

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
09 DHC 22

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

TOLLY ALBERT KENNON, III,
Attorney,

Defendant

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND CONSENT ORDER
OF DISCIPLINE

This matter was considered by a hearing committee of the Disciplinary Hearing Commission composed of Sharon B. Alexander, Chair, and members Robert F. Siler and Michael J. Houser. Jennifer A. Porter represented Plaintiff, the North Carolina State Bar. Defendant, Tolly Albert Kennon, III, was represented by James E. Ferguson, II and Jacob H. Sussman. Both parties stipulate and agree to the findings of fact and conclusions of law recited in this consent order and to the discipline imposed. Defendant freely and voluntarily waives any and all right to appeal the entry of this consent order of discipline. Based upon the stipulations of fact and the consent of the parties, the hearing committee hereby finds by clear, cogent, and convincing evidence the following

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar ("State Bar"), is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar (Chapter 1 of Title 27 of the North Carolina Administrative Code).

2. Defendant, Tolly Albert Kennon, III ("Kennon" or "Defendant"), was admitted to the North Carolina State Bar in 2000, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Rules of Professional Conduct.

3. Kennon was properly served with process and the matter came before the hearing committee with due notice to all parties.

4. During all or part of the relevant periods referred to herein, Kennon was engaged in the practice of law in the State of North Carolina and maintained a law office in Charlotte, Mecklenburg County, North Carolina.

5. During all or part of the relevant periods referred to herein, Kennon was admitted to practice in the United States District Court for the Western District of North Carolina and represented defendants in criminal cases before said court.

6. Kennon was appointed by the United States District Court for the Western District of North Carolina to represent the criminal defendants in the cases of *United States v. Archavis Briann Moore*, 3:05-CR-0028-RJC (hereinafter "the *Moore* case"), and *United States v. Salvador Castenada-Abrego*, 3:06-CR-00378-FDW (hereinafter "the *Castenada-Abrego* case").

7. In the *Moore* case, A.L. was subpoenaed by the government to appear and testify at trial against Kennon's client, Mr. Moore.

8. A.L. contacted Kennon's office after receiving the subpoena.

9. Kennon did not represent A.L.

10. In or about mid-to late November 2005, Kennon advised A.L. of his opinion that the subpoena was not valid and that she could choose not to appear as stated on the subpoena.

11. Kennon further told A.L. that her testimony in court would not be beneficial to Mr. Moore's case and suggested that she could leave the jurisdiction.

12. Kennon did not advise A.L. to seek the advice of an independent attorney.

13. In the *Castenada-Abrego* case, law enforcement officers attempted to talk with T.L. as a potential witness against Kennon's client, Mr. Castenada-Abrego.

14. T.L. contacted Kennon's office and discussed with Kennon the attempts of the law enforcement officers to talk with her.

15. Kennon did not represent T.L.

16. In or about early December 2006, Kennon told T.L. she did not have to talk with the law enforcement officers. Kennon further told T.L. that T.L. should direct law enforcement officers to contact him if they wished to speak with her.

Based upon the above stipulated facts and with the consent of the parties, the hearing committee hereby enters the following

CONCLUSIONS OF LAW

1. All the parties are properly before the hearing committee and the committee has jurisdiction over Defendant, Tolly Albert Kennon, III, and the subject matter.

2. Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline as follows:

- (a) By advising A.L. concerning the government's subpoena, by advising A.L. she could choose to not honor the government's subpoena, and by telling A.L. her testimony would not be beneficial to Mr. Moore's case and suggesting to A.L. that she could leave the jurisdiction, Kennon gave legal advice to an unrepresented person whose interests were in conflict or had a reasonable possibility of being in conflict with those of Kennon's client in violation of Rule 4.3, acted to unlawfully obstruct another party's access to evidence in violation of Rule 3.4(a), counseled a witness to leave the jurisdiction for the purpose of being unavailable as a witness in violation of Rule 3.4(b), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d); and
- (b) By advising T.L. concerning the attempts by law enforcement officials to talk with her, by instructing T.L. she did not need to not talk with law enforcement officials, and by directing T.L. to have those law enforcement officials contact him instead, Kennon gave legal advice to an unrepresented person whose interests were in conflict or had a reasonable possibility of being in conflict with those of Kennon's client in violation of Rule 4.3, acted to unlawfully obstruct another party's access to evidence in violation of Rule 3.4(a), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

Based upon the stipulations of fact and the consent of the parties, the Hearing Committee hereby finds by clear, cogent, and convincing evidence the following additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. Courts rely on the cooperation and participation of witnesses to provide relevant testimony for cases to be fairly and impartially heard and resolved.

2. The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against improperly influencing witnesses and the other restrictions set out in Rule 3.4.

3. Courts rely on attorneys, as officers of the court, to follow the applicable rules and procedures to ensure the fair and impartial consideration of cases and the administration of justice. Courts are vulnerable to attorneys who fail to comply with the applicable rules and procedures, thereby compromising both the courts' ability to fairly and impartially resolve contested matters and the appearance of fair and impartial consideration so integral to our system of justice.

4. T.L. and A.L. were vulnerable at the time Kennon improperly provided advice to them, because as lay people they were not knowledgeable of their rights, obligations, and possible positive and negative consequences to them concerning subpoenas, court appearances, and interviews with law enforcement personnel.

5. An attorney exercising reasonable judgment would have recognized that A.L. and T.L. had interests which were potentially divergent from Kennon's clients.

6. Under Rule 4.3, Kennon should have advised A.L. and T.L. to seek advice from an independent attorney when they approached him on the issues described herein.

7. T.L. and A.L. would have benefited from seeking the advice of independent legal counsel on their rights, obligations, and possible positive and negative consequences to them concerning subpoenas, court appearances, and interviews with law enforcement personnel.

8. Despite Kennon's advice, A.L. honored the subpoena. If A.L. had failed to appear in response to the subpoena, she would have been exposed to criminal liability for her actions. Furthermore, her failure to appear would have had an adverse impact on the government's case, forcing the government to find and present by alternate means the information she would have presented in her testimony.

9. T.L. did not speak with law enforcement officials prior to the scheduled hearing in federal court. T.L. testified at the hearing, and testified in a manner that led the judge to find her not credible.

10. Kennon has been previously disciplined by the State Bar. In 2003, Kennon was reprimanded by the Grievance Committee of the North Carolina State Bar for conflict of interest in violation of Rule 1.9. Kennon was reprimanded in that instance for undertaking representation of a woman in a divorce, support, and child custody case against a former client who Kennon had earlier represented in a previous divorce. The interests of the second wife were materially adverse to those of the former client and Kennon had obtained confidential information from the prior representation of the former client that would have been pertinent to his representation of the second wife. An attorney exercising reasonable judgment would have recognized that representing this former domestic client's current wife against the former client was a conflict of interest.

11. Kennon has acknowledged the wrongful nature of his conduct in the instant case by his stipulation of the facts contained herein and by his consent to the conclusions of rule violations and the discipline imposed herein.

12. Kennon had only been licensed as an attorney in North Carolina for six years when this misconduct occurred.

13. Kennon has been fully cooperative and compliant with the State Bar's regulatory process throughout this matter.

14. The hearing committee has carefully considered all of the different forms of discipline available to it, including admonition, reprimand, censure, suspension, and disbarment, in determining the appropriate discipline to impose in this case.

Based upon the foregoing Findings of Fact, Conclusions of Law, Findings of Fact Regarding Discipline, and with the consent of the parties, the hearing committee hereby enters the following additional

CONCLUSIONS REGARDING DISCIPLINE

1. Kennon's misconduct is aggravated by the following factors:
 - a. Prior disciplinary offense;
 - b. A pattern of misconduct;
 - c. Multiple offenses; and
 - d. Vulnerability of the victims, to wit: the unrepresented persons of A.L. and T.L., and the court.
2. Kennon's misconduct is mitigated by the following factors:
 - a. Absence of a dishonest or selfish motive;
 - b. Full and free disclosure to the hearing committee and cooperative attitude toward the proceedings;
 - c. Inexperience in the practice of law; and
 - d. Remorse.
3. Kennon's actions caused significant potential harm to the administration of justice, by undermining the court's access to all available relevant information necessary for a full, fair, and impartial consideration of the matters at issue.

4. Kennon's actions caused significant potential harm to T.L. and A.L., by compromising their opportunity to be advised by independent legal counsel representing their best interests in the matters at issue.

5. Had T.L. received advice from independent counsel and had her interests represented in the matter, she might not have engaged in the conduct that ultimately led to her being found not credible.

6. Kennon's actions caused significant potential harm to A.L. Kennon exposed A.L. to potential criminal liability had she followed his advice and not honored the subpoena.

7. The hearing committee has considered all lesser forms of sanctions available to it and finds that suspension is the only appropriate discipline in this case, for the following reasons:

- a. Kennon has been previously disciplined for conduct which in essence compromised the interest of another for the interest of his current client. Yet Kennon's conduct in this case consists of another two incidents in which he potentially compromised the interests of two unrepresented individuals to further the interests of his clients. In each instance, a lawyer exercising reasonable judgment would have recognized the conflict or potential conflict inherent in the situation. Kennon either repeatedly failed, despite the prior reprimand, to exercise reasonable professional judgment or he willfully compromised the interests of third parties. This pattern shows more severe discipline is needed to ensure Kennon does not repeat such conduct, for the protection of the public and future clients;
- b. Kennon's conduct shows a disregard for the applicable rules and procedures for court proceedings and his obligations as an officer of the court in such proceedings;
- c. Entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the misconduct Kennon committed and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar of this State.

8. The hearing committee has considered lesser alternatives and finds that a public censure, reprimand, or admonition would not be sufficient discipline because of the gravity of the significant potential harm to A.L., T.L. and the administration of justice caused by Kennon's conduct in the two cases described herein, and the threat of significant potential harm Kennon poses to the public, including potential harm stemming

from his pattern of instances in which he fails to understand or appreciate his obligations as an attorney to those other than his current client, including to the court and to individuals with interests potentially adverse to his clients.

9. The hearing committee therefore concludes that the only sanction in this case that can adequately protect the public and the administration of justice is an active suspension of Kennon's license for a period of time.

Based upon the foregoing Findings of Fact, Conclusions of Law, and additional Findings of Fact and Conclusions Regarding Discipline, and with the consent of the parties, the hearing committee hereby enters the following

ORDER OF DISCIPLINE

1. Defendant, Tolly Albert Kennon, III, is hereby suspended from the practice of law in North Carolina for three years, beginning 30 days from the date of service of this order upon Defendant.

2. Defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon Defendant.

3. Defendant shall comply with the wind down provisions contained in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124(b) of the North Carolina State Bar Discipline & Disability Rules. Defendant shall file an affidavit with the Secretary of the North Carolina State Bar within 10 days of the effective date of this order, certifying he has complied with the wind down rule.

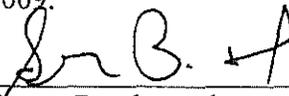
4. Costs of this action are taxed to Defendant. Defendant must pay the costs of this action within 30 days of service of the statement of costs by the Secretary.

5. At the conclusion of the three year active suspension of his license, Defendant may apply to be reinstated to the practice of law by filing a petition with the Secretary of the North Carolina State Bar demonstrating compliance with the general provisions for reinstatement set forth in 27 N.C. Admin. Code Chapter 1, Subchapter B § .0125(b) and demonstrating the following by clear, cogent, and convincing evidence:

- a. That he properly wound down his law practice and complied with the terms of 27 N.C. Admin. Code Chapter 1, Subchapter B § .0124 of the State Bar Discipline & Disability Rules;
- b. That he paid the costs of this proceeding within 30 days of service of the statement of costs upon him;
- c. That he has kept the North Carolina State Bar Membership Department advised of his current business and home address;

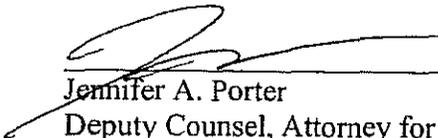
- d. That he has accepted receipt of all communications from the North Carolina State Bar and that he has responded to all communications from the North Carolina State Bar received after the effective date of this order within 30 days of receipt or by the deadline stated in the communication, whichever is sooner;
- e. That he took 10 hours of CLE on conflicts of interest, addressing conflicts between current, former, and/or prospective clients, with no more than 3 hours being in an online format; and
- f. That he has not violated the Rules of Professional Conduct or the laws of the United States or any state.

Signed by the Chair with the consent of the other hearing committee members,
this the 18 day of September, 2009.



Sharon B. Alexander
Chair, Disciplinary Hearing Committee

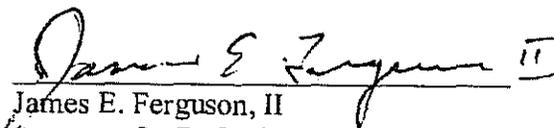
CONSENTED TO BY:



Jennifer A. Porter
Deputy Counsel, Attorney for Plaintiff



Tolly Albert Kennon, III
Defendant



James E. Ferguson, II
Attorney for Defendant



Jacob Sussman
Attorney for Defendant