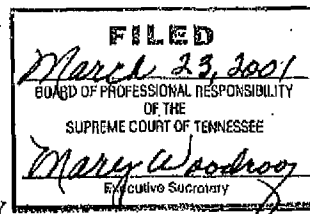


IN DISCIPLINARY DISTRICT I
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE



IN RE: LAWRENCE A. WELCH, JR.
Respondent, An Attorney
Licensed to Practice Law in
Tennessee
Greene County

DOCKET NO. 99-1127-1-H

JUDGMENT OF THE HEARING PANEL

This cause was heard by a Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee on January 15-17, 2001, pursuant to Rule 9, Rules of the Tennessee Supreme Court. Prior to the hearing, Disciplinary Counsel for the Board submitted a pretrial brief. Following the hearing, counsel for both parties submitted proposed findings of fact. This Hearing Panel, Ronald S. Range, Jr., Chair, Billie J. Farthing, and Polly A. Peterson, after considering all the testimony and exhibits in this matter, makes the following findings of fact and submits its judgment in this cause as follows:

I. STATEMENT OF THE CASE

1. The Board of Professional Responsibility filed a Petition for Discipline, Docket No. 99-1127-1-H, against the Respondent on October 21, 1999.
2. The Respondent filed a Response to Petition for Discipline on November 6, 1999.
3. The hearing on Respondent's Petition for Discipline was set for January 15-18, 2001.
4. On January 2, 2001, the Hearing Panel entered an Order limiting the January 15-18, 2001 hearing solely to the issues related to the false letter/memo allegations raised in the Petition for Discipline, reserving all other charges pending against the Respondent to be resolved at a later date.

II. FINDINGS OF FACT

5. The Respondent is an attorney licensed to practice law in Tennessee since 1991.
6. The Respondent began working at the Milligan & Coleman law firm in Greenville, Tennessee in December 1990.

7. The last three associates at Milligan & Coleman prior to the Respondent, Tom Kilday, Tom Garland, and Ron Woods, all made partner in two years.

8. Jeff Ward, who began working at Milligan & Coleman as an associate in 1993, also became a partner after two full years with the firm.

9. In his third year at Milligan & Coleman, the Respondent had not made partner and was anxious about his status at the firm.

10. After almost four years of employment at Milligan & Coleman, the Respondent still had not made partner.

11. The Respondent became upset with Milligan & Coleman when Milligan & Coleman advised the Respondent that the firm would not pay the Respondent's country club dues.

12. Milligan & Coleman's partners also were upset with the Respondent in 1993 when the Respondent disappeared before a trial and only reappeared immediately before the trial, leaving the partner with whom he was working, Ron Woods, with a difficult time preparing for trial without the Respondent.

13. In the summer of 1994, Milligan & Coleman determined that the Respondent was seeking reimbursement for mileage and expenses associated with client matters that were not really necessary, and the firm believed that the Respondent was abusing the reimbursement process to supplement the Respondent's income.

14. A partner at Milligan & Coleman, Tom Kilday, instructed the firm's bookkeeper, Edith Jaynes, not to reimburse the Respondent for any further expenses without the approval of a partner.

15. The Respondent also did certain things that were contrary to Milligan & Coleman's firm culture.

16. The Respondent was told several times to quit signing his name "Larry Welch, Esquire" but he continued to do so.

17. Nat Coleman put a public stop to Respondent's using "Larry Welch, Esquire" when Mr. Coleman walked by the Respondent's secretary's desk and saw "Larry Welch, Esquire" being used again by the Respondent contrary to previous instructions.

18. While at Milligan & Coleman, the Respondent would have a secretary call judges and put them on hold for the Respondent.

19. While at Milligan & Coleman, the Respondent maintained his own personal file where he kept research, briefs and work samples.

20. The Respondent took some Milligan & Coleman files with him after resigning with Milligan & Coleman's knowledge and permission.

21. The Respondent testified that he maintained his original handwritten notes of a telephone conversation that Respondent alleges occurred on December 16, 1993 between Nat Coleman and David Kumatz in Respondent's presence.

22. The Respondent submitted his original handwritten notes dated December 16, 1993 as an exhibit at his January, 2001 hearing.

23. The Respondent testified he was concerned about unethical conduct by attorneys at Milligan & Coleman.

24. The Respondent did not report his allegations of Milligan & Coleman's unethical activities to the Board of Professional Responsibility despite the Respondent's knowledge that he was required to report unethical conduct.

25. Mr. Woods, Mr. Kilday, Mr. Gaby and the Respondent were present at a meeting in or about July 1994 to discuss Respondent's status with the firm.

26. Mr. Kilday was the spokesperson for the Milligan & Coleman partners at this 1994 meeting with the Respondent to discuss the Respondent's status.

27. Mr. Kilday advised the Respondent at this 1994 meeting that Milligan & Coleman was not going to offer the Respondent a partnership at that time.

28. The Respondent attended a picnic at Tom Kilday's cabin for Milligan & Coleman attorneys in the summer of 1994.

29. Tom Kilday gave the Respondent a map to Tom Kilday's cabin for the summer, 1994 picnic.

30. Tom Kilday provided only Milligan & Coleman attorneys and law clerks a map to his cabin for the picnic.

31. The September 28, 1995 memo at issue in this matter references a map to Mr. Kilday's cabin as follows: "We will bring all videotapes to my [Tom Kilday's] cabin (map attached) on Saturday."

32. On August 8, 1994, the Respondent submitted his resignation to Milligan & Coleman.

33. After the Respondent left Milligan & Coleman, Milligan & Coleman discovered the Wanda Holt file was missing.

34. After the Respondent left Milligan & Coleman, Milligan & Coleman discovered the Respondent had without authority marked down a bill by \$5,000 a few days before the Respondent left Milligan & Coleman.

35. From 1990 until some time after he resigned, the Respondent had a key to the Bank of America Building where Milligan & Coleman was located.

36. From 1990 until some time after he resigned, the Respondent had a key to Milligan & Coleman's offices.

37. The lock on the front door to the Bank of America Building where Milligan & Coleman is located has not been changed since the Respondent left Milligan & Coleman.

38. Milligan & Coleman changed their locks after Milligan & Coleman learned about the September 28, 1995 memo from the TBI investigation.

39. The Respondent learned at Milligan & Coleman that the term "TFMIC" was used by Milligan & Coleman to refer to Tennessee Farmers Mutual Insurance Company.

40. No one who is not employed at a law office representing Tennessee Farmers Mutual Insurance Company would be likely to know the acronym TFMIC.

41. Outside Milligan & Coleman and other firms representing Tennessee Farmers Mutual Insurance Company, the term commonly used to refer to Tennessee Farmers Mutual Insurance Company is Farm Bureau, not TFMIC.

42. The September 28, 1995 memo uses the term "T.F.M.I.C."

43. The Respondent learned at Milligan & Coleman that Nat Coleman and sometimes other Milligan & Coleman attorneys used the term "Fat Boy" to refer to attorney John T. Milburn Rogers.

44. The September 28, 1995 memo states: "Nat, accordingly, continues to insist on there being some connection with Fat Boy across the street . . ."

45. The Respondent learned at Milligan & Coleman that Tom Garland handled sexual harassment cases.

46. The September 28, 1995 memo in question references Tom Garland's handling of sexual harassment cases as follows: "Tom Garland is of the opinion that your prospects for success remain bleak in defense of sexual harassment charges . . ."

47. The Respondent learned at Milligan & Coleman that Nat Coleman was lead counsel in the Isom case.

48. The September 28, 1995 memo references Mr. Coleman's involvement in the Isom case as follows: "Nat, accordingly, continues to insist on there being some connection with Fat Boy across the street and guarantees the timely disposal of your ongoing problems if you handle Isom as agreed."

49. The Respondent had great hatred toward Nat Coleman and Tom Kilday.

50. Tom Kilday was the alleged author of the September 28, 1995 memo.

51. The Respondent learned at Milligan & Coleman that Ron Woods handled tax matters.

52. The Respondent and Ron Woods worked together at Milligan & Coleman with accountant Ray Adams.

53. The Respondent knew Ron Woods relied on Ray Adams for IRS contacts.

54. Although the fact that Ron Woods worked with Ray Adams on tax related matters was well known, it was not general knowledge, even within Milligan & Coleman, that Ron Woods relied on Ray Adams for IRS contacts.

55. In a case the Respondent handled at Milligan & Coleman, the Respondent employed the tactic of using the IRS in an attempt to obtain an advantage.

56. Ron Woods has never used the tactic of employing the IRS to obtain an advantage for his client.

57. The September 28, 1995 memo makes the following reference to Ron Woods using the IRS through a contact of accountant Ray Adams: "Ron Woods is undertaking the necessary to fuel the IRS approach you suggested through an acquaintance of Ray Adams."

58. The September 28, 1995 memo includes at the bottom of the page copies of two sticky notes, reflecting Tom Kilday's handwriting and Nat Coleman's handwriting.

59. Post-it notes with Nat Coleman's and Tom Kilday's handwriting were not disseminated outside the firm and could only have been obtained by someone inside Milligan & Coleman.

60. The September 28, 1995 memo has a justified margin on the right side.

61. The only two people at Milligan & Coleman that produced writings with justified right margins were Tom Kilday (the alleged author of the memo) and the Respondent.

62. The Respondent's June 19, 1995 letter to Disciplinary Counsel Tripp Hunt responding to Ron Woods' complaint has justified right margins.

63. The September 28, 1995 memo incorporates pet words and phrases Tom Kilday routinely uses in his correspondences such as "undertake the necessary" (referenced twice in the memo), "endeavor," "given all options" and "timely."

64. The Respondent spent enough time around Mr. Kilday to be familiar with words and phrases Mr. Kilday routinely uses.

65. Tom Kilday has two brothers who are involved in law enforcement, a fact which was known to the other attorneys at Milligan & Coleman, including Respondent.

66. The September 28, 1995 memo states, "Since you are concerned about Barkley [sic] Bell I will endeavor to speak with my [Tom Kilday's] brother about the location of other documents you will need."

67. The September 28, 1995 memo references District Attorney General Berkeley Bell, whose name is incorrectly spelled in the memo as "Barkley Bell."

68. On a February 8, 1994 timeslip of the Respondent's from Milligan & Coleman, District Attorney General Berkeley Bell's name is misspelled "Barkley Bell," which is the same misspelling used in the September 28, 1995 memo.

69. The last paragraph of the September 28, 1995 memo is characteristic of the Respondent's writing style.

70. The Respondent learned at Milligan & Coleman that rubber stamps were kept in the secretarial offices of Linda Freshour or Edith Jaynes.

71. The Respondent used Milligan & Coleman's rubber stamps while at Milligan & Coleman.
72. During the time the Respondent worked at Milligan & Coleman, the firm Milligan & Coleman had an "attorney work product" rubber stamp.
73. The September 28, 1995 memo reflects Milligan & Coleman's "attorney work product" stamp or a stamp identical to Milligan & Coleman's.
74. Milligan & Coleman owned a "private and confidential" rubber stamp.
75. The September 28, 1995 memo reflects Milligan & Coleman's "private and confidential" stamp.
76. Milligan & Coleman's "private and confidential" stamp was unique and was laughingly discussed by attorneys at Milligan & Coleman because it stated "private and confidential" instead of "privileged and confidential."
77. Ron Woods has never seen a "private and confidential" rubber stamp used outside Milligan & Coleman's office.
78. In October 1992, or before that time, Ron Woods instructed Edith Jaynes to put up the "private and confidential" stamp and purchase a "privileged and confidential" stamp.
79. In October 1992, Edith Jaynes complied with Ron Woods' instructions and put up the "private and confidential" stamp and purchased a "privileged and confidential" stamp.
80. After the TBI disclosed the existence of the memo to Milligan & Coleman, Milligan & Coleman began looking for Milligan & Coleman's "private and confidential" stamp but could not find it.
81. In 1998 or later, while checking out a foul odor in the stairwell at Milligan & Coleman's offices, Ron Woods found in the basement of the stairwell the separated rubber pad and handle of Milligan & Coleman's "private and confidential" stamp.
82. Ron Woods testified that someone can enter the stairwell but can't get on any of the floors (i.e., such as the floors with Milligan & Coleman's offices) without a key.
83. The September 28, 1995 memo makes reference to Susan Payne's lawsuit against Judge Wilson as follows: "We are hand-delivering herewith a brief Jeff Ward has prepared to address the questions you raised about Susan, her lawsuit and the unasserted claims. It should provide sufficient ammunition to dispose of the limited matter presently raised but Tom Garland

is of the opinion that your prospects for success remain bleak in defense of sexual harassment charges, if timely filed, given all options except number 6."

84. Susan Payne was Judge John Wilson's secretary from approximately September 1990 to September 1994.

85. Susan Payne filed a pro se complaint in the Circuit Court for Greene County against John Wilson and the State of Tennessee, Docket No. 95 CV 736, on September 22, 1995.

86. Susan Payne's complaint against Judge Wilson and the State does not allege any sexual harassment against Ms. Payne by Judge Wilson.

87. Susan Payne was never sexually harassed by Judge Wilson.

88. Susan Payne's suit against Judge Wilson was dismissed by Order Granting Motion to Dismiss, filed May 9, 1996.

89. Judge Wilson did not consult with, talk to or retain Milligan & Coleman about the Susan Payne matter.

90. The Respondent knew that someone had told him that Susan Payne had filed a complaint against Judge Wilson about something.

91. Until they saw the September 28, 1995 memo in the summer of 1997, no attorney at Milligan & Coleman had any knowledge of any asserted or unasserted claim by Susan Payne against Judge Wilson.

92. In 1994, Jeff Ward brought to Ron Woods' attention that a check had been endorsed by the Respondent and cashed, the proceeds of which partly belonged to the firm and partly belonged to an insurance company.

93. Milligan & Coleman did not get their fee from the cashed check and also had to reimburse their client for the two-thirds of the check the client should have received.

94. Jeff Ward contacted the Respondent about the cashed check, but the Respondent could not tell Milligan & Coleman what happened to the check.

95. Ron Woods wrote the Board of Professional Responsibility regarding the Respondent and the cashed check because Lance Bracy, Chief Disciplinary Counsel for the Board, advised Mr. Woods he had to report the incident to the Board.

96. Ron Woods reported the Respondent's involvement in the cashed check incident to the Board of Professional Responsibility on May 22, 1995.

97. The Respondent's wife asked her brother, Tom Garland (a partner with Milligan & Coleman), "Do you know that Milligan & Coleman is trying to get Larry disbarred again?" referencing the cashed check matter reported by Ron Woods and the Wanda Holt incident reported to the Board by Gene Gaby.

98. The Respondent responded to Ron Woods' letter to the Board regarding the cashed check on June 19, 1995.

99. In his June 19, 1995 response to Mr. Woods' letter to the Board, the Respondent mentions Ron Woods, Gene Gaby and Tom Kilday by name but refers to attorney Jeff Ward only as the "Milligan & Coleman associate" and never by name.

100. On the September 28, 1995 memo, "JMW" is referenced as the memo's typist for Tom Kilday.

101. Milligan & Coleman attorney Jeff Mark Ward's initials are "JMW."

102. In his June 19, 1995 response to Mr. Woods' complaint with the Board, the Respondent states: "Gene Gaby has generously offered to submit an affidavit on my behalf addressing his knowledge of my character and integrity."

103. Gene Gaby spoke with the Respondent regarding the cashed check and told him that Milligan & Coleman was required to report the matter, but Mr. Gaby was glad to vouch to the Board for the Respondent's character.

104. Gene Gaby did speak with Disciplinary Counsel Tripp Hunt regarding the cashed check matter and told Mr. Hunt it was not Milligan & Coleman's interest to see the Respondent found guilty of a violation.

105. Gene Gaby is the only Milligan & Coleman attorney not named in the September 28, 1995 memo.

106. The cashed check matter reported by Ron Woods was being actively investigated as of September 28, 1995 (i.e., the date of the memo).

107. Disciplinary Counsel Tripp Hunt wrote Mr. Woods on September 12, 1995 proposing a meeting with Mr. Woods in Greenville on September 28, 1995 to discuss Mr. Woods' letter concerning the Respondent.

108. The Respondent wanted to be a judge.

109. If Judge Wilson had been removed from office, the Respondent's father-in-law, Tom Garland, Sr. (father of Milligan & Coleman partner Tom Garland, Jr.) likely had the clout with Governor Sundquist to appoint the Respondent as Judge Wilson's replacement.

110. The Respondent had previously gained favor with Governor Sundquist by running, at the Governor's request, for House of Representatives against incumbent Zane Whitson, a race which Respondent lost.

111. Tom Garland, Jr. was the Respondent's brother-in-law in addition to practicing law with the Respondent at Milligan & Coleman.

112. Tom Garland, Jr. became so upset with the Respondent in May 1996, regarding the Respondent's decision to run against Representative Zane Whitson, that Mr. Garland chose to cease having a relationship with the Respondent and the Respondent's wife (Mr. Garland's sister).

113. The Respondent worked with attorney Tom Rogan for one year after leaving Milligan & Coleman.

114. The Respondent was interested in returning to Milligan & Coleman after he resigned.

115. The Respondent had conversations with Judge John Wilson about the possibility of the Respondent returning to Milligan & Coleman.

116. On the Respondent's behalf, Judge Wilson asked Nat Coleman to speak with his partners about the Respondent returning to Milligan & Coleman.

117. Judge Wilson spoke with Milligan & Coleman about the Respondent's returning to the firm shortly before or after the Respondent left the employment of Tom Rogan in 1995.

118. Milligan & Coleman did not invite the Respondent to return to the firm after the Respondent resigned.

119. After leaving Milligan & Coleman, the Respondent leased office space at the Round Table Office Complex from October, 1994 through February, 1997.

120. While at the Round Table Office Complex from October 1994 through February 1997, the Respondent had access to the receptionist's typewriter.

121. While at the Round Table Office Complex, the Respondent worked early in the morning or late at night several times a week.

122. The Respondent had access to the Round Table Office Complex receptionist's typewriter early in the morning or late at night.

123. On August 26, 1997, Tennessee Bureau of Investigation (TBI) Special Agent Greg Monroe collected samples of type styles produced on the receptionist's typewriter at the Round Table Office Complex.

124. Robert Muehlberger, Forensic Document Analyst and Manager of the Forensic Lab for the United States Postal Inspection Service, analyzed the samples from the Round Table Office Complex along with other samples and made the following findings in his report: "The questioned typewriting appearing on Exhibit Q-1 through Q-4 [Q-1: One page of white, legal size paper bearing a typewritten letter dated September 28, 1995; Q-2: One white envelope addressed to Mr. John T. Milburn Rogers, 100 S. Main St., Greeneville, TN 37743; Q-3: One yellow post it note bearing typewriting; and Q-4: One yellow post it note bearing typewriting.] was typed on a Brother typewriter using the same Prestige 10/12 printwheel element that was used to type the samples on Exhibit K-4-1. [K-4-1: Samples of type styles produced on equipment at receptionist area of Round Table Offices, 1104 Tusculum Blvd., Greeneville, TN.] Common defects found in some of the typewritten characters on Exhibits Q-Z through Q-4 and on Exhibit K-4-1 allowed for the identification.

125. Everyone who leased space at the Round Table Office Complex had access to the receptionist's typewriter and word processor located at the front desk of the Round Table Office Complex.

126. During the time period the September 28, 1995 memo was postmarked and mailed on December 16, 1996, the Respondent leased office space at the Round Table Office Complex.

127. The Respondent knew John Rogers has an antagonistic relationship with Nat Coleman.

128. The Respondent knew John Rogers has an antagonistic relationship with Judge John Wilson.

129. John Rogers is a friend of District Attorney Berkeley Bell.

130. The September 28, 1995 memo was mailed to John Rogers on December 12, 1996.

131. John Rogers gave the memo to District Attorney Bell.
132. District Attorney General Berkeley Bell referred the memo to the TBI who began investigating it in August 1997.
133. The Respondent is friends with Bill Hall Bell, another attorney in Greeneville and the brother of District Attorney Berkeley Bell.
134. Susan Payne sought representation from Bill Hall Bell in her suit against Judge Wilson, but Mr. Bell declined to represent her.
135. The September 28, 1995 memo states that "Susan was videotaped leaving the office of Bill Hall Bell the day before her lawsuit was filed."
136. Judge Wilson first saw the September 28, 1995 memo when it was shown to him by TBI Special Agent Greg Monroe on August 20, 1997.
137. The Respondent previously had provided accurate information to Judge Wilson that Respondent had obtained from Bill Bell concerning Judge Wilson's run for re-election.
138. Sometime after the memo was sent on December 12, 1996, but prior to the TBI showing the memo to Judge Wilson on August 20, 1997, the Respondent told Judge Wilson that Bill Bell said "We have a letter that will blow Nat Coleman out of the water."
139. A few weeks before the TBI interviewed Judge Wilson on August 20, 1997, Respondent told Judge Wilson "Bill Bell says that we have a letter that's so bad that Judge Wilson will jump out his window" and "Don't have a heart attack."
140. After the TBI interviewed Judge Wilson on August 20, 1997, the next day or possibly the following day, Judge Wilson testified that the Respondent was in Rogersville at the Hawkins County Courthouse when Judge Wilson came out of the courthouse and the Respondent said to Judge Wilson "I understand you had some visitors."
141. Judge Wilson was surprised the Respondent knew the TBI had talked with Judge Wilson on August 20, 1997 because Judge Wilson had not told anyone about his conversation with the TBI.
142. The Respondent was interviewed by the TBI concerning the memo on August 28, 1997.
143. The Respondent denies going to the Hawkins County Courthouse in Rogersville the day after the TBI interviewed Judge Wilson.

144. Judge Wilson testified that he had another conversation with the Respondent during which Judge Wilson said to the Respondent "Larry, the TBI thinks you're involved." Judge Wilson testified the Respondent did not answer or respond to his comment.

145. Judge Wilson testified that he also said to the Respondent "Larry, the TBI believes or has evidence that your typewriter was used in this letter." Judge Wilson testified that again, the Respondent did not respond to this statement.

146. Judge Wilson testified that he talked with the Respondent and said "Larry, the TBI believes Bill Bell's also involved in this, or they have evidence, something to that effect." Judge Wilson testified that the Respondent did not answer or respond to this comment.

147. The Respondent testified at his deposition and on cross-examination that he did not see the memo or hear rumors about the memo prior to the TBI showing the Respondent the memo on August 28, 1997.

148. The Respondent subsequently testified on direct examination that he had heard talk about some kind of documents from Milligan & Coleman that would implicate Milligan & Coleman in some kind of wrongdoing.

149. The Respondent testified on direct examination that at some point he heard some kind of documents implicated Judge Wilson as being involved in wrongdoing.

150. The Respondent testified Judge Wilson is a good friend of the Respondent's.

151. The Respondent testified that at his deposition he did not recall any conversations with Judge Wilson about the memo.

152. After Judge Wilson's testimony, the Respondent testified that he did tell Judge Wilson that there was a document or documents that involve Judge Wilson and are so bad they'll make Judge Wilson want to jump out a window.

153. The Respondent testified that Judge Wilson did tell the Respondent that the TBI thought the Respondent was involved in the memo, but the Respondent testified "I didn't just stand there. I told him flat out, I did not do it." "Why would I be involved in anything like that?"

154. The Respondent testified that Judge Wilson did tell the Respondent "They think they have proof that your typewriter did it." The Respondent testified his response to Judge Wilson was "My typewriter didn't do it. I'd like to see whatever proof they've got."

155. The Respondent testified that Judge Wilson's testimony is inaccurate regarding these occasions where the Judge said the Respondent offered no response to the Judge's statements about the Respondent possibly being involved in creating the memo.

III. CONCLUSIONS OF LAW

The issue to be decided by the Hearing Panel in this matter can be simply stated: Did the Respondent prepare and mail the September 28, 1995 memo at issue? The Board contends that Respondent did prepare the memo, and that by doing so Respondent violated Tenn. Code Ann. § 23-3-201, DR 1-102(A)(1)-(6), and DR 8-102(B). The full text of said statute and rules is as follows:

T.C.A. 23-3-201. Grounds for disbarment or discipline - Any attorney, solicitor or counselor at law admitted to practice in the courts of the state may be disbarred or suspended from the practice of law:

(1) Who shall commit or may have committed, any infamous crime or misdemeanor involving moral turpitude.

(2) Who shall seek out any person having a claim for personal injury, or having any other ground of action, in order to obtain employment by such claimant or shall employ agents or runners for like purposes, or pay or reward, directly or indirectly, those who bring, or influence the bringing, of such cases to him or his office.

(3) Who shall wrongfully retain money or property of his client for an unreasonable time after demand made.

(4) Who shall be guilty of any fraudulent act or misrepresentation in proceedings to obtain admittance to the bar.

(5) Who shall be guilty of any unprofessional conduct, dishonesty, malpractice, or any conduct which renders him unfit to be a member of the bar.

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.

DR 8-102. Statements Concerning Judges and Other Adjudicatory Officers

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

Discussion of the foregoing statute and rules is unnecessary because the Respondent has not contended, nor could he in good faith, that his conduct would not violate these standards if he in fact authored and mailed the subject memo. Rather, Respondent's defense is premised upon his contention that he had nothing to do with preparing or mailing the memo.

As a preliminary matter, the parties disagree over the standard of proof applicable in this proceeding. The Board contends that the preponderance of the evidence standard applies, while Respondent argues that the Board must prove any violations of the Disciplinary Rules by clear and convincing evidence. Respondent's counsel likens this proceeding to a circumstantial criminal matter which requires the clear and convincing standard. He further argues that the higher standard is appropriate as any action could result in the loss of the Respondent's livelihood.

Rule 9, at Section 1.3, provides guidance. This section clearly states that a trial Court's review of a judgment by a hearing panel shall be by a preponderance of the evidence. The only other reference to a standard of review in Rule 9 is found in Section 19, dealing with reinstatement, which requires a standard of clear and convincing evidence.

Respondent, in his brief, cited numerous cases decided in other jurisdictions which use the clear and convincing standard at initial hearings in attorney disciplinary proceedings. However, in examining those cases and their antecedents, most jurisdictions apply the clear and convincing standard as a result of a disciplinary, Bar or Supreme Court rule. The Tennessee Disciplinary Rules require the clear and convincing evidence standard only in a reinstatement proceeding, and there the burden of proof is on the petitioner. All other references are to a preponderance of the evidence standard, and it is the decision of the Hearing Panel that a preponderance of the evidence is the standard to be applied at an initial disciplinary hearing.¹

Turning to the central issue in this case, it is the conclusion of the Hearing Panel that Respondent did in fact prepare and mail the memo in question, and that the evidence of

¹ Although the Hearing Panel concludes that the preponderance of the evidence standard applies, the Hearing Panel's Judgment would be no different had the clear and convincing standard of proof applied due to the nature and extent of the evidence of Respondent's culpability introduced at the hearing.

Respondent's involvement, while circumstantial, is overwhelming. In fact, much of the evidence introduced against Respondent is uncontradicted.

The memo itself is as libelous a document as could be imagined, and purports to reflect criminal conduct by Judge John Wilson, a sitting Circuit Court Judge, and every member of the Milligan & Coleman law firm except Gene Gaby. If the memo were true, and the parties concede that it is not, it would implicate Judge Wilson and the members of Milligan & Coleman in a criminal conspiracy pursuant to which Milligan & Coleman would assist Judge Wilson in disposing of the pending Susan Payne lawsuit against him, and in return Judge Wilson would rule in the pending Isom civil case in a manner favorable to Milligan & Coleman's client. A closer examination of the memo and a discussion of the relevance of its contents to certain other evidence introduced at the hearing is instructive.

The addressee of the memo is Judge Wilson, and the purported author of the memo is Tom Kilday, a partner at Milligan & Coleman. Mr. Kilday is also the partner who instructed the firm's bookkeeper, Edith Jaynes, not to reimburse Respondent for any more expenses without partner approval after the firm concluded that Respondent was abusing his expense account, and who in or about July 1994 served as the firm's spokesperson at a meeting with Respondent in which Mr. Kilday informed Respondent that the firm would not be offering him a partnership at that time. According to Judge Wilson, whom Respondent characterized as a very good friend, Respondent had great hatred for Mr. Kilday, as well as for Mr. Coleman.

The memo has a justified right margin, and evidence introduced at the hearing indicated that the only two persons at Milligan & Coleman who regularly produced writings with justified right margins were Tom Kilday (who the parties agree did not prepare the memo) and Respondent. Respondent's June 19, 1995 letter to Disciplinary Counsel Tripp Hunt responding to the cashed check matter has a justified right margin. The memo makes reference to Mr. Kilday speaking with his brother about "other documents you [Judge Wilson] will need," and Mr. Kilday has two brothers involved in law enforcement. Respondent would have been aware that Mr. Kilday's brothers were involved in law enforcement.

The memo purports to reflect assistance Milligan & Coleman was offering to Judge Wilson with a lawsuit filed against him by Susan Payne, a former secretary, which was in fact filed in the Circuit Court for Greene County on or about September 22, 1995, some six days

before the date on the memo of September 28, 1995.² Susan Payne consulted Greeneville attorney Bill Hall Bell about her claims against Judge Wilson, but Mr. Bell declined to represent her. Respondent was a friend of Bill Hall Bell and testified that someone told him Susan Payne had a complaint against Judge Wilson. By contrast, Judge Wilson never talked with anyone at Milligan & Coleman about the Payne matter, and no member of the Milligan & Coleman firm had any knowledge of any asserted or unasserted claims by Susan Payne against Judge Wilson until they were shown the memo by the TBI in the summer of 1997.

Susan Payne's complaint does not allege sexual harassment. However, the memo purports to reflect Tom Garland, Jr.'s opinion concerning sexual harassment charges that might be filed by Payne. Respondent knew that Mr. Garland handled sexual harassment matters.

The memo contains certain words and phrases commonly used by Mr. Kilday, including "undertake the necessary," which is used twice in the memo. This unusual phrase plainly would have been known only by someone who had worked with Mr. Kilday or was otherwise very familiar with his writing. Respondent would have known about Mr. Kilday's use of this phrase.

The memo also makes reference to Judge Wilson's alleged concern about "Barkley Bell," the local district attorney and brother of Respondent's friend Bill Hall Bell. General Bell's first name is Berkeley, but is misspelled in the memo as "Barkley." A timeslip of Respondent's from Milligan & Coleman makes reference to General Bell and uses the same misspelling of his first name, Barkley.

The memo states that Susan Payne "was videotaped leaving the office of Bill Hall Bell the day before her lawsuit was filed." Susan Payne did in fact consult with Bill Hall Bell concerning her claims against Judge Wilson. Not only was Respondent a friend of Bill Hall Bell, but Respondent previously had provided accurate information to Judge Wilson that Respondent had obtained from Bill Bell concerning Judge Wilson's run for re-election. The evidence introduced at the hearing indicated that the Bells were friendly with local attorney John T. Milburn Rogers, who has an antagonistic relationship with Judge Wilson, and that Respondent acted at times as an informant for Judge Wilson, giving Judge Wilson a heads up concerning

² While the memo bears the date September 28, 1995, the memo was not mailed to Mr. Rogers until December 1996, and therefore it is impossible to tell precisely when the memo was created.

information from the Bells and Mr. Rogers that Respondent would obtain by virtue of his friendship with Bill Hall Bell.

The memo references TFMIC, which Milligan & Coleman used to refer to Tennessee Farmers Mutual Insurance Company. The TFMIC acronym would not be widely known outside Milligan & Coleman or another law firm representing the insurer because most people referred to the company as Farm Bureau. Respondent was familiar with the term TFMIC.

The memo further states that "Nat, accordingly, continues to insist on there being some connection with Fat Boy across the street. . ." Respondent knew that Nat Coleman and certain other Milligan & Coleman attorneys sometimes referred to Mr. Rogers as "Fat Boy," and knew that Mr. Coleman has an antagonistic relationship with Mr. Rogers. Respondent also knew that Mr. Rogers has an antagonistic relationship with Judge Wilson.

The memo claims that Mr. Coleman "guarantees the timely disposal of your [Judge Wilson's] ongoing problems if you handle Isom as agreed." Respondent knew that Mr. Coleman was lead counsel for a defendant in the Isom case, a hotly contested matter on Judge Wilson's docket in which Mr. Rogers represented the plaintiff.

Next, the memo states that Ron Woods would "fuel the IRS approach you suggested through an acquaintance of Ray Adams." Respondent knew that Milligan & Coleman partner Ron Woods handled tax matters, and that Mr. Woods often worked with accountant Ray Adams. Respondent also knew that Ron Woods relied on Ray Adams for IRS contacts, a fact that was not widely known even inside Milligan & Coleman. Although Mr. Woods had never attempted to use the IRS to gain an advantage for a client, Respondent had attempted to use the IRS for that purpose in a case he handled while at Milligan & Coleman.

The memo further references a meeting at Tom Kilday's cabin, as well as an attached map (which was not in fact attached to the copy of the memo received by Mr. Rogers) allegedly showing directions to the cabin. Tom Kilday does in fact have a cabin, and Respondent attended a firm picnic at Mr. Kilday's cabin in the summer of 1994 around the time that Mr. Kilday had informed Respondent that the firm would not be offering Respondent a partnership. Mr. Kilday gave Respondent a map to the cabin prior to the summer 1994 picnic. Mr. Kilday provided the map only to other Milligan & Coleman attorneys and law clerks.

The memo also reflects what appear to be copied post-it notes containing authentic handwriting of Mr. Kilday and Mr. Coleman. Post-it notes containing Mr. Kilday's or Mr. Coleman's handwriting would not have been disseminated outside Milligan & Coleman.

As noted earlier, the memo in question was mailed to Mr. Rogers in December 1996. A typewritten note included with the memo purported to come from "a secretary," who wanted Mr. Rogers to stop Mr. Kilday's unlawful conduct. Interestingly, the typewritten note also includes a statement asking whether Mr. Rogers could subpoena Respondent, because Respondent "know[s] more than I do." Given the Hearing Panel's conclusion that Respondent drafted the memo and its attachments, the Hearing Panel concludes that Respondent inserted the reference to himself in the attachment in an effort to divert attention.

It is undisputed that Robert Muehlberger, Forensic Document Analyst and Manager of the Forensic Lab for the United States Postal Inspection Service, analyzed typing samples taken from the receptionist's typewriter at the Round Table Office Complex in Greeneville and concluded that the memo and its attachments, as well as the envelope containing the memo, were typed using the same printwheel element that was contained in the receptionist's typewriter at the Round Table. It is also undisputed that Respondent leased office space at the Round Table Office Complex during the time the memo was mailed, and that Respondent had access to the receptionist's typewriter at the Round Table.

It is abundantly clear to the Hearing Panel that whoever prepared the memo was a current or former employee of Milligan & Coleman, and while Respondent offered certain evidence intended to suggest that a former secretary or staff member might have prepared the memo, the Hearing Panel disagrees. Not only does it seem very unlikely that a staff member would have knowledge of all the things mentioned in the memo that give it credibility, but the Hearing Panel believes that the last paragraph of the memo in particular must have been written by an attorney: "Notwithstanding any customary attorney-client privilege, you should remember the State attorney assigned to defend this would be under a strict ethical obligation to report our arrangement if it is uncovered (as would the bar in general)." Ron Woods testified that this language was consistent with Mr. Welch's writing style. Respondent was also the only attorney who left Milligan & Coleman in the mid 1990's when the memo was prepared.

The only Milligan & Coleman attorney not implicated in the memo is Gene Gaby. In his June 19, 1995 response to Mr. Woods' letter to the Board concerning the cashed check matter, Respondent stated: "Gene Gaby has generously offered to submit an affidavit on my behalf addressing his knowledge of my character and integrity." Mr. Gaby did speak with Disciplinary Counsel Tripp Hunt regarding the cashed check matter and told Mr. Hunt that it was not Milligan & Coleman's interest to see the Respondent found guilty of a violation of the Disciplinary Rules because of the cashed check incident.

Although there is literally a mountain of evidence implicating Respondent, perhaps most damning to Respondent of all the testimony offered at the hearing was the testimony of Judge Wilson, whom Respondent described as his "very good friend." Judge Wilson testified that Respondent had great hatred for Mr. Kilday and Mr. Coleman. Judge Wilson also testified that Respondent appeared at the Hawkins County Courthouse in Rogersville the day after the TBI interviewed Judge Wilson, and told Judge Wilson "I understand you had some visitors." Judge Wilson was very surprised that Respondent knew the TBI had talked with Judge Wilson, because Judge Wilson had not told anyone about his meeting with the TBI. Respondent was not interviewed by the TBI until several days later, on August 28, 1997, and at the hearing Respondent denied going to the Hawkins County Courthouse in Rogersville to ask Judge Wilson about his TBI interview.

Judge Wilson also testified that he told Respondent that the TBI thought Respondent was involved in preparing the memo; that the TBI thought Respondent's typewriter was used to prepare the memo; and that the TBI believed that Bill Hall Bell was also involved in the preparation of the memo. These statements apparently occurred during at least two different conversations between Judge Wilson and Respondent, and Judge Wilson testified that Respondent did not answer and made no response to any of the foregoing comments implicating Respondent and Bill Hall Bell. At the hearing, Respondent denied failing to respond to Judge Wilson concerning Respondent's possible involvement, and testified "I didn't just stand there. I told him flat out, I did not do it." Given the subject being discussed, the Hearing Panel finds it inconceivable that either Judge Wilson or Respondent has trouble recalling the details of these conversations. Clearly, Judge Wilson and the Respondent could not have both been telling the

truth at the hearing in this matter, and it is the opinion of the Hearing Panel that Judge Wilson's testimony was credible, and Respondent's was not.

The Hearing Panel reaches this conclusion not only because of its perception of the witnesses as they testified, but also because of the fact that other testimony offered by Respondent at the hearing, and previously in his deposition, was not credible. The Respondent testified in his deposition in this matter and initially at the hearing that he did not recall having any conversations with Judge Wilson concerning the memo. The Respondent also testified at his deposition and during the hearing that he did not see the memo or hear rumors about the memo prior to the time the TBI showed Respondent the memo on August 28, 1997. However, the Respondent subsequently testified at the hearing that he had heard talk about some sort of documents from Milligan & Coleman that would implicate Milligan & Coleman in wrongdoing. Respondent later admitted making the statements to Judge Wilson about the existence of documents that were so bad they would make Judge Wilson want to jump out a window, and that there was a letter that will blow Nat Coleman out of the water.

When questioned about these inconsistencies in his testimony, Respondent testified that, at the time he heard rumors about the existence of the memo and passed the information along to Judge Wilson, he did not know that the document involved was a memo, and therefore he was justified in denying hearing rumors about the "memo," or having discussions with Judge Wilson concerning a "memo," because at the time those events occurred, he only knew of a "document." The Hearing Panel deems this testimony incredible, and believes that a simple question such as whether Respondent had any conversations with Judge Wilson about the memo should have been answered in the affirmative, whether or not Respondent knew the document in question was a memo at the time of the conversations.

In addition, the Respondent testified at the hearing concerning certain unethical conduct by attorneys at Milligan & Coleman, and it was Respondent's contention that the reason Milligan & Coleman was not comfortable with him, and therefore did not offer him a partnership, was because they knew he objected to their unethical behavior. The primary example of this conduct described by Respondent related to a telephone conversation between Nat Coleman and an insurance adjuster, David Kumatz. Respondent offered as an exhibit what he maintained were

his original handwritten notes documenting the telephone conversation, which bear the date December 16, 1993. The Hearing Panel found this exhibit troubling, for a number of reasons.

The alleged telephone conversation between Mr. Coleman and Mr. Kumatz related to a case Respondent had been working on in which he claimed his client, the insured, had alerted him to certain facts that might jeopardize the client's insurance coverage. If the contents of Respondent's notes are accurate, they would reflect a clear breach of the Disciplinary Rules by Mr. Coleman because they state that Mr. Coleman alerted the insurance adjuster to the coverage issue and encouraged him to pursue a declaratory judgment action against Milligan & Coleman's client, the insured. Mr. Coleman flatly denied that the notes are accurate or that the conversation in question ever occurred. Mr. Coleman also testified that no declaratory judgment action over coverage was filed by the insurance company, which severely undermines the credibility of Respondent's alleged notes. The Respondent admitted that he never reported the incident to the Board of Professional Responsibility, despite his knowledge that he was required to do so.

As was the case with Respondent and Judge Wilson, either the Respondent or Mr. Coleman perjured himself at the hearing, and in the opinion of the Hearing Panel, Mr. Coleman's testimony was credible, and Respondent's was not. It is also worth noting that, whether the contents of Respondent's notes are accurate or not (and the Hearing Panel believes that they are not), if Respondent in fact authored the notes on December 16, 1993 as he testified, and retained them in his possession for over seven years, it lends credibility to the Board's suggestion that Respondent might well have taken the rubber stamps or post-it notes with him when he left Milligan & Coleman in 1994 and used them to prepare the memo in 1995 or 1996.

The Board introduced a variety of evidence suggesting possible motives for Respondent's actions, including the fact that Milligan & Coleman chose not to offer Respondent a partnership; the fact that Milligan & Coleman subjected Respondent's expense reimbursement to partner overview; the fact that Respondent had certain conflicts with Milligan & Coleman's firm culture; the fact that Respondent wanted to be a judge and Respondent's father-in-law likely had the political clout to get Respondent appointed to fill Judge Wilson's position if Judge Wilson were removed from office; the fact that Milligan & Coleman would not re-employ Respondent after Respondent's resignation, despite Judge Wilson's appeal to Mr. Coleman to consider it; the fact that Ron Woods had reported the cashed check incident to the Board, which was being

investigated as of the date stated on the memo; and Respondent's great hatred for Mr. Kilday and Mr. Coleman. The Respondent offered evidence disputing some of these potential motives, but ultimately, the Board need not prove and this Hearing Panel need not decide precisely what motivated Respondent's actions. Although there is ample evidence that Respondent may have been motivated by vengeance or by a thirst for power, or both, the fact is that the reasons for Respondent's behavior will remain known only to Respondent unless and until he decides to reveal them.

Counsel for Respondent was aggressive and was also quite effective in challenging, on an individual basis, some of the plethora of evidence introduced against Respondent. When viewed in isolation, several of the individual pieces of circumstantial evidence pointing to Respondent at least arguably can be explained, although others, such as the fact that Respondent was the only attorney at Milligan & Coleman who had knowledge of Susan Payne's complaint against Judge Wilson prior to 1997, cannot. When the evidence is viewed as a whole, however, it points compellingly to one person and one person only, leaving the Hearing Panel with the inescapable conclusion that Respondent did in fact prepare and mail the memo in question.

Respondent made much of the fact that the memo was apparently prepared at least several months after his departure from Milligan & Coleman, and that he presumably would have needed access to Milligan & Coleman's offices to obtain the post-it notes reflecting Mr. Kilday's and Mr. Coleman's handwriting, as well as the rubber stamps used on the face of the memo. However, the Hearing Panel notes that Respondent retained his keys to the bank building and Milligan & Coleman's offices for some period of time after he left the firm, and the Hearing Panel also believes it is quite possible that Respondent might have taken the rubber stamps and the post-it notes with him when he left in the fall of 1994, whether or not he intended to use them for a nefarious purpose at that particular point in time. Thus, while Respondent raised a legitimate issue concerning his possible access to Milligan & Coleman's offices and his use of the post-it notes and the rubber stamps, this issue is only one of numerous issues addressed at the hearing, and it does not alter the Hearing Panel's conclusion that the Board met its burden of proving that Respondent created the memo.

Respondent also attempted to portray Milligan & Coleman's efforts to find out who prepared the memo as a flawed rush to judgment that began and ended with only one possible

culprit in mind--Respondent. The Hearing Panel disagrees. The Hearing Panel does not believe that Milligan & Coleman set out on a vindictive witch hunt designed to implicate Respondent. In fact, the testimony of Mr. Woods, who was the primary person who investigated the issue for Milligan & Coleman, reflected anguish and sympathy for Respondent, despite the fact that Mr. Woods is firmly convinced that Respondent committed the acts alleged.

In addition, several days after the hearing took place in this matter, the Board filed a Supplementation of the Record addressing certain information Mr. Woods had learned after the hearing. Specifically, Mr. Woods had testified at the hearing that he did not recall that any of Respondent's keys, other than the post office key, bore the legend "do not duplicate." Mr. Woods advised Disciplinary Counsel after the hearing that he reviewed the Respondent's former front door key and discovered that it is in fact marked in tiny print "do not duplicate." Mr. Woods also had testified at the hearing that Respondent's and Mr. Kilday's miscellaneous files were missing from Milligan & Coleman's offices. Mr. Woods looked through the firm's files again after the hearing and advised Disciplinary Counsel that he and Mr. Gaby had found both the Respondent's and Mr. Kilday's miscellaneous files commingled with other files. In short, the fact that Mr. Woods provided supplemental information favoring Respondent's position to the Board following the hearing belies Respondent's contention that Milligan & Coleman is determined to blame Respondent for the memo regardless of what the evidence shows.

Given that the Hearing Panel has concluded that Respondent was responsible for preparing the memo, the Hearing Panel believes it is appropriate to comment upon the nature of Respondent's offense. As stated earlier, the memo contains certain false statements implicating the members of the Milligan & Coleman firm in a criminal conspiracy with Judge Wilson pursuant to which Milligan & Coleman would assist Judge Wilson with the Payne matter, and in return Judge Wilson would "fix" the Isom case. The memo is clearly libelous to several members of the bar and a sitting judge, but it is also much more than that. Respondent mailed the memo to John Rogers, who Respondent knew had a very antagonistic relationship with both Judge Wilson and Milligan & Coleman. Respondent also knew that Mr. Rogers was good friends with District Attorney General Berkeley Bell, and that Rogers would be likely to get General Bell involved. This is in fact exactly what Mr. Rogers did, and General Bell eventually turned the memo over to the TBI for subsequent investigation.

There was evidence introduced at the hearing that the TBI was extremely interested in the memo, in large part because it appeared to prove a high-profile public corruption case against a sitting judge. The TBI investigated the memo aggressively, and it was only after significant effort that the members of Milligan & Coleman and Judge Wilson were able to persuade the TBI that the memo had no basis in fact. Thus, Judge Wilson and the members of the Milligan & Coleman firm were not only defamed among certain members of the bar and the community, but also faced a very serious threat of criminal prosecution and the loss of their professional positions.

In short, the preparation and mailing of the memo cannot be explained away as a practical joke gone bad or an error in judgment committed in a fit of anger. Rather, it is the product of a very troubled mind that was carried out deliberately after significant forethought and preparation. Respondent's conduct in preparing and mailing the memo clearly violated the standards of conduct cited by the Board in the Petition for Discipline, and the Hearing Panel concludes that the Respondent is currently unfit to practice law.

IV. JUDGMENT

For all the foregoing reasons, the Hearing Panel hereby recommends to the Supreme Court of Tennessee that Respondent be suspended from the practice of law for a period of three (3) years.

ENTERED:


Hearing Committee Chairman


Hearing Committee Member


Hearing Committee Member