

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

IN RE: JES BEARD

DOCKET NOS. 2008-1746-3(C)-RS  
2009-1798-3(C)-RS

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**JUDGMENT OF THE HEARING COMMITTEE**

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These consolidated matters came before the Hearing Committee appointed by the Board of Professional Responsibility of the Supreme Court of Tennessee at a hearing held from July 21, 2009 through July 23, 2009. The consolidated matters were heard pursuant to Rule 9 of the Rules of the Tennessee Supreme Court. The Hearing Committee, after carefully considering all evidence admitted in these matters and hearing the arguments of counsel, hereby renders the following judgment.<sup>1</sup>

**GENERAL FINDINGS OF FACT**

1. This is a disciplinary proceeding against the Respondent, Jes Beard, an attorney licensed to practice law in Tennessee.
2. The Respondent was licensed to practice in 1990.
3. Disciplinary Counsel, on behalf of the Board, filed a Petition for Discipline against the Respondent on April 1, 2008.
4. On July, 31, 2008, after receiving permission from the Chair of the Board of Professional Responsibility to file a late answer, Respondent filed an Answer.

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<sup>1</sup> Both parties have filed certain proposed findings of fact and conclusions of law. The Respondent filed proposed findings of fact and conclusions of law on August 13, 2009 relating primarily to what is characterized below as the "Morrow/Overton Complaint." Therein the Respondent requested through August 17, 2009 to file what he characterized as the "remainder" of his proposed Findings of Fact and Conclusions of Law. However, no additional proposed findings of fact or conclusions of law were filed by the Respondent.

5. On January 2, 2009 a second Petition for Discipline was filed and given Docket No. 2009-1798-3-RS.

6. By Order of the Hearing Committee, the two Petitions were consolidated on January 20, 2009.

7. A Motion for Default Judgment and to Deem Allegations Admitted regarding the second Petition was filed on April 30, 2009.

8. On July 15, 2009, less than a week before the hearing on this matter, the Respondent filed a Motion to Amend Response that included his response to the Supplemental Petition.

9. Despite the late filing and the proximity to the hearing, the Chair of the Board of Professional Responsibility granted Mr. Beard's request to allow the late-filing of this response, and on July 20, 2009, the Hearing Committee denied the Board's Motion for Default as moot.

10. The Petitions for Discipline charge the Respondent with the violation of Rules of Professional Conduct 1.1, 1.3, 1.4, 1.7(a), 3.2, 3.3(a), 4.1, 4.2, 8.1(b), 8.4 (a) and (d).

11. On June 18, 1999, the Respondent was privately reprimanded by the Board of Professional Responsibility as a result of a criminal contempt holding in Georgia. A true and exact copy of that Private Reprimand was entered into evidence at the hearing as Exhibit 1.

12. On August 22, 2000, the Respondent was publicly censured by the Board due to violations of the Disciplinary Rules regarding advertising. A true and exact copy of that Public Censure was entered into evidence at the hearing as Exhibit 2.

13. On January 11, 2001, the Respondent was again privately reprimanded by the Board for failing to act with reasonable diligence and promptness in his representation of a client. A true and exact copy of that Private Reprimand was entered into evidence at the hearing as Exhibit 3.

14. On December 4, 2002, the Respondent was publicly censured by the Board for failing to represent a client diligently. A true and exact copy of that Public Censure was entered into evidence at the hearing as Exhibit 4.

15. On June 23, 2003, the Respondent was publicly censured by the Board for assisting a client from removing a child from a home the child had been placed in pursuant to a safety plan. A true and exact copy of that Public Censure was entered into evidence at the hearing as Exhibit 5.

16. Finally, shortly before the Hearing on this matter, the Tennessee Supreme Court suspended the Respondent for two years. The Supreme Court's Order upheld the Findings and Conclusions of a previous Hearing Committee. A true and exact Copy of that previous Hearing Committee's Findings and Conclusions was entered into evidence at the hearing as Exhibit 6.

17. That previous Hearing Committee concluded that the Respondent violated numerous disciplinary rules through several instances of misconduct, including making misrepresentations of fact to a court. Id. at pp. 12-21. The Hearing Committee further held that, based upon the finding of several aggravating factors and the lack of any mitigating circumstances, the Respondent should be suspended from the practice of law for a period of two years. Id. at p. 22.

#### **July 31, 2008 Petition for Discipline**

#### **File No. 30335-3(C)-JV (Morrow/Overton Complaint)**

#### ***Findings of Fact***

18. On June 22, 2007, a complaint was entered as to the Respondent by Kathleen Brett Morrow, Esq. and designated as File No. 30335-3(C)-JV. Ms. Morrow has since changed her name, and she will be referred to throughout as Ms. Overton.

19. The Respondent represented a mother, Ms. Jennifer Darbyshire, and her boyfriend, Mr. Ray Marin, in Juvenile Court in a case involving three minor children.

20. In that action, the boyfriend of the mother had been accused of sexually abusing one of the three minor children.

21. A Restraining and No Contact Order had been entered in the action on August 19, 2002 prohibiting the mother from allowing any contact whatsoever between the boyfriend and the children. A true and accurate copy of the Restraining and No Contact Order was entered into evidence at the hearing as Exhibit 11. Though the Respondent disputes the validity of the Restraining and No Contact Order, the Board finds that the order was effective and binding as it specifically directed Ms. Darbyshire not to allow Mr. Marin to see the Darbyshire children, and the evidence showed Ms. Darbyshire had notice of the order. See Exhibit 12, p. 2-3. In this connection, the Board notes that the Petition to Terminate Restraining Order was signed by both Mr. Marin and Ms. Darbyshire. Exhibit 12, p. 4.

22. On September 19, 2006, the Respondent filed a Petition To Terminate Restraining Order (the "Petition") on behalf of the mother and the boyfriend requesting that the Court terminate or modify the Restraining and No Contact Order. A true and accurate copy of the Petition was entered into evidence at the hearing as Exhibit 12.

23. The court questioned the Respondent about the possibility of a conflict in his representation of both the mother and the boyfriend.

24. One basis for the Petition was that the mother had, in fact, allowed contact between the children and the boyfriend, in violation of the Court's Order, and that the children and the boyfriend had developed a positive relationship.

25. As a result of this allegation, Ms. Overton, on behalf of the Department of Children's Services, filed a Petition to Show Cause why the mother should not be held in contempt

for violation of the Restraining and No Contact Order. A true and accurate copy of the Petition to Show Cause was entered into evidence at the hearing as Exhibit 14.

26. Ms. Overton also testified that the Respondent had made oral statements to the Court in a previous hearing amounting to an admission that his client violated the Restraining and No Contact Order.

27. Ms. Overton testified that these statements and the filing of the Petition resulted in her filing of the Petition to Show Cause.

28. The Respondent eventually informed the Court that he did not represent the boyfriend after the Court had determined that the boyfriend had no standing to challenge the Restraining and No Contact Order.

29. The Board was not persuaded on the issues presented by the testimony of Ms. Darbyshire or Mr. Marin regarding the extent to which the Respondent informed them of the risks associated with filing the Petition or the conflicts of interest involved.

30. Ms. Overton's Petition to Show Cause was held in abeyance for a year pending no further violations of the Restraining and No Contact Order. A true and exact copy of the Order on Rehearing was entered into evidence at the hearing as Exhibit 13.

### ***Conclusions of Law***

31. The Respondent's actions exposed his client to contempt charges for the violation of a court order.

32. Rule of Professional Conduct 1.1 requires that a lawyer shall "provide competent representation to a client."

33. Rule 1.1 further states that competent representation "requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

34. In the Morrow/Overton complaint, the Respondent failed to provide competent representation to his client by filing a motion that directly led to the filing of a Petition for Contempt against his client. Specifically, the grounds stated within the motion to set aside or modify the protective order stated, as a supporting ground, that the client had been violating the protective order.

35. The Respondent's actions violated Rule 1.1.

36. Rule 1.4 of the Tennessee Rules of Professional Conduct requires as follows:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and comply with reasonable requests for information within a reasonable time.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

37. With regard to the Morrow/Overton complaint, the Respondent did not fully or adequately explain or communicate the consequences of his representation of each client in the face of a clear conflict or the possible consequences of filing pleadings that could lead to a finding of contempt against his client.

38. The Respondent's actions violated Rule 1.4.

39. The Respondent violated Rule 1.7 (a) which provides that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

- (2) each client consents in writing after consultation.

40. The Respondent engaged in the representation of a mother and the boyfriend against whom allegations of sexual misconduct with the mother's children had been made.

41. The Respondent then filed the Petition on behalf of the mother and the boyfriend, seeking to set aside an order of protection that forbade contact between the children and the boyfriend by stating within the Petition that the mother had already allowed such conduct.

42. The mother and the boyfriend had diverging interests and the representation of the mother, as evidenced by this petition, was being materially limited by the representation of the boyfriend.

43. Given these divergent interests, the Respondent could not reasonably believe that his representation of Mr. Marin would not adversely affect his simultaneous representation of Ms. Darbyshire. See Rule 1.7(b).

44. In fact, the Respondent's representation of Ms. Darbyshire was adversely affected as is evidenced by the Petition to Show Cause as to why Ms. Darbyshire should not be held in contempt for allowing Mr. Marin contact with her children. See Exhibit 14.

45. The Respondent's contention that the Order was an invalid Order does not absolve him of his failure to act ethically with regard to this conflict.

46. Furthermore, the waiver signed by the Respondent's client was insufficient. A true and exact copy of each waiver was entered into evidence at the hearing as Exhibit 15. First, the waivers were executed after the Respondent's filing of the Petition that exposed Ms. Darbyshire to contempt. Second, the waiver did not advise Ms. Darbyshire about any exposure to possible contempt proceedings.

47. Finally, the Respondent's actions in the Morrow/Overton complaint violated section 8.4(a). Rule 8.4 provides, in part, that it constitutes professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

48. As detailed above, the Respondent's actions violated a number of Rules of Professional Conduct.

49. Further, the Respondent's actions in attempting to benefit Mr. Marin have been prejudicial to the administration of justice in that they led to a Petition for Contempt being filed against Ms. Darbyshire.

50. The Supreme Court has adopted for use by its Hearing Committees the ABA Center for Professional Responsibility Standards for Imposing Lawyer Sanctions (ABA Standards).

51. In light of the violations set forth above, the following ABA Standard is applicable to the Respondent's actions and failures concerning the Morrow/Overton complaint.

52. Section 4.31 of the ABA Standards states:

Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

**File No. 30736-3(C)-JV (Robin Rubin Flores, Esq.)**

***Findings of Fact***

53. On November 13, 2007, a Complaint was entered as to the Respondent, by Robin Rubin Flores, Esq. and designated as File No. 30736-3(C)-JV. A true and exact copy of the Complaint was entered into evidence at the hearing as Exhibit 41.



54. The Respondent was hired to represent Albert Schlieff who was being prosecuted for the alleged rape of his step-grandchild.

55. At the direction of the Respondent, Mr. Schlieff's wife, Rosa Schlieff, contacted the grandchild in hopes of the child recanting her accusations.

56. Ms. Schlieff picked up the grandchild at the child's residence and drove to a secluded park.

57. Ms. Schlieff told the child to recant her accusations against Mr. Schlieff, providing a written recantation for the grandchild to copy into her own handwriting.

58. Ms. Schlieff told her if she did not recant her accusations against Mr. Schlieff she would report her alleged drug use.

59. Ms. Schlieff was subsequently charged with coercion of a witness, a Class D Felony.

60. Attorney Robin Rubin Flores, Esq. was appointed to represent Ms. Schlieff. During Mr. Flores' representation of Ms. Schlieff, the Respondent continued to contact Ms. Schlieff regarding her case and Mr. Schlieff's case without providing notice to or gaining permission from Ms. Flores.

61. Mr. Flores requested on different occasions that the Respondent refrain from contacting his client. See, e.g., Exhibit 41, Ex. 6.

62. The Respondent ignored this request.

63. On August 7, 2006, Ms. Schlieff pled guilty to coercion of a witness and received a two year sentence.

64. However, the court withheld execution of the judgment pending her satisfactory performance in judicial diversion.

65. The Respondent issued a subpoena to Ms. Schlief to testify regarding the very basis of the criminal charges against her at a hearing in the prosecution of Mr. Schlief on February 27, 2007.

66. Ms. Schlief, on the advice of Mr. Flores, relied on her Fifth Amendment right not to incriminate herself and did not testify at this hearing.

67. On October 10, 2007, at another hearing in the prosecution of Mr. Schlief, the Respondent called Ms. Schlief to the witness stand, without any notice to Mr. Flores.

68. Ms. Schlief did not invoke her Fifth Amendment right on this occasion and testified at length about her contact with the grandchild that gave rise to her indictment and eventual guilty plea.

69. On October 31, 2007, the Respondent filed, on behalf of Ms. Schlief, a Motion to Set Aside the Guilty Plea of Diversion. A true and accurate copy of the Motion to Set Aside the Guilty Plea of Diversion was entered into evidence at the hearing as Exhibit 37.

70. The Respondent filed this Motion without providing notice to Mr. Flores and while Mr. Flores remained Ms. Schlief's attorney of record.

71. Mr. Flores testified that, if the Motion was granted, Ms. Schlief would again be exposed to criminal prosecution and possible jail time.

72. Mr. Flores testified that setting aside Ms. Schlief diversion was not in Ms. Schlief's best interest.

73. Mr. Flores also testified that the Respondent was attempting to use Ms. Schlief's Motion to Withdraw her guilty plea to gain a strategic advantage in Mr. Schlief's trial.

74. It was only after the filing of this Motion that Mr. Flores was allowed to withdraw from his representation of Ms. Schlief.

75. When pressed by the Court as to whether the Respondent's representation of both Mr. and Ms. Schlieff was an impermissible conflict, the Respondent offered to withdraw the Motion to Set Aside the Guilty Plea.

76. The Respondent did in fact withdraw the Motion to Set Aside the Guilty Plea.

77. The Respondent testified that he withdrew Ms. Schlieff's Motion in order to not delay Mr. Schlieff's trial.

78. Both the Respondent and Ms. Schlieff testified that the Respondent never advised Ms. Schlieff of any conflict of interest in his representation of both her and Mr. Schlieff and that she never waived that conflict.

#### ***Conclusions of Law***

79. With regard to the Flores complaint, the Respondent violated Rule 1.1 by failing to provide competent representation to a client by advising Ms. Schlieff to file a motion to set aside her guilty plea that would set aside a conviction resulting in the granting of diversion and again put Ms. Schlieff in jeopardy of serving jail time. The Respondent took this action in order to gain a strategic advantage in the case of another client.

80. In this connection, the Respondent did not explain the consequences of his representation of each client in the face of a clear conflict or the possible consequences of filing pleadings that could expose Ms. Schlieff to jail time as a result of the setting aside of her guilty plea.

81. This failure violated Rule 1.4 of the Rules of Professional Conduct.

82. The Respondent undertook the representation of Ms. Schlieff while contemporaneously representing Mr. Schlieff in a criminal proceeding alleging that Mr. Schlieff had engaged in sexual misconduct with the Schlieff's granddaughter.

83. Ms. Schlieff had previously been represented and pled guilty to a charge of coercion of a witness.

84. This charge resulted from Ms. Schlieff's attempt to obtain a recantation of the granddaughter's allegations against Mr. Schlieff.

85. Ms. Schlieff took this action at the direction of the Respondent.

86. Despite the Respondent's representation of Mr. Schlieff and the Respondent's previous direction to Ms. Schlieff that resulted in the criminal charges against her, the Respondent attempted to represent Ms. Schlieff and withdrawal her guilty plea.

87. This representation was materially limited and adversely affected by the Respondent's representation of Mr. Schlieff.

88. In fact, the Respondent took this action, to the detriment of Ms. Schlieff, in order to gain a strategic advantage in the case against Mr. Schlieff.

89. The Motion was filed to allow Ms. Schlieff to deny that she coerced the grandchild thereby cutting off a cross-examination avenue for the State should Ms. Schlieff testify at Mr. Schlieff's trial.

90. The Respondent testified at the Hearing that he did not care whether the Motion was ruled on.

91. As long as the Motion was pending, Ms. Schlieff would be able to deny that her plea was made willingly.

92. The Motion jeopardized Ms. Schlieff in order create a strategic advantage for Mr. Schlieff at trial.

93. The Respondent undertook representation of Ms. Schlieff without ever advising her that a conflict of interest existed in the Respondent's representation of both Ms. Schlieff and Mr. Schlieff.

94. Mr. Schlieff and Ms. Schlieff had divergent interests and the representation of Ms. Schlieff was being materially limited by the representation of the Mr. Schlieff and the Respondent's desire to obtain every strategic advantage for Mr. Schlieff.

95. These divergent interests made it unreasonable for the Respondent to believe that the representation of Ms. Schlieff would not adversely affect his simultaneous representation of Mr. Schlieff.

96. Further, the Respondent's failure to advise Ms. Schlieff of the conflict and obtain a waiver further aggravated the conflict.

97. Thus, the Respondent's conduct violated Rule of Professional Conduct 1.7.

98. The Respondent's actions in the Flores complaint also violated Rule of Professional Conduct 4.2 which provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

99. Despite repeated requests from Mr. Flores that the Respondent refrain from communicating with Ms. Schlieff, the Respondent persisted in this action, eventually filing a pleading on Ms. Schlieff's behalf.

100. As such, the Respondent's actions violated Rule of Professional Conduct 4.2.

101. Finally, the Respondent's actions in the Flores complaint violated section 8.4(a) and (d).

102. As detailed above, the Respondent's actions have violated a number of Rules of Professional Conduct.

103. Further, the Respondent's actions have been prejudicial to the administration of justice by attempting to obtain a tactical advantage in the case of Mr. Schlieb by exposing Ms. Schlieb to prosecution and possible jail time.

104. In light of the violations set forth above in the Flores complaint, the following ABA Standards are applicable.

105. Section 4.31 of the ABA Standards states:

Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

106. Section 4.61 states:

Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.

107. Section 7.1 of the ABA Standards states:

Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

**File No. 27923-3(C)-JV (Marie Applegate)**

***Findings of Fact***

108. On January 24, 2005, a Complaint was entered as to the Respondent by Marie Applegate, and designated as File No. 27923-3(C)-JV. A true and exact copy of the Complaint was entered into evidence at the hearing as Exhibit 47.

109. The Respondent represented the Complainant in a parental relocation case in Shelby County in 2001.

110. The case resulted in a favorable outcome for the Complainant.

111. The Respondent drafted and filed an order with the Court, but opposing counsel moved to set the order aside.

112. No final order was entered, and in 2006, the Respondent submitted another proposed order.

113. In May of 2007, a final order was finally entered.

114. Ms. Applegate sent numerous emails to the Respondent between 2001 and 2006 requesting diligent efforts to bring the matter to a conclusion. Many of these emails were entered into evidence at the hearing as Exhibit 28.

115. The certified record of the Applegate matter, entered into evidence at the hearing as Exhibit 27, shows no activity between 2001 and 2006.

116. Ms. Applegate testified that all she wanted was a final order entered and she did not receive that final order for five years.

117. Ms. Applegate also testified that she filed her complaint with the Board because she was upset that nothing was being done.

118. The Respondent testified at the hearing that in attempting to file an order with the court, he sent a letter to opposing counsel providing a proposed order and stating that, if he did not hear from counsel within a stated period of time, he would file the order and sign opposing counsel's name to the order.

119. After not hearing from opposing counsel, but never having received permission to sign on their behalf, the Respondent testified that he signed the order for all counsel and submitted it to the court.

120. Opposing counsel subsequently moved to set the order aside and that motion was granted.

121. The Board moved the Hearing Committee to amend its pleadings to conform to the Respondent's testimony pursuant to Rule 15.02 of the Tennessee Rules of Civil Procedure and to allege violations of additional Rules of Professional Conduct.

122. The Hearing Committee granted the Board's motion to amend the pleadings to conform to the evidence and to allege violations of Rules of Professional Conduct 3.3 and 8.4(d).

### ***Conclusions of Law***

123. Through the conduct referenced above, the Respondent failed to provide competent representation by failing to have a final order entered in Ms. Applegate's case for five years.

124. This failure violated Rule of Professional Conduct 1.1.

125. Rule 1.3 of the Tennessee Rules of Professional Conduct requires that a lawyer "act with reasonable diligence and promptness when representing a client."

126. The Respondent did not diligently work to complete Ms. Applegate's case, and, thus, violated Rule 1.3.



127. The Respondent has also violated Rule of Professional Conduct 3.2 by failing to expedite Ms. Applegate's matter.

128. Rule 3.3 of the Rules of Professional Conduct prohibits a lawyer from making "a false statement of fact or law to a tribunal." The Respondent violated this rule by submitting an order purporting to be signed with permission of opposing counsel when he had no such permission.

129. The Respondent's actions violated section 8.4(a) and (d).

130. As detailed above, the Respondent's actions have violated a number of Rules of Professional Conduct.

131. The Respondent's actions in the Applegate complaint have been prejudicial to the administration of justice by delaying this administration and failing to bring this matter to a conclusion. This failure is evidence by the delay of more than five years between the final hearing and the entry of the final order. Furthermore, the Respondent's submission of an order on which he signed for opposing counsel without permission to do so violated 8.4(d) and required opposing counsel to take action to set the order aside.

132. In light of the violations set forth above in the Applegate Complaint, the following ABA Standards are applicable.

133. Section 7.1 of the ABA Standards states:

Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

134. Section 4.51 states:

Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most

fundamental legal doctrines or procedures and the lawyer's conduct causes injury or potential injury to a client.

135. Section 8.1 states:

Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that causes injury or potential injury to a client, the public, the legal system, or the profession.

136. ABA Standard section 8.1 is applicable in this case in light of the similarity between the Respondent's lack of diligence in the Applegate complaint and the lack of diligence found by the previous Hearing Committee that resulted in the Respondent's suspension from the practice of law for two years. See Exhibit 6. Also, the submitting of the false order by the Respondent is similar conduct to the previous finding by a Hearing Committee that the Respondent had submitted false pleadings and a false affidavit. Id.

**January 2, 2009 Petition for Discipline**

**File No. 31046c-3-JV (Franklin H. Davis, Jr.)**

***Findings of Fact***

137. On April 18, 2008, a complaint was entered as to the Respondent, by Franklin H. Davis, Jr. and designated as File No. 31046c-3-JV. A true and exact copy of the complaint was entered into evidence at the Hearing as Exhibit 40.

138. On April 18, 2008, the Board sent the Respondent a copy of the complaint and requested a response. A true and exact copy of the Board's letter to the Respondent was entered into evidence at the hearing as Exhibit 38.

139. The Respondent did not respond.

140. On May 8, 2008, a Notice of Petition for Temporary Discipline was sent to the Respondent

141. The Respondent responded by letter on May 16, 2008. A true and exact copy of the response was entered into evidence at the hearing as Exhibit 39.

142. The Respondent represented the Complainant in General Sessions.

143. On December 7, 2001, the Respondent appealed the judgment of the General Sessions Court to the Circuit Court.

144. The case was set for trial on March 12, 2002.

145. The case was subsequently continued to the following dates: March, 16, 2002, June 6, 2002, August 22, 2002, October 8, 2002, January 13, 2003, August 21, 2002, August, 20, 2004, October 26, 2004, June 14, 2005, August 17, 2005, December 13, 2005, April 11, 2006, July 11, 2006, August 16, 2006, and December 12, 2006. Mr. Davis did, however, agree to one continuance because he had to attend to his wife's medical condition. Ms. Holland Rainey, who worked for the Respondent from October 2000 through May 2003, as a paralegal, testified that she regularly spoke with Mr. Davis concerning the status of his case.

146. The case was dismissed for failure to prosecute on September 20, 2007.

147. A complaint was filed with Consumer Assistance Program (CAP) on November 7, 2008.

148. On January 23, 2007, the Respondent filed a motion to reinstate the case. This disciplinary complaint was filed April 18, 2008.

149. On May 19, 2008, an Order was entered reinstating the case. The Respondent testified at the hearing that the matter has once again been set for trial and continued.

150. The Respondent has failed to respond to numerous inquiries by disciplinary counsel to secure additional information.

151. Mr. Davis testified at the hearing that he has no idea what the status of his case is.

152. Mr. Davis further testified that his case is a small claims case and that he does not understand why the case has taken more than six years.

153. Mr. Davis testified that he wants his case brought to a conclusion and has never directed the Respondent to delay the case.

### ***Conclusions of Law***

154. Rule 1.3 of the Tennessee Rules of Professional Conduct requires that a lawyer "act with reasonable diligence and promptness when representing a client."

155. In the Davis complaint, the Respondent did not diligently work on the matter of Franklin H. Davis, Jr.

156. Rule 1.4 of the Tennessee Rules of Professional Conduct requires as follows:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply with reasonable requests for information within a reasonable time.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

157. In the Davis complaint, notwithstanding Ms. Rainey's testimony, the Respondent failed to keep Franklin H. Davis, Jr. reasonably informed as to the status of his matter. During the period of time between the filing of the appeal to Circuit Court and the dismissal for failure to prosecute, the Respondent failed to adequately communicate the status of this matter to the Complainant.

158. This failure continues as Mr. Davis testified at the Hearing that he still does not know the status of his case.

159. The Respondent's conduct violated Rule 1.4.

160. The Respondent has also violated Rule of Professional Conduct 3.2 by failing to expedite the matter of Franklin H. Davis, Jr. in file number 31046c-3-JV.

161. Finally, the Respondent's actions violated section 8.4(a) and (d).

162. As detailed above, the Respondent's actions have violated a number of Rules of Professional Conduct and have been prejudicial to the administration of justice.

163. In the Davis complaint, the Respondent delayed the administration of justice and the legal system by failing to bring Mr. Davis' case to trial.

164. In light of the violations set forth above in the Davis complaint, the following ABA Standards are applicable.

165. Section 8.1 states:

Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that causes injury or potential injury to a client, the public, the legal system, or the profession.

166. ABA Standard section 8.1 is applicable in this case in light of the similarity between the Respondent's lack of diligence in the Davis and Applegate complaints and the lack of diligence found by the previous Hearing Committee that resulted in the Respondent's suspension from the practice of law for two years. See Exhibit 6.

**File No. 31471-3-JV (Jerry Hoffer, ESQ. & Judge Daniel Swafford)**

***Findings of Fact***

167. On September 16, 2008 and October 6, 2008, complaint's were entered as to the Respondent by Jerry Hoffer, Esq. and Judge Daniel Swafford and designated as File No. 31471-3-

JV. A true and exact copy of Mr. Hoffer's complaint was entered into evidence at the hearing as Exhibit 25. A true and exact copy of Judge Swafford's complaint was entered into evidence at the hearing as Collective Exhibit C to the Supplemental Petition for Discipline, which was entered into evidence at the Hearing as Exhibit 18.

168. On September 29, 2008 and October 13, 2008, the Board sent the Respondent copies of the Complaint's and requested a response. A true and exact copy of the Board's October 13, 2008 letter to the Respondent was entered into evidence at the Hearing as Exhibit 20.

169. When the Respondent did not respond, a Notice of Petition for Temporary Discipline dated November 12, 2008 was sent to the Respondent.

170. The Respondent responded by letter, dated November 26, 2008. A true and exact copy of the response was entered into evidence at the Hearing as Exhibit 21.

171. Mr. Hoffer represents one of the parties in a custody case pending before Judge Swafford.

172. The Respondent represented the father of the child.

173. On June 16, 2008, the Respondent issued subpoenas for Mr. Chase Williams and his mother to appear at a hearing on July 11, 2008.

174. On June 26, 2008, the Respondent took the deposition of Mr. Williams. Mr. Williams was not a party nor represented by counsel.

175. The Respondent threatened Mr. Williams with a possible perjury charge or revocation of probation.

176. During the course of the deposition the following exchange occurred:

Mr. Hoffer: Well, you know that's not our call. I mean, you're saying that Jes Beard is going to get Steve Bebb to prosecute this gentleman for perjury? Okay.

Mr. Beard: That's exactly what I'm saying.

Exhibit 22, p. 19.

177. A true and exact copy of Mr. Williams's deposition was entered into evidence at the hearing as Exhibit 22.

178. Mr. Hoffer testified at the hearing that during this exchange he was disturbed by Mr. Beard's behavior and Mr. Williams was afraid.

179. Mr. Williams and his mother did not appear for the July 11, 2008 hearing.

180. The Respondent attempted to introduce Mr. Williams's deposition into evidence based upon Mr. Williams's unavailability.

181. The Judge ordered a Show Cause to compel attendance of Mr. Williams.

182. In response to a telephone call, Mr. Hoffer told Mr. Williams and his mother to honor the Show Cause Order and appear in court.

183. They appeared on July 24, 2008.

184. Mr. Williams advised the court that following the deposition, the Respondent advised Mr. Williams that because Respondent had Mr. Williams's deposition, Mr. Williams did not have to come to court if he didn't want to. A true and exact copy of the relevant portions of the transcript from the July 25, 2008 hearing was entered into evidence as Exhibit 24.

185. Mr. Williams also advised the court that he called the Respondent's office staff the day before the hearing and was again told that he did not have to appear.

186. Judge Swafford then inquired of the Respondent why he had given such direction to Mr. Williams and then requested the court to issue an attachment for Mr. Williams when he didn't appear.

187. The Respondent acknowledged that he told Mr. Williams that he didn't care whether Mr. Williams appeared or not.

188. The Judge held the Respondent in contempt, sentenced him to 10 days in jail, and incarcerated him.

189. The Respondent led Judge Swafford to believe that Mr. Williams did not attend the July 11, 2008 hearing because Mr. Williams was being uncooperative. A true and exact copy of the relevant portions of the transcript from the July 11, 2008 hearing was entered into evidence as Exhibit 23.

190. The Respondent testified concerning the facts and circumstances surrounding his instructions to Mr. Williams concerning the need for his appearance at the July 11, 2008 hearing. The Hearing Committee was not persuaded by his testimony.

### ***Conclusions of Law***

191. Rule of Professional Conduct 3.3(a) provides in part that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal."

192. Relating to the Hoffer/Swafford complaint, the Respondent made a false statement to the court concerning Mr. Williams's willingness to attend court to testify.

193. As such, the Respondent's actions violated Rule 3.3(a).

194. In the Hoffer/Swafford complaint, the Respondent violated Rule of Professional Conduct 4.1 which prohibits a lawyer from making a "false statement of material fact or law to a third person" by falsely informing Mr. Williams that he did not have to appear to honor the subpoena issued for him and then moving the court to attach Mr. Williams due to his failure to appear.

195. The Respondent's actions violated section 8.4(a) and (d).

196. As detailed above, the Respondent's actions have violated a number of Rules of Professional Conduct.



197. Further, the Respondent's actions have been prejudicial to the administration of justice.

198. In the Hoffer/Swafford complaint, the Respondent's actions mislead the court as to the availability of a witness and the Respondent's actions resulted in a Show Cause Order being issued against a witness who had been informed by the Respondent that he need not appear pursuant to a subpoena.

199. Furthermore, the Respondent's threatening of Mr. Williams with criminal prosecution in his deposition violated 8.4 (a) and (d). The Respondent has contended that his threats were appropriate because Mr. Williams was not being truthful. Mr. Williams's truthfulness, however, is irrelevant to the very clear prohibition of threatening criminal prosecution in order to obtain an advantage in a civil case expressed in Rule of Professional Conduct 4.4.

200. Section 7.1 of the ABA Standards states:

Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

201. Section 8.1 states:

Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that causes injury or potential injury to a client, the public, the legal system, or the profession.

202. ABA Standard section 8.1 is applicable in this case in light of the similarity between the Respondent's misrepresentations to Judge Swafford and the previous finding by a Hearing

Committee that the Respondent had submitted false pleadings and a false affidavit that resulted in the Respondent's suspension from the practice of law for two years. See Exhibit 6.

#### **GENERAL CONCLUSIONS OF LAW**

203. The acts and omissions by the Respondent described above constitute ethical misconduct in violation of Rules of Professional Conduct 1.1, 1.3, 1.4, 1.7(a), 3.2, 3.3(a)(1), 4.1, 4.2, 8.1(b), 8.4(a) and (d).

204. The Respondent has violated the Rules of Professional Conduct by ignoring conflicts of interests between his clients, by taking action to the detriment of one client in order to gain an advantage for another client, by improperly communicating with a person represented by another lawyer, by failing to represent his client competently and diligently, and by failing to properly communicate the status of her case to his client.

205. The Respondent's continual failures to respond to disciplinary counsel and his belated responses in each of the disciplinary complaints set forth above and in both of the Petitions for Discipline subject to this proceeding are violations of Rule of Professional Conduct 8.1(b) which prohibits a lawyer from failing to "respond to a lawful demand for information from an admissions or disciplinary authority. . ."

206. The ABA Standard section 8.1 listed above is particularly important in this case in light of the Respondent's significant disciplinary history which includes three public censures and three two year suspensions (served concurrently).

207. Five aggravating factors apply in this case.

208. Section 9.2 of the ABA Standards sets forth several factors that may act to increase the level of discipline imposed.

209. First, Respondent has substantial experience in the practice of law, having been licensed to practice law since 1990.

210. The Respondent has refused to acknowledge the wrongful nature of his conduct.

211. The Respondent has numerous prior disciplinary offenses.

212. The Respondent's actions constitute a pattern of misconduct.


213. The Respondent's victims, mostly people he purportedly represented, were particularly vulnerable in that they depended on him for legal guidance and advice.

214. Several cases, similar to the Respondent's, support disbarment. On May 12, 2006, the Supreme Court disbarred Edward A. Slavin based upon findings that he engaged in misrepresentation and deceit to the Courts and his clients, demonstrated incompetence and lack of diligence and habitually violated the Tennessee Rules of Professional Conduct. On May 31, 2006, The Supreme Court disbarred Mark Lee Pittman based upon findings that he had engaged in a pattern of neglect, deceived his clients as to the status of their legal matters and failed to return unearned fees, costs and files. On February 1, 2005, the Supreme Court disbarred John Carlin Mask, Jr. based upon findings that he failed to act competently, failed to represent his clients zealously, failed to represent his clients within the bounds of the law and engaged in the unauthorized practice of law. On April 17, 2002, the Supreme Court disbarred Joel D. Whinton based upon findings that he neglected clients, made misrepresentations to clients and failed to communicate with clients.

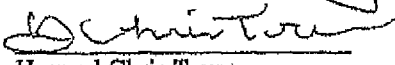
215. The Hearing Committee has carefully considered the various disciplinary actions that could be applied in these consolidated matters. The Hearing Committee is particularly concerned that the Respondent has engaged in repeated incidents of similar conduct violative of the Rules of Professional Responsibility that have on several occasions negatively affected the

Respondent's clients, the courts, and opposing counsel. Numerous other disciplinary sanctions imposed on the Respondent have not deterred him from committing other acts or omissions constituting violations of the Rules of Professional Responsibility. The Respondent is currently suspended from the practice of law for a period of two years. It is the considered opinion of the Hearing Committee that suspending the Respondent from the practice of law for an additional time period is not a sufficient sanction under the circumstances presented.

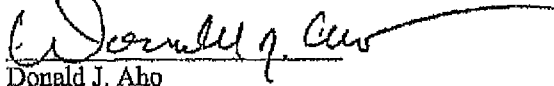
216. As such, in light of all of the foregoing findings of fact and conclusions of law, consideration of the applicable ABA Standards for imposing lawyer sanctions described above, and in light of the aggravating factors presented in these consolidated matters, the Hearing Committee hereby finds that the Respondent should be disbarred.



Michael E. Callaway



Howard Chris Trew



Donald J. Aho  
Chairperson