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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2012-2013

1111340

Douglas H. Cooner

v.

Alabama State Bar

**Appeal from the Disciplinary Board of the Alabama State Bar
(No. 02-150(A))**

On Return to Second Remand

WISE, Justice.

On February 17, 2010, a panel of the Disciplinary Board ("the Board") of the Alabama State Bar ("the Bar") ordered that Douglas H. Cooner be disbarred from the practice of law.

1111340

Cooner appealed the Board's decision to this Court. On October 8, 2010, this Court held that the Board's order disbarring Cooner did not satisfy the requirements of Rule 4.2, Ala. R. Disc. P., because it did not include findings of fact as to each allegation of misconduct adequate for this Court to conduct a meaningful review to determine whether the Board's conclusion that Cooner had violated Rules 1.7(b), 8.4(a), 8.4(c), and 8.4(g), Ala. R. Prof. Cond., was supported by clear and convincing evidence. Cooner v. Alabama State Bar, 59 So. 3d 29 (Ala. 2010) ("Cooner I").¹ Accordingly, this Court reversed the Board's judgment as to those violations, ordered the Board to vacate its order of disbarment as to those violations, and remanded this case for the Board to enter a new order that complied with Rule 4.2, Ala. R. Disc. P.

¹The Board also concluded that Cooner had violated Rule 1.8(c), Ala. R. Prof. Cond. On appeal, Cooner conceded that the Board's findings of fact regarding its determination that he had violated Rule 1.8(c) were sufficient for appellate review. Based on that concession, this Court considered Cooner's argument that the Board erred in finding that he had violated Rule 1.8(c), Ala. R. Prof. Cond.; held that Cooner's preparation of the trust instrument did not violate Rule 1.8(c), Ala. R. Prof. Cond.; and reversed the Board's judgment with regard to the violation of Rule 1.8(c), Ala. R. Prof. Cond.

1111340

On June 27, 2012, the Board entered its "Report and Order (On Remand)" ("the June 27, 2012, order on remand"). Cooner then appealed to this Court from the June 27, 2012, order on remand. On March 15, 2013, this Court held that the June 27, 2012, order on remand did not comply with either Rule 4.2, Ala. R. Disc. P., or with this Court's mandate in Cooner I, supra, because it did not include specific findings of fact as to each allegation of misconduct. Cooner v. Alabama State Bar, [Ms. 1111340, March 15, 2013] ___ So. 3d ___ (Ala. 2013) ("Cooner II"). Accordingly, we remanded this cause with directions for the Board to vacate its February 17, 2010, order of disbarment and the June 27, 2012, order on remand and to enter a new order that complies with Rule 4.2, Ala. R. Disc. P., and with this Court's mandate in Cooner I.

On April 15, 2013, the Board submitted to this Court its "Second Report and Order (On Remand)" ("the second order on remand").

Standard of Review

"The standard of review applicable to an appeal from an order of the Disciplinary Board is "that the order will be affirmed unless it is not supported by clear and convincing evidence or misapplies the law to the facts." Noojin v. Alabama State

1111340

Bar, 577 So. 2d 420, 423 (Ala. 1990), citing Hunt v. Disciplinary Board of the Alabama State Bar, 381 So. 2d 52 (Ala. 1980).'

"Davis v. Alabama State Bar, 676 So. 2d 306, 308 (Ala. 1996)."

Cooner I, 59 So. 3d at 37.

Discussion

In the second order on remand, the Board specifically stated that it was vacating all prior orders. Therefore, the Board has complied with our directions that it vacate its February 17, 2010, order of disbarment and the June 27, 2012, order on remand.

In its second order on remand, the Board quoted charges IV, IX, X, and XI from the complaint filed against Cooner. In its findings-of-fact section of the second order on remand, the Board stated:

"Being fully cognizant of the Alabama Supreme Court's admonition in its Opinions of October 8, 2010 [Cooner I,] and March 15, 2013 [Cooner II], the same Findings of Fact as set forth in the Panel's June 27, 2012, Report and Order (on Remand) will once again be set forth; however, specifically numbered Findings of Fact shall be connected to and recited as to each Charge in support of the Panel's Conclusions of Law."

The Board then recited the evidence in paragraphs 1 through 30 of the findings of fact, which was almost identical to the

1111340

"Findings of Fact" in the June 27, 2012, order on remand. In its "Conclusions of Law" section in the second order on remand, the Board stated:

"1. Charge IV alleges a violation of Rule 1.7(b) of the Ala. R. Prof. C. as set forth above. This allegation of misconduct is specifically based upon and supported by Findings of Fact 1, 3, 4, 5, 8, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, and 30.

"2. Charge IX alleges a violation of Rule 8.4(a) of the Ala. R. Prof. C. as set forth above. This allegation of misconduct is specifically based upon and supported by Findings of Fact 1, 3, 4, 5, 8, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, and 30.

"3. Charge X alleges a violation of Rule 8.4(c) of the Ala. R. Prof. C. as set forth above. This allegation of misconduct is specifically based upon and supported by Findings of Fact 5, 6, 8, 9, 11, 12, 14, 15, 18, 19, 20, 21, 24, 25, 26, 27, 28, and 30.

"4. Charge XI alleges a violation of Rule 8.4(g) of the Ala. R. Prof. C. as set forth above. This allegation of misconduct is specifically based upon and supported by Findings of Fact 1 through 30.

"The Panel finds that based upon the Findings of Fact assigned and related to each Charge as set forth above, that there is clear and convincing evidence that Mr. Cooner is guilty of violating each of those Charges of misconduct."

(Emphasis added.)

In the second order on remand, the Board has once again failed to include specific findings of fact as to each

1111340

allegation of misconduct. In its conclusions of law, the Board did not include a summary of the specific conduct it found constituted a violation of each Rule of Professional Conduct Cooner was charged with violating, and it did not include any explanation as to why such conduct constituted a violation of the particular rule. Rather, the Board merely cites laundry lists of the various paragraphs included in the "Findings of Fact." References to paragraph numbers alone do not constitute findings of fact as to each allegation of misconduct. Also, with regard to Charge XI, the Board states that its finding of misconduct is "based upon and supported by Findings of Fact 1 through 30," which is merely a reference to the entire "Findings of Fact." Thus, it is clear that the Board is still relying solely on the general recitation of the evidence that is included in the "Findings of Fact" portion of the second order on remand. However, this Court has previously held that that general recitation of facts alone was not sufficient to comply with Rule 4.2, Ala. R. Disc. P. See Cooner I, 59 So. 3d at 39; Cooner II, supra.

Accordingly, the Board still has not complied with this Court's specific mandates in Cooner I and Cooner II.

1111340

Therefore, we are again compelled to remand this cause with instructions that the Board vacate the second order on remand and enter a new order that complies with Rule 4.2, Ala. R. Disc. P., and with this Court's prior mandates in Cooner I and Cooner II. The Board shall make due return to this Court at the earliest possible time and within 30 days after the date of this opinion.

REMANDED WITH INSTRUCTIONS.

Stuart, Bolin, Parker, Main, and Bryan, JJ., concur.

Moore, C.J., and Murdock, J., dissent.

1111340

MURDOCK, Justice (dissenting).

As the main opinion notes, in Cooner v. Alabama State Bar, [Ms. 1111340, March 15, 2013] ___ So. 3d ___, ___ (Ala. 2013) ("Cooner II"), this Court remanded this case a second time because the order of the Disciplinary Board of the Alabama State Bar ("the Board") on remand following this Court's reversal and directions on remand in Cooner v. Alabama State Bar, 59 So. 3d 29 (Ala. 2010) ("Cooner I"), still "did not include specific findings of fact as to each allegation of misconduct." Although not recited in the main opinion issued today, our opinion in Cooner II also noted that a second remand was necessary at that time because the Board had not "vacated its February 17, 2010, order as we instructed in Cooner I." ___ So. 3d at ___.

I agree with the main opinion that the Board has now vacated its February 17, 2010, order of disbarment and therefore has complied with that aspect of our mandate in Cooner II. I disagree with the main opinion, however, as to its decision that this case needs to be remanded for a third time for the Board to enter specific findings of fact.

1111340

There have been two problems all along with the purported findings of fact in this case. First, as explained in both Cooner I and Cooner II, there have not been actual findings of fact by the Board as opposed to general recitations of evidence heard by the Board. The main opinion in the present case states that "this Court has previously held that that general recitation of facts alone was not sufficient to comply with Rule 4.2, Ala. R. Disc. P." ___ So. 3d at ___ (emphasis added). This statement, however, actually recasts our previous holdings in a way that, I think, is responsible for an incorrect conclusion that we must remand this case once again. In point of fact, what we said in our previous opinions in this case is that a general recitation of "evidence" is not sufficient to constitute the requisite findings of "facts." As we said in Cooner I:

"'The Bar acknowledges that [in] Section II of the order ... the paragraphs are not preceded by the statement, "The Disciplinary Board finds as follows.'"

". . . .

"We have reviewed the Board's order and conclude that the order does not satisfy the requirements of Rule 4.2, Ala. R. Disc. P. A recitation of the

1111340

evidence does not constitute a finding of fact as to each allegation of misconduct"

Cooner I, 59 So. 3d at 38-39 (emphasis added). And as we said in Cooner II:

"[T]he 'findings of fact' included in the order on remand are nothing more than a general recitation of the evidence presented at the hearing."

Cooner II, ___ So. 3d at ___ (emphasis added).

The latest order issued by the Board, especially when read in its entirety, while not a model for future orders, suffices. To begin with, the recitation of facts begins with the statement that "[t]he Panel made the following Findings of Fact." (Emphasis added.) In addition, gone from the discussion that follows are many of the references to what a witness stated in his or her testimony and in place of such references are definitive statements of fact apparently accepted by the Board as such. To take one example, in describing the evidence received from Leslie Barineau, a guardian ad litem for one of Douglas Cooner's clients, the Board's original order could be read as simply reciting Barineau's testimony: "Ms. Barineau explained she had a difficult time obtaining an accounting or information from Mr.

1111340

Cooner" and "[s]he identified the previously discussed accounting but stated it was not complete." (Emphasis added.) This same information is now framed as definitive facts: "Ms. Barineau had a difficult time obtaining an accounting" and "[t]he accounting referenced ... above was not complete."

The Board thus has done enough in my opinion to convert what previously were mere "general recitations" of testimony and other evidence into serviceable, if not ideal, factual findings.

The second problem all along has been the failure of the Board to align different factual findings with different conclusions of misconduct. The technique that the Board has finally employed is that of numbering paragraphs and then listing the corresponding numbers as part of the conclusion as to each charge. At the conclusion of this discussion, the order states: "The Panel finds that based upon the Findings of Fact assigned and related to each Charge as set forth above, ... there is clear and convincing evidence that Mr. Cooner is guilty of violating each of those Charges of misconduct." Again, this approach is not recommended; it

1111340

makes the order more difficult for this Court to review and assess. That said, I cannot go further and say that it warrants a third remand.

Based on the foregoing, I dissent from the reversal of the Board's current order. I would proceed to a consideration of the merits of the Board's findings and conclusions in that order.