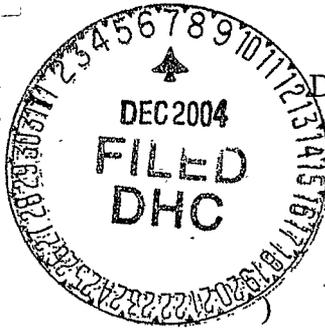


Hoke 13905
Graves 13513

NORTH CAROLINA

WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF
THE NORTH CAROLINA STATE BAR
04 DHC 15

The North Carolina State Bar,
Plaintiff

v.

David F. Hoke and
Debra C. Graves, Attorneys,
Defendants

Order of Discipline

This matter was heard on the 23rd and 24th days of September 2004 before a hearing committee of the Disciplinary Hearing Commission composed of Stephen E. Culbreth, Chair; Karen Eady-Williams, and Marguerite P. Watts. The defendants, David F. Hoke and Debra C. Graves, were present and represented by James B. Maxwell. The plaintiff was represented by David R. Johnson and Margaret Cloutier, Deputy Counsels. Based upon the stipulations of fact and evidence introduced at the hearing and the arguments of counsel, the hearing committee hereby enters the following:

Findings of Facts

1. The Plaintiff, the North Carolina 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 promulgated thereunder.

2. The Defendant, David F. Hoke (hereafter "Hoke"), was admitted to the North Carolina State Bar on 21 March 1987, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the rules, regulations and Rules of

Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. The Defendant, Debra C. Graves (hereafter "Graves"), was admitted to the North Carolina State Bar on 23 August 1986, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the rules, regulations and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

4. During all or a portion of the relevant periods referred to herein, both Hoke and Graves were actively engaged in the practice of law in Wake County, North Carolina as attorneys with the North Carolina Attorney General's Office in the Special Prosecutions Division. At present, David F. Hoke serves as Assistant Director of the North Carolina Administrative Office of the Courts and Debra C. Graves is a Senior Assistant Federal Public Defender for the Eastern District of North Carolina.

5. On 14 April 1995, the decomposing body of Allen Ray Jenkins (hereafter "Jenkins") was discovered in his home in the Town of Aulander, Bertie County, North Carolina. Upon discovery of Jenkins' body, investigators from the Aulander Police Department, the Bertie County Sheriffs Department and the State Bureau of Investigation began an investigation into the circumstances of the death of Jenkins as a homicide. The lead investigator for this effort was Senior Agent Dwight Ransome (hereafter "Ransome") of the State Bureau of Investigation.

6. In the three to four weeks immediately after discovery of Jenkins' body, law enforcement officers interviewed individuals about Jenkins as to when he might last have been seen and in whose company, if anyone. Notes of these interviews were made by the investigating officers and these notes were ultimately transcribed into official SBI reports. Copies of all these SBI reports were distributed to Ransome for his file and to David Beard (hereafter "Beard"), District Attorney for Bertie County. The SBI records center retained a copy of each report as well.

7. Among the witness interview reports prepared by investigators were 16 transcribed reports of 18 individuals (two husband and wife interviews were reported in one report each) in which the individuals interviewed had indicated to law enforcement officers that they had last seen Jenkins alive at some point in time after 3 April 1995. The dates on which these particular witnesses said they had seen Jenkins alive ranged from 6 April 1995 through 10 April 1995.

8. Relatively early in the investigation, Crystal Morris (hereafter "Morris") and Shanna Hall (hereafter "Hall"), ages 15 and 16, became a focus of interest of law enforcement officers. Morris and Hall were reported to have been frequent visitors to Jenkins' home and they were interviewed by law enforcement officers on numerous occasions. At one point, Ransome arranged for Gary Scott (hereafter "Scott"), the boyfriend of Morris, to record telephone conversations with her discussing Jenkins and his murder. At least one such conversation was taped on 17 May 1995.

9. Morris and Hall first implicated and later identified James Alan Gell (hereafter "Gell") as the individual who had shot and killed Jenkins with Jenkins' own shotgun. They told law enforcement officers that they were present at Jenkins' house and one of them indicated that she witnessed the murder take place. According to Morris and Hall, the murder occurred on 3 April 1995.

10. On 20 July 1995, Dr. M. G. F. Gilliland of the Medical Examiners Office in Greenville, North Carolina, informed investigators that she had concluded, based on maggot larvae size, that the date of Jenkins' death was more consistent with a date of death of April 3 than April 10.

11. The reports of sightings after April 3 conflicted with the Medical Examiners' conclusion and, if the murder occurred after 3 April 1995, Gell could not have been the perpetrator as he was either out of state or in jail.

12. Thereafter, Ransome re-interviewed 7 of those individuals he, personally, had previously interviewed who had given a date of last seeing Jenkins alive after April 3. Ransome

also re-interview one witness, the wife from one of the couple interviews, who had been originally interviewed by another officer. In each of those 8 re-interviews, the witnesses indicated that they could have been mistaken in their original statement or that they could have seen Jenkins last alive on or before April 3.

13. On 31 July 1995, Gell was arrested and charged with first degree murder in the death of Jenkins. Hall and Morris were also arrested and charged in connection with the same murder.

14. Two local attorneys were initially appointed to represent Gell for what District Attorney Beard had designated as a capital case. By the Fall of 1995, at least one of the originally appointed attorneys had withdrawn and the appointed attorneys representing Gell were Teresa Smallwood and Charles Moore. In November and December 1995, Beard's office had provided some voluntary discovery to the defense, including lab reports, test results, and reports of interviews and statements from Gell, Hall, and Morris.

15. On 2 January 1996, Beard requested that the North Carolina Attorney General assume the prosecution of Gell. On 16 January 1996, the Attorney General, through William N. Farrell, Jr., notified Beard that the Attorney General would accept the responsibility for the Gell prosecution. At some time between 16 January 1996 and 13 February 1996, Hoke was assigned by the Attorney General's Office to represent the State of North Carolina in the Gell prosecution. Beard retained responsibility for prosecuting Morris and Hall.

16. At some time shortly after 15 February 1996, Beard forwarded a copy of the prosecution file from his office to the Attorney General's office and it was delivered to Hoke. This file became Hoke's "working file" that he used up to and throughout the trial of Gell in February 1998. At some point after February, 1996, Hoke requested a copy of the complete SBI file from the SBI Records Division and received that file on 21 May 1996. At no time after 21 May 1996, up to and through the date of the trial commencing on 2 February 1998, did Hoke ever compare the SBI file that was received on or about 21 May 1996 with the file that he had previously received from Beard's office to see if the contents differed.

17. At some time between May 1996 and January 1997, Graves was assigned by the Attorney General's Office to serve as co-counsel with Hoke. As such, Hoke and Graves jointly assumed the role of prosecutor in a criminal proceeding and both appeared on behalf of the State and were equally responsible for the conduct of the prosecution on behalf of the State.

18. On 1 May 1996, Gell's then current defense counsel, Teresa Smallwood, filed a motion in the matter seeking to obtain any exculpatory or favorable materials from the State pursuant to the constitutional requirements first established in the case of *Brady v. Maryland*, 373 U.S. 83 (1963). Such material is commonly referred to as "*Brady*" material. Hoke did not provide any materials to Smallwood in response to that motion.

19. Both Hoke and Graves understood that Beard had what is commonly referred to as an "open file policy" in his office. If such a policy existed, it would have meant that defense counsel for Gell would have had access to any and all law enforcement notes of interviews, lab reports and other documents developed in the course of the investigation before Hoke and Graves had become involved in the prosecution. However, the Attorney General's Office did not observe an open file policy and, accordingly, Hoke and Graves did not provide such access to the investigatory file to defense counsel after they were assigned to the case. Neither Hoke nor Graves ever personally confirmed with David Beard that he had an open file policy in this case nor did they ever confer with any of Gell's defense counsel to determine if they had, in fact, had access to the file before Hoke and Graves were assigned to the case.

20. The taped telephone conversation between Morris and Scott, which had been recorded in May 1995, was not transcribed until November 1996 and a copy of that typed transcript was provided to Hoke and Agent Ransome. While Hoke and Graves never heard or listened to the actual tape of that telephone conversation, they did review the transcript of that telephone conversation. Although Hoke and Graves admit that they thought that the transcript could have potential impeachment value for cross-examination of the state's eyewitnesses, they did not believe that it constituted *Brady* material. They concluded that neither the transcript nor the tape needed to be provided to defense counsel before trial and did not provide it at any time before or during the trial.

21. On 7 September 1997, there was a hearing before the Hon. Cy Grant involving approximately 16 motions that had previously been filed by Smallwood and rulings were made on each. Included in those motions was Smallwood's 26 May 1996 *Brady* motion and an order was entered by Judge Grant requiring the State to produce all exculpatory evidence "to the extent that the State of North Carolina is required to comply with the statutory requirements of North Carolina law, as well as with the U. S. Supreme Court in the case of *Brady v. Maryland* and *U.S. v. Agnew*. [sic] To that extent, they are required to provide exculpatory evidence that they have in their files or in their possession." In that same hearing, the Court appointed Maynard Harrell (hereafter "Harrell") as substitute lead counsel, replacing Smallwood.

22. Before 7 September 1997 and the entry of the various orders issued by Judge Grant referred to above, both Hall and Morris had entered pleas of guilty to Second Degree Murder. They were expected to testify against Gell at his trial.

23. The Gell trial was scheduled to begin on Monday, 2 February 1998. On 30 January 1998, Harrell, filed a second request for exculpatory evidence and specifically requested the statements of all known witnesses who had said they saw Jenkins alive after 3 April 1995, the alleged date of the Jenkin's death.

24. When Judge Meyer informed Hoke and Graves of Harrell's motion dated January 30, 1998, Graves advised the court that the State was aware of some statements in the SBI files from individuals who had at one time indicated that they thought they had last seen Jenkins alive after 3 April 1995, but she further advised Judge Meyer that according to her information when they were re-interviewed, they could not be specific, and the State did not feel the statements were exculpatory.

25. At the conclusion of the hearing on Harrell's motion, the Court ordered Hoke and Graves to produce for *in camera* inspection "the statements of any witness who allegedly saw the deceased after the date of the 3rd day of April, 1995, and let me review them. If there are multiple statements of the same witness, I want to read all of the statements."

26. At the time of the court's order, the SBI files in Hoke and Graves' possession and control of Defendants contained 24 reports of interviews with 18 witnesses who had on at least one occasion said that they had seen Jenkins alive after 3 April 1995. Sixteen of the 24 SBI reports of these 18 witnesses were made between 14 April 1995 and 8 May 1995. The remaining 8 reports were of interviews of 8 of these same witnesses conducted in July 1995.

27. Defendants conferred with Agent Ransome in the courtroom during a recess and located 8 reports describing the initial interviews with 9 witness and 8 additional reports of re-interviews with 8 of those same individuals in July. Defendants provided those 16 reports (out of 24) to the court for an *in camera* inspection during the lunch break on the first morning of trial. There were 8 additional statements attributed to witnesses from interviews conducted by law enforcement officers other than Agent Ransome in the SBI file that were not produced.

28. In discussions that Defendants had with Agent Ransome before 2 February 1998, both Hoke and Graves were aware that Agent Ransome had interviewed some individuals who had initially reported seeing Jenkins alive after April 3. They were also aware that according to Agent Ransome, when he re-interviewed these witnesses, they had changed their mind or equivocated on the date. Graves recalled reading reports of such witness interviews involving patrons and personnel of a restaurant.

29. Defendants did not personally review the witness statements in either the original SBI investigatory file in possession or control of Agent Ransome or the duplicate in their possession to determine which statements would be produced under the court order. The Defendants did not personally verify that the 16 reports produced were the only witness reports or statements that should have been produced by examining the file themselves.

30. While Hoke and Graves produced the 16 reports of interviews and re-interviews to Judge Meyer in response to his order to submit "any and all statements" of witnesses who might have said they saw Jenkins alive after 3 April 1995, Hoke and Graves failed to comply with Judge Meyer's order by failing to produce the 8 additional reports of interviews with 9 additional individuals in the SBI files.

31. Two days into the jury selection, February 4, Agent Ransome located another statement of a 10th witness and Graves voluntarily provided it to defense counsel on that date and so advised Judge Meyer. Agent Ransome assured Hoke and Graves that all of the reports of the witnesses whose statements were subject to Judge Meyer's order had been produced when, in fact, they were not. Hoke and Graves did not instruct Ransome to conduct a thorough review of the SBI file to identify the statements that were required to be produced nor did they review the SBI file themselves.

32. Gell was convicted and the jury sentenced him to death. On or about 11 October 2000, after Gell's appeals were conducted, new lawyers were appointed to handle the investigation into and preparation of a motion for appropriate relief. At that time the Attorney General's office provided a copy of the entire file which included the "working file" from Beard's office that Hoke and Graves used during trial, as well as the entire SBI file that had been delivered to the Attorney General's office on 21 May 1996. The prosecution file contained the additional witness statements or reports from the SBI that Hoke and Graves had not produced to the court or the defense and the transcript of the taped telephone conversation between Scott and Morris.

33. Gell filed a motion for appropriate relief with the court alleging, in part, that the State had failed to comply with the order of the court to provide all exculpatory evidence to the defense by failing to provide the other witness statements and the tape recording of the telephone conversation between Scott and Morris. On 16 December 2002, the Court awarded Gell a new trial based, in part, on Defendants' failure to produce the witness statements and the tape recording.

34. Despite having the complete SBI file, at no point before, during, or after the trial did either Defendant compare the contents of the file received from Beard's office with the SBI file.

35. During Hoke and Graves' preparation for trial, they learned that the file they received from Beard was incomplete when Agent Ransome referred to an individual whose name was not familiar to either Hoke or Graves and whose transcribed interview they had not read or

did not remember. When they returned to their offices in Raleigh, they went to their duplicate SBI file, located the statement of that witness, reviewed it, and concluded that it was irrelevant for any purposes thereafter, but they did not then compare the contents of the file received from Beard with the SBI file to determine if there were any other reports that they had not read.

36. After Judge Grant's Order of September 1997 to furnish all Brady material to Gell's counsel, Hoke and Graves did nothing to determine whether Judge Grant's Order had been or would be complied with. Hoke and Graves did not ask defense counsel what materials, if any, they had received from Beard before Hoke and Graves' involvement in the case after the order had been issued.

37. Defendants relied on Agent Ransome to assist them in complying with Judge Meyer's order of 2 February 1998 to produce all such witness statements, but such reliance was misplaced. At no time after 2 February 1998, and during the continuing trial, did either Hoke or Graves personally and independently examine every interview in the SBI file.

Based upon the foregoing **Findings of Fact**, the hearing committee enters the following:

Conclusions of Law

1. All parties are properly before the hearing committee and the committee has jurisdiction over the Defendants and the subject matter.
2. The Defendants' conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:
 - (a) By failing to produce all exculpatory witness interview reports when the Defendants had a duty under the Rules of Professional Conduct and existing case law to know the contents of the investigation files in the possession of the State and its agents, Defendants failed to make timely disclosure to the defense of all evidence or information known to the

prosecution that tends to negate the guilt of the accused, in violation of Rule 3.8(d);

- (b) By failing to verify the accuracy of the assertion of SBI Agent Ransome that all of the witness statements that needed to be produced were in fact produced, Defendants failed to make reasonable efforts to ensure that a nonlawyer's conduct over which Defendants had direct supervisory authority was compatible with Defendants' professional obligations, in violation of Rule 5.3(b); and
- (c) By failing to produce all exculpatory witness statements as required by both the Rules of Professional Conduct and by the order of the court, Defendants engaged in conduct prejudicial to the administration of justice, in violation of Rule 8.4(d).

Based upon the foregoing **Findings of Fact** and **Conclusions of Law** and upon the evidence and arguments of the parties concerning the appropriate discipline, the hearing committee hereby makes these additional

Findings of Fact Regarding Discipline

1. The Defendants, through the office of the Attorney General of North Carolina, fully and freely provided all SBI and Attorney General files to Mr. Gell's post-trial attorneys and exhibited a cooperative attitude to and with the State Bar throughout these proceedings.
2. The Defendants have both established reputations for honor and integrity, throughout their professional careers as was attested to by present and former Judges of the North Carolina Supreme Court, Court of Appeals, Judges of the Superior Court, past officers of the State Bar, former members of the Disciplinary Hearing Commission and their peers.

3. The failure of Defendants to locate all 24 recorded interview transcripts and deliver them to Judge Meyer was a failure on their part to personally and carefully review the entire SBI file and supervise Agent Ransome in his efforts to locate all statements.
4. Defendants have no prior discipline. The conduct in this matter occurred more than six years before this hearing with no known misconduct during that interval. This appears to be an isolated violation of the Rules of Professional Conduct with little chance of repetition.

Based on the **Findings of Fact and Conclusions of Law** above and the additional **Findings of Fact Regarding Discipline**, the Hearing Committee makes the following:

Conclusions with Respect to Discipline

1. There were no aggravating factors.
2. Defendants' violations of the Rules of Professional Conduct are mitigated by the following factors:
 - (a) Absence of prior disciplinary record;
 - (b) Absence of dishonest or selfish motive;
 - (c) Timely and good faith efforts to rectify the consequences in that they cooperated with the counsel in the motion for appropriate relief;
 - (d) Full and free disclosure to the Hearing Committee and a cooperative attitude toward this proceeding;
 - (e) Inexperience in the prosecution of capital cases;
 - (f) Excellent character and reputation;

(g) Delay in the disciplinary proceeding through no fault of theirs; and

(h) Remorse.

3. The mitigating factors outweigh the aggravating factors.

4. The Defendants' conduct caused harm or potential harm to the profession, to the administration of justice, and to the public, but a censure is not required based on the mitigating factors.

Based upon **Findings of Fact and Conclusions of Law**, the **Findings of Fact Regarding Discipline, and the Conclusions with Respect to Discipline**, the hearing committee hereby enters the following:

Order of Discipline

1. The Defendants are hereby reprimanded in the attached Reprimand.

2. The Defendants shall pay all costs of this proceeding permitted by law, including the costs of their depositions, within thirty days of service of notice of the amount of costs as assessed by the Secretary.

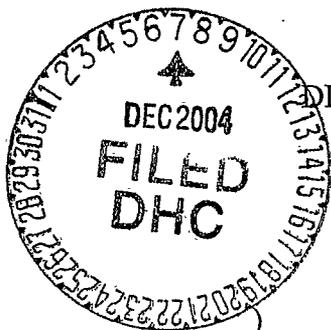
Signed by the undersigned hearing committee chair with the consent of the other hearing committee members.

This the 2nd day of December, 2004.


Stephen E. Culbreth, Chair
Disciplinary Hearing Committee

NORTH CAROLINA

WAKE COUNTY



BEFORE THE
 DISCIPLINARY HEARING COMMISSION
 OF
 THE NORTH CAROLINA STATE BAR
 04 DHC 15

The North Carolina State Bar,
 Plaintiff

v.

David F. Hoke and
 Debra C. Graves, Attorneys,
 Defendants

Reprimand

Following a hearing on the 23rd and 24th days of September 2004, a Hearing Committee of the Disciplinary Hearing Commission issued an Order of Discipline imposing a Reprimand against you based on your conduct as found in the above captioned matter.

A Reprimand is a formal, written form of discipline issued in cases in which the attorney has violated one or more provisions of the Rules of Professional Conduct and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the hearing committee has determined that the misconduct does not require more serious discipline.

As Chair of the hearing committee that heard this matter, it is my duty to issue this Reprimand to you. I trust that you will fully understand the spirit in which this duty is performed.

For purposes of this Reprimand, I am summarizing the Findings of Fact in the Order of Discipline as follows:

You were both assigned to conduct the State's prosecution of capital murder charges against James Alan Gell in Bertie County in 1996. Shortly after that assignment, you were provided with a copy of the investigative file from the District Attorney for Bertie County. You were also provided with a complete copy of the SBI file directly from the SBI office. You decided to use the material you received from the District Attorney as your working file even though you made no effort to compare the files to verify that your working file was complete.

The SBI file contained 16 reports of interviews with 18 witnesses who said that they had seen the victim alive after the alleged date of death of April 3, 1995. These interviews had been conducted contemporaneously with or soon after the discovery of the victim's body on April 14, 1995. The SBI file also contained 8 reports of re-interviews with 8 of these same witnesses in July, 1995 specifically concerning the question of when they had last seen the victim alive. Ms.

Graves admitted that she had read and knew of at least some of these witness statements before the start of trial.

You were both aware that the *Brady* rule required you, as prosecutors, to produce to the defense exculpatory information from your files. In September 1997, you were ordered by the court to produce all exculpatory or *Brady* information to the defense. You admit that you did not produce any information to the defense in response to that order. You had a duty under both the Rules of Professional Conduct and the established case law to know the contents of your file, which should have contained the witness interview reports. This duty cannot be avoided by a failure on your part to become knowledgeable of what your file contains. These interview reports obviously reflected information that the victim may have been alive after the alleged date of death or at a time when Gell was known to be in jail or out of state and these witness statements were clearly *Brady* material.

Gell's trial began on 2 February 1998. On the morning trial began, you were informed by the Court that Gell's attorneys had filed a motion to compel you to turn over any statements of witnesses who had said they had seen the victim alive after April 3, 1995. The Court then ordered you to produce all such statements for *in camera* inspection. You and the SBI agent went through the SBI file in a side room adjacent to the courtroom during a break, reviewed the SBI file with the agent, and then produced to the Court only those reports involving those witnesses who the agent had re-interviewed in July 1995. As a result, you produced 8 reports of 9 witnesses plus the re-interview reports of 8 of those witnesses to the Court before the lunch recess that first day of trial. The judge reviewed the produced statements during the lunch recess and ordered them to be provided to the defense when Court resumed. Despite the order of the Court to produce all statements, you did not instruct the agent to conduct a more thorough review of the file after that initial production of statements to make sure that all of the statements had been produced. Two days later, the Agent produced another report of a witness interview that you furnished to the defense, one of a witness who had not been re-interviewed, and reported it to the Court. Despite this disclosure of another witness statement, you did not instruct the agent to conduct a complete review of the file. Further, you did not conduct your own review of the file for such statements at any time.

The Hearing Committee concluded that your conduct violated three of the Rules of Professional Conduct. By failing to produce all of the witness statements when you had a duty to do so, you failed to make timely disclosure to the defense of all exculpatory evidence or information known to the prosecution in violation of Rule 3.8(d). By failing to verify the accuracy of the assertion by the SBI agent that all witness statements that needed to be produced were in fact produced, you failed to make reasonable efforts to ensure that a nonlawyer's conduct over which you had supervisory authority was compatible with your professional obligations in violation of Rule 5.3(b). Finally, by failing to produce all exculpatory witness statements as required both by the Rules of Professional Conduct and by the order of the Court, you engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

The Hearing Committee found that there were a number of mitigating factors in deciding the level of discipline to be imposed, especially your reputation for excellent character and your lack of any prior discipline. The Hearing Committee also believed that your misconduct in this case was out of character and an aberration. As a result, the Hearing Committee believed that

more serious discipline was not warranted. The Hearing Committee was mindful that other prosecutors have received stayed suspensions for failing to disclose exculpatory evidence, but concluded that the aggravating circumstances of those cases were not present here. The Hearing Committee felt that you had learned from this experience and would not repeat your mistakes.

The Hearing Committee also believes that there was no clear, cogent, and convincing evidence that your conduct was intentional even though it violated your statutory, Constitutional, and ethical duties. The Committee was mindful that this view was shared by one of Mr. Gell's counsel, who prior to the new trial granted to Mr. Gell informed you in October of 2002 that "it was not now, nor has it ever been, our theory that ...you...engaged in any form of prosecutorial misconduct." The Committee also knows that Mr. Gell's counsel then filed a motion to dismiss for prosecutorial misconduct in the Bertie County Superior Court in June 2003 concerning your failure to disclose the witness statements and that Judge Grant, who had earlier granted Mr. Gell a new trial based on your failure to disclose the witness statements, denied the defense's motion in December 2003.

Although the Hearing Committee believes the mitigating factors precluded more serious discipline, the Hearing Committee reminds you that attorneys must conduct themselves with honesty and integrity at all times, especially in assuring that direct orders of the court are complied with. As officers of the court, it is your responsibility to obey the court's orders. The Hearing Committee trusts that you will take this Reprimand to heart, benefit from it, and never again violate the Rules of Professional Conduct.

Signed by the Chair with consent of all committee members, this the 2nd day of December, 2004.


Stephen E. Culbreth, Chair
Disciplinary Hearing Committee