hearing constitute hearsay even when attached to a responsive pleading. The fact a document is attached to a responsive pleading or otherwise included in the record does not make it, without more, admissible evidence.

Mr. Penn alleges a procedural irregularity in that the hearing panel limited his testimony and explanations during the hearing. The instances referred to in the supplemental memorandum are to one occasion where the hearing panel chair instructed Mr. Penn that his answer went "way beyond explaining the answer to the question" and one occasion where she instructed him to "Answer yes or no then you can explain." From a review of the record, the court is unable to find these instructions were inappropriate or affected the outcome of the hearing.

Finally, Mr. Penn alleges the determination of the hearing panel was not supported by evidence which was both material and substantial. Evaluation of this allegation is, in the opinion of the court, made more difficult by the unfortunate circumstance that the hearing panel found with regard to the three complaints they sustained that Mr. Penn was "guilty of violating all of the disciplinary rules alleged to have been violated by the Board." Many of the rules contain multiple requirements or may be violated in multiple ways. Without specific findings, it is difficult to determine which of the requirements or manner of violation the hearing panel based its determination. The court has reviewed each complaint to determine whether there is evidence which is material and substantial upon which the hearing panel could have found a violation of the the disciplinary rule cited.

a. The complaint of Wendy Dabbous, File No. 23523-9-1c.

Ms. Dabbous represented Ms. Gwendolyn Elizabeth Pike in a divorce action brought by her husband, Michael Keith Pike, and in a dependent/neglect juvenile proceeding brought by Michael Pike's mother, Vivian Pike, seeking custody of Michael Pike's and Gwendolyn Pike's minor children. Penn represented Michael Keith Pike in the Circuit Court in the divorce action and, also represented Vivian Pike in the juvenile matter. In the complaint for divorce, Mr. Pike indicated the custody issues were being referred to the Juvenile Court, but also asked that he be awarded custody of the parties minor children.

In the duel proceedings, Mr. Penn instructed Michael Pike as well as Vivian Pike and the children's grandfather, Alfred Pike, to prepare journals reflecting the mother's interaction with the children. He was provided such a journal prepared by Michael Pike and attempted to cross-examine him with it during the Juvenile Court proceeding. By the time this occurred, Michael Pike had discharged Mr. Penn from representing him in the divorce proceeding and had joined with Gwendolyn Pike in opposing Vivian Pike's gaining custody of their minor children.

The Board alleged that Mr. Penn's conduct violated the following disciplinary rules:

DR 1-102. Misconduct. —(A) A lawyer shall not: (1) Violate a Disciplinary Rule. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 4-101. Preservation of Confidences and Secrets of a Client. — (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of a client. (2) Use a confidence or secret of a client to the disadvantage of the client. (3) Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

DR 7-102. Representing a Client Within the Bounds of the Law. — (A) In the representation of a client, a lawyer shall not: (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

With regard to Disciplinary Rule DR 1-102, the court is of the opinion that all disciplinary violations involve the violation of a disciplinary rule as prohibited by subsection (A)(1), constitutes conduct that is prejudicial to the administration of justice prohibited by (A)(5), and also involves conduct that adversely reflects on the attorney's fitness to practice law prohibited by (A)(6). For that reason, these violations will not be addressed separately from the more specific violations alleged. Not all disciplinary violations, however, involve dishonesty, fraud, deceit or misrepresentation prohibited by (A)(4). The court is of the opinion that in this case, there was no substantial and material evidence that would support the hearing panel's finding that Mr. Penn engaged in conduct that involved dishonesty, fraud, deceit or misrepresentation. According to Mr. Penn, the plan was for Michael Pike to file a divorce action and simultaneously for Vivian Pike to file a dependent/neglect petition in juvenile court seeking

custody of Michael and Gwendolyn Pike's children. That testimony of Mr. Penn was uncontroverted. The journals Mr. Penn asked they keep were obviously for the purpose of assisting Vivian Pike's effort to obtain custody of her grandchildren. That was the use Mr. Penn attempted to make of them and his conduct did not, in the opinion of the court, involve dishonesty, fraud, deceit or misrepresentation.

With regard to a violation of DR 4-101(A), the court is of the opinion there was substantial and material evidence that would support the hearing panel's finding that Mr. Penn knowingly attempted to use a confidence or secret of Michael Pike to Michael Pike's disadvantage in that Michael Pike was at the time opposing Vivian Pike's efforts to gain custody of his children. There was also substantial and material evidence that he knowingly attempted to use Michael Pike's confidential or secret information to the advantage of a third person without his former client's permission.

The court is of the opinion that there is no substantial and material evidence that would support the hearing panel's finding of a violation of Disciplinary Rule 7-102. There is no evidence that Mr. Penn took any action with regard to the Pikes that would serve merely to harass or maliciously injure someone.

The court affirms the hearing panel's finding of a violation of DR 1-102(A)(1)(5) and (6) and DR 4-101(A). The remaining violations concerning the complaint of Wendy Dabbous are set aside.

b. The complaint of Dr. Wade Spurling, File No. 23403-9-1c.

Mr. Penn represented a Mr. Vladimir Birg in a personal injury case. As part of his representation, he signed a lien against the proceeds of that case in favor of Dr. Wade Spurling in the amount of \$1040. The settlement sheet in the case reflects that \$1040.00 was paid to Dr. Spurling, but Mr. Penn admitted that he did not actually pay Dr. Spurling that amount. According to Mr. Penn, Dr. Spurling authorized him to apply that amount to expenses incurred and owed by him to Mr. Penn in another case, Spurling v. Plambeck, in which Mr. Penn represented Dr. Spurling. Dr. Spurling, however, wrote Penn a letter dated October 27, 2000, demanding payment of these monies. Mr. Penn testified that the letter was contrary to Spurling's agreement with him. A second letter demanding payment was forwarded to Mr. Penn from a Ms. Gray in Dr. Spurling's office. A third letter, dated October 30, 2000, was written by Dr. Spurling objecting to applying the payment to the Plambeck expenses. The amount was never paid to Dr. Spurling, but was applied to the expenses incurred in the Plambeck case. A Petition for Discipline was filed alleging Mr. Penn's conduct violated DR 1-102(A)(1)(4)(5)(6); DR 7-102(A)(1); and DR 9-102(A)(B).

Again, the court is of the opinion that in the complaint of Dr. Spurling, there was no substantial and material evidence that would support the hearing panel's finding that Mr. Penn engaged in conduct that involved dishonesty, fraud, deceit or misrepresentation. Mr. Penn's

testimony was uncontradicted that Dr. Spurling owed the Plambeck expenses. Whether or not Dr. Spurling verbally agreed to do so, Mr. Penn offset monies owed by Dr. Spurling against monies payable to him. He explained his accounting in a letter to Dr. Spurling. There is no substantial and material evidence of fraud, deceit, dishonesty or misrepresentation in his dealing with Dr. Spurling. Accordingly, the finding of a violation of DR 1-102(A)(4) by the hearing panel is set aside.

DR 7-102(A)(1) provides that a lawyer, in representing his client, shall not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." The court does not understand the application of this provision to Dr. Spurling's complaint and finds there is no substantial and material evidence what would sustain the hearing panel's finding that Mr. Penn violated it. The finding of a violation of DR-7-102(a)(1) is therefore set aside.

DR 9-102(A) requires that all funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable accounts separate from the lawyer's or law firm's account. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited in such an account, "but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved." DR 9-102(B) requires the lawyer to promptly notify the client of the receipt of the client's funds, maintain records of all such funds and promptly pay or deliver them to the client upon request the funds the client is entitled to receive.

The funds involved in this case belonged to Mr. Birg. Mr. Penn had an obligation to settle Mr. Birg's account with Dr. Spurling. When the dispute with Dr. Spurling arose, Mr. Penn should have maintained Mr. Birg's funds in the client account until the dispute was resolved as required by DR-9-102(A). Absent an agreement, Mr. Penn had an obligation, under the provisions of DR-9-102(B), to disburse Mr. Birg's funds as requested or directed. The court finds the hearing panel's finding of a violation of DR-9-102(A) and (B) by Mr. Penn was supported by substantial and material evidence. As a result, the court also affirms the hearing panel's finding of a violation of DR-1-102(1), (5) and (6).

c. The complaint of attorney, William Monroe, File No. 23404-9-1c.

The complaint of attorney, William Monroe, involved Mr. Penn's representation of Patricia Pashby in a lawsuit against Charter Lakeside Hospital and a Dr. John Doe, later identified as Dr. Hal Brunt. The case involved an assault on Ms. Pashby by another patient at the hospital. The case against Charter Lakeside was settled for the sum of \$100,000.00. During Mr. Penn's representation of Ms. Pashby he also received the proceeds of a private insurance policy owned by Ms. Pashby in the amount of \$10,041.27. Of the two amounts, Ms. Pashby received a total of \$10,000.00. Mr. Penn received an attorney's fee of \$33,000.00 in the claim against

Charter Lakeside and also retained \$35,000.00 of the proceeds as a retainer in pursuing the claim against Dr. Brunt. His firm additionally was paid \$7,500.00 which Mr. Penn testified was reimbursement for the expense of having a nurse transcribe Ms. Pashby's medical records. The lawsuit against Dr. Brunt was subsequently nonsuited. On September 12, 2000, Mr. Monroe wrote Mr. Penn on behalf of Ms. Pashby, sending a client authorization and asking that Mr. Penn turn over Ms. Pashby's file. A similar request was forwarded October 2, 2000, and November 16, 2000. Mr. Penn failed to turn over the file and Mr. Monroe, on December 8, 2000, filed a complaint with the Board setting out Mr. Penn's failure to turn over the file and his failure to provide Ms. Pashby an accounting of the proceeds of the Charter Lakeside settlement. On April 12, 2001, Mr. Penn caused the file to be delivered to a representative of Ms. Pashby.

On April 2, 2002, a Petition for Discipline was filed alleging Mr. Penn's acts are violations of DR 1-102(A)(1)(4)(5)(6), DR 2-110(A)(2)(B)(4) and DR 9-102(A)(B). The hearing panel found a violation of each of these disciplinary rules.

DR 2-110(A)(2) provides that "a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled. . ." Subsection (B)(4) mandates that a lawyer withdraw when he or she is discharged by his client. There is substantial and material evidence in the record from which the hearing panel could determine that Mr. Penn had been discharged by Ms. Pashby and failed to turn over the property and papers to which she was entitled.

As previously, stated, DR 9-102(A) requires that all funds of clients paid to a lawyer or law firm, be deposited in one or more identifiable accounts separate from the lawyer's or law firm's account. DR 9-102(B) requires the lawyer to promptly notify the client of the receipt of the client's funds, maintain records of all such funds, render appropriate accounts regarding these funds and promptly pay or deliver them to the client upon request. The hearing panel found the \$35,000.00 retainer fee was "improper, excessive and unearned," and that those monies should be returned to Ms. Pashby. The hearing panel further found Mr. Penn's conduct regarding Ms. Pashby's case to amount to an egregious violation of the disciplinary rules.

Mr. Penn testified that Ms. Pashby authorized him to use the funds remaining from the Charter Lakeside settlement to prosecute the remaining claim against Dr. Hal Brunt. Mr. Penn offered a written authorization to that effect into evidence. He admitted, however, that he took Ms. Pashby's claims against Charter Lakeside and Dr. John Doe on a one-third contingency fee basis. At that point, he had an obligation to represent Ms. Pashby to the conclusion of her case. He undertook no additional obligation to her at the time he retained the additional \$35,000.00. Those facts, in the opinion of the court, constitute substantial and material evidence that the additional fee was unearned and excessive as found by the hearing panel in this case. Accordingly, the court affirms the hearing panel's finding that Mr. Penn violated DR 2-110(A)(2)(B)(4), DR 9-102(A)(B), and, thus, DR 1-102(A)(1)(4)(5)(6).

Conclusion

In summary, the court affirms the hearing panel's finding of a violation of DR 1-102(A)(1)(5) and (6) and DR 4-101(A) regarding File No. 23523-9-lc. The finding of a violation of DR 1-102(A)(4) and DR 7-102(A)(1) are not sustained by the evidence and are set aside. As to File No. 23403-9-lc, the court affirms hearing panel's finding of a violation of DR-9-102(A) and (B) and DR-1-102(1), (5) and (6). The finding of a violation of DR 7-102(A)(1) is not sustained by the evidence and is set aside. With regard to the Patricia Pashby matter, File No. 23404-9-lc, the court affirms the hearing panel's finding that Mr. Penn violated DR 1-102(A)(1)(4)(5)(6), DR 2-110(A)(2)(B)(4), and DR 9-102(A)(B). While some of the violations found by the hearing panel have been set aside, the court is of the opinion this alteration of the hearing panel's findings would not have affected the discipline recommended. The determination of the hearing panel as to the discipline recommended is, therefore, affirmed.

A judgment setting forth findings and conclusions of the court will be filed simultaneously with this memorandum. The clerk of the court will file this memorandum in the record but it shall not be spread onto the minutes of the court.

This 9th day of November 2009.



Donald P. Harris, Senior Judge
Sitting by Designation

c: Sandy Garrett
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