

MEMORANDUM OPINION

PROCEDURAL HISTORY

A Petition for Discipline was filed against Talley by the Board on December 19, 2005. Talley failed to respond to discovery requests issued by the Board and ultimately, the hearing was conducted by the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee on May 8, 2007. The hearing was conducted by conference call by agreement of the parties. Neither Talley or his counsel participated in the hearing. The Hearing Committee found that due to Respondent's failure to respond to discovery requests, the Board's allegations in the Petition would be taken as true. The Hearing Committee recommended Talley be disbarred. Talley appealed the Hearing Committee's ruling and on July 22, 2009, the Chancery Court of Shelby County, Tennessee, Senior Judge Donald P. Harris, sitting by designation, vacated the judgment of the Hearing Committee and remanded the matter for further proceedings.

On January 15, 2010, a hearing on the Petition for Discipline was held before a newly constituted Hearing Panel (the Panel). The Board and Talley, represented by counsel, presented evidence. On January 27, 2010, the Panel entered its findings and recommendations that Talley be disbarred. Talley filed a timely Petition for Certiorari in the Chancery Court for Shelby County, Tennessee and the record was duly certified to this Court.

SUMMARY OF FACTS

On January 15, 2010, this matter was heard by the Hearing Panel upon the pleadings, the testimony of Talley, and the entire record, including certain stipulated exhibits. At the conclusion, the Panel took the matter under advisement pending a written findings and recommendation which it filed with the Board on January 27, 2010. The panel found Talley had pleaded guilty to a misdemeanor, to wit, violation of the Securities Act, which is classified as a Class A misdemeanor. The Panel found that by pleading guilty to the above described crime, Talley admitted to the following:

39-11-403. Criminal responsibility for facilitation of felony.

(a) A person is criminally responsible for the facilitation of a felony, if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony. Tenn. Code Ann. § 39-11-403

The Panel found the felony to which Talley pled guilty to facilitating specifically was described in Count 2 of the indictment of Talley and others, which involved employing a device, scheme, or artifice, to defraud investors in connection with the offer, sale, or purchase of a security in violation of Tennessee Code Annotated §48-2-121. The Panel further found that Talley filed a Conditional Guilty Plea in BPR Docket Number 2001-1265-9-LC admitting to the violation of the

following Disciplinary Rules of the Code of Professional Responsibility: DR 1-102 (A)(1) and (A)(6), and DR 9-102 (A)(B). The Panel also found that the Petition for Discipline and Supplemental Petition for Discipline filed as Docket Number 2001-1265-9-LC alleging misconduct by Talley set forth acts and conduct similar in nature to the wrongful conduct alleged by the Board in the instant case. The Panel noted and found that despite his Conditional Guilty Plea in BPR Docket Number 2001-1265-9-LC and his Guilty Plea in the Criminal Court of Shelby County, Tennessee in Docket Number 05-06002, Talley failed to admit any guilt in his testimony before the Panel and showed little, if any, remorse with regard to his conduct. The Panel recommended Talley be disbarred.

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 Tenn. Code Ann. § 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 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, Sec 1.3 (2007).

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

ANALYSIS AND DISCUSSION

On January 15, 2010, a Hearing Panel of the Board of Professional Responsibility held a hearing in Disciplinary District IX of the Board of Professional Responsibility of the Supreme Court of Tennessee. Present and participating were counsel for the Board, counsel for Mr. Talley, Mr. Talley, and the three Board members. The hearing related to a Petition for Discipline filed by the Board against Talley on December 5, 2005, alleging misconduct and violations of Rule 1.15 and

Rule 8.4 of the Rules of Professional Conduct. The conduct that led to Talley's indictment occurred prior to the adoption of the Rules of Professional Conduct. The Panel recognized that the Disciplinary Rules of the Code of Professional Responsibility were in effect at the time of Talley's conduct, since the conduct occurred prior to the adoption of the Rules of Professional Conduct. The Panel therefore took judicial notice of the prior Rules pursuant to the Tennessee Rules of Evidence 202 (a)(b).

Talley, in his Brief and oral argument to this Court states the issue to be as follows:

Did The Hearing Panel Impose An Excessive Punishment For The Conviction Of A Misdemeanor?

Talley concurred during the Panel hearing with the facts as alleged by the Board and consented to the admission of the exhibits submitted to the Panel by disciplinary counsel. There was no dispute as to the record in the case. Talley's argument centers around his position that disbarment or suspension is an excessive and inappropriate punishment in the instant case. In support of his position, Talley points to the various disciplinary decisions submitted as exhibits to the Panel by disciplinary counsel as comparative cases, in support of the Board's request for disbarment. Talley argues that these comparative case examples of attorney discipline are based on felony cases, whereas Talley pled guilty to a misdemeanor. Talley seeks to distinguish those cases from his. Talley argues that Rule 9, Section 14.2 indicates what should be classified as a "serious crime". Talley testified he was convicted of a Class A misdemeanor, and that in "common parlance", a misdemeanor is not a serious crime.

The Board countered Talley's argument by pointing out Talley pled guilty to the charge of facilitation to violate the Securities Act and the Panel specifically found the guilty plea violated Disciplinary Rule 1.102 which provides as follows:

DR 1-102. Misconduct. —(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (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.
- (7) Willfully refuse to comply with a court order entered in a case in which the lawyer is a party.

[As amended by order entered October 9, 1997.]

The Panel stated in it's findings

"Counsel for Respondent (Talley) argues that the offense to which Respondent pled guilty was not a "serious crime" within the meaning of the ABA Standards For Imposing Lawyer Sanctions as approved February, 1986 and amended February, 1992 (the Standards). The Panel disagrees. In this matter, the Respondent has pled guilty to the facilitation of a fraud. The conduct in question caused not only injury to the individuals whose funds were wrongfully taken from them, but also to the profession. The injury in question was reasonably foreseeable at the time of the misconduct."

Talley maintains the Board erred in it's findings and recommendation because the offense Talley pled guilty to is a misdemeanor, thus not a "serious crime".

Tennessee Supreme Court Rule 9, Section 14.1 and 14.2 provides as follows:

- 14.1** Upon the filing with the Supreme Court of a certificate demonstrating that an attorney who is a defendant in a criminal case involving a serious crime, as defined in Section 14.2 herein, has entered a plea of nolo contendere or a plea of guilty or has been found guilty by verdict of the jury, or the trial court sitting without a jury, the Court shall enter an order immediately suspending the attorney. Such suspension shall take place regardless of the pendency of a motion for new trial or other action in the trial court and regardless of the pendency of an appeal. Such suspension shall remain in effect pending final disposition of a disciplinary proceeding to be commenced upon such finding of guilt.
- 14.2** The term "serious crime" shall include any felony under the laws of Tennessee and any other crime a necessary element of which as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime." Tenn. Sup. Ct. R. 9, Sec 14.1 and 14.2 (2007)

It is axiomatic that generally there are two classes of crimes; felonies and misdemeanors. Rule 9, Section 14.2 provides that any felony under Tennessee law is a serious crime. Thus, "any other crime" as mentioned in the Rule, by definition refers to certain misdemeanors. Therefore, Talley's argument that misdemeanors cannot or should not be classified as serious crimes is without merit. The Rule clearly refers to crimes, a necessary element of which involve improper conduct as attorney, fraud, deceit, theft, and other elements. The Board pointed out that the Panel relied on the ABA Standards in determining the appropriate punishment, specifically finding that Talley had engaged in conduct violative of Section 5.11 (b) of the Standards, which provide in pertinent part the following:

5.11 Disbarment is generally appropriate when

(a) A lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft;...or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) A lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

The findings of the Panel in this regard are supported by Mr. Talley's own admissions during the Panel hearing and his testimony that investors lost five or six million dollars in the scheme that led to his guilty plea.

Talley's Petition for Certiorari to the Chancery Court of Shelby County, Tennessee asserts that the decision of the Hearing Panel was not in conformity with the provisions of Rule 9, Section 8.3 of the Tennessee Supreme Court. Talley did not state in what fashion the decision did not conform to that Rule. Talley simply stated that he was convicted of a misdemeanor which by definition should not be considered a "serious crime". Talley presented no evidence to this Court to support his contention, nor did Talley cite any authority for this proposition. The Board, in response, points to Talley's conviction of a crime involving the elements of fraud and dishonesty.

Unless the trial court concludes that: 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. The trial court cannot modify the Panel's decision under the new standard. Moreover, under the new standard, "the [trial] court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact." *Bd. of Prof'l Responsibility v. Love*, 256 S.W.3d 644, 653 (Tenn. 2008)

Tennessee Supreme Court Rule 9, section 1.3, is virtually identical to Tennessee Code Annotated section 4-5-322(h), the statutory section covering judicial review under the Uniform Administrative Procedures Act ("UAPA"). *Bd. of Prof'l Responsibility v. Love*, Id. Thus, just like this Court's standard of review under UAPA cases, under Tennessee Supreme Court Rule 9, section 1.3, the standard of review is restricted to the record, and the hearing panel's findings "may not be reversed or modified unless arbitrary or capricious or characterized by an abuse, or clearly unwarranted exercise, of discretion and must stand if supported by substantial and material evidence." *CF Indus. v. Tenn. Pub. Serv. Comm'n.*, 599 S.W.2d 536, 540 (Tenn. 1980); *Bd. of Prof'l Responsibility v. Love*, Id.

Finding a violation of DR1-102 (A)(1)(3)(4)(5) and (6) by Talley provides a basis for the Panel's decision. In addition, the Panel's finding that Talley engaged in conduct violative of Section 5.11 of the Standards also supports the Panel's decision. The Panel further found aggravating

factors. Thus, Talley's claim that his violations are not a "serious crime" is not supported by the record and is without merit.

Talley alleged in his Petition that the Hearing Panel's decision evidences a lack of understanding of the charges and the matters presented to it. Talley presented no evidence or testimony to support this proposition before the Hearing Panel, and presents none to this Court. Talley presents no specifics as to this allegation and the record contains no indication that the Panel was confused or uninformed as to the Board's claims. The allegation is not supported by the record and is without merit.

Talley alleged the Panel failed to adequately set forth and state the basis of the conclusions drawn and the decisions enunciated in its findings and recommendations. Talley fails to set forth any basis for this allegation. The record clearly shows the Panel set forth its Findings of Fact and Conclusions of Law and reached its decision based on same. The allegation is not supported by the record and is without merit.

Talley alleged the Panel failed to adequately consider the live proof and the witness. Talley does not point out any incidents or testimony that sustain this allegation. A review of the record shows the Panel had Talley's testimony in full, without any objections. At times, the Panel asked questions to clear up certain testimony. The Panel pointed to the live testimony in its findings. The allegation is not supported by the record and is without merit.

Talley asserted the Panel refused to follow the appropriate law with respect to the "obvious definition" of what is a "serious crime". Talley does not provide the Court with any authority defining a "serious crime". The Panel specifically disagreed with Talley's assertion that the offense to which he pled guilty in Criminal Court for Shelby County, Tennessee was not a serious crime. The Panel pointed to Section 5.11 of the Standards, which the Panel found Talley violated. The assertion is not supported by the record and is without merit.

Talley asserts he was denied due process. Talley did not explain in what manner he was denied due process. In fact, Talley concurred in his Brief to this Court as to the truth of the matters alleged in the Statement of the Case and the Statement of the Facts submitted to the Panel by the Board. Talley agreed all the exhibits submitted were consented to and agreed to as being appropriate parts of the record. Talley was given a full hearing. Talley was allowed to testify to the extent he desired. Talley made no objection to the process before the Panel. The assertion is not supported by the record and is without merit.

Talley alleges the decision of the Panel was arbitrary and capricious. Talley fails to point out what evidence supports this allegation. Talley's focus in this case is his claim the Panel exceeded its authority in recommending disbarment. Talley justifies this claim with his bare statement that his conviction of a misdemeanor does not merit nor justify the recommendation. Talley does not deny the facts presented to the Panel. Talley's defense centers on the definition of a "serious crime". While Talley relied on "common parlance" among lawyers and the public to support his theory, Talley presented no witnesses or evidence to support his "common parlance"

claim. The Panel rejected this defense specifically in light of the provisions of Section 5.11 of the Standards and Tenn. Sup. Ct. R. 9, Section 14.2.

When a trial court's act is arbitrary or capricious, it is an abuse of the trial court's discretion. Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made. A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)

The Panel's ruling in the instant case is similar to a trial court's discretionary decision. When reviewing a trial court's discretionary decision, appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision. Appellate courts should permit a trial court's discretionary decision to stand if reasonable judicial minds can differ concerning its propriety. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999) The same principles apply to this case.

Superimposed on the Panel's findings of the aforementioned violations, is the fact that the Panel found as aggravating factors that Talley is an experienced lawyer, that Talley had a prior disciplinary offense arising out of a similar factual pattern, and showed little, if any, remorse or willingness to admit his own misconduct for the prior violation or the current criminal offense despite his guilty pleas to both.

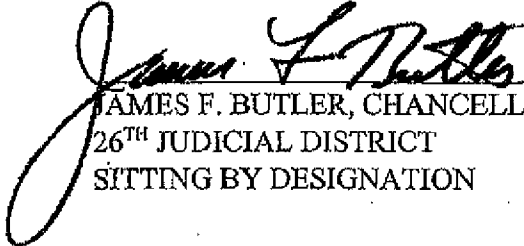
The Panel found that Talley's guilty plea to the charge of facilitation of a violation of the Securities Act constituted admission of violation of DR 1-102 (A)(1), (3),(4),(5), and (6). The Panel rejected Talley's defense that the misdemeanor conviction did not provide a basis for a recommendation of disbarment. The Panel found aggravating factors existed. The Panel recommended Talley be disbarred.

CONCLUSION

The Court concludes that the findings and recommendations of the Hearing Panel were (1) inconformity with constitutional or statutory provisions; (2) within the Panel's jurisdiction; (3) made upon lawful procedure; (4) were not arbitrary or capricious in any manner or characterized by any abuse of discretion or clearly unwarranted exercise of discretion; and (5) supported by evidence which is both substantial and material in the light of the entire record. The Panel exercised its jurisdiction to make a discretionary decision as to the punishment to be recommended to Talley. The Appellate Court is not permitted to substitute its judgment for that of the trial court, which in this case was the Hearing Panel. The Appellate Court begins with the assumption that the decision is correct and reviews the evidence in the light most favorable to that decision. The findings and recommendations of the Hearing Panel are hereby affirmed. The costs are assessed to Mark D. Talley and his surety, for which execution may issue.

IT IS SO ORDERED.

This The 31st Day of August, 2010.



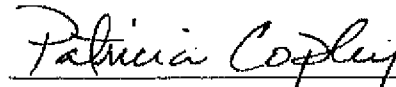
JAMES F. BUTLER, CHANCELLOR
26TH JUDICIAL DISTRICT
SITTING BY DESIGNATION

CERTIFICATE OF SERVICE

I, Patricia Copley, hereby certify that I have mailed a copy of the foregoing Order to:

Randall J. Spivey, Esq., 1101 Kermit Drive, Ste. 730, Nashville, Tennessee 37217 and
Ted I. Jones, Esq., Jones & Garrett, Ste. 315, 1835 Union Ave., Memphis, Tennessee 38104,

this the 31st. day of August, 2010.



Patricia Copley, Administrative Assistant to
Chancellor James F. Butler