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BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL A

IN RE: **FRANK DAVID REES**
Arkansas Bar ID #79238
CPC Docket No. 2009-077

CONSENT FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based were developed from information provided to the Committee by Jerry and Donnie James. The information related to the representation of Donnie James in 2004-2008 by Respondent F. David Rees, an attorney practicing primarily in Jonesboro, Arkansas. On July 16, 2009, Respondent was served with a formal complaint, supported by affidavits from Jerry James, Kathy Swanner, Donnie James, Brenna Ryan, Lisa Croy, Stewart Lambert, Paul Teufel, Jason Lewallen, John Wesley Hall, Jr., Alvin Schay, Stuart Vess, Blake Hendrix, and Jeff Rosenzweig.

After a ballot vote, Mr. Rees requested a public hearing pursuant to Section 11 of the Court's Procedures. Prior to that hearing, Mr. Rees and the Executive Director negotiated a consent proposal, which was presented to and approved by Panel A, and now becomes the final order in this case.

Factually, the case is summarized as follows. Donnie Butch James ("Donnie") of Jonesboro, was sentenced to fifty (50) years in the Arkansas Department of Correction (ADC) in August 1998 from Craighead Circuit Court on his pleas to multiple serious felonies (two aggravated robberies, kidnaping, and aggravated assault). Donnie's current parole eligibility date is August 5, 2033. Donnie had earlier served about nine years, from 1987-1996, of a twenty-five year sentence in ADC for an aggravated robbery. His father, Jerry G. James ("Jerry") of Jonesboro, hired Jonesboro attorney F. David Rees and paid him a $50,000 fee in full on March 22, 2004, to represent Donnie

James in an application for executive clemency, either a pardon from the Governor of Arkansas or a time-cut in his sentence, in an attempt to get Donnie released from prison early. Jerry James stated he received assertions from David Rees that led him to believe Rees had personal connections with state officials and his reputation as an attorney could both advance Donnie's cause and lead to a successful outcome.

In April 2004, Rees turned the matter over to Brenna Ryan, who was first licensed as an attorney in April 2003 and had just become a new associate at the Rees firm. At the time neither David Rees or Brenna Ryan had ever handled an executive clemency matter for an inmate. Ryan did most, if not all, of what work was done for Donnie until she left the firm in April 2005. Early on Ms. Ryan learned that Donnie had to serve a minimum of seven (7) years time before he was eligible to apply for clemency. She calculated he would not be eligible to apply until about February 2005, and so informed both Jameses by letter in May 2004. Ryan visited Donnie twice at the Brickeys Unit near Marianna - in May and late December 2004, the only Rees firm member who ever met Donnie. She also wrote him occasionally.

In early 2005, on Donnie's behalf, Ryan contacted an Arkansas investigator who had a reputation for being able to get an inmate transferred to another unit. Nothing ever came of any effort to get Donnie transferred to the unit, especially the one at Newport, that his father and he desired, due to Donnie's inmate status, which required he be housed in a maximum security unit. The investigator charged the Rees Law Firm $647.50 for her work.

After Ryan left his firm in late April 2005, David Rees assumed responsibility for the file. Documentation from the Jameses or the Rees firm file indicates Mr. Rees did little work on the matter, and usually then only in response to demands or complaints from Jerry or Donnie James that

little or nothing was being done. In February 2006, Rees wrote Donnie, asking Donnie to fill out the application forms and send them to Rees to be typed, which Donnie did soon thereafter.

By mid-April 2006, Donnie and his father had obtained from friends and relatives all of the letters of support for Donnie that Rees would eventually include in the Executive Clemency Application. After Donnie wrote Rees a blunt letter in mid-September 2006, Rees had West Memphis attorney Jason Lewallen, a former associate at the Rees Law Firm, get the application packet pulled together and put in final form for submission, and Rees sent Donnie the final Application packet to sign. Lewellan charged the Rees Law Firm $400 for his services rendered between September 15-20, 2006. The packet was filed by Rees on October 10, 2006. Without providing a hearing for Donnie and his attorney, in February 2007 the Post Prison Transfer Board voted 5-0 against favorably recommending Donnie to the Governor. In January 2008, Governor Beebe wrote Donnie denying his application. As a result of this denial, Donnie cannot apply for any form of executive relief for four years. Donnie did not hear from Rees regarding executive clemency after the Application was filed in October 2006.

In 2008, Jerry James, through new counsel, made demand on Rees for return of the unearned portion of the $50,000 fee he paid on Donnie's matter. No accounting for the use of the $50,000.00 or any refund has been made. No time records were kept or any other detailed contemporaneous record of effort expended was made and maintained by the Rees Law Firm on the Donnie James file. Affidavits of several attorneys working at the Rees Law Firm during 2004-2005 all indicate no time records were ever kept at the firm. Ms. Ryan estimated she spent about twenty-five (25) hours working on Donnie's matter during the year she was at the Rees Law Firm.

Affidavits of attorneys Lambert, Schay, Hall, Vess, Rosenzweig, and Hendrix, who all have

had executive clemency experience representing Arkansas inmates, opine that $50,000 is clearly an excessive and unreasonable legal fee for a matter like this under any scenario with which they are familiar, even if done by an attorney with reasonable experience in this area of law. They also opine that $50,000 is certainly excessive and unreasonable based on the time and effort expended here or reasonably required. The highest fee for such a similar matter any of the six offered as having charged a client was $15,000.

A copy of the Rees Law Firm "office file" on this James matter was obtained from Mr. Rees's counsel and was machine numbered pages 1-567. 351 pages of the 567 (62%) are only copies of Donnie James's old circuit court criminal case files from the clerk's office. Many of the remaining 216 pages are duplicates of other pages in the 216.

In his response, Mr. Rees offered, in summary, that he made it clear when accepting the engagement that he could not guarantee results; that he properly performed the legal work required in the engagement; that the executive clemency application was not successful but that the client had been advised of the discretionary nature of clemency; the client was pursuing a claim not only for a refund of the fee but for an amount far in excess of the fee paid; he performed other legal work or services for Donnie or Jerry James; and the client was using the Committee as leverage in a typical fee dispute. Mr. Rees offered that he was an experienced criminal defense lawyer; that he supervised the case file; that he pursued the client's objectives in the representation; that any delay in submission of the clemency application was not unreasonable under the circumstances; that the client was kept fully informed during the application process; that his fee was reasonable; that the six lawyers who submitted affidavits with the Complaint that his fee was unreasonable each stated they had not reviewed the file or the Application; that, through counsel, Jerry James had demanded either

a full or higher refund; that there was no misrepresentation by Rees as to the services to be provided or results obtained; and that Rees did not imply in any manner that he had influence with certain high government officials that could be used to benefit the client.

Upon consideration of the formal complaint and attached exhibit materials, the consent documents and terms, and other matters before it, and the Arkansas Model Rules of Professional Conduct, by ballot vote Panel B of the Arkansas Supreme Court Committee on Professional Conduct finds:

A. The conduct of F. David Rees violated Model Rule 1.2(a) (same as Arkansas Rule 1.2(a)), in that the objective of Jerry and Donnie James in employing the Rees Law Firm to assist Donnie in applying for and obtaining some form of executive clemency to get Donnie out of prison was that the clemency application would be timely filed and be pursued by Rees by all reasonable and by proper means to a conclusion. The Rees Law Firm did not file an application until two and one half years after being employed, with no reasonable explanation for such a long delay in filing. Model Rule 1.2 (a) requires that a lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter....

B. The conduct of F. David Rees violated Model Rule 1.5(a) in that the $50,000.00 fee charged by Mr. Rees to Jerry James for accepting and pursuing to conclusion an executive clemency application for Donnie James was not reasonable under all the circumstances, both as they existed at the formation of the attorney-client relationship or based on the work and effort put into the matter by the Rees Law Firm. Brenna Ryan, an almost-new lawyer first licensed in April 2003 and initially

assigned to the file in April 2004 by David Rees, had no prior experience in executive clemency matters. David Rees and other attorneys in his firm put in only minimal time and effort on the matter to October 2006, when the application was finally filed. Ms. Ryan estimated she may have put in about twenty-five (25) hours time on the matter up to late April 2005, when she left the firm. Even assigning her a very generous hourly rate of $200 an hour for a new lawyer, her time for all purposes and tasks on the James matter would only come to about $5,000. In fixing the fee and assessing its reasonableness from time to time during the engagement, there is no indication that David Rees considered and utilized reasonable considerations of the time and labor required or devoted to the matter; the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will or did preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; or the amount involved and the results obtained. The affidavits of six Arkansas attorneys with executive clemency experience all indicate that $50,000 is clearly excessive and unreasonable in relation to the fee customarily charged in the locality for similar legal services and reasonable under the circumstances of the James matter. Model Rule 1.5(a) requires that a lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

C. The conduct of F. David Rees violated Arkansas Rule 1.16(d) in that upon termination of representation, apparently not later than early 2008 when the Governor denied James's application, Mr. Rees did not take steps to the extent reasonably practicable to protect the client's interests, specifically by refunding any payment of fee that has not been earned. Rule 1.16(d) requires that upon termination of representation, an attorney shall take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advanced payment of fee that has not been earned.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that the Arkansas law license of **FRANK DAVID REES**, Arkansas Bar ID# 79238, be, and hereby is, **REPRIMANDED** for his conduct in this matter, he is **ORDERED TO PAY $35,000.00 RESTITUTION for the BENEFIT of JERRY JAMES,** and he is assessed $2,595.00 in case costs.

The restitution and costs assessed herein, totaling $37,595.00, shall be payable through the Office of Professional Conduct as follows:

1. Within thirty (30) days after filing of this Order, by cashier's check or money order payable to "Jerry James," for $12,531.67.

2. Within sixty (60) days after filing of this Order, by cashier's check or money order payable to "Jerry James," for $12,531.67.

3. Within ninety (90) days after filing of this Order, by cashier's check or money order

payable to "Clerk, Arkansas Supreme Court" for $12,531.66. The balance of restitution and the case costs shall be paid from this final payment.

ARKANSAS SUPREME COURT COMMITTEE ON
PROFESSIONAL CONDUCT - PANEL A

By: _____
Gwendolyn Hodge, Vice-Chair, Panel A

Date: March 19, 2010

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