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

IN RE:	:	
DAVID A. LUFKIN, SR., BPR # 007057	:	Docket No.: 2007-1663-2(K)-TH
An Attorney Licensed and Admitted to Practice	:	
Law in the State of Tennessee (Knox County)	:	
	:	

JUDGMENT OF THE HEARING COMMITTEE

This cause came to be heard by the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee on June 24-25, 2009, pursuant to Rule 9, Supreme Court of Tennessee. The Hearing Committee, consisting of Angelia Morie Nystrom, Chairman, Barbara J. Muhlbeier, and J. Randolph Humble ("Hearing Committee"), makes the following findings of fact and submits its Judgment in this cause.

I. STATEMENT OF THE CASE

A Petition for Discipline was filed by the Board of Professional Responsibility (the "Board") on April 3, 2007, charging David A. Lufkin, Sr. (the "Respondent") with a violation of certain disciplinary rules in File No. 20993-2(K)-TH (Chancellor Richard Johnson matter), File No. 21888-2(K)-TH and 29315-2(K)-TH (John A. Lucas matter), File No. 22294-2(K)-TH (Flavia Marie Hage matter), File No. 22309-2(K)-TH (Robert M. Bailey matter), File No. 22605-2(K)-TH (Patricia Seymour matter), File No. 25830-2(K)-TH (Lucino Vasquez and Maria Ramirez matter), and File No. 293-11-2(K)-TH (Thomas W. Hamilton matter). Respondent filed his Answer to Petition for Discipline on November 13, 2008.

II. OVERVIEW OF THE COMPLAINTS AT ISSUE

The Respondent is an attorney who has been licensed to practice law in the State of Tennessee since 1980. Prior to the filing of the Petition for Discipline herein, the Respondent was previously suspended for a two-month period of time, said suspension being served during the months of February and March 1999, for actions involving what was described by several judges as conduct "not becoming an officer of the court."

Following a hearing in litigation filed against him, Respondent was admitted to a psychiatric facility on December 8, 1999. On December 16, 1999, the Tennessee Supreme Court (the "Supreme Court") granted Respondent's Petition for Disability Inactive Status. The Respondent's license to practice law remained in Disability Inactive Status for nearly seven years, from December 1999 until July 2006. On July 3, 2006, the Supreme Court reinstated Respondent to active status. On September 13, 2006, the Board filed a Petition to Temporarily Suspend the Respondent, which was granted by the Supreme Court on October 17, 2006. From October 2006 until the present, the Respondent has remained temporarily suspended. On March 17, 2006, the Respondent filed an Application for Dissolution or Modification of Temporary Suspension. After a hearing on March 4, 2009, a separate hearing panel took notice of this pending hearing and recommended that the Respondent remain temporarily suspended.

A. File No. 20993-2(K)-TH (Chancellor Richard Johnson matter)

On or about May 17, 1999, a complaint was entered as to Respondent by Chancellor Richard Johnson and was designated as File No. 20993-2(K)-TH. As per the complaint, the Respondent or his law firm had represented Henry Schein, Inc. in a collection matter against Dr.

Edmond Watts. On May 6, 1998, Respondent filed an Execution and Garnishment to levy on "all assets, office equipment, 1986 gray Ford VIN 1FABP4033GG123403 Tag No. C 7256." Pursuant to the execution and garnishment, a constable seized the vehicle and a computer system. On May 15, 1998, Dr. Edmond Watts filed a Motion to Quash the Garnishment and Execution with the General Sessions Court for Washington County. At a hearing on May 22, 1998 (at which the neither the Respondent nor a representative from his office appeared), the Court granted the motion and ordered that the property be returned. Although the computer system was returned, the vehicle was not. Respondent appealed the case to the Washington County Law Court. At a hearing before Chancellor Richard Johnson (sitting by interchange) on April 19, 1999, Chancellor Johnson ordered the vehicle be returned "before midnight tonight." Respondent did not cause the vehicle to be returned. On May 24, 1999, Chancellor Johnson signed an Order reflecting his April 19, 1999 ruling and publicly sanctioned Respondent and prohibited him from practicing in the Washington County civil courts for a period of thirty (30) days. Respondent appealed the decision, which was reversed by the Tennessee Court of Appeals.

B. File No. 21888-2(K)-TH and 29315-2(K)-TH (John A. Lucas matter)

On December 15, 1999, a complaint was entered as to the Respondent by John A. Lucas and was designated as File No. 21888-2(K)-TH. On July 10, 2006, a new complaint was entered as to Respondent regarding the same matter and was designated as File No. 29315-2(K)-TH.

As per his complaints, John A. Lucas ("Mr. Lucas") represented AssetCare, Inc., which was a collection agency that collected accounts for various medical providers. Between 1992 and 1995, AssetCare employed Respondent and his law firm to handle collection cases in East

Tennessee. After the relationship between Respondent and AssetCare soured, AssetCare filed a Complaint for Declaratory Judgment in May 1996, requesting that the court find that AssetCare owed no monies to Respondent. Per the complaints of Mr. Lucas, AssetCare requested, but did not receive, a complete accounting of the collection matters handled by Respondent. Further, Mr. Lucas alleged that Respondent had engaged in theft and fraud in the handling of collections cases, including the failure to accurately advise forwarders and clients of the status of pending matters and further by failure to remit collected fees to forwarders and clients.

C. File No. 22294-2(K)-TH (Flavia Marie Hage matter)

On April 3, 2003, a complaint was entered as to the Respondent by Flavia Marie Hage and was designated as File No. 22294-2(K)-TH. As per the complaint, Flavia Marie Hage (now Griffey) ("Ms. Griffey") retained Respondent to represent her in a divorce proceeding. She paid Respondent a retainer of approximately $1375.00. Respondent filed a Complaint for Divorce and a Motion for Default in November 1999. In December 1999, Respondent's law license was placed in Disability Inactive status. Ms. Griffey learned of this when she called Respondent's office. By January 2000, Ms. Griffey was represented by an attorney with Ambrose, Wilson, Grimm & Durand. On or about February 17, 2000, Ms. Griffey received a letter from Respondent's office, which was being run by Robert M. Bailey who had been appointed as receiver, which stated that she was entitled to a refund of $775.00. Ms. Griffey did not receive the refund and either did not file a claim for the refund with the receiver during the claims period or filed a claim which was denied.

D. File No. 22309-2(K)-TH (Robert M. Bailey matter)

On March 8, 2000, a complaint was entered against the Respondent by Robert M. Bailey and was designated as File No. 22309-2(K)-TH. After Respondent's license to practice law was placed in Disability Inactive status, Robert M. Bailey ("Mr. Bailey") was appointed as receiver for Respondent's law firm on January 5, 2000. As per Mr. Bailey's complaint, based upon his preliminary investigation and after discussions with a number of Respondent's clients, it appeared that a large amount of money was collected by Respondent on behalf of his clients and that the client portion of the monies were apparently not remitted to the clients. Additionally, Mr. Bailey's complaint indicates that the total amount of money in issue was not fully known and the period of time which the apparent failure to remit occurred was not fully known.

E. File No. 22605-2(K)-TH (Patricia Seymour matter)

On June 12, 2000, a complaint was entered against the Respondent by Patricia Seymour and was designated as File No. 22605-2(K)-TH. As per Patricia Seymour's ("Ms. Seymour") complaint, Respondent failed to adequately represent her in a Florida divorce proceeding that took place in 1996. Ms. Seymour states that Respondent was not available for most crucial times in her case, including mediation in Florida. Additionally, she states that the rates and billing were excessive although she paid the fees in full.

F. File No. 25830-2(K)-TH (Lucino Vasquez and Maria Ramirez matter)

On November 26, 2002, a complaint was entered against the Respondent by Lucino Vasquez and Maria Ramirez and was designated as File No. 25830-2(K)-TH. Respondent had represented Fifth Third Bank in a collections matter against Lucino Vasquez ("Mr. Vasquez")

and Maria Ramirez ("Ms. Ramirez") and obtained a judgment in the amount of $3,602.12. Per the complaint, Mr. Vasquez and Ms. Ramirez entered into a payment plan with the Respondent's office whereby they agreed to pay $50.00 per month until such time as the judgment was paid in full, which occurred sometime after Respondent's license was placed in Disability Inactive status. The allegation of the complaint is that Respondent failed to notify the credit bureaus that the judgment had been satisfied.

G. File No. 29311-2(K)-TH (Thomas W. Hamilton matter)

On June 14, 2006, a complaint was entered against the Respondent by Thomas W. Hamilton and was designated as File No. 29311-2(K)-TH. Thomas W. Hamilton ("Mr. Hamilton") is the Executive Vice President and General Manager of American Lawyers Company ("ALC"), which publishes *American Lawyers Quarterly* ("ALQ"). ALQ is a directory of lawyers and law firms specializing in debt collections, creditor's rights and bankruptcy. ALC forwarded collections cases to Respondent from 1990 until 1999. As per his complaint, Mr. Hamilton and/or ALC received a letter stating that the Respondent had taken a leave of absence from the practice of law. After December 1999, Mr. Hamilton avers that he received claims with supporting documentation from forwarders and/or clients seeking reimbursement for funds mishandled by Respondent in the amount of $51,386.48.

III. RELEVANT LEGAL AUTHORITY

The Board contends that Respondent has violated DR1-102(A), DR 2-106, DR 2-110, DR 6-101, DR 7-101, DR 7-102(A), DR 7-106(A) and (C), and DR 9-102(A) and (B).

DR 1-102(A) deals with misconduct and provides that a lawyer shall not:

(1) Violate a Disciplinary Rule.
(2) Circumvent a Disciplinary Rule through actions of another.
(3) Engage in illegal conduct involving moral turpitude.
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
(5) Engage in conduct that is prejudicial to the administration of justice.
(6) Engage in any other conduct that adversely affects on his fitness to practice law.
(7) Willfully refuse to comply with a court order entered in a case in which the lawyer is a party.

DR 2-106(A) deals with fees for legal services and provides that a lawyer shall not enter into an arrangement for, charge, or collect an illegal or clearly excessive fee. DR 2-106(B) further provides that a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

DR 2-110 deals with withdrawal from employment and provides in part that a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client and allowing time for employment of other counsel. It further provides that a lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

DR 6-101 deals with competence and provides, in pertinent part, that a lawyer shall not handle a legal matter without adequate preparation in the circumstances and shall not neglect a matter entrusted to him or her.

DR 7-101 deals with zealous representation of a client and states as follows:

(A) (1) A lawyer shall act with reasonable diligence and promptness in representing a client.

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

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

(4) A lawyer shall not intentionally:

(a) Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). ...

(b) Fail to carry out a contract of employment entered into with a client for professional services. ....

DR 7-102(A) deals with representing a client within the bounds of the law. It provides in pertinent part that, in the representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another. Also, a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law unless it can be supported by good faith argument for an extension, modification or reversal of existing law. It further provides that a lawyer shall not knowingly make a false statement of law or fact. Finally, it provides that a lawyer shall not knowingly engage in conduct contrary to a Disciplinary Rule.

DR 7-106 deals with trial conduct. Paragraph (A) provides that a lawyer shall not disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but may take appropriate steps in good faith to test the validity of such rule or ruling. Paragraph (C) goes further to provide that, in appearing in a professional capacity before a tribunal, a lawyer shall not fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of an intent not to comply. It further provides that a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal. Finally, it

provides that a lawyer shall not intentionally or habitually violate any established rule of procedure or evidence.

DR 9-102 deals with preserving the identity of funds and property of a client. Paragraph (A) provides that all funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable insured depository institutions maintained in the state in which the law office is situated.

Paragraph (B) of DR 9-102 provides that a lawyer shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities and other properties of a client coming into the possession of the lawyer and render appropriate accounts regarding them.

(4) Promptly pay or deliver to the client as requested by the client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Rule 9, Section 8.4 of the Supreme Court Rules states, "In determining the appropriate type of discipline, the Hearing Panel shall consider the applicable provisions of the ABA Standards for imposing all your sanctions." The ABA standards provide, in part, as follows:

A. Failure to Preserve Client Property

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

B. Lack of Diligence

4.41 Disbarment is appropriate when:

(a) A lawyer abandons the practice and causes serious or potential injury to a client; or

(b) A lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

(c) A lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

C. Lack of Candor

4.61 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.

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

D. Abuse of the Legal Process

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

E. Violation of Duties Owed as a Professional

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional 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.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system.

F. Prior Discipline Orders

8.1 Disbarment is generally appropriate when a lawyer:

...

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

The ABA Standards further provide that after misconduct has been established, aggravating and mitigating circumstances may be considered in deciding sanctions. Although

not included in the original Petition for Discipline against the Respondent, the Board has asserted in its Brief filed June 19, 2009 that the following aggravating circumstances in this case justify an increase in the sanction to be imposed against the Respondent:

1. The Respondent's prior discipline of a two (2) month suspension on October 2, 1998, which was served in February and March 1999;

2. The Respondent's dishonest or selfish motive;

3. The Respondent's pattern of misconduct;

4. The Respondent's multiple offenses; and

5. The Respondent's substantial experience in the practice of law since 1980.

The Hearing Committee was to determine whether the Respondent had violated the Disciplinary Rules and, if so, what, if any, disciplinary action should be taken with regard to the conduct of Respondent. The Hearing Committee reviewed documents, heard evidence and testimony of witnesses, and arguments by Mr. Lufkin and Disciplinary Counsel Sandy Garrett, all from which the Hearing Committee makes the findings of fact below.

IV. FINDINGS OF FACT

At the hearing in this cause, the Hearing Committee makes the following findings with respect to the complaints filed against Respondent:

A. File No. 20993-2(K)-TH (Chancellor Richard Johnson matter)

The Hearing Committee heard the arguments of Counsel for the Board and the testimony of the Respondent in relation to the complaint filed by Chancellor Richard Johnson. As set forth in the testimony, Respondent or his law firm had represented Henry Schein, Inc. in a collection

matter against Dr. Edmond Watts. On May 6, 1998, Respondent filed an Execution and Garnishment to levy on "all assets, office equipment, 1986 gray Ford VIN 1FABP4033GG123403 Tag No. C 7256." The Respondent testified that Constable Ted Rastall seized the vehicle and a computer system. Pursuant to the records which were admitted as Exhibit 2, on May 15, 1998, Dr. Edmond Watts filed a Motion to Quash the Garnishment and Execution with the General Sessions Court for Washington County. At a hearing on May 22, 1998 (at which neither Respondent nor a representative of his office appeared), the Court granted the motion and ordered that the property be returned. Although the computer system was returned, testimony indicated that the vehicle was not. Per the Respondent's testimony, the Respondent appealed the case to the Washington County Law Court. As set forth in the record, at hearing before Chancellor Richard Johnson (sitting by interchange) on April 19, 1999, Chancellor Johnson ordered the vehicle be returned "before midnight tonight."

Respondent testified that he did not cause the vehicle to be returned as ordered by Chancellor Johnson. As set forth in the record, on May 24, 1999, Chancellor Johnson signed an Order reflecting his April 19, 1999 ruling and publicly sanctioned Respondent and prohibited him from practicing in the Washington County civil courts for a period of thirty (30) days. Respondent testified that he followed the advice of Disciplinary Counsel and did not argue with Chancellor Johnson; instead, he appealed the decision of Chancellor Johnson, which was reversed by the Tennessee Court of Appeals.

The Hearing Committee finds that, although Respondent ultimately prevailed with the Tennessee Court of Appeals in the Henry Schein, Inc. matter, his willful disregard for the ruling of Chancellor Johnson was a violation of DR 7-106(A) [an attorney shall not disregard or advise a client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a

proceeding...] and DR7-106(C)(5)(6) [in appearing before a tribunal, a lawyer shall not (5) fail to comply with known local customs of courtesy and (6) shall not engage in undignified or discourteous conduct which is degrading to a tribunal].

B. File No. 21888-2(K)-TH and 29315-2(K)-TH (John A. Lucas matter)

The Hearing Committee heard the testimony of attorney John A. Lucas ("Mr. Lucas") with regard to the complaints filed by him against Respondent. Mr. Lucas, in his complaints, averred that Respondent committed "massive fraud" and stole hundreds of thousands of dollars to support his extravagant lifestyle. Mr. Lucas testified that he represented AssetCare, a forwarder, in litigation against Respondent, who had previously collected accounts for AssetCare. Mr. Lucas testified that, during the course of his representation of AssetCare, he learned that Respondent had computerized accounting records and then separate ledger cards on which Respondent kept accounting records. He asserted that he was contacted by employees and former employees of Respondent, who provided him with documentation from Respondent's client files that indicated fraud and theft.

The Hearing Committee notes that certain documents that were attached to Mr. Lucas' complaint but not admitted into evidence were provided to Mr. Lucas by one or more of Respondent's employees. Per the testimony of Jan Denton ("Ms. Denton"), a former employee of Respondent, she obtained the documents from client files while in the employ of Respondent and provided them to Mr. Lucas for use in his case that was pending against Respondent. The Hearing Committee finds the conduct of Ms. Denton egregious in the taking of these records from client files and then providing them to opposing counsel during pending litigation. If Ms. Denton believed that Respondent was committing fraud or theft, then Ms. Denton should have

reported such action to the authorities instead of to adverse counsel with whom Respondent had an already contentious relationship dating back a number of years. Ms. Denton testified that she did not contact the authorities at any time with regard to the conduct of Respondent.

Mr. Lucas testified that, based on conversations he had with Respondent's employees, he learned that Respondent had cash flow issues in his firm. Mr. Lucas testified at the hearing that Respondent was guilty of perpetuating "massive fraud" and theft of "hundreds of thousands of dollars." However, the Hearing Committee notes that Mr. Lucas testified that he could point out only five or six specific instances of funds being collected and not timely remitted. When questioned in detail about this by the Hearing Committee, Mr. Lucas could only testify as to knowledge about two instances where money may have been collected and not remitted, with said amounts totaling less than ten thousand dollars. The Hearing Committee did question Ms. Denton and Mary Trowbridge concerning the timely remittance of payments to forwarders and clients. Although the Hearing Committee did find Ms. Denton's action with regard to providing client records to Mr. Lucas particularly egregious, the Hearing Committee found credible Ms. Denton's testimony that she was advised to not confer with forwarders or clients with regards to funds collected. She testified that she was aware of at least one instance where funds collected by her were not forwarded to the client or forwarder in a timely manner. The Hearing Committee also determined that, based on the testimony of Mary Trowbridge with regard to the ledger cards, that payments received were not always timely remitted to forwarders and clients.

The Hearing Committee found it important that Mr. Lucas, when questioned by Respondent, admitted that he had contacted the Federal Bureau of Investigation ("FBI") regarding the alleged theft and fraud committed by Respondent. As a result of Mr. Lucas contacting the FBI, a multi-agency investigation was commenced into the books and records of

Respondent's law practice, other entities in which he was involved, and the personal financial records of Respondent and his wife. Entities involved included the FBI, the Tennessee Bureau of Investigation ("TBI"), the Internal Revenue Service ("IRS"), and the Department of Justice ("DOJ"). As per the testimony of both Respondent and Robert M. Bailey, the books and records related to Respondent's law practice, other entities in which he was involved, and to Respondent's personal finances were seized in the spring of 2000. Importantly, although no agency has found any wrongdoing on the part of Respondent, those records have not been returned to Respondent. The Hearing Committee takes notice that Respondent has been forced to respond to the allegations against him without the benefit of his books and records.

In weighing the testimony of Mr. Lucas, the Hearing Committee must also consider the testimony of attorney Leslie M. Shields ("Ms. Shields"), who represented the Respondent in the civil case filed by the IRS against Respondent. Ms. Shields testified that she was retained by Respondent after the IRS, following a four-year investigation, concluded that Respondent had not engaged in criminal wrongdoing with regard to the reporting on his federal income tax returns but that evidence of erroneous information on his income tax returns may have existed. Ms. Shields testified that the IRS had completed a Civil Audit Report, in which the IRS alleged that Respondent owed more than $451,000.00 plus interest in back taxes. In order to represent Respondent, Ms. Shields stated that she had to file Freedom of Information Act requests for records, as well as multi-agency requests. She explained that the IRS criminal investigation was commenced in December of 1999, which is consistent with the time period in which Mr. Lucas testified that he contacted the FBI. She further testified that, when the IRS criminal investigation resulted in "no indictment," the IRS conducted a civil audit.

Ms. Shields testified that the civil audit of Respondent encompassed tax years 1996, 1997 and 1998. She also testified that the IRS civil audit includes a bank deposit analysis of all business and personal accounts. She testified that the IRS sent a report to her, which indicated that they had reconciled all bank accounts with tax returns. She testified that the conclusion in the report was that the income and gross receipts were determined correct as filed in the tax returns of Respondent. Ms. Shields stated that the deficiency assessment was based on the claimed deductions. Ms. Shields stated that she was able to obtain information in Respondent's files to verify that the deductions taken were correct. As per the testimony of Ms. Shields, the IRS appeals officer determined that there was no evidence of fraud and conceded on every item and reduced the tax due to zero based on the IRS's own file.

The Hearing Committee finds that the Board failed to present credible evidence of fraud or theft by Respondent, as alleged by Mr. Lucas. At worst, Respondent failed to adequately communicate with clients and forwarders and had poor control over the management of his law firm. The Hearing Committee finds that the evidence shows that Respondent may have, on several occasions, failed to timely remit payments to forwarders and clients and further may have mislead forwarders and clients as to the status of the payments received. Accordingly, the Hearing Committee finds that Respondent violated DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit or misrepresentation] and DR 7-101(A)(2) [a lawyer shall keep a client reasonably informed about the status of a matter and shall promptly comply with reasonable requests for information].

C. File No. 22294-2(K)-TH (Flavia Marie Hage matter)

The Hearing Committee heard the testimony of Flavia Marie Hage (now, Griffey) ("Ms. Griffey") with regard to the complaint filed by her in relation to her divorce case. The parties stipulated that she paid the Respondent $1375.00 to represent her in her divorce. Ms. Griffey testified that the Respondent filed her divorce case in November 1999. She further testified that she learned in December 1999 that the Respondent was not currently practicing law. She testified that, shortly thereafter, she hired Mary Abbott at Ambrose, Wilson, Grimm and Durand to represent her in the divorce action. Ms. Griffey stated that she received a letter from Respondent's office dated February 17, 2000, which indicated that she was entitled to a refund of $775.00 from the fee that she paid to Respondent. She testified that she did not receive the funds and further testified that she did not remember if she filed a claim with the Chancery Court during the claims period. In any event, she stated, she did not receive the funds.

The Hearing Committee notes that, by Respondent's own testimony and by the testimony of the receiver, Respondent was hospitalized and did not have access to his files after such time as his license was placed in Disability Inactive status. To assert that Respondent should have notified Ms. Griffey and further should have refunded the funds that she was told were due and owing to her by the receiver or by someone under his control appears to the Hearing Committee to be in contravention of the purpose of the designation of "Disability Inactive" for a practicing lawyer who has a mental or physical infirmity that prohibits him or her from practicing law.

The Hearing Committee finds no violation of the Disciplinary Rules by Respondent with regard to the claim of Ms. Griffey. Respondent took Disability Inactive status in December 1999, and the record indicates that Ms. Griffey was represented by another attorney in January 2000. Further, the record indicates that a receiver had been appointed to run the Respondent's

law practice during his period of disability and that the letter referenced by Ms. Griffey was sent during the time the receiver had control of the Respondent's practice. Respondent had no access to his files. The receiver testified that there was in place a claims procedure whereby any person who felt that he or she was owed money by the Respondent could file a claim with the Chancery Court. Ms. Griffey could not remember whether or not she had filed a claim; however, if she did file a claim, the record indicates that the claim was denied, as no monies were paid to her. The evidence presented does not indicate that Ms. Griffey suffered any detriment at the hands of the Respondent, and the Hearing Committee recommends that her complaint be dismissed.

D. File No. 22309-2(K)-TH (Robert M. Bailey matter)

The Hearing Committee heard the testimony of Robert M. Bailey ("Mr. Bailey") related to the complaint filed by him against the Respondent. Mr. Bailey was appointed as receiver of Respondent's law firm in January 2000. The Hearing Committee noted that his complaint was filed shortly after he was appointed receiver and consisted of a single paragraph, which stated that it appeared that a large amount of money was collected by Respondent and his law firm and that it appeared that a portion of the funds had not been remitted to the clients. It further stated that the total amount and the time frame in which it was received but not remitted was not known by Mr. Bailey. Mr. Bailey did not amend the complaint at any time during which he served as receiver.

Mr. Bailey testified that his duties as receiver were to physically secure Respondent's office, to secure the money remaining in the office, to deal with client accounts, and to preserve the value of the firm. He testified that the accounting system was complicated and that he audited the files the best he could. He stated that he sent out payments received to clients and

forwarders for a number of years. Mr. Bailey testified that he was never able to trace where any missing money may have gone. He further testified that he created a mailing matrix and gave clients an opportunity to file claims. Mr. Bailey testified that very few claims were filed and that the majority of them were denied. Per the testimony of Mr. Bailey, only five claims were allowed. He stated that the largest claims paid were claims for taxes and for the claim of AssetCare. Mr. Bailey testified that there was never any proof that a debtor check went anywhere other than the trust account, and he further testified that he was never able to determine whether monies were allocated appropriately between the trust accounts and the general account. Mr. Bailey also testified that all of Respondent's books and records were confiscated during a multi-agency criminal and civil investigation in the Spring of 2000, which meant that he was without the benefit of them when carrying out his duties as receiver.

The Hearing Committee asked Mr. Bailey if there was any proof that Respondent or anyone acting on his behalf stole money from clients or failed to remit funds to clients. Mr. Bailey stated that he had no concrete evidence of wrongdoing by Respondent. Accordingly, the Hearing Committee finds no violation of the Disciplinary Rules in regard to the complaint filed by Mr. Bailey.

E. File No. 22605-2(K)-TH (Patricia Seymour matter)

The Hearing Committee heard arguments of Counsel for the Board and the Respondent related to the claim of Patricia Seymour ("Ms. Seymour"), and further heard testimony of Wendell Hall in relation to the Seymour divorce case, which by all indications was concluded in 1996. The Hearing Committee noted that Ms. Seymour did not file a complaint regarding the representation by the Respondent or her bill for some four (4) years following the conclusion of

the representation. Counsel for the Board indicated at hearing that Ms. Seymour had a medical emergency as was unavailable to testify. Respondent made a motion that the complaint of Ms. Seymour be dismissed, and Counsel for the Board agreed to withdraw it. Accordingly, the complaint of Ms. Seymour was dismissed by the Hearing Committee.

F. File No. 25830-2(K)-TH (Lucino Vasquez and Maria Ramirez matter)

The Hearing Committee heard the testimony of Maria Ramirez ("Ms. Ramirez"), who spoke through an interpreter. Ms. Ramirez testified that Fifth Third Bank, which was represented by the Respondent, obtained a judgment against her in the approximate amount of $3,000. She testified that she sent payments to Respondent's address for a number of years, with said payments continuing until some time in September 2002. The basis of Ms. Ramirez' claim is that Respondent failed to notify the credit bureau when the judgment was paid in full and that she was forced to file her own motion on or about January 28, 2003 so that the record would indicate that the judgment was paid in full.

The Hearing Committee finds no violation of the Disciplinary Rules by Respondent with regard to the complaint of Ms. Ramirez. Pursuant to the testimony of both the Respondent and the receiver, the payments by Ms. Ramirez on the judgment entered against her continued for a number of years after Respondent's license was placed in Disability Inactive status and a number of years after the receiver was appointed to manage Respondent's practice. Both the receiver and Respondent testified that the Respondent had no access to his files, which had been confiscated during a multi-agency criminal and civil investigation of Respondent. Additionally, Respondent had no way of knowing that Ms. Ramirez was even making payments, as they were made to the receiver and not to him. Further, the Hearing Committee concluded that the

Respondent had no duty to provide an accounting of payments received from Ms. Ramirez and that the Respondent had no duty to report receipt of payments from Ms. Ramirez to any credit bureau or agency.

G. File No. 29311-2(K)-TH (Thomas W. Hamilton matter)

The Hearing Committee heard the testimony of Thomas W. Hamilton ("Mr. Hamilton") with regard to the complaint filed by him against the Respondent. Mr. Hamilton testified that he is the Vice President of American Lawyers Company ("ALC"), which publishes *American Lawyers Quarterly* ("ALQ"). ALQ is a directory of lawyers and law firms specializing in debt collections, creditor's rights and bankruptcy. Mr. Hamilton testified that ALC forwarded collections cases to Respondent for a number of years. Mr. Hamilton further testified that his company had a bonding program, with a $1 Million defalcation bond which covered embezzlement and theft. He stated that his company paid approximately $53,000.00 in claims for cases cleared through Respondent's office from January 2000 until July or August 2000 while Respondent's license was in Disability Inactive status.

The Hearing Committee notes that Mr. Hamilton produced no evidence that monies were misappropriated by Respondent, his office or anyone at Respondent's request or direction. In fact, when asked whether there was any proof Respondent did anything wrong, Mr. Hamilton stated that there was no evidence Respondent personally took money. Accordingly, the Hearing Committee finds no violation of the Disciplinary Rules by Respondent with regard to the complaint by Mr. Hamilton.

V. RECOMMENDATION OF THE HEARING COMMITTEE

After having heard the arguments of Disciplinary Counsel, the statements of Mr. Lufkin, taking testimony of witnesses, and having reviewed the record in this cause, it is the conclusion of the Hearing Committee that the conduct of the Respondent complained of does not warrant a lengthy suspension or disbarment. Importantly, no evidence was presented which indicated that Respondent or any person under his control and at his direction engaged in embezzlement or theft. As per the testimony of Ms. Shields, the IRS conducted a complete and thorough investigation of the Respondent's tax returns for tax years 1996, 1997 and 1998 and found no evidence of wrongdoing. Additionally, the FBI, TBI and Department of Justice investigated Respondent and found insufficient evidence to indict Respondent on any charge. Further, no evidence was presented which indicated that any client of Respondent was harmed by his actions.

However, the Hearing Committee concludes that Respondent did violate DR 7-106(A) with his willful disregard of the order of Chancellor Richard Johnson. Although Respondent appealed Chancellor Johnson's ruling and ultimately prevailed at the Court of Appeals, Respondent had a duty to comply with the lower court's ruling pending the outcome of the appellate process. Further, the Hearing Committee concludes that Respondent also violated DR 7-106(C)(5) and (6) by his failure to comply with local customs of courtesy in the Washington County courts and further by engaging in undignified conduct degrading to a tribunal by willfully failing to comply with the order of Chancellor Johnson. Although the Board did not request that Respondent's prior suspension for unprofessional conduct be considered as a mitigating circumstance in their original Petition for Discipline, the Hearing Committee has concluded that it is appropriate for consideration in recommending discipline in this matter.

Further, the Hearing Committee concludes that Respondent did violate DR 1-102(A)(4) by representing to forwarders and clients on more than one occasion that payments collected had not been received when, in fact, the payments had been collected. Further, the Hearing Committee concludes that Respondent did violate DR 7-101(A)(2) by failing to keep clients reasonably informed about payments which had been remitted on collection accounts.

Accordingly, the Hearing Committee recommends as follows:

1. That Respondent, David A. Lufkin, Sr., be suspended from the practice of law for a period of two years, retroactive to October 17, 2006;

2. That, in addition to any requirement of the Commission on Continuing Legal Education, Respondent attend fifteen hours of continuing legal education classes within the next two years dealing with trust account management, attend ten hours of continuing legal education classes within the next two years dealing with ethics in the practice of law, and attend five hours of continuing legal education classes within the next two years dealing with general law practice management; and

3. That Respondent be assigned a practice monitor to monitor his practice and accounts for a period of one year following reinstatement of his license to practice law.

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This 10th day of July, 2009.

HEARING PANEL

By Angelia Morie Nystrom
Angelia Morie Nystrom, Chair

Barbara J. Muhlbeier w/permission by Angelia M. Nystrom
Barbara J. Muhlbeier

J. Randolph Humble w/permission by Angelia M. Nystrom
J. Randolph Humble

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Order has been served on the parties or on counsel for the follows by hand-delivery and addressed as follows:

David A. Lufkin, Sr.
5329 Brown Gap Road
Knoxville, TN 37918

Sandy Garrett
Deputy Chief Disciplinary Counsel-Litigation
Board of Professional Responsibility
1101 Kermit Drive, Suite 730
Nashville, TN 37217

This 10th day of July, 2009.

Angelia Morie Nystrom
Angelia Morie Nystrom