NO. COA12-1545
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

THE NORTH CAROLINA STATE BAR,
Plaintiff,

v.

BENJAMIN S. SMALL, Attorney,
Defendant.

From the Disciplinary Hearing Commission of the North Carolina State Bar
No. 11 DHC 13

Appeal by defendant from order entered 1 June 2012 by the Disciplinary Hearing Commission. Heard in the Court of Appeals 25 April 2013.

The North Carolina State Bar, by Deputy Counsel David R. Johnson and Counsel Katherine Jean, for plaintiff-appellee.

Crumpler Freedman Parker & Witt, by David B. Freedman and Dudley A. Witt, for defendant-appellant.

GEER, Judge.

Defendant Benjamin S. Small appeals from an order of discipline of the Disciplinary Hearing Commission of the North Carolina State Bar (the "Commission"). On appeal, Mr. Small primarily contends that the sanction imposed upon him was disproportionate to the alleged misconduct when compared to discipline imposed by the Commission in factually similar cases.

We hold that our Supreme Court's decision in *N.C. State Bar v. Talford*, 356 N.C. 626, 576 S.E.2d 305 (2003), forecloses the type of proportionality review sought by Mr. Small in this case. Since we also find Mr. Small's remaining arguments unpersuasive, we affirm the Commission's order.

Facts

Mr. Small was appointed as counsel for James Neal Halley in a Cabarrus County criminal case in which Mr. Halley was charged with child abuse resulting in serious bodily injury, a Class C felony. On 26 November 2008, Mr. Small filed a motion in the Halley case entitled "Motion to Recuse for Conduct Prejudicial to the Administration of Justice." Mr. Small sought an order recusing the District Attorney's Office from further participation in Mr. Halley's prosecution. The superior court denied Mr. Small's motion to recuse, specifically rejecting Mr. Small's factual allegations as completely without merit and concluding that there was "'no basis in fact or law'" for the motion. The court found that the motion was "'vexatious'" and "'filed for the improper purpose of harassing'" the assistant district attorney assigned to the case.

In September 2006, the Clerk of Cabarrus County Superior Court appointed Mr. Small to serve as the guardian ad litem ("GAL") for Clevie Hatley in a proceeding to determine Mr.

Hatley's competence and whether the Clerk should appoint a general guardian. After a contested hearing in November 2006, Mr. Hatley was declared incompetent. Two of Mr. Hatley's daughters, Gail Ervin and Sheila Furr, were appointed as his general guardians. After the November 2006 hearing, Mr. Hatley's general guardians paid Mr. Small a fee for his GAL work performed during the hearing.

In 2007, attorney Vernon A. Russell was retained to assist Mr. Hatley in seeking to restore his legal competency. In September 2007, Mr. Russell filed a motion to restore competency on Mr. Hatley's behalf, and the Clerk again appointed Mr. Small to serve as GAL for Mr. Hatley. Attorney William F. Rogers, Jr. represented the general guardians in opposition to Mr. Hatley's motion. After the Clerk denied Mr. Hatley's motion to restore competency, Mr. Small charged the guardians $75.00 per hour for his service as Mr. Hatley's GAL, and the guardians paid the invoice.

Mr. Hatley appealed to superior court in December 2008. Judge Cressie H. Thigpen presided over the superior court trial on Mr. Hatley's motion to restore competency, but the trial was never completed because Mr. Hatley died during jury selection. After Mr. Hatley died, Mr. Russell dismissed Mr. Hatley's motion. Mr. Small did not, prior to the dismissal of the

motion, seek an order from Judge Thigpen regarding a fee for his GAL services.

Subsequently, Mr. Small submitted an invoice to the Hatley estate for services he rendered to Mr. Hatley as GAL during December 2008. The invoice sought $175.00 per hour -- in other words, $100.00 more per hour than the fee Mr. Small previously charged while serving as GAL for Mr. Hatley in the hearing before the Clerk in 2007. On 21 May 2009, attorney Wesley B. Grant, as counsel for the Hatley estate administrator, responded to Mr. Small's invoice by sending a letter to Mr. Small asking to meet to discuss settlement of Mr. Small's claim for GAL fees, which the Hatley estate administrator thought was excessive. Mr. Small declined to meet.

On 20 August 2009, before the Hatley estate administrator submitted any proposed fee for Mr. Small to the Clerk for approval, Mr. Small filed a complaint and notice of hearing in district court. In the complaint, Mr. Small sought judgment against the Hatley estate, its administrator, and its heirs individually and collectively for GAL fees that Mr. Small claimed he was owed for his service as GAL for Mr. Hatley during the December 2008 appeal from the Clerk's 2007 denial of Mr. Hatley's motion to restore competency. Mr. Grant represented the Hatley estate and its administrator, while the heirs of the

estate other than the administrator were represented by Mr. Rogers, who had previously represented Mr. Hatley's guardians.

On or about 23 September 2009, Mr. Grant filed a motion to dismiss the Complaint pursuant to Rules 12(b)(1), (3), and (6) of the North Carolina Rules of Civil Procedure. Mr. Rogers in turn filed a Rule 12(b)(6) motion to dismiss Mr. Small's claims against the beneficiaries of the Hatley estate. The time to answer the complaint had not yet expired when Mr. Grant and Mr. Rogers filed their motions to dismiss.

On 28 September 2009, Mr. Small, Mr. Grant, and Mr. Rogers appeared in district court in response to a notice of hearing that Mr. Small served with the Complaint. At the hearing, Mr. Small announced in open court that Mr. Rogers was violating his ethical duties by failing to withdraw from his representation of the heirs of the Hatley estate. Mr. Small contended that Mr. Rogers was needed as a witness in Mr. Small's lawsuit against the Hatley estate and its heirs. Mr. Rogers was willing to withdraw from his representation of the heirs of the Hatley estate if the Complaint was not dismissed. Mr. Rogers was never called as a witness in the case.

Despite the fact that Mr. Grant and Mr. Rogers' motions to dismiss were timely filed, Mr. Small filed motions for entry of default and default judgment on 16 October 2009. On 21 October

2009, Mr. Small, Mr. Grant, and Mr. Rogers appeared before Judge Charles E. Brown for a hearing on the motions to dismiss the complaint. At the hearing, there was discussion about whether Judge Thigpen should consider Mr. Small's request for a GAL fee, but Mr. Small never agreed to seek approval from Judge Thigpen and gave no indication that he intended to contact the judge.

By order dated 6 November 2009, Judge Brown dismissed the complaint pursuant to Rule 12. After Judge Brown dismissed the complaint, Mr. Small asked Judge Brown to consider his motions for entry of default and default judgment even though they had been rendered moot by Judge Brown's dismissal of the complaint. Judge Brown denied Mr. Small's request. On 13 November 2009, Mr. Small filed an appeal from the dismissal of the complaint and from the denial of his motions for entry of default and default judgment. Mr. Small filed a calendar notice with the district court and gave notice to Mr. Grant and Mr. Rogers that his appeal was set for hearing in superior court on 25 January 2010.

At some time after the appeal of the Clerk's order denying Mr. Hatley's motion to restore competency was dismissed, Mr. Small submitted to Judge Thigpen *ex parte* a one-page document titled "Motion and Order for Payment of Guardian Ad Litem Fees." The "Motion and Order" was not signed by Mr. Small and falsely

indicated that "this matter" came before Judge Thigpen on 8 December 2008 even though the issue of Mr. Small's GAL fee was not raised at the hearing before Judge Thigpen on 8 December 2008.

Moreover, although Mr. Small knew that the fee he sought to collect pursuant to the Motion and Order was disputed in his district court lawsuit and in the Hatley estate proceeding, Mr. Small did not copy Mr. Grant and Mr. Rogers on his letter to Judge Thigpen or otherwise give Mr. Grant and Mr. Rogers notice of the motion and proposed order. Mr. Grant and Mr. Rogers did not become aware of Mr. Small's motion and proposed order until Mr. Small submitted them to the court during a 22 March 2010 hearing before Judge Joseph N. Crosswhite.

Mr. Grant and Mr. Rogers filed three motions for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure against Mr. Small: (1) on 16 November 2009, in the district court case; (2) on 14 December 2009, also in the district court case; and (3) on 31 December 2009, in superior court where Mr. Small purported to calendar a hearing on his notice of appeal. Mr. Small's appeal and Mr. Grant's and Mr. Rogers' 31 December 2009 motion for sanctions were added to the 25 January 2010 Cabarrus County Superior Court Motions Calendar. On 6 January 2010, Mr. Small dismissed his appeal. However, Mr.

Grant's and Mr. Rogers' motion for sanctions remained on the 25 January 2010 calendar for hearing.

A hearing on the issue whether Mr. Small should be sanctioned was held before Judge Crosswhite on 25 January 2010. Mr. Small did not appear, and Judge Crosswhite decided at the hearing that Mr. Small should be sanctioned. On 28 January 2010, Mr. Grant hand delivered to Mr. Small a copy of his letter to the trial court coordinator enclosing the proposed order for sanctions against Mr. Small. The written order imposing sanctions against Mr. Small was entered by Judge Crosswhite on 9 February 2010, and Mr. Grant, on the same day, mailed Mr. Small a copy of the order for sanctions stamped "filed." The order required Mr. Small to pay attorneys' fees to opposing counsel by 9 February 2010. Mr. Small failed to timely comply with Judge Crosswhite's order for sanctions.

After the deadline to comply passed, Mr. Small moved to set aside the order for sanctions. The other parties filed a motion for contempt based on Mr. Small's failure to comply with the order for sanctions. The hearing on these motions was set for 22 March 2010 and continued to 25 March 2010. Judge Crosswhite denied Mr. Small's motion, and Mr. Small was ordered to comply with the court's order for sanctions.

Upon receipt of information about Mr. Small's conduct in the Hatley matter, the North Carolina State Bar opened a grievance file regarding Mr. Small. Mr. Small acknowledged receipt on or about 27 May 2010 of a copy of a Letter of Notice informing him of the allegations in the grievance file. The Letter of Notice notified Mr. Small that he was required to respond within 15 days. Mr. Small requested, and was allowed, approximately two additional months in which to submit his response to the State Bar. Under the extended deadline, Mr. Small's response was due 6 August 2010.

Mr. Small failed to submit a response to the Letter of Notice about the grievance file by the 6 August 2010 deadline. On 17 August 2010, the State Bar's Office of Counsel sent Mr. Small a letter informing him that his response was late and reminding him that failure to respond to a Letter of Notice may in itself provide a basis for discipline. Mr. Small did not respond to the Office of Counsel's 17 August 2010 letter. On 2 September 2010, the Office of Counsel sent a letter informing Mr. Small that if he did not respond immediately, his grievance file would be reviewed by the Grievance Committee without a response. Mr. Small failed to submit his response to the Letter of Notice until 22 September 2010.

The State Bar filed a complaint with the Commission against Mr. Small on 22 April 2011, alleging various violations of Rules 1, 3, 4, and 8 of the North Carolina Rules of Professional Conduct and requesting disciplinary action against Mr. Small. On 22 August 2011, Mr. Small filed an answer denying the material allegations of the complaint and requesting the complaint be dismissed with prejudice.

Following a hearing on the State Bar's complaint at which Mr. Small represented himself, the Commission entered an order of discipline on 1 June 2012. The Commission concluded that Mr. Small's conduct constituted grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) (2011) based on the following:

> a. By filing the motion to recuse the DA's Office without basis in law or fact which impugned the integrity of the DA's Office, [Mr. Small] filed a frivolous motion and raised an issue therein for which there was no basis in fact or law in violation of Rule 3.1, used means that had no substantial purpose other than to embarrass or burden a third party in violation of Rule 4.4(a), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
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> b. By filing the Complaint against the heirs of the Hatley Estate, individually, seeking to collect a $175.00 per hour fee for his service as GAL, Small made a frivolous claim in violation of Rule 3.1;

c. By asserting at the 28 September 2009 hearing that Attorney Rogers was required to withdraw from his representation of the Hatley heirs because he was a witness in the case, Small made baseless assertions and used means that have no substantial purpose other than to embarrass, delay or burden a third person in violation of Rule 4.4(a);

d. By filing motions for entry of default and default judgment before the time to answer the Complaint expired, Small made frivolous claims in violation of Rule 3.1 and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);

e. By submitting the "Motion and Order for Payment of Guardian Ad Litem Fees" *ex parte* to the Honorable Cressie H. Thigpen when he knew the matter was being contested in both the estate matter and in the lawsuit he filed, Small communicated *ex parte* with a judge in violation of Rule 3.5(a) and engaged in conduct prejudicial to the administration of justice in violation for [sic] Rule 8.4(d);

f. By failing to comply with the 9 February 2010 Order awarding sanctions, Small knowingly disobeyed the rules of a tribunal in violation of Rule 3.4(c); and

g. By failing to timely respond to the Letter of Notice in grievance file 10G0398, Small knowingly failed to respond as required to a lawful inquiry by a disciplinary authority in violation of Rule 8.1(b).

After concluding that Mr. Small's actions constituted misconduct subjecting him to discipline, the Commission made "ADDITIONAL FINDINGS OF FACT REGARDING DISCIPLINE" ("Additional Findings"). Those findings included the facts that Mr. Small's misconduct in the Hatley estate proceeding resulted in limited court resources being wasted to consider Mr. Small's frivolous motion; Mr. Small was sanctioned on 18 December 2008 for making frivolous filings and, yet, despite the sanction, Mr. Small continued to make frivolous filings in the Hatley estate proceeding; and Mr. Small was sanctioned again on 9 February 2010 and 5 May 2010, but despite the sanctions, Mr. Small failed to acknowledge the wrongful nature of his conduct at the disciplinary hearing.

In addition, the Commission found that Mr. Hatley's daughters were vulnerable because they lacked legal expertise to respond to Mr. Small's frivolous filings without the assistance of a lawyer and, therefore, suffered harm as a result of Mr. Small's conduct because they were required to pay legal fees to defend the frivolous actions. Further, as a result of Mr. Small's misconduct, Mr. Hatley's daughters had a diminished opinion of the legal profession. Finally, Mr. Small's failure to timely respond to the disciplinary process interfered with

the State Bar's ability to regulate attorneys and undermined the privilege of lawyers in this State to remain self-regulating.

Based on its Conclusions and these Additional Findings, the Commission considered various factors that, if present, may warrant suspension of a law license and found the following factors present: "[I]ntent of the defendant to commit acts where the harm or potential harm was foreseeable;" "circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;" "elevation of the defendant's own interest above that of the client;" "the negative impact of the defendant's actions on the client and the public's perception of the profession;" "the negative impact of the defendant's actions on the administration of justice;" and "the adverse effect of defendant's conduct on third parties." The Commission further found the following disciplinary factors present: "a pattern of misconduct;" "multiple offenses;" "refusal to acknowledge wrongful nature of conduct;" "vulnerability of the victim;" and "imposition of other penalties or sanctions, to wit, the sanction orders previously issued against [Mr. Small] by the courts."

The Commission concluded Mr. Small's conduct "caused significant harm to his clients and other parties to the proceeding, the public, the administration of justice and the

profession and potential significant harm to his clients." The Commission further concluded Mr. Small's conduct "caused harm to the legal profession by undermining the public's trust and their confidence in lawyers and the legal system." Accordingly, the Commission found that "discipline short of suspension would not adequately protect the public because of the gravity of harms [Mr. Small's] conduct caused" and that "the public will be adequately protected by suspension of [Mr. Small's] law license."

The Commission, therefore, ordered Mr. Small's license suspended for two years. The order of discipline specified that in order for Mr. Small to be reinstated at the conclusion of his active suspension, Mr. Small was required to complete 15 hours of continuing legal education classes, including five hours of professional responsibility and five hours of civil procedure. Mr. Small timely appealed the order of discipline to this Court.

Discussion

Disciplinary proceedings conducted by the Commission are bifurcated into (1) an adjudicatory phase in which the Commission determines whether the defendant committed misconduct and, if the Commission determines the defendant committed misconduct, (2) a dispositional phase in which the Commission determines the appropriate sanction for the misconduct

committed. *See Talford*, 356 N.C. at 634, 636, 576 S.E.2d at 311, 312.

During the dispositional phase, the Commission is required to find facts supporting the sanction imposed. *Id.* at 638, 576 S.E.2d at 313 ("[E]ach level of punishment in the escalating statutory scheme: (1) requires its own particular set of factual circumstances in order to be imposed, and (2) is measured in light of how it will effectively provide protection for the public. Thus, upon imposing a given sanction against an offending attorney, the DHC must provide support for its decision by including adequate and specific findings that address these two key statutory considerations."). Based upon its findings and conclusions and upon the purposes for disciplining attorneys, the Commission determines the appropriate sanction. *See id.* (explaining Commission must determine sanction based on findings showing propriety of specific sanction imposed and showing how effectively sanction imposed will protect public).

This Court reviews appeals from disciplinary orders imposing sanctions based upon attorney misconduct under the whole record test. *Id.* at 632, 576 S.E.2d at 309. In this case, Mr. Small does not challenge the sufficiency of the evidence to support any of the Commission's findings of fact,

and the Commission's findings are, therefore, binding on appeal. *See N.C. State Bar v. Key*, 189 N.C. App. 80, 87, 658 S.E.2d 493, 498 (2008) ("[U]nchallenged findings of facts are binding on appeal."). Mr. Small also does not challenge the Commission's determination that he committed misconduct by violating several Rules of Professional Conduct.

Mr. Small argues, instead, that the Commission erred by imposing discipline based upon consideration of its Additional Findings 2, 3, 4, and 9 because the conduct underlying those Additional Findings constituted the basis for the Commission's findings that Mr. Small violated the Rules of Professional Conduct. The four challenged Additional Findings are:

> 2. [Mr. Small] was sanctioned on 18 December 2008 for his frivolous filing in the *Halley* case.
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> 3. Despite this sanction, [Mr. Small] proceeded to make frivolous filings in the Hatley matter.
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> 4. [Mr. Small] was sanctioned on 9 February 2010 for his misconduct in the Hatley matter and sanctioned again on 5 May 2010.
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> . . . .
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> 9. [Mr. Small's] failure to timely respond to the disciplinary process interfered with the State Bar's ability to regulate attorneys and undermined the privilege of lawyers in this State to remain self-regulating.

Mr. Small contends that although he "cannot cite any controlling law directly on point in support of his position, he believes that the well-established Merger Doctrine commonly applied in North Carolina criminal cases is applicable and urges the Court to adopt said Doctrine in State Bar proceedings." We disagree.

Mr. Small notes that "[t]he general rule in North Carolina is that a defendant cannot be sentenced separately for an offense that is included in the underlying offense charged." He then points to the application of the "merger doctrine" in felony murder cases. The felony murder "merger doctrine" provides that "'[w]hen a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction.'" *State v. Rush*, 196 N.C. App. 307, 313-14, 674 S.E.2d 764, 770 (2009) (quoting *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002)). Further, when the sole theory of first degree murder is felony murder, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first degree murder. *Id.* at 314, 674 S.E.2d at 770.

Mr. Small suggests that the Commission similarly "should not be allowed to impose a punishment based on Additional Findings that were included part and parcel in its original

Findings" supporting its adjudicatory phase conclusions that Mr. Small committed misconduct because "[u]pholding the Additional Findings would deprive [Mr. Small] of due process, effectively punishing him twice for the same offense." That argument fails to recognize that, here, there were no offenses which could have merged. Unlike the felony murder merger scenario, in this disciplinary proceeding, there was no underlying violation of one of the Rules of Professional Conduct that was then used to prove an element of a different rule violation.

To the contrary, once the Commission determined Mr. Small committed professional misconduct, it was ***required*** to make specific findings to support its ultimate decision that suspension, rather than a different sanction, was appropriate under the circumstances of this case. *See Talford*, 356 N.C. at 638, 576 S.E.2d at 313. Since a defendant is not punished during the adjudication phase of a disciplinary proceeding, imposition of a sanction during the subsequent disposition phase cannot constitute double punishment. We further note that if the Commission could not consider the facts underlying the adjudication phase determination when making its disposition phase decision, the sanction imposed would, illogically, not be grounded in the actual misconduct committed.

Mr. Small next contends that the Commission erred by imposing a disproportionate punishment in light of previous punishments imposed by the Commission in factually similar cases. Specifically, Mr. Small argues that the facts of four prior disciplinary cases show "substantially worse conduct than that at issue here," and yet, Mr. Small argues, the Commission did not sanction the attorneys in those actions with active suspensions.

As an initial matter, the parties dispute the applicable standard of review for this Court when reviewing the nature of the sanction imposed by the Commission in the disposition phase of disciplinary proceedings. Mr. Small contends that, under *Talford*, the whole record test applies to a determination that a suspension is the appropriate sanction. The State Bar counters, however, that the *Talford* whole record test applies only to a determination "whether a suspension is appropriate discipline under the facts and conclusions determined by" the Commission. The State Bar contends that we should review the length of any suspension and the terms of any statement or reinstatement for abuse of discretion.

In *Talford*, our Supreme Court held that the Commission does not have unlimited discretion in imposing sanctions. *See id.* at 631, 576 S.E.2d at 309 (holding appellate courts are "obligated

to modify or remand any judgment (or discipline) shown to be *improperly* imposed" and rejecting the Commission's "contention that its sanctions are beyond the purview of the state's appellate courts"). The Court in *Talford* further indicated that even though the Commission does have discretion when imposing a particular sanction, the Commission's ultimate imposition of a sanction is nonetheless reviewed under the whole record test:

> Certainly, there is a range of factual circumstances that the [Commission] may categorize as being within the parameters of any one level of punishment. However, *the [Commission's] discretionary powers to fit a set of facts within a punishment level are not unbridled. At a minimum, the [Commission] must support its punishment choice with written findings that*: (1) are consistent with the statutory scheme of N.C.G.S. § 84-28; and *(2) satisfy the mandates of the whole-record test* . . . .

Id. at 638, 576 S.E.2d at 313 (emphasis added). Given the Court's emphasis on the whole record test, even after noting the Commission's discretion in imposing sanctions, we conclude defendant's argument is reviewed under the whole record test.

Under the whole record test, the "following steps are necessary as a means to decide if a lower body's decision has a 'rational basis in the evidence': (1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the

expressed findings and/or conclusions adequately support the lower body's ultimate decision?" *Id.* at 634, 576 S.E.2d at 311.

In *Talford*, the Court of Appeals, although observing it was not obligated to do so by statute, engaged in a "'proportionality review'" of prior reported appellate decisions to determine whether the sanction imposed in that case, disbarment, had historically been imposed in circumstances analogous to those before the Court. *N.C. State Bar v. Talford*, 147 N.C. App. 581, 592-93, 556 S.E.2d 344, 352 (2001), *aff'd as modified*, 356 N.C. 626, 576 S.E.2d 305 (2003). On appeal, the Supreme Court addressed the Court of Appeals' proportionality review as follows:

> The Court of Appeals noted that there were no cases resulting in the disbarment of an attorney for misconduct analogous to defendant's. Our own review of prior cases involving attorney disciplinary actions produced similar results, leading us to concur with the lower court's conclusion that the disbarment judgment imposed on defendant stands "as an aberration," [*Talford*, 147 N.C. App.] at 595, 556 S.E.2d at 354, *which must be reconsidered in light of the contextual analysis provided herein*.

Talford, 356 N.C. at 641-42, 576 S.E.2d at 315 (emphasis added) (footnote omitted).

However, within this same discussion, the Supreme Court noted in a footnote: "Although the Court of Appeals referred to its examination of cases as part of its 'proportionality'

review, this Court expressly disapproves of any reference in the lower court's opinion that may suggest a 'proportionality review' is included in an appellate court's examination of attorney disciplinary actions. Such actions are reviewed under the whole-record test, as described within the body of this opinion." *Id.* at 641 n.4, 576 S.E.2d at 315 n.4. The Court determined, based on its review of other appellate decisions and the Commission's findings in that case, that the decision to disbar the defendant had no rational basis in the evidence. *Id.* at 642, 576 S.E.2d at 315.

Here, Mr. Small's entire argument that imposition of a two-year active suspension was unwarranted hinges on a comparison of this case to four unrelated orders of the Commission imposing comparatively lighter sanctions on the defendant attorneys. None of the orders cited in Mr. Small's brief is a part of the record in this case. Moreover, Mr. Small cites no prior opinions of our appellate courts upholding or reversing discipline under analogous facts.

Although the Supreme Court in *Talford* reviewed *prior reported appellate court decisions* and agreed with the Court of Appeals' determination that the sanction imposed in that case was inconsistent with those decisions, *id.* at 641-42, 576 S.E.2d at 315, nothing in *Talford* suggests that this Court can or

should look at unrelated prior orders of the Commission, not included in the record, when reviewing the nature of a sanction imposed in a disciplinary proceeding. Rather, the type of proportionality review sought by Mr. Small was expressly disavowed by the Supreme Court in *Talford* since it is inconsistent with the whole record test. *Id.* at 641 n.4, 576 S.E.2d at 315 n.4. Consequently, we affirm the Commission's order.

Affirmed.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).