

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL B

IN RE: NEWTON DONALD JENKINS, JR.
Arkansas Bar ID # 94231
CPC Docket No. 2010-054

Received

SEP 08 2011 SL

Arkansas Supreme Court
Committee on Professional Conduct

HEARING FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based were initially developed from information provided to the Committee by Brian Foster in October 2009. The information related to the representation of Mr. Foster in 2006-2009 in both state and bankruptcy courts by Respondent Newton Donald Jenkins., Jr., an attorney practicing primarily in Alma and later in Van Buren, Crawford County, Arkansas. Respondent was served with a formal complaint, supported by affidavits from Brian Foster, Charles Embry, and Shannon Holloway (Underwood) Vaughn. Respondent filed a Response in November 2010, Mr. Foster filed rebuttal in November 2010, and the matter was considered at a ballot vote by Panel A on January 21, 2011. After being informed of the ballot vote results, Respondent Jenkins requested a *de novo* public hearing.

The public hearing was conducted before Panel B on August 18, 2011. The hearing Panel consisted of regular Panel B members James Dunham (Chair) and other attorney members Henry Hodges, Stephen Crane, and Valerie Kelly, and non-attorney members Sylvia Orton and Carolyn Morris. Attorney Kenneth Mourton of Panel C served in place of regular Panel B attorney member Barry Deacon who was unavailable due to a prior schedule conflict. Stark Ligon represented the Office of Professional Conduct. Mr. Jenkins represented himself.

FILED

SEP 08 2011

**LESLIE W. STEEN
CLERK**

After consideration of the pleadings and exhibits received into evidence, the testimony of Donald Jenkins, Charles Embry, and Sonia Jenkins, and arguments of counsel, the Panel deliberated and returned the findings and sanctions hereafter set out.

I. FINDINGS OF FACTS

1. R. Shayne Conine, a Little Rock dentist, had personal problems in early 2005, and had to leave her practice and go out of state for care.

2. Brian Foster, a friend, stepped forward and devoted much time and effort for several months to keep her dental practice going and tending to her financial affairs.

3. After Dr. Conine returned to Arkansas in late August 2005, a dispute arose with Foster.

4. Using attorney Shannon L. Holloway Underwood (now Vaughan), Conine sued Foster in Pulaski Circuit Court No. CV-2006-6952 in June 2006. Foster answered *pro se*. Dr. Conine filed an Amended Complaint.

5. In October 2006, Foster, through a friend, paid a \$500 fee and retained the services of Alma attorney Donald Jenkins to represent Foster in the Conine v. Foster case.

6. Jenkins claimed that on November 3, 2006, he signed, and his office mailed for filing, in the Pulaski County Conine v. Foster suit, his Entry of Appearance as Foster's counsel and a First Amended Answer, Counter-Claim, and Motion to Dismiss. These documents were produced by Jenkins at the August 14, 2007, hearing on his Motion to set Aside the Conine judgment against Foster.

7. There is no evidence presented that shows these sent-for-filing pleadings were received by any named recipient copied (attorney Underwood or Mr. Foster) or actually filed in Pulaski County.

8. At a trial on January 4, 2007, Foster and Jenkins did not appear and defend, and judgment was granted to Dr. Conine for over \$45,000 against Foster. The judgment was filed on January 12, 2007.

9. On or about April 6, 2007, Foster independently first learned of the Conine judgment and contacted Jenkins, asking what had happened. Jenkins responded that he would check into it.

10. Dr. Conine actively pursued collection of the judgment against Foster.

11. In late April 2007, Jenkins filed a Motion to Set Aside the Conine judgment, basically admitting he had not effectively represented his client Foster in the matter. In his Motion, Jenkins also pled that neither Foster nor Jenkins had notice fo the January 4, 2007, trial date.

12. At a hearing on August 14, 2007, Jenkins stated to the Court that the mailing his office sent on November 3, 2006, to the Pulaski County Circuit Clerk for filing of his Entry of Appearance and Foster's Amended Answer and Counterclaim was never received back in his office, indicating any non-delivery of the mailing. At the same hearing, Foster's Motion to Set Aside Judgment was denied.

13. Dr. Conine continued her active collection efforts against Foster, using attorney Paul Herrod.

14. Foster employed Little Rock attorney Robert Cortinez, II, to negotiate with Herrod and Dr. Conine on relief from the judgment.

15. On September 16, 2008, on behalf of Foster, Cortinez wrote Jenkins and put Jenkins on notice that Foster was asserting a claim for legal malpractice against Jenkins, arising out of the 2007 Conine judgment against Foster.

16. Jenkins responded in a letter on September 23, 2008, to Mr. Cortinez that Foster was

an old friend, Jenkins had no insurance or assets to address Foster's negligence claim, and Jenkins offered to do a *pro bono* bankruptcy for Foster to discharge the Conine judgment debt.

17. Foster's efforts through Cortinez to negotiate a settlement with either Jenkins or Conine were not successful.

18. Jenkins tried to negotiate a settlement through Herrod, and they got as close as a \$17,000 installment offer, as shown by the letter from Herrod to Jenkins dated January 15, 2009, but did not settle.

19. In December 2008, Foster consulted with Jenkins about filing bankruptcy.

20. On December 10, 2008, using Jenkins' bankruptcy client information form, Foster faxed to Jenkins Foster's bankruptcy information for Jenkins to use in preparation for Foster's initial filing.

21. On December 12, 2008, Jenkins filed a Chapter 7 petition for Foster as Case No. 08-bk-75126 in the Fort Smith Division of the Western District of U. S. Bankruptcy Court.

22. Jenkins testified at the hearing in this case that the Conine judgment was the only substantial debt Foster had as of December 2008 when Foster filed for bankruptcy protection, using Jenkins as his attorney.

23. Nowhere in Foster's bankruptcy case filings did Jenkins list the claim Foster had earlier asserted against Jenkins for potential malpractice arising out of the 2007 Conine judgment against Foster.

24. In early 2009, Dr. Conine employed Charles Embry of North Little Rock, an experienced bankruptcy lawyer, to protect her 2007 judgment against Foster from discharge by Foster in his bankruptcy case.

25. After learning of Jenkins' failure to list the malpractice claim that had been asserted by Cortinez for Foster against Jenkins, and for other reasons, Embry filed an "adversary proceeding" ("AP") in bankruptcy court (Case No. 09-ap-07076) in May 2009 to determine dischargeability of Foster's debt to Dr. Conine, based on claims of fraud by Foster and other issues.

26. Jenkins answered in the "AP" case for Foster on May 28, 2009, stating "Debtor [Foster] denies he has a claim against his attorney [Jenkins]."

27. This was a false statement, known to Jenkins to be false at the time he made it, based on the correspondence beginning in September 2008 between Cortinez and Jenkins.

28. In other filings in the Foster bankruptcy or "AP" cases, Jenkins knowingly gave false or misleading information to the court and opposing counsel, as is detailed hereafter.

29. The Court ordered that Foster file new and corrected schedules and other reports.

30. Late on July 23, 2009, Jenkins filed additional bankruptcy schedules for Foster. The new schedules contained basically the same information as the original schedules Jenkins filed and did not disclose the Foster malpractice claim asserted against Jenkins.

31. The next day, on July 24, 2009, at a "341(a)" first meeting of his creditors, Foster was careful in his response to the Trustee's questions about Foster's possible malpractice claim against Jenkins.

32. At this same July 24, 2009, 341(a) meeting, Jenkins specifically denied that such a malpractice claim by Foster existed.

33. In mid-August 2009, Embry filed a motion to disqualify Jenkins as Foster's counsel in all bankruptcy cases.

34. Jenkins responded by filing a motion seeking sanctions against Embry for filing frivolous pleadings.

35. At a hearing on September 2, 2009, the Court, Judge Ben Barry, agreed with Embry, and announced that it was removing Jenkins as Foster's counsel in both Foster bankruptcy cases due to Jenkins' "obvious conflict."

36. Even though the actual order removing Jenkins was not filed until September 24, 2009, Jenkins filed pleadings for Foster in the bankruptcy case up to that same date.

37. Since Jenkins was removed as his attorney, Foster has proceeded *pro se* in his bankruptcy case and filed amended schedules listing his \$53,000 malpractice claim against Jenkins.

38. In January 2010, acting *pro se*, Foster filed suit in Pulaski County Circuit Case No. CV-2010-17 against Jenkins and his law firm over Foster's "Conine judgment" malpractice claim.

39. Jenkins has a pending motion to dismiss in that suit, is pending at the time this case was submitted to the hearing panel.

40. Embry claims Jenkins abused the legal and court process and unnecessarily burdened Embry and his client Conine by failure to give notice to Embry when Foster and/or Jenkins were not going to appear for hearings in Fort Smith. This cost Embry, and his client Conine, unnecessary time, expense, and aggravation in fees and by Embry driving from North Little Rock to Fort Smith for several scheduled meetings of creditors, only to learn the hearing was not to go forward due to the absence of Foster or Jenkins or both.

41. Embry also testified at the hearing that since August 2009, the Foster bankruptcy case

activity has almost exclusively been about Jenkins' actions, and not those of Foster.

42. Embry testified that he estimated the total expense to date to his client Conine for Embry's efforts for her in the Foster bankruptcy case is \$40-50,000.

43. At the hearing in this case, Jenkins testified that he "dropped the ball" on Brian Foster; had not properly handled his representation of Foster, including that he had treated Foster as "family" and not set up Foster's files or client account as other client files or accounts were set up at the Jenkins Law Firm; and that Jenkins had never charged Foster for Jenkins' services over a number of years.

44. At the hearing in this case, Jenkins testified that Foster had notice of the January 4, 2007, trial date in the Conine v. Foster case in Pulaski Circuit Court and never provided that information to Jenkins.

45. At the hearing in this case, Jenkins testified that the letter to him from attorney Robert Cortinez dated September 16, 2008, sent on behalf of Foster, was not read or understood by Jenkins as "notice" of any potential claim of malpractice by Foster against Jenkins.

II. FINDINGS ON RULE VIOLATIONS

Upon consideration of the formal Complaint and attached exhibit materials, hearing testimony, arguments of counsel, and other matters before it, and the Arkansas Rules of Professional Conduct, Panel B of the Arkansas Supreme Court Committee on Professional Conduct finds:

A. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr. violated Rule 1.1, in the two instances as charged in Counts A.1 and A.2 of the Complaint: (A.1) that in his representation of Brian Foster in Conine v. Foster, in 2006-2007, Jenkins failed to confirm that

his Entry of Appearance and First Amended Answer and Counterclaim, which Jenkins claimed were mailed on November 3, 2006, were actually filed in late 2006. This failure resulted in a large money judgment being awarded against his client Foster in January 2007, basically by default, conduct by Jenkins demonstrating a lack of the required legal knowledge, skill, thoroughness and preparation reasonably necessary for the Foster representation, and (A.2) the Entry of Appearance and First Amended Answer and Counterclaim, which Jenkins claimed were mailed by his office on November 3, 2006, to the Pulaski County Circuit Clerk for filing, and with copies to his client Foster and to opposing counsel Underwood, were incorrectly addressed to ZIP code 72901 (Fort Smith) instead of 72201 (Little Rock). None of this critical mail was delivered to its intended recipients, conduct by Jenkins or his law firm demonstrating a lack of the required legal knowledge, skill, thoroughness and preparation reasonably necessary for the Foster representation. Arkansas Rule 1.1 requires that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

B. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr. did not violate Rule 1.2(a) as charged in Count B.1 of the Complaint.

C. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr. violated Rule 1.3, as charged in Count C.1 of the Complaint, in that in late 2006, and without good cause or a valid legal excuse, Jenkins failed to timely file for Foster an answer or responsive pleading to Plaintiff Conine's Amended Complaint, leading to a default judgment of over \$45,000 being granted against Foster in January 2007. Arkansas Rule 1.3 requires that a lawyer shall act with reasonable diligence and promptness in representing a client.

D. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr., violated Rule 1.7(a), as charged in Counts D.1, D.2, and D.3 of the Complaint: (D.1) knowing after the September 16, 2008, letter to him from attorney Robert Cortinez, II, that Brian Foster was asserting a claim for legal malpractice against Jenkins and his law firm, Jenkins had a concurrent conflict of interest in representing Foster in his bankruptcy case filed in December 2008, because there was a significant risk that the representation of Foster as a client would be materially limited by the personal interest of Foster's lawyer, Donald Jenkins. At the hearing on September 2, 2010, the bankruptcy court removed Jenkins as Foster's attorney, finding that a inherent, obvious, and blatant conflict existed between Mr. Jenkins and his client Foster, and Foster's bankruptcy estate, due to the potential malpractice claim asserted by Foster against Jenkins, as shown by the Cortinez and Herrod correspondence with Jenkins; (D.2) knowing after the September 16, 2008, letter to him from attorney Robert Cortinez, II, that Brian Foster was asserting a claim for legal malpractice against Jenkins and his law firm, Jenkins had a concurrent conflict of interest in representing Foster in his bankruptcy case filed in December 2008, because there was a significant risk that the representation of Foster as a client would be materially limited by the personal interest of Foster's lawyer, Donald Jenkins, and Foster did not waive this conflict Jenkins had by giving Foster's informed consent to the conflict, confirmed in writing; and (D.3) knowing he was in a "conflict" situation in representing Foster, Jenkins placed his personal interest ahead of that of his client Foster when Jenkins knowingly failed for months to list on Jenkins' bankruptcy schedules a claim Jenkins knew Foster had been asserting against Jenkins since September 16, 2008, for Jenkins' legal malpractice in 2006-early 2007 in the Conine v. Foster state litigation. Arkansas Rule 1.7(a) requires that, except as provided in paragraph (b), a

lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) ...; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) ...; (3) ...; and (4) each affected client gives informed consent, confirmed in writing.

E. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr. did not violate Rule 3.3(a)(1), as charged in Count E.1 of the Complaint.

F.1. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr. did not violate Rule 3.4(b), as charged in Count F.1 of the Complaint.

F.2. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr. did violate Rule 3.4(b), as charged in Count F.2 of the Complaint, in that (F.2) just prior to the first meeting of creditors on July 24, 2009, in Foster's bankruptcy case, Jenkins counseled or assisted Foster to testify in a false or at least in a misleading manner when Jenkins counseled Foster to not say that Jenkins' conduct toward Foster that allowed the Conine judgment was malpractice. Arkansas Rule 3.4(b) requires that a lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

G. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr. did violate Rule 4.4(a), as charged in Count G.1 of the Complaint, in that on February 19, 2009, notice was sent to counsel

in the Foster bankruptcy case, that the first meeting of creditors was continued and reset to March 13, 2009, at 1:00 p.m. On March 13, Mr. Embry, counsel for judgment creditor Conine, was traveling from his office in North Little Rock to Fort Smith, a one-way distance of about 159 map miles. Near Alma, a distance of about fifteen miles from Fort Smith, at about 10:47 a.m., Embry received an e-mail from Jenkins stating that Foster was “out of state” and would not be attending the first meeting of creditors set for approximately two hours later. Embry was forced to turn around, and return to his office, having wasted a least half a day due to Jenkins’ failure to give him adequate notice of the situation, so Embry could have avoided the trip and the expense to Embry’s client, conduct by Jenkins that had no substantial purpose other than to delay or burden a third person, creditor Conine and her counsel Embry. Arkansas Rule 4.4(a) requires that, in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

H. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr. violated Rule 8.4(c), as charged in Counts H.1, H.2, and H.3 of the Complaint, in that (H.1) knowing since the Cortinez letter of September 16, 2008, which Jenkins acknowledged with his reply letter of September 23, 2008, that Brian Foster was asserting a claim for legal malpractice against him arising out of Jenkins’ representation of Foster in the state case of Conine v. Foster, and that a personal judgment in excess of \$45,000 against Foster resulted in that matter, on December 12, 2008, Mr. Jenkins filed or caused to be filed in Foster’s bankruptcy case, No. 08-bk-75126, schedules, financial statements, and other pleadings that failed to list Foster’s malpractice claim against Jenkins, conduct by Jenkins involving dishonesty, fraud, deceit or misrepresentation; (H.2)

knowing since the Cortinez letter of September 16, 2008, which Jenkins acknowledged with his reply letter of September 23, 2008, that Brian Foster was asserting a claim for legal malpractice against him arising out of Jenkins' representation of Foster in the state case of Conine v. Foster, and that a personal judgment in excess of \$45,000 against Foster resulted in that matter, on July 23, 2009, Mr. Jenkins filed or caused to be filed in Foster's bankruptcy case, No. 08-bk-75126, schedules, financial statements, and other pleadings that again failed to list Foster's malpractice claim against Jenkins, conduct by Jenkins involving dishonesty, fraud, deceit or misrepresentation; and (H.3) knowing since the Cortinez letter of September 16, 2008, which Jenkins acknowledged with his reply letter of September 23, 2008, that Brian Foster was asserting a claim for legal malpractice against him arising out of Jenkins' representation of Foster in the state case of Conine v. Foster, and that a personal judgment in excess of \$45,000 against Foster resulted in that matter, on July 28, 2009, Mr. Jenkins filed or caused to be filed in Foster's bankruptcy case, No. 08-bk-75126, schedules, financial statements, and other pleadings that again failed to list Foster's malpractice claim against Jenkins, conduct by Jenkins involving dishonesty, fraud, deceit or misrepresentation. These amended schedules were filed by Jenkins after the meeting with creditors for Foster on July 24, 2009, at which Jenkins denied that Foster may have a malpractice claim against Jenkins and that attorney Cortinez of Little Rock may have been employed by Foster to assert Foster's claim against Jenkins. Arkansas Rule 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

H.4. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr. did not violate Rule 8.4(c), as charged in Count H.4 of the Complaint.

I. By a unanimous vote, that the conduct of N. Donald Jenkins, Jr. violated Rule 8.4(d) in that Jenkins' conduct in filing Foster's bankruptcy case, in spite of Jenkins' obvious and inherent conflict in attempting to represent Foster while Foster had a potential and disclosed-to-Jenkins malpractice claim against Jenkins, resulted in the bankruptcy court having to devote additional and unnecessary court time and resources to the conflict and issue of removal of Jenkins as Foster's counsel in two cases, conduct by Jenkins that was prejudicial to the administration of justice. Arkansas Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

By a unanimous vote, Panel B finds that the conduct found proven is "serious misconduct" as defined by Sections 17.B.2 and 17.B.3 of the Procedures (2011). Member Dunham would also find that "serious misconduct" under Sections 17.B.4 and 17.B.5. Member Orton would join Mr. Dunham on Section 17.B.5.

III. SANCTIONS

As to the sanctions to be imposed:

1. Five members (Crane, Hodges, Kelly, Morris, and Mourton) voted for a license suspension of twenty-four (24) months, which is imposed. Member Orton voted for a thirty-six (36) month suspension. Chair Dunham voted for a sixty (60) month suspension.

2. The sanction assessed here is enhanced based on Respondent's disciplinary history.

3. By a unanimous vote, no restitution was ordered.

4. Five members (Dunham, Kelly, Morris, Mourton, and Morris) voted for a \$5,000.00 fine, which is imposed under Section 18.B of the Procedures. Members Crane and Hodges voted for a

\$10,000.00 fine.

5. The Office of Professional Conduct moved for the allowance of costs, under Section 18.A of the Procedures, as follows:

A. Standard minimum case costs of \$50.00;

B. The expense of three transcripts (one from Pulaski Circuit Court in CV-06-6952 (\$169.40); and two from US Bankruptcy Court No. 09-ap-07076 (\$211.05 and \$228.25) ordered in the hearing case, totaling \$608.70; and

C: The actual costs of the court reporter's services for the hearing - \$500.00 invoiced;

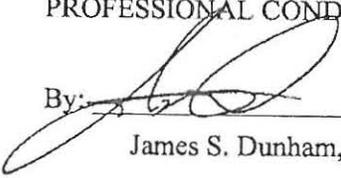
all costs totaling \$1,158.70. The Panel Chair found the costs presented to be reasonable and ordered them assessed against Respondent Jenkins.

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 **NEWTON DONALD JENKINS, JR.**, Arkansas Bar ID# 94231, be, and hereby is, **SUSPENDED FOR TWENTY-FOUR (24) MONTHS** for his conduct in this matter, and he is **FINED \$5,000.00, and ASSESSED TOTAL COSTS OF \$1,158.70.**

The suspension shall become effective on the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court. The \$5,000.00 fine and \$1,158.70 costs assessed herein shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct within thirty (30) days of the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court.

ALL OF THE ABOVE IS SO FOUND & ORDERED.

ARKANSAS SUPREME COURT COMMITTEE ON
PROFESSIONAL CONDUCT - PANEL B

By: 

James S. Dunham, Chair, Panel B

Date: 9-8-2011
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