

FILED

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

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BOARD OF PROFESSIONAL
RESPONSIBILITY

RW EXEC. SEC

IN RE: THOMAS FLEMING MABRY
BPR No. 09065, Respondent
An Attorney Licensed and
Admitted to the Practice of
Law in Tennessee
(Knox County)

DOCKET NO. 2011-2055-2-SG

JUDGMENT OF THE HEARING PANEL

Pursuant to Rule 9 §8.2 of the Rules of the Supreme Court of Tennessee, this cause came to be heard by the Hearing Panel assigned by the Board of Professional Responsibility of the Supreme Court of Tennessee on July 18, 2012. The Hearing Panel, comprised of attorneys Timothy C. Houser (chair), Danny P. Dyer and Sara E. Compher-Rice, makes the following findings of fact and conclusions of law, and submits its judgment in this cause as follows:

I. STATEMENT OF THE CASE

1. The Petition for Discipline was filed on June 22, 2011, charging the Respondent with violation of Disciplinary Rules in File No.'s 31590-2-SG, 31802-2-PS, and 33051-2-PS.
2. Respondent was duly served with the Petition and on September 6, 2011 Respondent answered the Petition.
3. A scheduling conference was held with the Hearing Panel, counsel for the Board and the *pro se* Respondent on December 14, 2011, and deadlines for discovery and witness and exhibit list exchanges were set, and the hearing in this matter was scheduled for May 9, 2012.

4. Upon the Board's Motion to Continue due to the unavailability of a material witness, the Hearing Panel submitted an Order granting a continuance of the hearing to July 18, 2012 and extending the time for the Respondent to submit his exhibit list until June 14, 2012.

5. On July 3, 2012 attorney David A. Luftkin, Sr. filed an Appearance of Counsel for Respondent.

6. Respondent filed a Motion for Continuance based on multiple grounds and a request to allow additional discovery on July 12, 2012 which was denied by the Hearing Panel's Order filed July 13, 2012. Thereafter, on July 16, 2012 the Respondent filed a "Motion to Strike Board of Professional Responsibility's Brief and The Board of Professional Responsibility's Supplemental Witness and Exhibit List and to Dismiss the Petition for Discipline", which was denied by the Hearing Panel at the Hearing on July 18, 2012.

II. FINDING OF FACTS

1. The Respondent has been licensed to practice law in Tennessee since 1980 except for a period of temporary suspension.

2. The Respondent represented Velda Shore in the case of Shore v. Fields and Goddard in the Circuit Court for Blount County, Tennessee, Docket No. L-16322, filed August 19, 2012, hereinafter sometimes referred to as the "Shore case." Board Exhibit 1.

3. The "Third Cause of Action (Civil Conspiracy)" in paragraphs 19 through 21 of the Shore case alleged "unlawful purpose of communication" between the county attorney and county building commissioner and "that overt acts existed together with concert of action ("communication by and between and among" the county attorney, county mayor (a non-party to the lawsuit), representatives of another non-party to the lawsuit and the county building commissioner).

4. The “Third Cause of Action (Civil Conspiracy)” in the Shore case was based in part on inconsistencies in legal conclusions with regard to land use found in correspondence from the county building commissioner dated November 1, 2007 and December 13, 2007. Exhibit 1.

5. Due in significant part to argument by the defendant Goddard’s attorney, Respondent filed an “Amendment to Complaint and/or Voluntary Dismissal” in the Shore case as to the named defendant Goddard on September 18, 2008, but at no time did he dismiss the other allegations set forth in the “Third Cause of Action (Civil Conspiracy)” as applicable to defendant Fields and the non-parties mentioned in the complaint even though Respondent has acknowledged that those allegations became “moot” with the amendment of the complaint as reflected in his “Memorandum of Law Against Award of Sanctions”. Exhibit 7 (page 4 paragraph 3).

6. On September 19, 2008, counsel for the remaining named defendant in the Shore case filed a Motion to Dismiss the “Third Cause of Action (Civil Conspiracy)” and served it upon the Respondent together with a “safe harbor” letter requesting that the Respondent dismiss the pending action within twenty-one (21) days or that an amended motion would be filed thereafter seeking Tennessee Rules of Civil Procedure Rule 11 sanctions. An “Amended Motion to Dismiss and Impose Sanctions” was thereafter filed on October 24, 2008.

7. The Respondent filed no formal response nor took other action with regard to either the pending Motion to Dismiss or the Amended Motion to Dismiss and Impose Sanctions in the Shore case. On or about November 14, 2008, he met with Ms. Shore. On December 4, 2008 he was contacted by his Ms. Shore and informed verbally, followed by writing on or about December 10, 2008, that Ms. Shore did not wish for Respondent to further represent her in the case. Thereafter, on December 20, 2008, Respondent filed his Motion to Withdraw from the Shore case. Exhibit 7 (Respondent’s “Memorandum of Law Against Sanctions,” page 3 paragraph 2).

8. The trial court in the Shore case conducted a hearing on Defendant's "Motion to Dismiss and for Sanctions" on January 25, 2009, and by its Order entered March 4, 2009 found that Respondent's "failure to dismiss the frivolous civil conspiracy allegation and factual contention-or what became a frivolous contention" violated Tennessee Rules of Civil Procedure Rule 11, and that sanctions against the Respondent were appropriate, but did not grant an award of sanctions against Ms. Shore. Exhibit 7.

9. The trial court in the Shore case conducted a hearing on the sanctions previously imposed against the Respondent and awarded a Five Thousand Dollars (\$5,000.00) judgment against the Respondent, but also allowed further filings by the Respondent to decide whether future evidentiary hearings or argument would be allowed in the case upon the issue of the Rule 11 violation. Exhibit 8. There was no further proof before the Hearing Panel of additional pleadings or whether any judgment on the Rule 11 sanction or the Shore case as a whole has become final such that it will not be modified by the trial or appellate courts.

10. Respondent entered into an agreement with Gina French to pursue the possibility of repayment of legal fees from her umbrella liability policy with Allstate Insurance Company. Respondent was retained and paid for the purposes of writing a letter to Allstate Insurance Company on her behalf and (2) filing a complaint in the matter. Exhibit 41 and Exhibit 42. On January 26, 2009 Respondent filed a Civil Summons in Ms. French's behalf in the General Sessions Court of Knox County, and set the case for trial on March 11, 2009, hereinafter sometimes referred to as the "French case". Exhibit 40.

11. Counsel for Allstate in the French case attempted communication with the Respondent on multiple occasions, including with correspondence dated February 3, 2009 and March 31, 2009.

12. Counsel for Allstate in the French case filed a Motion to Dismiss on or about July 24, 2009, and thereafter, on or about October 28, 2009, the Respondent filed a voluntary non-suit and thereafter the French case was dismissed without prejudice on November 3, 2009. See Exhibit 20, Collective Exhibit 23, and Exhibit 40.

13. As supported by correspondence from the Respondent to Ms. French dated October 19, 2009 and the testimony of the Respondent at the hearing herein, Respondent informed Ms. French of difficulties with the theories of recovery in her case and proposed that a voluntary dismissal of her case would be the recommended strategy. Exhibit 19.

III. CONCLUSIONS OF LAW

1. In *File No. 31590-2-SG-Informant: Jerry Cunningham*, the Board avers that “The acts and omissions of Respondent . . .” as pertaining to the Shore case and set forth in its Petition for Discipline “constitute ethical misconduct in violation of Rules 3.1 and 8.4(a) (d) (c)” of the Rules of Professional Conduct. Additionally, in *File No. 31802-2-PS Complainant: Velda Shore*, the Board avers that Respondent’s “acts and omissions” in the Shore case as set forth in its Petition for Discipline “constitute ethical misconduct in violation of Rules 1.3; 1.4; 3.1; 1.16; and 8.4(a) (c) (d)” of the Rules of Professional Conduct at the relevant times herein.

2. The Board’s averments of Rule 3.1 violations in *File No. 31590-2-SG-Informant: Jerry Cunningham* and in *File No. 31802-2-PS Complainant: Velda Shore* are based upon the Respondent’s filing of the complaint in the Shore case containing the “Third Cause of Action (Civil Conspiracy)” and thereafter neglecting to dismiss that part of the complaint as to one remaining named defendant.

At the relevant times herein, Rule 3.1 provided:

Rule 3.1. Meritorious Claims and Contentions. – A lawyer shall not bring or defend or continue with the prosecution or defense of a proceeding, or assert or controvert or continue to assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Although not named as a defendant in the Shore case, Jerry Cunningham, a retired attorney, was mentioned not by name but in his capacity as mayor of Blount County, Tennessee as a person involved with improper communications, allegedly supporting the claim of civil conspiracy. In addition, the county building commissioner Roger Fields and county attorney Robert Goddard were named specifically as defendants. The Respondent testified that his basis for the civil conspiracy allegations consisted of two letters from Mr. Fields with seemingly inconsistent positions regarding property usage which were attached to the original complaint in the Shore case, as well as a billing entry by attorney Goddard. Shortly after filing the complaint, and upon conversations with attorney Goddard's counsel, Respondent found it appropriate to voluntarily dismiss Mr. Goddard from the complaint when it was confirmed that he was acting as the county's attorney and not representing Mr. Cunningham individually. The Respondent never dismissed the allegations as to the defendant Fields which included references to the county mayor and others. Jerry Cunningham testified before the Hearing Panel that the averments filed by the Respondent in the Shore case caused him embarrassment and had no basis in fact. The Respondent admitted that (apparently in his opinion at least) the civil conspiracy averments became "moot" after Mr. Goddard was dismissed from the complaint, seemingly acknowledging that the allegation was not based on fact or law at that point. . Exhibit 7 (page 4 paragraph 3).

The trial court found in part that the Respondent's “. . . *failure to dismiss* the frivolous civil conspiracy allegation and factual contention-*or at least what became a frivolous contention*-was neither reasonable nor consistent with the letter and spirit of Rule 11 and his professional responsibilities as the case progressed.” Exhibit 8 (paragraph No. 5). The trial court imposed sanctions against the Respondent individually for violations of Rule 11.

The Hearing Panel did not have the benefit of testimony from Velda Shore. However, in the form of exhibits introduced by the Board through the Respondent's testimony it was evident that communication between the Respondent and Ms. Shore did take place during the period following the Motion to Dismiss and safe harbor letter from counsel for the defendant Fields, on or about September 19, 2008. Collective Exhibit 13 (e-mails and written correspondence between September 19 and December 4, 2008). During that period of time, the Respondent testified that communications with his client were diminished such that he did not address the Motion to Dismiss prior to his discharge on or about December 4, 2008, at which time he could take no further action in the Shore case.

Although the factual and legal basis for the civil conspiracy allegations in the Shore case are limited and perhaps ultimately not actionable, the Hearing Panel concludes there was insufficient proof that there was no basis for the claim at the time the complaint was filed. As to the merit of the civil conspiracy averments following the September 19, 2008 dismissal of Robert Goddard, the Motion to Dismiss filed by counsel for Roger Fields, and the Respondent's brief stating that the issue was “moot” following the dismissal, the Hearing Panel finds that although the Respondent could have dismissed the balance of the civil conspiracy averments prior to his discharge on or about December 4, 2008 evidence of that failure alone is insufficient to conclude that there was a violation of Rule 3.1 of the Rules of Professional Conduct, notwithstanding a

finding by the trial court awarding Rule 11 sanctions, a judgment which may or may not have become final and exhausted by appeals. Although only one defendant remained in the case after dismissal of Goddard, at least one other individual was referenced in the complaint and the Hearing Panel was not presented with any authority stating that civil conspiracy is not a viable claim when there is only one defendant when other parties, albeit not named as defendants, are alleged to have been involved in wrongful conduct.

3. The Board avers that in *File No. 31802-2-PS Complainant: Velda Shore* the Respondent violated Rule 1.3 of the Rules of Professional Conduct. At the relevant times herein, Rule 1.3 provided:

Rule 1.3. Diligence. – A lawyer shall act with reasonable diligence and promptness in representing a client.

The Hearing Panel finds that the Respondent's failure to take action with regard to the civil conspiracy averments in the Shore case following the September 19, 2008 Motion to Dismiss and safe harbor letter and the October 24, 2008 Amended Motion to Dismiss and Impose Sanctions from counsel for the defendant Fields until Respondent's discharge on December 4, 2008 violated the duty of diligence under Rule 1.3 of the Rules of Professional Conduct. At the Hearing, Respondent offered his own testimony as well as cross-examination of attorney Kevin Shepherd, called as a witness by the Board, that following Respondent's Motion to Withdraw on December 30, 2008, no motions for sanctions were filed against Mr. Shepherd who substituted as counsel for Ms. Shore in her case. The Hearing Panel finds that it is irrelevant to the Respondent's violations of the Rules of Professional Conduct whether or not another attorney violated a similar rule, but in any event notes that the Order substituting Mr. Shepherd as counsel for Ms. Shore and allowing Respondent to withdraw from the case was not entered until June 22, 2009, and that in any event

Mr. Shepherd filed a Motion to Amend Ms. Shore's complaint and remove civil conspiracy allegations on April 14, 2009 (Exhibit 38) and filed an Amended Complaint removing those allegations on June 15, 2009 (Exhibit 39). Accordingly, the earliest pleadings bearing Mr. Shepherd's signature precede the Order allowing the Respondent to withdraw, and specifically address the issues for which the Respondent has been found to have breached his ethical duty of diligence to his client. Furthermore, there was no proof before the Hearing Panel that Mr. Shepherd had been given a renewed safe harbor after he undertook the representation of Ms. Shore, or of any agreements he may have reached with opposing counsel with regard to timing of amendment of the complaint and/or the dismissal of the civil conspiracy allegations.

Moreover, while the Hearing Panel is unable to find the Respondent violated Rule 3.1 with regard to the civil conspiracy claim, that does not preclude a finding that Respondent did not act with the diligence required by Rule 1.3. Based upon Respondent's own admission in his memorandum (Exhibit 7) that the claim became moot upon the dismissal of Goddard, it became incumbent upon Respondent to take some action. While Respondent argues he did not have sufficient time prior to being discharged by his client in December 2008, the Panel does not find that argument persuasive. Indeed, based on his belief the claim became moot upon the dismissal of defendant Goddard it is incomprehensible why Respondent did not simultaneously dismiss the conspiracy claim upon dismissing the defendant Goddard. Instead, Respondent did nothing, causing unnecessary litigation and subjecting his client to the possibility of monetary sanctions.

Accordingly, the Hearing Panel concludes that the Respondent violated Rule 1.3 of the Rules of Professional Conduct with regard to his client in *File No. 31802-2-PS Complainant: Velda Shore*.

4. The Board avers that in *File No. 31802-2-PS Complainant: Velda Shore* the Respondent violated Rule 1.4 of the Rules of Professional Conduct. At the relevant times herein, Rule 1.4 provided:

Rule 1.4. Communication. -- (a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Hearing Panel does not find that the Board has proved by the preponderance of the evidence that the Respondent violated his ethical duty to Ms. Shore as defined in Rule 1.4. The Hearing Panel was not afforded to the opportunity to hear testimony from Ms. Shore. However, from proof through the testimony of the Respondent and e-mail and correspondence contained in Collective Exhibit 13 it is apparent that in fact Respondent was in regular communication with his client, and that the client was actively involved with the strategy of her case. Attorney Shepherd further testified that Ms. Shore, although of advanced age, was very involved in the litigation and very aware of what was happening while Shepherd represented her.

Accordingly, the Hearing Panel does not conclude that the Board has proved by the preponderance of the evidence that Respondent violated Rule 1.4 of the Rules of Professional Conduct with regard to his client in *File No. 31802-2-PS Complainant: Velda Shore*.

5. The Board avers that in *File No. 31802-2-PS Complainant: Velda Shore* the Respondent violated Rule 1.16. At the relevant times herein, Rule 1.6 provided:

Rule 1.16. Declining or Terminating Representation. – (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from representation of a client if:

- (1) the representation will result in a violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from the representation of a client if the withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetuate a crime or fraud;
- (3) a client insists upon pursuing an objective or taking action that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) the representation will result in an unanticipated and substantial financial burden on the lawyer or has been rendered unreasonably difficult by the client;
- (6) other good cause for withdrawal exists; or
- (7) after consultation with the lawyer, the client consents in writing to the withdrawal of the lawyer.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of the representation of a client, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, including:

- (1) giving reasonable notice to the client so as to allow time for the employment of other counsel;
- (2) promptly surrendering papers and property of the client and any work product prepared by the lawyer for the client and for which the lawyer has been compensated;
- (3) promptly surrendering any other work product prepared by the lawyer for the client provided, however, that the lawyer may return such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse effect on the client with respect to the subject matter of the representation;
- (4) promptly refunding to the client any advance payment for expenses that have not been incurred by the lawyer; and
- (5) promptly refunding any advance payment for fees that have not been earned.

The Hearing Panel was presented with somewhat conflicting testimony from the Respondent and attorney Kevin Shepherd as to transfer of the client's file and materials following

Respondent's termination. It was contended that the lack of cooperation by Respondent in conveying file materials caused delay of the Shore case. However, Respondent testified that he spoke with the client's new counsel and offered the materials early after his Motion to Withdraw. Attorney Shepherd testified that in June 2009 he attempted to fax a letter to Respondent requesting the file but the letter was not offered into evidence nor was there any evidence that the letter was received by Respondent. Attorney Shepherd also testified that he did not believe Respondent was intentionally withholding the file. Furthermore, there was evidence that the client previously had been provided with substantially the entire file during the time of Respondent's representation. The Hearing Panel did not have the benefit of testimony from the client at the Hearing to substantiate the claims. Accordingly, the Hearing Panel does not conclude that the Respondent violated Rule 1.6 of the Rules of Professional Conduct with regard to his client in *File No. 31802-2-PS Complainant: Velda Shore*.

6. The Board avers that in *File No. 31590-2-SG-Informant: Jerry Cunningham* and in *File No. 31802-2-PS Complainant: Velda Shore* the Respondent violated Rule 8.4(a) (c) (d) of the Rules of Professional Conduct.

At the relevant times herein, Rule 8.4(a) (c) (d) provided:

- Rule 8.4. Misconduct.** – It is 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;
 - (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
 - (d) engage in conduct that is prejudicial to the administration of justice.

With regard to Rule 8.4, in view of the Hearing Panel's finding that the Respondent violated Rule 1.3 with regard to diligence in *File No. 31802-2-PS Complainant: Velda Shore*, then it follows that the Respondent is also in violation of Rule 8.4(a) which prohibits violation of the Rules of Professional Conduct.

With regard to Rule 8.4(c), the Hearing Panel does not find by the preponderance of the evidence that the Respondent engaged in dishonesty, fraud, deceit or misrepresentation, nor did he engage in conduct that was prejudicial to the administration of justice in *File No. 31590-2-SG- Informant: Jerry Cunningham* and in *File No. 31802-2-PS Complainant: Velda Shore*.

Accordingly, in *File No. 31802-2-PS Complainant: Velda Shore* the Hearing Panel concludes that the Respondent violated Rule 8.4(a) of the Rules of Professional Conduct.

7. In *File No. 33051-2-PS-Complaint of Gina French* the Board avers that Respondent's "acts and omissions" in the French case as set forth in its Petition for Discipline "constitute ethical misconduct in violation of Rules 1.3; 1.4; 3.2; 8.4(a) (d)" of the Rules of Professional Conduct at the relevant times herein.

8. The Board avers that in *File No. 33051-2-PS-Complaint of Gina French* the Respondent violated Rule 1.3 of the Rules of Professional Conduct. At the relevant times herein, Rule 1.3 provided:

Rule 1.3. Diligence. – A lawyer shall act with reasonable diligence and promptness in representing a client.

The testimony of the complainant Gina French and the Respondent together with exhibits introduced through their testimony were presented at the Hearing. The Hearing Panel finds that the Respondent was retained by Ms. French to pursue the possibility of recovering money from her umbrella insurance policy to compensate her for legal expenses incurred in past litigation, which claim in addition to any other issue may have been time barred. Respondent filed a civil warrant in the General Sessions Court for Knox County, Tennessee on January 26, 2009. Exhibit 20 shows that the matter was originally set for hearing on March 11, 2009, and subsequently it was continued until the filing of the non-suit on October 28, 2009 when faced with a Motion to Dismiss

by the defendant Allstate. However, there was little evidence presented by either side to explain the delay or prove that the delay was caused by Respondent rather than matters inherent in the type of litigation at issue. Therefore, the Hearing Panel does not find by the preponderance of the evidence that the delay in the case was solely caused by the Respondent's lack of diligence or that the client was prejudiced by the lapse of time.

Accordingly, the Hearing Panel does not find by the preponderance of the evidence that the Respondent violated Rule 1.3 of the Rules of Professional Conduct in *File No. 33051-2-PS-Complaint of Gina French*.

9. The Board avers that in *File No. 33051-2-PS-Complaint of Gina French* the Respondent violated Rule 1.4 of the Rules of Professional Conduct. At the relevant times herein, Rule 1.4 provided:

Rule 1.4. Communication. – (a) A lawyer shall:

- (4) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
 - (5) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (6) keep the client reasonably informed about the status of the matter;
 - (7) promptly comply with reasonable requests for information; and
 - (8) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Hearing Panel concludes from the testimony of Gina French, the Respondent and the exhibits introduced through their testimony that the theory of recovery in the French case became tenuous, and that by letter dated October 19, 2009 Respondent informed Ms. French of that fact and proposed a voluntary non-suit which would allow refiling of the action at such time when she might have a better possibility of prevailing. Exhibit 19. It is not lost on the Hearing Panel that

the Respondent's advice came at a time when he was facing sanctions in the Shore case for his failure to dismiss the civil conspiracy claim in that case. The Hearing Panel was not presented with proof of any prejudice to the client or her case because of the non-suit, or any reasonable theory why Ms. French would not want to consent to such action.

Accordingly, the Hearing Panel does not find by the preponderance of the evidence that the Respondent violated Rule 1.4 of the Rules of Professional Conduct in *File No. 33051-2-PS-Complaint of Gina French*.

10. The Board avers that in *File No. 33051-2-PS-Complaint of Gina French* the Respondent violated Rule 3.2 of the Rules of Professional Conduct. At the relevant times herein, Rule 3.2 provided:

Rule 3.2. Expediting Litigation. – A lawyer shall make reasonable efforts to expedite litigation.

As more fully explained in the preceding paragraphs, the Hearing Panel does not find by the preponderance of the evidence that the Respondent failed to use reasonable efforts to expedite litigation in *File No. 33051-2-PS-Complaint of Gina French*.

11. The Board avers that in *File No. 33051-2-PS-Complaint of Gina French* the Respondent violated Rule 8.4(a) (d) of the Rules of Professional Conduct. At the relevant times herein, Rule 8.4(a) (d) provided:

Rule 8.4. Misconduct. – It is professional misconduct for a lawyer to:
(b) 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;
(d) engage in conduct that is prejudicial to the administration of justice.

With regard to Rule 8.4, in view of the Hearing Panel's findings that it was not proved by the preponderance of the evidence that the Respondent violated the Rules of Professional Conduct as averred in *File No. 33051-2-PS-Complaint of Gina French* then it follows that there is not a

basis in that case to find a violation of Rule 8.4(a) which prohibits violation of the Rules of Professional Conduct. With regard to Rule 8.4(d), the Hearing Panel does not find by the preponderance of the evidence that the Respondent engaged in conduct that was prejudicial to the administration of justice in *File No. 33051-2-PS-Complaint of Gina French*.

Accordingly, in *File No. 33051-2-PS-Complaint of Gina French* the Hearing Panel concludes that the Respondent is not in violation of Rule 8.4(a) or (d) of the Rules of Professional Conduct.

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

1. The Hearing Panel finds that the Respondent's prior disciplinary offenses as evidenced by Exhibits 30, 31, 32, 33, 34, 35 and 36, including but not limited to those involving violations similar to the violation of Rule 1.3 as hereby adjudged by the Panel in the Shore case, to be aggravating circumstances.

2. The Hearing Panel finds that the Respondent's pattern of misconduct and multiple offenses are aggravating circumstances.

3. The Hearing Panel finds that the Respondent's refusal to acknowledge the wrongful nature of his conduct to be an aggravating circumstance.

4. The Hearing Panel finds that the Respondent's substantial experience in the practice of law since 1980 to be an aggravating circumstance.

5. The Hearing Panel finds that the Respondent's full and free disclosure to the Disciplinary Board and cooperative attitude toward the Disciplinary Board and the Hearing Panel to be a mitigating circumstance.

6. The Hearing Panel finds that the imposition of other penalties or sanctions in the form of the Rule 11 monetary sanction imposed upon the Respondent personally by the Circuit Court of

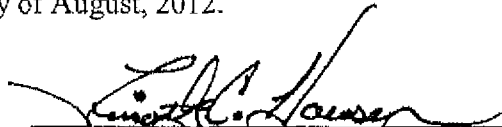
Blount County, Tennessee in Shore v. Fields and Goddard, Docket No. L-16322 to be a mitigating circumstance.

V. SPECIFICATION OF DISCIPLINE

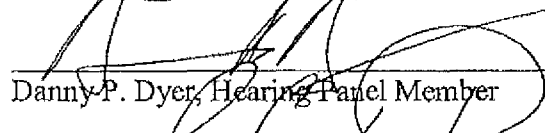
Pursuant to Rule 9 §8.4 of the Rules of the Supreme Court of Tennessee, having found one or more grounds for discipline of the Respondent, the Hearing Panel specifies the following discipline as appropriate:

1. That the Respondent, Thomas Fleming Mabry, be suspended from the practice of law for a period of Forty-Five (45) days.


Respectfully submitted this 2nd day of August, 2012.



Timothy C. Houser, Hearing Panel Chair



Danny P. Dyer, Hearing Panel Member



Sara E. Compher-Rice, Hearing Panel Member

NOTICE

The judgment of the Hearing Panel herein may be appealed pursuant to Section 1.3 of Rule 9 of the Rules of the Supreme Court of Tennessee by filing a petition for writ of certiorari, which petition shall be made under oath or affirmation and shall state that it is the first application for the writ. *See* Tenn. Code Ann. §27-8-104(a) and §27-8-106.