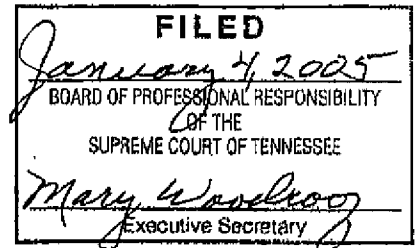


IN DISCIPLINARY DISTRICT II  
BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE



IN RE:            SHERMAN AMES, II  
                         Respondent

DOCKET No. 2001-1271-2-TH

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JUDGMENT OF THE HEARING COMMITTEE

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This cause came to be heard by the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee on December 14 and 15, 2004, upon Petition, Response thereto, statements by Disciplinary Counsel and Respondent, *pro se*, testimony of witnesses and the record as a whole, all of which was heard pursuant to Rule 9, *Rules of the Tennessee Supreme Court*. This Hearing Committee, Loren E. Plemmons, Chair, David M. Eldridge and John R. Humble, makes the following findings of fact and submits its judgment in this cause as set forth herein below.

I. STATEMENT OF THE CASE

1. A Petition for Discipline was filed on November 29, 2001 charging Respondent with violation of Disciplinary Rules in File Number 22665-2(K)-TH.
2. Respondent was served with said petition via certified mail receipt dated December 4, 2001. Respondent answered the petition through his counsel of record which answer was filed with the Disciplinary Board on February 2, 2002.

3. Disciplinary Counsel served Interrogatories and Request for Production of Documents upon Respondent via certificate of service dated May 28, 2002. Disciplinary Counsel served a Motion to Compel Discovery upon Respondent via certificate of service dated October 3, 2002.
4. Respondent served his responses to the requested discovery via certificate of service dated January 24, 2003.

## II. FINDINGS OF FACT

5. On June 27, 2000, a complaint was filed regarding Respondent, Sherman Ames, II, by Paul T. Gillenwater, an attorney licensed to practice law within the State of Tennessee.
6. The Informant, Paul T. Gillenwater herein after referred to as Mr. Gillenwater, and Respondent practiced law together in Knoxville, Tennessee in an office sharing - association of attorneys agreement during the time period of 1979 through May 2000.
7. The association of attorneys, herein after referred to as "the firm" was comprised of Paul T. Gillenwater, H. Douglas Nichol and Sherman Ames, II, a/k/a Gillenwater, Nichol & Ames.
8. The firm jointly represented clients as plaintiffs in asbestosis litigation.
9. Proceeds obtained on behalf of clients were deposited into numerous trust accounts identified by Defendant and occasionally into the trust account of Paul T. Gillenwater.
10. Each member of the firm assumed the various trust accounts utilized for clients' proceeds from asbestosis cases were being audited each month by certified public accountants.
11. However, the firm's trust accounts were not being audited by certified public accountants.

12. No attorney from the firm reviewed the firm's trust accounts to determine whether payments to clients and various other obligatees of asbestos proceeds were timely and properly made.
13. Mr. Gillenwater hired Susan Lynn Hoard Tackett, herein after referred to as Mrs. Tackett, to work as Respondent's secretary in March or April 1995.
14. In late 1995, Respondent and Mrs. Tackett began an intimate personal relationship which continued through January 1, 2000.
15. Beginning in 1996 and continuing through October 7, 1998, Mrs. Tackett's job responsibilities included maintaining the numerous trust accounts in which the clients' proceeds from asbestosis cases were deposited and for which Mr. Gillenwater was the only authorized signatory. In addition, Mrs. Tackett maintained Respondent's individual attorney trust account, Respondent's attorney operation account and Respondent's personal checking account.
16. No attorney of the firm reviewed the firm's trust accounts to determine whether said accounts were being maintained by Mrs. Tackett pursuant to generally acceptable trust accounting principals.
17. During the time period of January 1997 through October 1998, Mrs. Tackett forged Mr. Gillenwater's signature to checks totaling Seven Hundred Eighty Four Thousand Thirty Eight and 70/100 Dollars (\$784,038.70) drawn on the firm's numerous trust accounts which checks were made payable to Respondent and deposited into Respondent's attorney operations and personal bank accounts.
18. In 1998, Mrs. Tackett withdrew and utilized Five Thousand and 00/100 Dollars

(\$5,000.00) from Respondent's attorney trust account.

19. Respondent did not review his attorney trust account to determine whether said account was being maintained by Mrs. Tackett pursuant to generally acceptable trust accounting principals.
20. Respondent did not review his attorney operation account nor his personal checking account to determine whether said accounts were being maintained by Mrs. Tackett pursuant to generally acceptable accounting principals.
21. On at least two (2) occasions, Mrs. Tackett lied to Respondent regarding the source of funds for a deposit she made into Respondent's account in the approximate amount of Ninety Five Thousand and 00/100 Dollars (\$95,000.00) and the purchase of a swimming pool in the approximate amount of Twenty Thousand and 00/100 Dollars (\$20,000.00).
22. Respondent had no actual knowledge that Mrs. Tackett was funneling embezzled funds through his accounts from which he received some benefit.
23. Mrs. Tackett was fired from her employment with the firm on October 7, 1998 and thereafter prosecuted for embezzlement. Mrs. Tackett plead guilty, was incarcerated and at the time of the hearing was serving the remaining portion of her sentence on probation.
24. The remaining members of the firm assured the Hearing Panel that no client of the firm has suffered any monetary loss and that in the event any future potential monetary loss is discovered, the party owed will be paid.
25. On March 24, 2000, Respondent settled a worker's compensation claim in the amount of One Hundred Thirty Thousand and 00/100 Dollars (\$130,000.00). for a client, Jimmye Lou Smith who was the surviving spouse of Frank O. Smith, Sr. in the Circuit Court for

Coffee County, Tennessee.

26. Although Respondent deposited the worker's compensation settlement funds into his attorney trust account, Respondent deposited into his attorney operations account the following: on March 24, 2000, Thirty Thousand and 00/100 Dollars (\$30,000.00); on March 31, 2000, Ten Thousand and 00/100 Dollars (\$10,000.00); and on April 24, 2000, Twenty Four Thousand Eight Hundred Seventy Five and 97/100 Dollars (\$24,875.97).
27. On October 23, 2000, Respondent paid from his attorney operations account the sum of Twenty Nine Thousand Three Hundred Thirty Four and 00/100 Dollars (\$29,334.00) to Mutual of Omaha, an entity holding a subrogation interest in the Smith worker's compensation case.
28. As shown in collective Exhibit 7, Respondent mailed the subrogation funds to Mutual of Omaha at P.O. Box 1602, Tullahoma, Tennessee in an envelope postmarked November 30, 2000.
29. As further shown in collective Exhibit 7, Respondent's check made payable to Mutual of Omaha was returned to Respondent at the firm's address in an envelope with return address of "Carlos & Nancy Bussche, P.O. Box 1602, Tullahoma, Tennessee."
30. Mr. Gillenwater testified that the funds intended for Mutual of Omaha's subrogation interest has been paid into Chancery Court for Knox County, Tennessee.
31. At the hearing, Respondent admitted that the funds for Mutual of Omaha's subrogation interest were improperly deposited into and co-mingled with Respondent's funds for a period in excess of seven (7) months and that the subrogation interest should have remained in his attorney trust account.

32. Pursuant to the workers' compensation settlement order, Respondent was to receive twenty percent (20%) of the total settlement proceeds as an attorney fee. Therefore, Respondent's fee is Twenty Six Thousand and 00/100 dollars (\$26,000.00).
33. Respondent made the following trust account transactions concerning the Smith workers' compensation settlement:

Settlement Proceeds				\$130,000.00
Less:				
Check Number	Date	Purpose	Amount	
#0936	3/30/00	Court Rptr.	206.00	
#1103	3/31/00	Attorney	10,000.00	
#1104	4/24/00	Attorney	24,875.97	
#1106	3/24/00	Attorney	30,000.00	
#1107	3/29/00	Client	61,688.53	
#1108	3/30/00	Wit. Depo	<u>450.00</u>	
Total Disbursed from Respondent's trust account				<u>\$127,220.50</u>
Settlement Proceeds - missing				\$ 2,779.50

34. Respondent made the following transactions concerning the Smith workers' compensation settlement from his attorney operations account:

Deposits: 3/24/00, 3/31/00, 4/24/00	\$64,875.97
Less:	
Check #2783, dated 10/23/00, mailed 11/30/00, Payee - Mutual of Omaha	<u>29,334.00</u>
Total settlement funds kept by Respondent	\$35,541.97
Awarded Attorney Fee	<u>-26,000.00</u>
Excess Fee	\$ 9,541.97

35. The settlement proceeds which are missing from the accounting presented from Respondent's trust account of \$2,779.50 plus the excess fee retained by Respondent of \$9,541.97 total \$12,321.47.

### III. CONCLUSIONS OF LAW

36. The Board contends the acts and omissions by Respondent as alleged, constitute violations of the *Code of Professional Responsibility*, specifically the following:
- DR 1-102. Misconduct (A)(1)-(6)**  
**DR 2-106. Fees for Legal Services (A), (B)(1)-(8)**  
**DR 9-102. Preserving Identity of Funds and Property of a Client (A)(1)-(2), (B)(1)-(4)**
37. Respondent admits and therefore the Hearing Committee finds that Respondent has violated DR 9-102 (A) by co-mingling funds to be held in trust for the benefit of a client with funds belonging to the lawyer for a period in excess of seven (7) months.
38. Concerning the funds embezzled from the firm's trust accounts and Respondent's individual trust account by Mrs. Tackett, Respondent denies violations of DR 1-102 Misconduct and, DR 9-102 Preserving Identity of Funds and Property of a Client.
39. The Hearing Committee finds and concludes that Respondent has violated DR 1-102 Misconduct (A)(1)(2) and DR 9-102 Preserving Identity of Funds and Property of a Client (A)(1)-(2), (B)(1)-(4) by failing to ensure the firm's trust accounts and Respondent's individual trust account were being maintained by Mrs. Tackett pursuant to generally accepted trust accounting principles including those principles which are set forth in DR 9-102(B)(1)-(4).
40. The Hearing Committee finds and concludes that Respondent has violated DR 9-102 Preserving Identity of Funds and Property of a Client (A)(1)-(2), (B)(1)-(4) by failing to ensure that the Smith workers' compensation settlement proceeds were properly received and disbursed whereby Two Thousand Seven Hundred Seventy Nine and 50/100 Dollars (\$2,779.50) remained missing at the time of hearing.
41. Respondent denies violation of DR 2-106 Fees for Legal Services (A), (B)(1)-(8) which

allegation relates to an attorney fee received in excess of twenty percent (20%) of the Smith workers' compensation settlement.

42. The Hearing Committee finds and concludes that Respondent has violated DR 2-106 Fees for Legal Services (A), (B) by receiving Nine Thousand Five Hundred Forty One and 97/100 Dollars (\$9,541.97) in excess of the maximum fee allowed by law.
43. The Hearing Committee finds and concludes that Respondent has violated DR 9-102 (A) Preserving Identity of Funds and Property of a Client by depositing funds designated for the Mutual of Omaha subrogation interest of the Smith workers' compensation settlement into Respondent's attorney operation account.
44. The Hearing Committee finds and concludes that funds designated for the Mutual of Omaha subrogation interest of the Smith workers' compensation settlement which has been paid into Knox County Clerk and Master's Office is the property of Mutual of Omaha, if the subrogation interest still exists, or, the property of the client, Mrs. Jimmye Smith. Payment of said funds to either Respondent or his former firm would be a violation of DR 2-106 Fees for Legal Services (A), (B), i.e., collecting fees in excess of those permitted by law.

#### IV. FACT FINDING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

45. Respondent has not presented a claim of mitigating circumstances.
46. From the testimony of Respondent and the remaining members of the firm, the Hearing Committee finds as a mitigating circumstance that each member of Gillenwater, Nichol & Ames had an obligation pursuant to violated DR 9-102 Preserving Identity of Funds and Property of a Client (B)(1)-(4) to ensure the firm's trust accounts were being maintained



by Mrs. Tackett pursuant to generally acceptable trust accounting principles including those principles which are set forth in DR 9-102 (B)(1)-(4).

47. The Hearing Committee finds as a mitigating circumstance that Mr. Gillenwater and Mr. Nichol have paid all persons who were to receive funds which have been embezzled and that no client, to their knowledge, has been harmed as a result of the embezzlement from the firm's trust accounts.
48. The Hearing Committee finds Respondent's prior disciplinary record as set forth in the Petition is an aggravating circumstance.


#### V. JUDGMENT

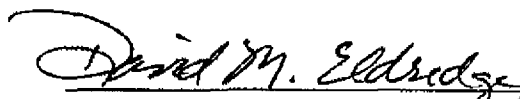
**IT IS THEREFORE ORDERED** by the Hearing Committee as follows:

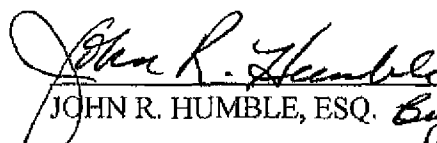
1. That Respondent, Sherman Ames, II, shall be suspended from the practice of law for a period of six (6) months.
2. That Respondent, Sherman Ames, II, shall be suspended for an indefinite period of time which such indefinite suspension shall terminate at such time as Respondent performs the following:
  - a. Complete an ethics seminar or similar training upon the generally acceptable trust accounting principles required to comply with *Tennessee Rules of Professional Conduct*.
  - b. Pays his former client's widow, Jimmye Lou Smith, Nine Thousand Five Hundred Forty One and 97/100 Dollars (\$9,541.97) for the excess fee he received.
  - c. Accounts to Disciplinary Counsel that the missing trust account funds of the Smith workers' compensation settlement proceeds, Two Thousand Seven

Hundred Seventy Nine and 50/100 Dollars (\$2,779.50), were properly received and disbursed or in the event Respondent cannot account for proper payment of said funds that Respondent shall pay his former client's widow, Jimmye Lou Smith said sum.

Enter this the 23rd day of December, 2004.

  
LOREN E. PLEMMONS, ESQ.  
CHAIR

  
DAVID M. ELDRIDGE, ESQ. *By Permission*

  
JOHN R. HUMBLE, ESQ. *By Permission*