IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

JAMES D. R. ROBERTS, JR., Petitioner,	)	
vs.	)	DOCKET NO. 11-1449-IV
BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE Respondent.	)	

MEMORANDUM OPINION

This cause came on to be heard on the 26th of May for presentation of argument. Petitioner urges the Court to send the matter back to the Board of Professional Responsibility for a new trial. Alternatively, he urges the Court to dismiss the matter outright. Respondent resists the Petitioner's requests and urges the Court to uphold the discipline imposed upon the Petitioner by the hearing panel.

PROCEDURAL HISTORY

The Board of Professional Responsibility of the Supreme Court of Tennessee, hereinafter (the Board) filed a Petition for Discipline against Petitioner, James D. R. Roberts, Jr., on March 9, 2009. Mr. Roberts filed a Response to the Petition on May 1, 2009. A Hearing Panel was appointed on May 26, 2009. The members of the Hearing Panel were Michael Sontag, Eileen Smith and Daniel Clayton.

On July 13, 2009, Mr. Roberts filed a Motion to Defer and Abate Proceedings, accompanied by a memorandum in support of his motion. The Board filed a Response to the motion on July 16, 2009. The Hearing Panel denied the motion on August 5, 2009.

A final hearing was scheduled for November 17-18, 2010. Mr. Roberts filed a Motion for Summary Judgment with an affidavit, exhibits and attachments, on October 18, 2010. The Board filed its Response to Motion for Summary Judgment on November 3, 2010. The Hearing Panel continued the final hearing and subsequently entered an Order on February 22, 2011, denying the Motion for Summary Judgment and re-scheduling the trial deadlines.

On February 28, 2011, Mr. Roberts filed a Motion for Leave to File Dispositive Motion and Motion for Leave to Conduct Additional Discovery. The Board responded to these motions on March 4, 2011. On April 28, 2011, the Hearing Panel entered an Order granting the motions allowing further dispositive motions and additional discovery.

On May 16, 2011, Mr. Roberts filed a second Motion for Summary Judgment and a Memorandum in Support of Summary Judgment. On the same date, Mr. Roberts also filed a Motion of Leave to file Amended Response, a Motion for More Definite Statement, and Memorandum in Support of Motion for More Definite Statement. The Board responded to these motions.

Mr. Roberts filed a Reply of Response to Respondent's Motion for More Definite Statement and Reply to Response to Respondent's Motion for Leave to File an Amended Response on July 11, 2011. Mr. Roberts filed a Reply to the Board's Response to Motion for Summary Judgment on July 11, 2011.

The Hearing Panel entered an Order on July 19, 2011, denying the Motion for Summary Judgment and the Motion for More Definite Statement. Mr. Roberts was permitted to amend his response to the Petition for Discipline.

On July 22, 2011, Mr. Roberts filed a Motion to Strike Response to Motion for Summary Judgment and Response to Statement of Undisputed Facts filed by the Board. The Board filed a response on July 25, 2011.

On July 29, 2011, Mr. Roberts filed a Motion in Limine to Exclude Testimony from the February 21, 2007, Emergency Hearing, a Motion in Limine to Exclude the April 4, 2007, Order and a Motion to Alter or Amend Order Denying Motion for Summary Judgment. The Board responded to these motions on August 3, 2011.

The Board filed a Notice of Nonsuit Pertaining to RPC 3.1 on August 4, 2011.

A final hearing was held on August 8-9, 2011. The Hearing Panel took oral argument on the pending motions. On August 12, 2011, the Hearing Panel entered an Order denying Mr. Roberts' motions to strike the Board's response to the summary judgment and to alter or amend the Order denying the summary judgment. The Hearing Panel also determined that Mr. Roberts' motion to exclude the testimony from the February 21, 2007, emergency hearing was premature. Finally, the Hearing Panel ruled that the April 4, 2007, Order was relevant evidence and that it did not have preclusive effect.

Mr. Roberts filed a Renewed Motion in Limine to Exclude the April 4, 2007, Order on August 18, 2011.

On August 25, 2011, the hearing panel entered its Judgment, finding that Mr. Roberts violated Rules of Professional Conduct 4.4(a)(1), Respect for the Rights of Third Persons; 3.3(a)(1) &(b), Candor Toward the Tribunal; and 8.4(a)(c) and (d), Misconduct. The Hearing Panel concluded that for these violations, Mr. Roberts should be suspended from the practice of law for six (6) months.

The Hearing Panel entered an Order on September 16, 2011, denying Mr. Roberts Renewed Motion in Limine to Exclude the April 4, 2007, Order.

On September 20, 2011, Mr. Roberts filed a Motion for Stay and a Motion for New Trial and New Hearing Panel. He filed a supplement to Motion for New Trial and for a New Hearing Panel on September 28, 2011. The Board filed responses to these motions on September 30, 2011.

The Hearing Panel entered an Order on October 6, 2011, granting Mr. Roberts request for a stay. However, the Hearing Panel denied Mr. Roberts' Motions for a New Trial and a New Hearing Panel.

Next Mr. Roberts filed a Petition for Certiorari on October 21, 2011. The Board filed an Answer on October 28, 2011. The administrative record was filed on November 3, 2011. The transcript of the proceedings was filed January 31, 2012.

On March 16, 2012, Mr. Roberts filed a Motion to Stay. On March 9, 2012, Mr. Roberts filed a Motion to Disqualify Disciplinary Counsel. The Board responded to those motions on March 16, 2012, and March 19, 2012.

On May 9, 2012, Mr. Roberts filed a Motion for a New Trial and for a New Hearing Panel. The Board filed its response on May 22, 2012.

On August 20, 2012, Mr. Roberts filed a Motion to Recuse (Judge Donald P. Harris), a Motion to Allow Taking of Further Evidence, and a Motion to Set Motions and to Realign Briefing Schedule Accordingly. On August 23, 2012, Judge Harris entered an Order Recusing himself from the case. The Tennessee Supreme Court appointed the Honorable Ben Cantrell on August 24, 2012.

Mr. Roberts, *pro se,* filed a Motion to Recuse (Judge Ben Cantrell) on August 28, 2012. The Board filed a response on August 30, 2012.

On August 30, 2012, Mr. Roberts filed a Motion to Strike "Revised Scheduling Order" entered August 24, 2012. On September 4, 2012, Mr. Roberts filed a Motion to Compel and a Motion to Strike Order entered August 28, 2012, by Hon. Ben Cantrell. On September 7, 2012, Mr. Roberts filed a Motion for Recusal of the Supreme Court Based on Tenn.Const.Art. VI, Tenn.Code Ann. §17-2-101 and Tenn.S.Ct. 10 and to Certify this matter to the Governor for Appointment of a Special Court. Mr. Roberts also filed a Motion to Allow Withdrawal of Counsel on September 7, 2012.

On September 17, 2012, the Board filed its responses to the Motion to Allow Withdrawal of Counsel, the Motion to Compel, the Motion to Strike Order Entered August 28, 2012, by Hon. Ben Cantrell, and Motion to Strike Revised Scheduling Order Entered August 24, 2012.

Judge Cantrell entered an Order on September 24, 2012, denying Mr. Roberts' Motion to Recuse.

On October 9 and 10, 2012, Mr. Roberts filed a Motion for Sanctions Pursuant to T.R.C.P. 11, a Renewed Motion for New Trial and New Hearing Panel, and a Renewed Motion to Allow Taking of Further Evidence. The Board filed responses to those motions on October 19 and 22, 2012.

On October 22, 2012, Mr. Roberts filed a Request for Show Cause Order. The Board filed its response on November 16, 2012. By this time Judge Cantrell was no longer in the case.

On November 16, 2012, Senior Judge Steve Daniels entered an Order Recusing himself from the case. Senior Judge Jon Kerry Blackwood was appointed.

On February 21, 2013, Mr. Roberts filed a Motion to Recuse Judge Blackwood. The Board filed its response on March 13, 2013. On June 4, 2013, Judge Blackwood entered an Order of Recusal.

Subsequent to Judge Blackwood's Recusal, the Tennessee Supreme Court appointed Chancellor J. B. Cox to hear the case. A scheduling conference was held in late December, 2013.

On December 20, 2013, Mr. Roberts filed a Motion to Stay Pending Outcome of Related Matters or in the Alternative, to File a Counterclaim. An Agreed Order was entered on February 21, 2014 to stay the proceedings.

Upon the Board's request the Court held a status conference and addressed all pending motions on August 4, 2014. On August 21, 2014, the Court entered the following: Order Denying Motion for Stay, Order to Allow Further Evidence, Order Denying Motion to Continue, Order Regarding Motion for New Trial, Order Striking Motion for Rule 11 Sanctions, Order Denying Motion to Strike August 28, 2012, Order as Moot, and Order Reserving Right to Rule on Show Cause if Necessary.

An Agreed Protective Order was entered into by the parties on October 3, 2014.

A Scheduling Order was entered on December 29, 2014. On December 31, 2014, Mr. Roberts filed an Expedited Motion for Hearing and/or to Alter Scheduling Order. On January 26, 2015, an Amended Scheduling Order was entered setting the deadlines for briefs and setting the date for oral argument on May 26, 2015.

On February 18, 2015, Mr. Roberts filed a Motion for Additional Discovery and Objections to the Board's Responses to Discovery and Motion to Compel. The Board filed its response on February 20, 2015. Following a phone conference on the motions, the Court entered an Order on March 19, 2015. The case proceeded to oral argument on May 26, 2015.

STANDARD OF REVIEW

As with all matters in this controversy, there is some disagreement as to the standard of review to be applied. The Court intends to articulate the overarching standard of review in this section of the memorandum.

This matter is before the Court on Petition for Certiorari that challenges the discipline imposed by the hearing panel. All matters of disciplinary enforcement for lawyers in Tennessee are governed by Tenn.R.S.Ct. 9. The provisions for reviewing the actions of the hearing panel are contained in §1.3 of Rule 9. The 2006 version of Rule 9 governs this case. It states in pertinent part:

> 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 the panel are made, the Chancery 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 light of the entire record.
>
> In determining the substantiality of the 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. Rule 9, §1.3 (2006).

ISSUES RAISED BY THE PETITIONER

The Petitioner has raised thirteen (13) issues for the Court's consideration. These issues, as stated by the Petitioner are as follows:

I. Panel Member Sontag's Failure to disclose his $75,000,000.00 in pending cases before the complaining Chancellor requires a new trial.
II. Panel Member Eileen Smith's Failure to disclose her removal from a case for ethical misconduct before the complaining Chancellor requires a new trial.
III. Panel Member David Clayton's Failure to disclose his firm's prior appearances before the complaining Chancellor requires a new trial.
IV. Panel Member Eileen Smith's Failure to disclose her interest in becoming a prosecutor with the Board requires a new trial.
V. The Failure to follow Tenn. S. Ct. Rule 9, Section 8.2's requirement that Hearing Panel Members be selected on a rotating basis requires a new trial.
VI. The Hearing Panel's refusal to grant Summary Judgment in favor of Respondent should be reversed and the entire proceeding dismissed.
VII. The Board's pre-trial refusal to disclose to Respondent the specific charges made against him and the punishment sought taint the process and require a new trial.
VIII. The "Hearing Panel" erred in that its decisions were (1) arbitrary and capricious; (2) characterized by an abuse of discretion; or (3) unsupported by evidence which is both substantial and material in light of the entire record.
    A. Panel Member Daniel Clayton Acted Outside his Authority.
    B. November 22, 2005 Hearing.
    C. John Wesley Green's Complaint to the Court of the Judiciary.
    D. Comments Regarding the Testimony of Art Fourier.
    E. Not Allowing Testimony and Evidence Related to Mr. Buslo's Ethical misconduct in the *Green v. Green* case.
    F. Printouts from the Tennessee Secretary of State's Office.
    G. Motions in Limine.
    H. Unilateral Evidentiary Rulings.
    I. Signature of Other Panel Members.
IX. The Findings of Fact of the Hearing Panel were in Error.
X. Evidence Ignored by the Hearing Panel Contrary in its Findings of Fact and Argument for Reversal.
XI. The sanctions of the hearing panel are unlawfully harsh and inconsistent with the ABA Standards applied to similar situations.
XII. The violations of Respondent's Constitutional rights.
XIII. The hearing panel is an unconstitutionally constituted body and therefore its decisions must be void.
    A. Due Process.
    B. Violation of Tennessee law and the Tennessee Constitution.

C. The Tennessee attorney discipline enforcement scheme is insulated from the general population of the state members of the bar and is therefore unconstitutionally constituted.

ANALYSIS

Issues I., II., III. and IV.
Panel Members

Issues I, II III and IV can be fairly analyzed as a group. Essentially Mr. Roberts claims that each and every Panel member failed to make disclosures that they should have made pursuant to the Code of Judicial Conduct. He further argues that the Panel members had an "interest" in the outcome of the litigation that mandated their recusal in this instance and should lead to a new trial.

It is undisputed that the Code of Judicial Conduct applies to Hearing Panel members pursuant to Tenn.S.Ct. Rule 9, §6.5 (2006). The appropriate version of this rule applicable to the Hearing Panel members at the time of the hearing was the 2009 version of Tenn.S.Ct. Rule 10, Canon 3(E)(1)(c) which states:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than a de minimis interest that could be substantially affected by the proceeding;

Tenn.S.Ct. Rule 10, Canon 3(E)(1)(c)

It is also undisputed that Tenn.S.Ct. Rule 9 §§ 6.4 and 8.2 require the appointment of Hearing Panels from the disciplinary district in which the attorney practices law.

From these Rules it is clear that the members of Hearing Panel were under an obligation to recuse of their own volition if, based upon an objective standard, their impartiality might reasonably be questioned. This is one of Mr. Roberts' complaints about the process. He posits that objectively there is an appearance of impropriety and a judge's impartiality might reasonably be questioned if the judge (Hearing Panel Member) had any cases filed in the court from which the complaint arose. He further argues that a desire to be employed by the Board somehow presents an appearance of impropriety that should have mandated recusal and all of which resulted in an unfair trial. Stated another way he believes that if a Hearing Panel Member ever had any connection with the court from which the complaint originated or any desire to be employed by the prosecuting entity, then ipso facto that Hearing Panel Member is conflicted out and should have recused, sua sponte. If that were the case the entire attorney disciplinary process would come to a screeching halt.

Admittedly, at first blush, the allegation that a Hearing Panel Member had $75,000,000.00 worth of cases pending before the judge who signed the complaint for discipline would cause one to pause. Shouldn't the existence of that large a dollar value of cases be enough on its own to cause recusal? Clearly, the answer to that question is speculative in nature. If it came to light that none of the cases that the

Hearing Panel Member had before the complaining judge were handled on a contingency fee basis, would the analysis change?

Mr. Roberts has shown no real interest that a Hearing Panel Member had that would be disqualifying. Attorneys represent their clients for their clients' interests and the dollar amount of cases filed before a trial judge, if the attorney has entered into a legal and ethical fee arrangement with the client, is not an interest in the litigation as they have been defined.

Further the Court cannot ignore the fact that the litigation we are speaking of here is the disciplinary proceeding itself. Mr. Roberts has not shown that a Hearing Panel Member had any monetary interest in his ability to practice law. As cited the rule states that the Judge (hearing panel member) has an economic interest in the subject matter of the litigation or in a party to the litigation. Clearly, the type of interest contemplated by the rule is not present in this case.

The timing of Mr. Roberts' challenge of the Panel Members is suspect to this Court. The Hearing Panel was appointed May 26, 2009. Mr. Roberts' hearing before the Panel was held August 8-9, 2011. Clearly, Mr. Roberts had ample time to research the Hearing Panel in any manner he desired. His argument that he did not find out about the "inherent conflicts" of the Panel Members until immediately after his trial is hollow at best. He had two (2) years to know and understand any potential conflicts the Hearing Panel may have had. He only raised the issue of their failure to disclose after an unfavorable ruling. The Court is relying on the analysis in the Davis case to find that Mr. Roberts has waived his right to challenge the Hearing Panel Members based on the timing of his challenge.

Mr. Sontag

Mr. Roberts asserts that Mr. Sontag had $75,000,000.00 of cases filed before the complaining Chancellor at the time of the hearing. He somehow equates the value of Mr. Sontag's clients' interest to Mr. Sontag himself. This reliance is misplaced. Mr. Sontag had no pecuniary or property interest in Mr. Robert's disciplinary proceeding..

Mr. Roberts spends a great deal of time arguing about the potential for retaliation from the complaining Chancellor against the Panel Members in the cases before the Chancellor. This is an extreme logical leap that ignores the bench's responsibility to report unethical conduct. Taking that argument to its extreme, an attorney concerned about retaliation for serving on a Hearing Panel where there was a complaining member of the Bench would simply never serve in that capacity. No complaint from a judge would ever get heard by a Hearing Panel because they all might have a case in that court the following week.

Mr. Roberts goes on to argue that the cases Mr. Sontag had filed should have been disclosed to him. On the contrary, if Mr. Sontag analyzed his situation in such a way that he believed a reasonable person would believe that his representing clients in cases before the Chancery Court of Davidson County would cause an appearance of impropriety in this disciplinary proceeding he would have been under an obligation to recuse and could have done so without disclosure. Here Mr. Sontag has no pecuniary or property interest in his clients' cases before the Chancery Court of Davidson County. Further, he has no pecuniary or property interest in Mr. Roberts ability to practice law as a licensed attorney.

Mr. Clayton

Mr. Roberts also makes similar arguments concerning Mr. Clayton due to his practice before the Chancery Court. The Court will not reiterate its analysis, but suffice it to say that the analysis applicable to Mr. Sontag is also applicable to Mr. Clayton on the issues of recusal and disclosure.

Ms. Smith

Lastly, Mr. Roberts takes issue with Ms. Smith and her service on the Hearing Panel. While it is undisputed that Ms. Smith later went to work for the Board, it is also clear that the job that she ultimately obtained was not posted during the time of the hearings or decisions in Mr. Roberts' case. Just because someone has expressed a desire or made mention that they would like to work somewhere in the future does not constitute negotiation for employment and does not violate the Code of Judicial Conduct. Ms. Smith had no direct conflict.

Mr. Roberts' argument that Ms. Smith somehow feared retaliation from the complaining Chancellor is also without merit. There is no relationship between the actions that resulted in disqualification of Ms. Smith's firm in the previous case and this case.

Issue V.
Selection of the Hearing Panel

The Chair of the Board of Professional Responsibility is tasked with the selection of the members of the hearing panel. Tenn.S.Ct. Rule 9, §8.2 states:

> "the Chair shall select [members of the hearing panel] on a rotating basis from the members of the district committee in the district in which the respondent practices law..."

Mr. Roberts' argument is that since the Panel Members selected by the Chair were not selected on a pure rotational basis that his Panel has been selected via an unlawful procedure. He further insinuates that the Chair hand selected the Panel for his case.

The Board admits that the selection process employed at the time of Mr. Roberts' petition for discipline was initiated is not strictly "rotating." Interestingly, the rule does not specify the keeping of a list for observation of the rotation of the members. It further does not designate the direction of rotation on said list, whether it is mandated to be clockwise or counterclockwise rotation. Frankly, the rule requires the Chair to ensure that the Panel is "rotated" to ensure fairness of the Panel.

Since 2004, the Board has used a "random" selection process that is a piece of software that generates names at "random" from the available Hearing Panel Members that practice in the disciplinary district that a respondent practices in. The program generates three (3) names from the pool of available names. If there is a conflict with a Hearing Panel Member that Hearing Panel Member is not seated on the Panel, and the software generates enough other names to fill a Panel of three (3). This process is repeated until a Panel of three (3) is selected.

Whether the term is "rotating" or "random" is less important than if the Respondent had due process in the selection of the panel by the Chair of the Board of Professional Responsibility. The procedure outlined by the Board has the benefit of a screening process that ensures that conflicts are checked for and that human hands are not associated with the "selection" process itself. This Court is satisfied that it should not reverse this entire process on the pyrrhic distinction of a "rotating"

selection versus a "random" selection. Mr. Roberts has shown no bias directly related to the use of a "random name generating program." He had a "randomly selected" panel that fulfilled the Chair's mandate to "rotate" Panel Members to ensure due process.

Issue VI.
Summary Judgment

As there was no argument as to this issue by Mr. Roberts' counsel at the hearing, the issue is waived. In the event that the Court's recollection of the argument made is faulty the Court will analyze the issue from the briefs of counsel. Plainly stated, whether the testimony given by Mr. Roberts at the contempt hearing was or was not evasive and untruthful is a material and disputed fact. This fact alone mandates denial of the second (2nd) Summary Judgment Motion made by Mr. Roberts. Whether Mr. Roberts' assertion of S.Ct. Rule 1.6 in light of Mr. Anderson's testimony is a disputed material fact concerning Mr. Roberts' duty of candor to the tribunal as well as his duty to third (3rd) persons.

Issue VII.
Disclosure and Punishment

This Court is satisfied that the Board complied with the disciplinary rules in initiation of its petition. The Court is further satisfied that Mr. Roberts had appropriate notice of the charges against him in the disciplinary proceeding. Further, Mr. Roberts was keenly aware of the type of punishment sought by the Board.

Formal disciplinary proceedings are governed first by the Supreme Court Rules and then by the Tennessee Rules of Civil Procedure. Rule 8.2 governs the initiation

of formal disciplinary proceedings via petition for discipline "which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct." See *Mabry v. Bd. Of Prof'l Responsibility*, 2014 Tenn. LEXIS 1046, 14-15.

Mr. Roberts goes to great length in his brief to characterize the conduct of the Board as retaliation against him because he would not take the Public Censure offered by the Board. This consternation of allegedly not knowing what he was charged with which would merit punishment above the previously offered sanction is hard to understand. First, offers of compromise are not evidence, are irrelevant, and do not form a floor from which a prosecution of any sort may proceed. Citations omitted as unnecessary. Offers in compromise are just what they appear to be. If they are not accepted all bets are off.

Pursuant to the Rule the petition is sufficient. The contents of the petition set out the alleged misconduct of Mr. Roberts. In addition to the petition, the history of the referral of the matter to the Board by the Chancellor, Mr. Robert's counsel's response to the allegations, the response letter sent by the Chancellor, the references in that letter that point to the allegations in great detail and the people who were involved paint a clear picture of the nature of the allegations against Mr. Roberts.

Mr. Roberts also argues that he was unaware of the sanctions sought by the Board. The Board was seeking appropriate sanctions since at the conclusion of the investigative period Mr. Roberts was unwilling to accept the discipline offered by the Board. Clearly, the ABA standards apply to the sanctions available to the Hearing Panel. When the parties did not reach an agreement as to a sanction, the Board was free to seek any sanction within the appropriate range as outlined in the ABA

standards. The Board, in its petition for discipline sought an appropriate sanction. That sanction of necessity would have been determined by the Hearing Panel applying the ABA standards to the proof, which they did.

Issue VIII.
The "Hearing Panel"

The Hearing Panel erred in that its decisions were (1) arbitrary and capricious; (2) characterized by an abuse of discretion; or (3) unsupported by evidence which is both substantial and material in light of the entire record

This Court will attempt to deal with Mr. Roberts assertions in somewhat the same order he argues them in his brief. Initially, Mr. Roberts argues that the Hearing Panel did not act within the proper scope of their authority. He fails to show how that occurred.

A Hearing Panel is made up of three (3) members who are responsible for conducting the hearing. They have a responsibility to conduct the hearing reasonably and in an orderly fashion. It is entirely appropriate for one (1) of the Hearing Panel Members to take the lead in the hearing. Otherwise, Mr. Roberts would be arguing that there were inconsistent evidentiary rulings if the Hearing Panel Judges disagreed on the evidentiary rulings. Even in an appellate setting where there are usually three (3) judges participating, it is entirely reasonable for one (1) judge to take the lead in the process. It is even more important during a hearing where evidentiary rulings are made.

Mr. Roberts apparently argues that the actions of Mr. Sontag and Ms. Smith in the hearing were not appropriate due to their limited vocal appearance in the record until well into the hearing. During hearings, there are times in trials when judges do

not speak for long stretches of time. This does not indicate that they were not present or not participating. Mr. Roberts' assertion that it was difficult to determine whether Mr. Sontag and Ms. Smith were even present is a far flung argument. The record bears out the participation of all the Members of the Hearing Panel. This is especially true in light of Mr. Clayton presiding over the proceeding and making evidentiary rulings.

Next Mr. Roberts turns to specific evidentiary rulings made by the Hearing Panel. The first of these challenges is to the exclusion of the testimony of John Wesley Green that relates to the tone, body language and demeanor of the Chancellor. Clearly a review of the record reveals that Mr. Green was allowed to testify concerning the events of November 22, 2005. Mr. Green also attempted to testify as to the Chancellor's tone "body language and demeanor" based on her in-court statements that Mr. Green felt demonstrated a prejudgment of his case to the extent that he quit attending the hearings. The Board objected to this testimony. The Hearing Panel did not abuse its discretion in denying Mr. Green the opportunity to testify as to these events. Mr. Green in fact got in testimony of the Chancellor's tone inflection and body language which led to Mr. Roberts filing a Motion to Recuse. The issue at a hearing before a Hearing Panel of the Board of Professional Responsibility is not the conduct of the court unless it directly relates to the conduct of counsel. The issue before the Hearing Panel is the conduct of the attorney in the situation and whether that conduct violates the professional rules.

In like manner the Complaint to the Court of the Judiciary filed by Mr. Green is not relevant to a determination of whether or not Mr. Roberts violated the

professional rules. The Hearing Panel did not abuse its discretion in denying entry of Mr. Green's Complaint. Mr. Green got to testify in the hearing at issue.

As to Mr. Fourier's testimony, reasonable minds could differ as to whether his testimony regarding settling the underlying Green litigation without client authority is relevant. Therefore, the Hearing Panel did not abuse its discretion in disallowing that testimony.

Mr. Roberts next argues that the Hearing Panel erred in allowing in testimony of the February 21, 2007 hearing. Mr. Roberts filed a pretrial motion to exclude the testimony. The Board objected. The Hearing Panel found that the motion was premature and deferred ruling on the motion. The Panel deemed it appropriate to deal with those objections as the testimony was being offered. The Panel did not abuse its discretion in dealing with the February 2007 hearing and the April 2007 order in this way. Mr. Roberts counsel did not make contemporaneous objections to the testimony as it came in to the record.

The April order seems to cause Mr. Roberts the most concern. He is convinced that the Hearing Panel treated the order as having preclusive effect. Restated in another way, if the complaining Chancellor said that he was evasive and untruthful and interfered with the administration of justice in her order then ipso facto the Board sided with the complaining Chancellor. Simply put the record does not bear out this elementary analysis. The record bears out the fact that the Hearing Panel stated they were not giving the order preclusive effect. The record bears out that Mr. Roberts counsel objected to the use of the order during Mr. Roberts' testimony. The Hearing Panel was consistent in its ruling allowing the order in.

Under Rule 401 the order is relevant. This point is conceded by Mr. Roberts in his brief when he argues that there are only two (2) lines of the order that are relevant. If there are two (2) lines that are relevant, then, how can there have been an abuse of discretion in allowing the order into evidence? Given this concession and given the other reasons articulated by the Board for the offer of the order, the Hearing Panel did not abuse its discretion by allowing the April 2007 order into evidence.

Mr. Roberts also argues that original signatures of the other Panel Members were required and that given the fact that Mr. Clayton signed the other Panel members' names with permission mandates a new trial. While the Court agrees that it can find no precedent for a judge signing another judge's name by permission, Mr. Roberts waived this issue by not raising this issue with the Hearing Panel. It is clear that all Panel Members participated in the hearing and consented to the ruling that is the basis for Mr. Roberts' discipline. The rules reveal no requirement that all members of a Hearing Panel sign each order.

Issue IX.
The Findings of Fact of the Hearing Panel were in Error

Mr. Roberts goes to great lengths to discuss the particular errors he alleges were made by the Hearing Panel in its findings of fact and conclusions of law. Before the Court goes into greater detail in its analysis it is important to reiterate that it is not this Court's obligation to act concerning the underlying litigation. It is not this Court's task to determine whether the underlying sale was illegal. It is this Court's task concerning this issue to determine whether the findings and conclusions are supported by material evidence in the record.

Mr. Roberts first takes issue with finding # 8. In that finding the Hearing Panel dealt with the misspelling of the company name in the Sheriff's sale. In his brief he does not disagree with the finding. He says that it grossly understated the numerous other errors in the execution process. That assertion alone does not make the finding erroneous. The gravamen of the discussions concerning the notice begin with the theory that the name of the corporation was misspelled and consequently the sale was defective. This finding is not only clearly supported by the record, Mr. Roberts concedes its accuracy.

Consistent with Mr. Roberts' arguments, he next brings up finding #10. Then he concedes its accuracy. Next he takes issue with finding #12. He initially argues that the finding is in error, and then he argues that the finding is supportive of his position. He cannot have it both ways. As to finding #12, the Court finds that there is material evidence in the record to support the finding. Mr. Roberts refers to finding #13 apparently for context for his argument but he fails to show that it is inaccurate. There is evidence in the record to support this finding.

Mr. Roberts takes issue with finding #15 due to the timing of wording of the finding. He next claims that finding #17 is almost accurate. These two (2) findings read together do no violence to Mr. Roberts' version of the facts. There is support in the record of a previous conversation consistent with finding #17 and support for finding #15 in the communications that followed that are conceded by Mr. Roberts. We all know that this fateful chain of events manifested themselves over conversations had at Mr. Armstrongs' home during a football game. These findings are supported by material evidence.

Mr. Roberts next takes issue with finding #19, as if he cannot see any dual purpose or a need to have any conversation with his clients about any potential conflict that might arise. He further argues that it was his intent all along to merely reserve the corporate name. Well, he did not reserve the corporate name. His law office with Mr. Armstrong's assistance through Ms. Layman formed another corporation that spelled its name exactly as the misspelled name in the Sheriff's notice with a share certificate that mirrored the share certificate that was to be sold in the Sheriff's sale. Mr. Roberts argues that the corporate entity only served Mr. Armstrong's needs. This argument is disingenuous at best in light of Mr. Armstrong's testimony. Mr. Armstrong's intent was clearly to allow Mr. Roberts to use what he was forming to help out Mr. Roberts in the case that involved Mr. Green. There is no other explanation for Mr. Armstrong's appearance at the Sheriff's sale. Finding #19 is supported by material evidence in the record.

It cannot legitimately be contested that Mr. Roberts law office prepared and submitted the application for the corporate charter and that it was issued on December 14, 2006.

Similarly finding #21 is accurate as well. Mr. Roberts office did front the money for the filings for the new corporation.

Mr. Roberts also wants to parse finding #25. He would rewrite the finding to include a more complete list of all of his filings of December 14, 2006. Said laundry list is not necessary to the finding which encompasses the relief Mr. Roberts requested. There is evidentiary support for the finding in the record. The same analysis applies to finding #26.

The evidentiary support for finding #27 is cited by Mr. Roberts in his brief and is present in the record.

Mr. Roberts next takes issue with finding #28. The testimony about damages and a federal lawsuit is in the record and has been consistently argued by Mr. Roberts or his counsel. There is support in the record for this finding. The course of conduct that occurred as a result of the action of Mr. Armstrong and Mr. Roberts might not have been as ideal as what Mr. Roberts now argues in his brief. The fact that Mr. Roberts did not reserve the corporate name to keep his friend and client Mr. Armstrong out of the middle of Mr. Green's case does not change Mr. Roberts' intent to use the other entity for the purpose of a later federal lawsuit.

The Court will not address findings #37 and #42 as there is a concession in Mr. Roberts' brief that the findings are supported by the evidence.

As to finding #44, the Hearing Panel is in the best position to weigh the credibility of the witnesses before it. Inherent in the finding is a weighing of the difference between the testimony of Mr. Roberts and the testimony of Mr. Armstrong. The Hearing Panel was in the best position to judge the credibility of the witnesses. There is support in the record for the finding. Further, Mr. Roberts really does not contest its accuracy. He argues that it is taken out of context. His answer is truthful only to an extent. The entire truth is that given that it was Mr. Green's idea to form a corporation, Mr. Roberts did not do that for his client Mr. Green. Mr. Roberts did not reserve the corporate name for his client Mr. Green. Mr. Roberts had a discussion with Mr. Armstrong concerning Mr. Green's case during a football game viewing at Mr. Armstrong's home. Mr. Armstrong would not have independently had the idea to form

the corporation consistent with the misspelled Sheriff's notice. That information had to be supplied by Mr. Roberts even during the football conversation.

Apart from Mr. Roberts' purposes, Mr. Armstrong had no incentive to name his new corporation in the manner that he did. The finding that it was Mr. Roberts' idea is given life and credibility in the details. Mr. Armstrong was not the best position to know about the details of the misspelling. Mr. Armstrong was not in the best position to have knowledge about how to issue the stock certificate. After Mr. Armstrong appeared at the law office going forward with the football conversation, Mr. Roberts gave life to the idea by supplying all the necessary details to benefit his client Mr. Green not Mr. Armstrong.

As to finding #46, this finding is also supported by material evidence. Mr. Roberts did initially refuse to answer questions consistent with the finding. Finding #47 bears out the acknowledgement that Mr. Roberts asserted a right not to answer. Mr. Armstrongs' testimony brings Mr. Roberts' assertions into question. The Hearing Panel was in the best position to judge the credibility of the witnesses.

Finding #50 is supported by material evidence in the record. The hearing panel did not use the order for preclusive effect. This Court has also already ruled on the relevance of the order.

Next, Mr. Roberts challenges the Hearing Panel's conclusions of law. Mr. Roberts takes issue with conclusion #1. The argument that this entity was created for any purpose other than to help Mr. Roberts in the Green litigation is disingenuous. Mr. Roberts own arguments belie his intentions. He says it was Mr. Greens' idea to form a corporation consistent with the misspelling and yet he embroils an unwitting other client

Mr. Armstrong in this litigation by supplying all the details necessary in Mr. Armstrong's filing to further illustrate Mr. Green's case. He did not form the corporation for Mr. Green. He did not reserve a corporate name as he says was his intent. He supplied all the details and the initial conversation that led to Mr. Armstrong's decision to create the entity that Mr. Armstrong admits had no real other purpose. Mr. Armstrong was helping Mr. Roberts. Mr. Roberts was truly in charge of what went on even if he did not say a word at the Sheriff's sale. The conclusion is supported by material evidence in the record.

If the formation of the new entity was not for the purpose of delaying or disrupting the sale and was for the purpose of pointing out the illegality of the sale why was it necessary. Mr. Roberts already had a notice with numerous errors. He had already filed a motion to quash with supporting documents. He had informed the Sheriff and Mr. Bulso of the irregularities and he had sought a hearing. He had preserved Mr. Green's legal rights. And if he had not he knew what else he should have done, like reserve the corporate name and or form an entity with Mr. Green instead of tangling Mr. Armstrong up in this litigation.

Concerning conclusion number 2, just because the sale occurred and a veteran officer and his counsel did not let the conducting of the sale fail due to the actions of Mr. Roberts and Mr. Armstrong with Mr. Roberts direction, this does not mean that they did not attempt to delay or disrupt the sale. Mr. Roberts appeared at the sale with a video camera and documented the entire sale on video after he had filed all the appropriate motions and outlined the problems with the sale for the Court. Questions were asked by Mr. Roberts and Mr. Armstrong concerning the shares that were to be

sold that were inconsistent with Mr. Roberts being there for the purpose of documenting an illegal sale. All he had to do was show up and turn the camera on. This conclusion is supported by material evidence in the record.

As to conclusion #3 Mr. Armstrong clearly had a reason to incorporate the new company in the way that he did. He did it to help Mr. Roberts. This rationale is supported by the record in this case. This same rationale supports the conclusions of the Hearing Panel that the incorporation was in name only. Again, all the details surrounding the certificate was supplied by Mr. Roberts to ensure confusion in the Green litigation.

Conclusion #4 is conceded by Mr. Roberts as being accurate.

Conclusion #5 deals with the harm caused or potentially caused by this turn of events. There was clear potential for harm in disrupting or delaying the sale in the actions surrounding the creation of this entity.

Concerning Conclusion #6, it is clear that the act of forming this other entity by Mr. Roberts firm for Mr. Armstrong and using the existence of this other entity for the purposes it was used for resulted in actual harm and a waste of judicial resources surrounding the contempt hearings. These actions interjected Mr. Armstrong into the litigation and caused Mr. Bulso to have to determine what role Mr. Armstrong had. Mr. Roberts, by his actions arising as a result of Mr. Green's initial idea (as Mr. Roberts sees it) and as a result of the conversations at the football game viewing at Mr. Armstrongs' home and his subsequent formation of an entity that could only have been formed with the information available only to Mr. Roberts, and due to the actions taken by Mr. Roberts and Mr. Armstrong at the sale, caused Mr. Bulso to have to file the contempt

petitions. Had Mr. Roberts taken even one of the other actions that he has described (post an appeal bond in Mr. Green's case, create another corporation for Mr. Green in the misspelled name, reserve the corporate name in the misspelled name with the secretary of state) there might not have been a need for the contempt pleadings and the hearings surrounding them. The record supports the finding.

Conclusions #7 and #8 are also supported by material evidence in the record. On one hand Mr. Roberts argues that he had every right to disrupt or delay a patently illegal sale and on the other hand he argues that he did not disrupt the sale at all but merely documented a patently illegal sale. Respectfully, he may not have it both ways. He used a third (3rd) person and injected that person into the litigation for the purpose of delay and harassment.

Issue X.
Evidence Ignored by the Hearing Panel Contrary to its Findings of Fact and Argument for Reversal

In his brief Mr. Roberts argues that the hearing panel was unwilling to accept the fact that the execution sale was illegal. Clearly, the Hearing Panel nor this Court was charged with the responsibility of determining whether the execution sale was illegal or not. The Panel's responsibility was to determine whether the Rules of Professional Conduct had been violated and this Court's obligation is to determine whether the Panel's determination was done under appropriate procedure. It is also this Court's task to determine whether there is substantial and material evidence in the record to support the Panel's decision. This Court has already undertaken its analysis of whether appropriate procedure was extended to Mr. Roberts. This Court has already determined that there is substantial and material evidence to support the decision of the

Hearing Panel. There is no indication that the Hearing Panel ignored evidence in making its findings.

In this section of his brief, Mr. Roberts points to no new concepts that he has not already discussed. He appears to be stuck upon the illegality of the execution sale. For the sake of argument, let us assume that the execution sale was illegal because of the misspelling of the corporate name and for all the other errors argued by Mr. Roberts that the sale was illegal. Mr. Roberts had preserved Mr. Green's rights by the filings that he made before the complaining Chancellor without any other action being necessary. Even without registering a corporate name or creating another corporate entity like Mr. Green suggested, the notice itself and the lack of a hearing before the execution sale were the appropriate legal and ethical impetus for his arguments. The rest of his actions, whether they were legal or not, were unethical according to the Hearing Panel. If there is substantial and material evidence in the record to support the finding then this Court must uphold the finding of the panel

Authoring the creation of another entity for the sole purpose of confusion and harassment were not necessary. Using a third (3rd) party to achieve the result illustrates Mr. Roberts' unstated unwillingness to follow through with reserving a corporate name or creating another corporation with Mr. Green. None of these actions were necessary or proper. One merely had to hold the defective notice up against the actual spelling to achieve appellate review of the matter. Mr. Roberts could already substantiate that he did not have a hearing before the sale without any of the actions that were taken in this context.

Mr. Roberts wants to hide behind Mr. Armstrong's lack of recollection of any conversation concerning whether or not Mr. Roberts would disclose this information pursuant to Rule 1.6. Mr. Armstrong's testimony is the most believable in this instance because Mr. Armstrong has nothing to lose. His perceptions were likely colored by the ease with which Mr. Roberts discussed Mr. Green's case with him (Mr. Armstrong).

Issue XI.
The Sanction was Unlawfully Harsh and Inconsistent with the ABA Standards

Mr. Roberts devotes substantial time and effort in an attempt to persuade this Court that he made no false statements, that he had no selfish motive, that there was no harm or potential for harm, that he was not evasive, and that the Hearing Panel should have not disciplined him but in the alternative should have applied a different discipline because it did not apply the ABA standards correctly. The Court will not reiterate its previous analysis concerning the Hearing Panel's findings and conclusions. Given the findings made by the Panel, the Panel had a duty to consider, (a) the duty violated, (b) the lawyer's mental state; and (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors.

The Hearing Panel determined that Mr. Roberts violated Rules of Professional Conduct 4.4(a), 3.3(a)(1) and (b), and 8.4(a)(c), and (d). The Panel then applied the ABA standards that were applicable. They are:

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court for that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a party or causes interference or potential interference with a legal proceeding.

The Hearing Panel found three (3) aggravating factors: dishonest or selfish motive; multiple offenses; and refusal to acknowledge the wrongful nature of the conduct. There is substantial and material evidence in the record to support these findings. Mr. Roberts motive is clear. He believes that he is the only person related to the disciplinary complaint that understands levy, execution and garnishment law and that all his actions are not only legal but ethical. Everyone else is just missing the point. What is clear however is that Mr. Roberts used a third (3rd) person to do what he dared not do by using Mr. Green, no matter how he spins the analysis in retrospect, to attempt to frustrate, impede or disrupt the sale when he could not get a hearing. Just because he was lucky enough to draw a twenty-five (25) year veteran officer who went through with the sale anyway does not mean that there was not injury or potential for injury. These actions caused needless additional pleadings and hearings and impeded the administration of justice, which costs Mr. Green more money in time and legal fees, which were an issue already according to Mr. Roberts. Mr. Roberts actions caused injury to Mr. Armstrong by allowing him to be placed in the middle of this situation

involving Mr. Green. Mr. Armstrong was forced into additional unnecessary legal proceedings and forced to testify about these events. Mr. Roberts had a selfish motive in hiding behind nondisclosure rules in order to frustrate the process. The Hearing Panel found that it believed Mr. Armstrong regarding whether he ever instructed Mr. Roberts about discussing his matters. Their finding is reasonable. The system was injured by this course of conduct. Mr. Roberts clearly acted knowingly and clearly will not acknowledge that he acted in any way that could be unethical. Clearly the suspension is not unlawful and it is not inconsistent with the ABA standards.

Issues XI. and XIII.
Constitutional Rights

As to the remaining arguments, Mr. Roberts has conceded that there is controlling authority that has upheld the constitutionality of the attorney disciplinary process.

CONCLUSION

Therefore this Court must conclude that the decision of the Hearing Panel must be upheld. Counsel for the Board will draft an order consistent with the Memorandum.

This the 21st day of July 2015.

J. B. COX
SITTING AS SPECIAL JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Memorandum has been forwarded by U. S. Mail, postage prepaid, to:

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This the 21st day of July, 2015.

J. B. COX
SITTING AS SPECIAL JUDGE