SUPREME COURT OF KENTUCKY
KBA FILE 13785

KENTUCKY BAR ASSOCIATION — COMPLAINANT

vs.

STANLEY M. CHESLEY — RESPONDENT

REPORT OF TRIAL COMMISSIONER

I. THE CHARGE

Pursuant to SCR 3.190, the Inquiry Commission charges that Stanley M. Chesley, whose Kentucky Bar Association member number is 11810, engaged in professional misconduct by violating the following nine ethical rules:

1. SCR 3.130-1.5(a)
2. SCR 3.130-1.5(c)
3. SCR 3.130-1.5(e)
4. SCR 3.130-1.7
5. SCR 3.130-1.8(g)
6. SCR 3.130-3.3(a)
7. SCR 3.130-8.1(a)
8. SCR 3.130-8.3(c)
9. SCR 3.130-5.1(c)(1)

Each rule will be specifically quoted in the Conclusions of Law.

II. THE PROCEEDINGS

A hearing regarding these charges began on November 5-6, and 12-13, 2009, with Judge Rod Messer presiding as the Trial Commissioner. Present representing the KBA were Linda Gosnell, Esq., Carey Howard, Esq., and other staff members of the Bar. The Respondent Stanley Chesley was present on some of the days with counsel (appearing at various times), Kent Westberry, Esq., James Gary, Esq., Frank Benton, IV, Esq., Scott Cox, Esq., Mark Miller, Esq., and the Honorable Susan Dlott, wife of the Respondent.

Prior to the hearing, testimony of video depositions from five witnesses located out of the state were provided to the Trial Commissioner. These video recordings were entered of record at the hearing. In this initial hearing 44 exhibits were introduced by the Complainant through the out-of-state testimony of John Vardaman, Esq., Heidi Levine, Esq., Helene Madonick, Esq., all three of whom represented the Defendant in the underlying action, American Home Products. Also presented was the deposition of Faye Stilz, Esq., an employee of the Respondent Chesley, and Frank Dominguez, a representative of one of the banks in which the settlement funds from the underlying action were held.

Approximately one week into the hearing, Judge Messer learned of a potential conflict and recused with respect to the Respondent Chesley, but continued with the charges against David Helmers. Subsequently, on March 9, 2010, this Trial Commissioner was appointed to continue the hearing with respect to the Respondent Chesley. That hearing resumed on September 13-15, 20-24, 2010. Prior to the hearing this Trial Commissioner reviewed all the pertinent records including the pleadings, the depositions mentioned above, and all of the testimony given at trial prior to Judge Messer's recusal. Again the KBA was represented by Ms. Gosnell and Mr. Howard, along with Bar Counsel paralegals. The Respondent was present and represented by Mr. Gary, Mr. Benton, Mr. Cox, Mr. Miller, Esq., and Sheryl Snyder, Esq. Forty-three witnesses gave testimony either by deposition or in person. The Trial Commissioner also considered 124 exhibits.

At the conclusion of the hearing Counsel requested a briefing schedule. This motion was granted, the transcript prepared, and briefing was concluded and the case was submitted to the Trial Commissioner on January 31, 2011.

III. FACTUAL HISTORY

Both the Board of Governors and the Supreme Court are no doubt familiar with many of the underlying events that led to these charges against the Respondent Chesley from their review of the disciplinary cases of the other plaintiffs' counsel in the underlying action. These counsel include Shirley Cunningham, Melbourne Mills, William Gallion, and David Helmers. The actions of the presiding judge, Joseph Bamberger, are also before the Court in disciplinary proceedings taken against him. The Judicial Conduct Commission also took action against Judge Bamberger, which resulted in his resignation from the bench. We will focus therefore on a review of some of the facts in this case as they relate specifically to the Respondent Chesley.

Chesley has argued and would have the Trial Commissioner believe that he was brought into this case by plaintiffs' other counsel for a very limited purpose of lending his "expertise" to the case in acquiring a favorable settlement from the Defendant, American Home Products (hereinafter AHP.) This argument is misleading and not supported by the facts.

The lawsuit at issue in this proceeding, Darla Guard, et al or Jonetta Moore, et al versus A.H. Robins Company, et al, (herein after the Guard case) was filed in Boone Circuit Court as Civil Action Number 98-CI-759 in 1998. Counsel of record in that action were William Gallion, Shirley Cunningham, and Melbourne Mills. The action was filed and certified as a class action complaint on behalf of individual named plaintiffs and

"all those similarly situated" in Kentucky who claimed injury from certain diet drugs commonly referred to as the fen-phen drugs. Cunningham and Mills, primarily through advertising, had signed up hundreds, if not thousands of potential clients for the tort claims against the manufacturer of the fen-phen drugs, AHP, and a doctor who prescribed the drugs in Kentucky, Dr. Rex Duff. Gallion, who had previously shared offices with Cunningham, was brought in as a litigator who would prepare the case and try it. David Helmers was his associate.

Near the same time as the filing of the Guard case, many similar diet drug cases were being filed in many jurisdictions across the country. Most were being consolidated in a federal court action as multidistrict litigation (MLD) in the Eastern District of Pennsylvania. Respondent Chesley was involved in representing plaintiffs in that federal litigation and became a member of its management committee for purposes of settlement negotiations with AHP. This federal action resulted in an agreed settlement for many diet drug cases throughout the country.

The Guard case in Boone Circuit Court, however, was not removed to the federal court and many plaintiffs in the Guard action signed opt-out agreements from the national settlement. These cases were to proceed toward trial in the Boone Circuit Court.

Shortly after the Guard case had been certified as a class action on behalf of "all Kentuckians who had consumed diet drugs prescribed by Dr. Duff," another class action (seeking a remedy of medical monitoring) was filed in Leslie Circuit Court by four attorneys, Kenneth Buckle of Hyden, Kentucky, Alva Hollon of Florida, but licensed in Kentucky, Michael Gallagher of Texas, and Robert Arledge of Mississippi. The presiding judge of the Leslie Circuit Court certified this case as a class action on the same

day it was filed. This case was styled Feltner, et al versus AHP, et al, Case Number 99-CI-127, Leslie Circuit Court. The two suits created problems for the AHP counsel as an issue arose as to whether these cases were overlapping in their certified classes. This problem seemingly was resolved, however, when the Feltner case nearly immediately was removed to the U. S. District Court for the Eastern District of Kentucky. It appeared that the Feltner case would likely be transferred to the MDL proceedings in Philadelphia.

On July 30, 1999, Respondent Chesley filed his own class action complaint in the Boone Circuit Court styled Courtney, et al versus AHP, et al, Case Number 99-CI-842. His clients included three individuals. Two weeks later Respondent Chesley filed a motion to consolidate his case with the Guard case. The Guard counsel, including Gallion, strongly objected to this motion to consolidate. Interoffice memos between Helmers and Gallion at this time reveal their strong objection to any attempt by Chesley to enter their case.

Next, while the Feltner case was under stay in the federal court pending a possible transfer to the MDL in Philadelphia, Respondent Chesley entered his appearance as counsel for that plaintiff class on September 29, 1999, in that case. Shortly thereafter, on October 12, a notice of an Agreed Order to Remand the case to Leslie Circuit Court was entered. Attorney Buckles' signature on the order of remand contains the initials "SMC." David Schaefer, counsel for AHP, testified that the remand had been worked with AHP by the Respondent Chesley. Upon remand of the Feltner action, cocounsel in the Feltner case quickly moved to intervene in the Guard action in Boone Circuit Court. Almost at the same time, Respondent Chesley filed a "status report" in the Courtney action in Boone Circuit regarding the current status of his negotiations with Gallion to work

together in the Courtney and Guard cases. That status report contended that the Court should consolidate Courtney and Guard despite the inability of the attorneys to come to an agreement. The status report also informed Judge Bamberger of the order to remand the Feltner case to the Leslie Circuit Court. Chesley cited this as an additional reason that his case should be consolidated with the Guard case. He failed to inform the Boone Circuit Court that it was he himself who had arranged for the remand.

Soon thereafter, Gallion and his cocounsel in the Guard case threw in the towel on their efforts to resist Respondent Chesley's entry into their case. The Guard counsel and Respondent Chesley entered into a written stipulation to consolidate and the Courtney case was thereby consolidated with the Guard action for "all purposes." Once Courtney was consolidated with the Guard class action, the Feltner matter fell by the wayside as far as any involvement by these attorneys. Many of the Feltner claims were later settled as part of an inventory settlement administered in another state. Likewise the Courtney plaintiffs were not included in the Guard settlement but were sent back to the national case. Respondent Chesley, however, had accomplished his goal of joining the class action as counsel in the Boone Circuit Court. Soon thereafter, Gallion, Cunningham, and Mills entered into a fee splitting contract with the Respondent Chesley and one other Cincinnati attorney who had some clients in the class action. This agreement (KBA Exhibit 147) was reached following a negotiation of all the attorneys in a meeting in Cincinnati.

Under specific language in the agreement the attorneys agreed to be cocounsel in the Guard action, but with designated roles for the various counsel. Respondent Chesley agreed to act as "lead negotiator" in any attempts to settle the case. In this initial

agreement, if the case were successfully settled, he was to receive 27 % of the attorney fees generated by the settlement of any individual opt-out cases or a settlement of the entire class action. Gallion would be lead trial counsel in the event that the case had to be tried. If there were no settlement but the plaintiffs prevailed at trial, Chesley's portion of the attorneys' fees would be reduced to 15 %. This agreement had an expiration date of December 31, 2000. The agreement also provided a specific provision allowing all attorneys to review the fee contracts with the clients. Chesley claims that he never did this. The agreement provides that the clients are to be notified, but they were not.

During the year 2000, attempts to negotiate a settlement with AHP were fruitless. The Respondent Chesley conversed with John "Jack" Vardaman, a Washington lawyer, who represented AHP and with whom Chesley had a longstanding professional acquaintance. At the end of that year Chesley wrote a letter to Gallion requesting that their fee agreement be renewed. This renewal of the agreement was accomplished and resulted in a change in the fee splitting portion of the agreement. In the new agreement Chesley's percentage was reduced to 21 % (KBA Exhibit 148), upon a successful settlement.

Meanwhile, the Boone Circuit Court set the matter for trial in the summer of 2001. Before trial, however, the Court directed parties to make another attempt at a negotiated settlement through a mediation. All parties met for mediation for two days, April 30 and May 1 of 2001, in the offices of their mediator in Lexington, Kentucky. Counsel present for the Defendant AHP were Jack Vardaman, Helene Madonick, and local counsel David Schaefer. Counsel present for the Plaintiff class were Gallion, Helmers, the Respondent Chesley, and for the second day Cunningham. Also present

was a "trial consultant" named Mark Modlin, a longtime personal friend of the presiding judge.

In preparation for the mediation David Helmers sent both the mediators and defense counsel binders of materials relating to the medical conditions of the Kentucky opt-out clients with whom they attorneys had contracts. He also sent materials to Chesley, which included a detailed chart breaking down proposed settlement ranges for clients in these various injury categories. Included in that chart prominently near the top was a notation that the fee contract rate to be applied to the settlement amounts was 30 percent (KBA Exhibit 261). After two days of negotiation, an agreement was reached for an aggregate settlement of the Guard claims against AHP for $200 million. A settlement agreement letter was drafted by counsel memorializing this "inventory" settlement. Respondent Chesley did not sign this settlement letter agreement as one of the "settling attorneys." The only class plaintiffs included in the aggregate settlement were persons who had fee contracts with either Gallion, Cunningham, Mills, or Lawrence. This letter of agreement by its terms incorporated and contained reference to three exhibits, two of which were, at the time the letter was signed, not yet in existence. One exhibit not yet in existence was to contain the names of each individual client whose claims were settled by the aggregate agreement. The other exhibit was to be a list of the amounts to be designated to be the allocations of the total settlement fund for each of the individual clients. These allocations to the individual clients were to be determined by plaintiffs' counsel.

The settlement agreement also contained two conditions precedent to the agreement's effectiveness that could only be ratified by order of the Boone Circuit Court.

One of those conditions was the decertification of the previously certified class action and the other was the dismissal of the Guard lawsuit. The dismissal with respect to the settling plaintiffs would be with prejudice; as to all other class members who were not the opt-out clients of the settling attorneys, the dismissal was without prejudice. The agreement also referred to and incorporated a "side letter" which outlined an agreement by the settling attorneys and their clients that they would indemnify AHP for any claims brought against Dr. Duff or his clinic up to $7.5 million (no such claims were ever made). The clients were not informed of this indemnity nor in fact were they informed of any of the terms of the settlement.

On May 9, 2001, the Respondent Chesley, Gallion, Helmers, Cunningham, and David Schaefer appeared before the Boone Circuit Court to present the results of this negotiated settlement. No notice of this hearing was ever sent to a member of the class. This astonishing hearing was recorded. It would be the last of any such recorded proceedings before the Court. Before the hearing begins; counsel had presented the presiding judge with a jointly drafted and proposed Order Decertifying Class and Dismissing Action. At no point, however, either during or after the hearing did any of the lawyers provide Judge Bamberger with a copy of the letter agreement itself. Judge Bamberger's questions and the Respondent Chesley's response to those questions are well worth viewing. Chesley deftly deflects the judge's concerns about lack of notice to either the class or any of the settling clients. In spite of his concerns, Judge Bamberger signs the Order Decertifying Class and Dismissing Action that same day. This order was not filed for record with the Boone Circuit Court, however, until May 16, 2001.

Following the settlement agreement and the hearing before Judge Bamberger resulting in the Order Decertifying Class and Dismissing Action, Gallion, Cunningham, Mills, and their employees began meeting with their clients and collecting releases from them. No client was informed of the amount of the settlement or that the settlement represented an aggregate settlement for 431 individuals. They were not told that the case had already been dismissed by the Boone Circuit Court. Many of these clients have testified in this proceeding as well as other disciplinary proceedings and court actions, all to the same general effect of what they were told. Not one was ever shown the settlement document, even though some asked to see it. The disclosure requirements specifically required within the settlement document, as well as by Court rule, were essentially ignored by class counsel. The clients were threatened with dire consequences if they revealed the amounts and circumstances of their settlement to anyone, including their own families.

After obtaining the requisite percentage of client releases, David Helmers, on instructions from the Respondent Chesley, flew to New York City to hand-deliver them to the appropriate officials at AHP. Shortly after the delivery of these releases, AHP made its initial deposit of $150 million (three-fourths of the total) to a Cunningham client trust account. Shortly thereafter, on June 19, 2001, Chesley received a check for $12,372,534.37. Later on July 5 and August 4, 2001, two additional checks totaling $4,124,287.50 were mailed to Chesley. As a result of this initial distribution to class counsel, Chesley received a total of $16,497,121.87. We deem Respondent Chesley to be reasonably conversant with fifth grade arithmetic. Even a rough calculation would reveal

that the sixteen and a half million dollars received by Chesley is several million in excess of the 21 % of the attorney's fees to which he was contractually entitled.

The criminal schemes of Gallion, Cunningham, and Mills began to unravel soon thereafter. The story, well documented in other disciplinary proceedings before the Kentucky Bar, are by now familiar to both the Board of Governors and the Court. It is a sordid tale worthy of the pen of Charles Dickens were he alive and well. Alas, this tale is not fiction.

Initially, the law practice partners of both Gallion and Mills became suspicious of the handling of the proceeds from the Guard settlement. Both Michael Baker (against his former partner Gallion) and David Stuart (against his former partner Mills) brought suit alleging entitlement to proceeds from the settlement. In the course of their discussions regarding their grievances, Baker informed Stuart that the settlement had been for $200 million. This was a surprise to Stuart, and when he mentioned this to Mills, Mills was shocked. Mills had not attended the settlement negotiations and, at the time of the settlement, Gallion had lied to Mills and told him that the settlement was for $150 million. On February 6, 2002, Gallion attended an office birthday party for Mills. In a heated exchange, Mills confronted Gallion concerning the $50 million lie. He demanded that an additional distribution be made to the clients from these funds and then ordered Gallion to leave his office.

That very evening, Gallion, Cunningham, and Judge Bamberger's good friend Modlin met with the Respondent Chesley in Boone County. The party then paid a visit to Judge Bamberger in the jury room of the Boone Circuit Courthouse. No motion had been filed, no notice given, and no record made of this extraordinary ex parte meeting with the

Judge. Respondent Chesley claims that he does not recall this meeting, but his failure to recollect is not credible. The Commissioner finds by a preponderance of evidence he did attend this meeting and played a leading role in the presentation made to Judge Bamberger on that evening. Among other issues taken up with the Judge, Chesley argued the appropriateness of an application of the cy pres doctrine to dispose of "extra" funds remaining in the possession of the attorneys and provided a legal memorandum in support of this argument. He also made an argument for an order approving attorneys' fees and cited factors from a case called Grinnell v. Detroit as governing the issue. It is unclear which Grinnell case was cited. In any event, no mention was made to the Judge of the fact that the attorney's fees were governed by contracts with the clients and by a contract among the lawyers. Still Judge Bamberger at the time of this "meeting" had never been provided with settlement documents or any other financial or accounting documents in the case. The result of this extraordinary "meeting" was Judge Bamberger's oral approval of attorneys' fees totaling 49 % of the $200 million settlement as appropriate. The resulting written order was signed somewhat later.

Meanwhile, both Baker and Stuart had contacted the Kentucky Bar Association with their concerns over the handling of this settlement money. On January 30, 2002, an application requesting the Kentucky Bar's Inquiry Commission to issue subpoenas to Gallion, Cunningham, Mills, and Bank One was filed and served upon Mills. February 11, 2002, was the hearing date set for this application.

On February 11, 2002, the Inquiry Commission, over the objection of Mills' counsel, authorized issuance of the subpoena application for bank records and other records relating to the receipt and disbursement of the settlement funds from the Guard

case. That same afternoon, five wire transfers totaling approximately $59 million were made by Gallion and Cunningham from several of their personal accounts into an account at First Union Bank in the joint names of Gallion, Cunningham, and Mills.

On February 15, 2002, Judge Bamberger signed the order which he had orally agreed to a few nights previously. This order approved all attorneys' fees paid but made no mention of an amount either in numbers or percentages. This order also authorized further distributions of funds to clients of half the remaining funds, the amount of which was not specified. This order, although apparently signed on February 15, was not filed for record with the Boone Circuit Clerk until June 6, 2002.

Sometime after the "meeting" with Judge Bamberger, Respondents Chesley and Gallion both contacted David Helmers who was then established in his own firm and asked him to assist in a "second distribution" to the clients. Helmers received a letter from Respondent Chesley's office providing him with a document to show to each client and have them sign. David Helmers, along with employees from the other firms, followed these instructions with all of the clients.

On April 1, 2002, Respondent Chesley received an additional check for $4 million, not drawn on the client trust account from which his previous fees had been paid, but drawn on a different account in a bank outside of Kentucky. Respondent Chesley's fees now totaled in excess of $20 million.

Over the spring months in 2002, the Guard clients received a second distribution from their attorneys. However, Judge Bamberger's order approving the second distribution and approving additional attorneys' fees was not filed with the Boone Circuit Clerk until June 6, 2002. Concurrently with this filing, the Judge entered an order sealing

the record and restricting the Clerk's certificate of service in the Guard case to only Mills, Gallion, Cunningham, Helmers, and Chesley. All subsequent orders over the following months were mailed only to those individuals. Judge Bamberger's order approving additional attorneys' fees listed no amount and provided no accounting. Again, there was no motion, no notice and no hearing for the entry of this order.

The Respondent Chesley received this June 6, 2002, order and must have been well aware of its factual inaccuracies. He claims, unconvincingly, that he did not read it. The Respondent Chesley also was noticed on the series of subsequent orders purporting to create the nonprofit corporation funded by the undistributed remains of the settlement moneys. We now know those remaining proceeds to be $20 million, although this amount was never mentioned in an order.

On another front in 2002, William E. Johnson of Frankfort, Kentucky, was representing Mills in his response to the Kentucky Bar Association's Inquiry Commission's subpoena. Whitney Wallingford represented Gallion and Cunningham in responding to the subpoenas which they had been issued. At a meeting attended by Wallingford, Mills, Johnson, Gallion, Cunningham and Chesley, Chesley urged that all counsel from the Guard case who had received subpoenas from the Bar Association be represented by the same counsel, William E. Johnson. The Respondent Chesley attended this meeting and urged the joint representation by Mr. Johnson even though he had not received subpoenas from the Inquiry Commission. After that meeting, Wallingford agreed to withdraw as counsel for Gallion and Cunningham, but he completed a submission to the Bar on which he had previously been working. Before filing his submission, as he had been instructed, he sent a copy to Chesley for his approval. This

submission contained a chart which inaccurately and grossly inflated the amounts of money that had been paid to the clients. Chesley called Wallingford and told him to go ahead and submit it to the KBA, and Wallingford complied.

On still another front, David Stuart had filed an action against Mills relating to the dissolution of their law firm. Stuart demanded that Mills provide an accounting of the firm's total income, including amounts received from the settlement of the Guard case. As part of Stuart's discovery, Stuart's counsel had obtained a commission from the Fayette Circuit Court authorizing the out-of-state deposition of the Respondent Chesley and the authorization of an appropriate subpoena. Mediation of this lawsuit was ordered and Mills attended along with his former partner, Stuart, their respective counsel and others. The others included an employee of Mills, Rebecca Phipps, who had been in contact with Chesley in her efforts to be appointed to the Board of Directors for the Kentucky Fund for Healthy Living, the nonprofit corporation founded to dispose of the $20 million "leftover" fund. Chesley had made arrangements with Rebecca Phipps to contact him if it appeared that the parties were encountering difficulties with the settlement. Mills' offer for settlement fell short of Stuart's demand. At some point Phipps excused herself from the mediation and called the Respondent Chesley to inform him of this stalemate. Chesley informed her that he would contribute the difference to get the matter settled. Respondent Chesley ended up wiring $500,000 to a client trust account to be combined with Mills' money and then used to pay the Stuart settlement. Apparently $250,000 of that amount was later reimbursed to him from his other cocounsel, Gallion and Cunningham. Stuart's action was settled without the necessity of Respondent Chesley's deposition.

A new fire soon developed on another front. An attorney in Lexington in January 2005 filed an action in Boone Circuit Court on behalf of several of the Guard clients against the Respondent Chesley, Cunningham, Gallion, Mills and the Kentucky Fund for Healthy Living. In his response to this action, Chesley admits having acted as class counsel in the Guard case. Subsequent pleadings denied that he had ever acted as class counsel. He also filed a motion to dismiss and attached redacted copies of his fee agreements wherein language identifying him as cocounsel had been removed.

Also in 2005, when the Kentucky Judicial Conduct Commission preferred charges against Judge Bamberger for his alleged misconduct in the Guard case, the Respondent Chesley met with Bamberger to prepare for his meeting with the Commission. He attended this meeting before the Conduct Commission and apparently argued in support of Bamberger's application of the cy pres doctrine and the establishment of the Kentucky Fund for Healthy Living. After this appearance, Judge Bamberger resigned his office and has since been disciplined by the Kentucky Bar.

With the civil action against Chesley and his Guard co-counsel under way, (Abbott, et al. v. Chesley, et al., Case No. 05-CI-735, Boone Circuit Court), Chesley called his friend, Kenneth Feinberg, to enlist his assistance in obtaining an affidavit in support of the actions by co-counsel in the Guard settlement. Feinberg obtained the information for the preparation of his affidavit from Gallion. In this proceeding Feinberg disavowed the information which he provided in his affidavit and stated that if he knew what he knows now he would have thrown the affidavit in the wastebasket. He was supposed to have been paid $50,000 by Gallion, but Gallion never paid this amount. Chesley testified that he was embarrassed to discover that Gallion had not paid Feinberg,

so he gave him $10,000. Feinberg was never informed that this affidavit had been filed of record in the Abbott case by a codefendant of the Respondent.

Sometime in 2006 Chesley also dropped by the office of AHP's counsel in Washington, D.C., Jack Vardaman. He left a copy of the settlement agreement with handwritten notes attached and asked Vardaman to send him a letter along the lines of Chesley's notes. Chesley's first note read: "This case was settled as a class action. Decertification was not relevant to the collateral issues of attorneys' fees or administration of the settlement proceeds and process." Vardaman testified that this was not a true statement. Nor were other statements suggested thereon by Chesley. Vardaman wisely did not send the requested letter. (Vardaman deposition, pp. 67-71).

In late March of 2006, Respondent Chesley was informed that the Inquiry Commission was now investigating his conduct in the Guard case. The Commission requested written responses to a number of questions. The Commission received its responses on May 9, August 8 and October 4, 2006. The Respondent's responses are in some instances misleading, other instances incomplete, and in some instances outright falsehoods. These responses will be dealt with individually in the conclusions of law.

On December 4, 2006, the Inquiry Commission issued its Complaint of Misconduct against Respondent Chesley and this hearing ensued.

IV. CONCLUSIONS OF LAW

The Respondent Chesley is charged with violating three provisions of Kentucky's Rules of Professional Conduct with respect to his collection in the Guard case of fees in excess of $20 million.

1. Supreme Court Rule 3.130-1.5(a) provides in pertinent part:

> "[a] lawyer's fee shall be reasonable. Some 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 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 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; (8) Whether the fee is fixed or contingent."

Without question the Respondent's acceptance of fees of more than $20 million in this litigation is unreasonable and a violation of the above quoted rule. Not only is the Respondent's fee part and parcel of the grossly unreasonable fees collected by the lawyers in this case in light of what the clients had contracted to pay, it is ethically unreasonable under the above criteria per se. The evidence presented by Vicki Hamm based upon the financial records of the transactions documenting the fees paid by counsel to themselves is unrefuted. Even a simplistic calculation of what Chesley was entitled to under the contractual agreements with the clients is somewhat less than $13 million, not in excess of $20 million. Respondent Chesley was present and participated in argument to Judge Bamberger wherein the Judge approved fees in the case of 49 %. In fact, he argued the holdings of the Grinnell case to Judge Bamberger. In that case a fee of 15 percent was reversed as excessive. The greed evidenced by the plaintiffs' attorneys in this case is astounding, and Chesley, although his avarice may not be as breathtaking as that of Cunningham, Gallion and Mills, is culpable of unethical conduct under this rule.

2. Supreme Court Rule 3.130-1.5(c) provides in pertinent part:

> "[a] fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Such a fee must meet the requirements of Rule 1.5(a). A contingent fee agreement shall be in writing and should state the

> method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon recovery of any amount in a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and showing the remittance to the client and the method of its determination."

Without question the Respondent Chesley has violated this ethical standard. All the clients in this class action had contractual contingency fee agreements with class counsel. These fees were either for 30 % or 33 1/3 %. Under the contractual agreements counsel were also permitted to charge expenses up to 3 %. All attorney fees in the Guard case should have been calculated from the total recovery of each individual client based upon the contractual percentage agreed to by that client. The above quoted rule was completely ignored by all class counsel. Chesley participated with his co-counsel in charging a 49 % contingency fee to these clients with no accurate written statement of the fees, expenses or method of determining the fee provided to anyone. Chesley's contractual agreement with class counsel was for 21 percent of fees upon successful settlement of the case. Ms. Hamm's chart based upon the financial records of these transactions clearly demonstrates what Chesley's fees should have been under these contingent fee contracts. Chesley's share should have been $12,941,638.46. This amounts to a bit more, (a relative term in these circumstances), than his initial payment on June 19, 2001. The circumstances of the later payments is of record. Of course the final $4 million payment came only after Chesley lent his critical assistance in persuading Judge Bamberger to sign the order approving the unjustified fees after their unrecorded

meeting in Boone County. Chesley was paid some $7,555,000 in excess of his proper fee calculations under the contracts.

3. Supreme Court Rule 3.130-1.5(e) provides in pertinent part:

> "[a] division of a fee between lawyers who are not in the same firm may be made only if: (1) (a) The division is in proportion to the services performed by each lawyer or, (b) By written agreement with the client, each lawyer assumes joint responsibility for the representation; and (2) The client is advised of and does not object to the participation of all lawyers involved; and (3) The total fee is reasonable."

The Respondent Chesley has violated the above quoted rule in numerous respects. No client was ever advised of Chesley's participation nor ever given an opportunity to object. Chesley himself took no measures to ensure compliance with this rule and made no inquires concerning advice to the clients. As noted above the total fees are clearly unreasonable. Chesley argues that he was hired to represent Gallion, Cunningham and Mills in this case – not the class. This argument is belied by all the actions and documents in the case. The obligation to inform the clients and obtain their consent to a division of fees among lawyers from different firms lies with all the lawyers involved. The lack of notice to, and advice and consent of, the clients in the Guard class was obvious to all class counsel. Indeed, Chesley's own expert witness was at a loss to explain how this rule had been followed.

4. Supreme Court Rule 3.130-1.7 provides in pertinent part:

> "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless: (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) Each client consents after consultation. (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; and (2)

> The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

The Commissioner cannot find a clear violation of this rule in the evidence. Bar counsel argues violation of this ethical principle in two respects. First, the Respondent Chesley and other counsel in the Guard action, agreed to the decertification of the case and a dismissal "without prejudice" with respect to the 70 "unknown" members of the Guard class without notice of either the May hearing before the Boone Circuit Court or notice after entry of the order. Without question the identity of these 70 opt-out class members could have been discovered from AHP. But the obligations of class counsel with respect to such notice under Civil Rule 23 or any other legal principle is unsettled. Notice, in our view, is the better rule, but some jurisdictions hold otherwise.

Second, Bar counsel argued that Chesley's actions in settling three other individual claims for severely injured plaintiffs who suffered from PPH as a result of ingesting fen-phen drugs conflicted with his representation of the Guard class. Although such practices merit close examination, this Commissioner can find no evidence that these settlements affected or impacted the aggregate settlement made for the 431 members of the Guard class in any adverse way.

5. Supreme Court Rule 3.130-1.8(g) provides in pertinent part:

> "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients…., unless each client consents after consultation, including disclosure of the existence and nature of all the claims…and of the participation of each person in the settlement."

A more egregious violation of this ethical rule by all plaintiff counsel in the Guard case is difficult to imagine. This includes the Respondent Chesley. The settlement agreement itself specifically provides contractually for compliance with this rule by the "settling" attorneys. Chesley points out that he did not sign the settlement agreement as one of the "settling" attorneys, even though he was noticed with the final agreement. It is important to note that this ethical rule exists separately from the settlement agreement and is an independent requirement in and of itself in any aggregate settlement. There is no evidence in the record that clients were consulted concerning the aggregate settlement before, during or after the mediation before it was presented to the Boone Circuit Court. No notice was given to either settling claimants or those 70 who were dismissed without prejudice. Respondent Chesley does not escape liability for this rule simply because he had the foresight not to sign the settlement document. He was class counsel pursuant to his agreement with Cunningham, Gallion and Mills. Chesley was fully aware that his clients had not been informed concerning the settlement at the time the agreement was reached and afterward. He was fully aware that no notice had been sent to the settling clients prior to the hearing on May 9, 2001, in Boone Circuit Court. Chesley himself bamboozled Judge Bamberger with his often non-sensical answers to the Judge's queries about notice. The actions of the Respondent Chesley and his co-counsel were deliberate and dishonest. Their failure to comply with this rule demonstrates their true motivation – to get the money and run – rather than to protect the interest of their clients.

6. Supreme Court Rule 3.130-3.3(a) provides in pertinent part:

> "[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) Fail to disclose a material fact to the tribunal when disclosure is necessary to avoid a fraud being perpetrated upon the tribunal..."

The Respondent Chesley violated this ethical rule by his participation in the "meeting" with Judge Bamberger in the jury room of the Boone Circuit Courthouse in 2002. He participated in the argument that the Grinnell case provided legal authority justifying attorney's fees totaling 49 % of the total recovery of $200 million. Chesley knew at this time that his clients all had contractual agreements for attorney's fees much less than this amount. He was aware that there was no notice given and that the presentation was being made to the judge behind closed doors and off the record. He made no effort to disclose to the Court that the attorneys had contingency fee contracts.

Chesley also provided a written memorandum arguing the application of the cy pres doctrine to create a charitable fund for what the attorneys described for the Judge as "extra" settlement funds. This doctrine clearly had no proper legal application to the aggregate settlement in the Guard action.

Furthermore, in the May 9, 2001, hearing he argued to Judge Bamberger that no notice was needed to the class members of the agreement to settle the case and decertify the class. This decision had significant legal ramifications for both the 431 who settled and for the 70 who did not. He also argued for dismissal of the action without notice to any members of the class. Chesley was presented to the Court as the "expert" in these class action matters. He mislead the Court regarding notice while knowing full-well that his clients had neither been informed of the settlement nor had given their consent.

7. Supreme Court Rule 3.150-8.1(a) provides in pertinent part:

> "...a lawyer...in connection with a disciplinary matter, shall not: knowingly make a false statement of material fact."

Respondent Chesley has violated this ethical provision in several instances. In making his responses to questions asked him during the investigation into his conduct in

the Guard litigation by the Inquiry Commission of the Kentucky Bar, Respondent's answers were incomplete, misleading and/or false. He answered Bar questions in letters dated May 9, 2006, and August 8, 2006 (KBA Exhibits 266 and 270). In answering a question regarding his communications with other Guard attorneys or Judge Bamberger regarding the appropriateness of the use of the

cy pres doctrine, Chesley gave a seriously distorted reply. He made no mention of his off-the-record meeting with Judge Bamberger in February 2002 wherein he presented legal authority supporting the appropriateness of a cy pres fund. His answer to the next question, Number 15, is false and misleading wherein he denies any communications of any nature with Judge Bamberger regarding the establishment of a charity or nonprofit entity to disburse any funds from the Guard settlement. Again no mention is made of his participation in the 2002 courthouse "meeting". His answer to Question 16 is untruthful. Chesley was well aware that there would be a second distribution prior to his receipt of the $4 million check. He himself had called David Helmers asking him to assist in the second distribution. An employee of his law office delivered a letter to Helmers to have the clients sign in the course of this distribution. His answers to Question 17 and 18 are not truthful. He in fact did communicate with counsel regarding the second distribution of funds and met with Judge Bamberger in this secret 2002 meeting to discuss the second distribution. Experienced counsel in his office participated in drafting the deceptive letter to be given to the Guard clients upon receipt of a second distribution. These answers were egregious misrepresentations, if not outright lies, to the Inquiry Commission.

8. Supreme Court Rule 3.150-8.3(c)(now 8.4) provides in pertinent part: that it

is misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Clearly from the evidence, Respondent Chesley believed that he would be able to "take his money and run" after the settlement and avoid any responsibility in the distribution of the settlement to the clients. When he became aware of the misdeeds of Cunningham, Gallion and Mills, his responsive actions all became part of an attempt to conceal and cover up their misdeeds. Chesley must have been fully aware of the fraud perpetrated by his accepting fees far in excess of what he was entitled to under his contractual arrangement. He was fully aware that no accounting had been made to the clients or to the Court. Rather than taking actions to correct these misdeeds, to inform his clients and the Court, and to disgorge ill gotten gain, Chesley acted with dishonesty, deceit and misrepresentation in assisting his co-counsel in their efforts to conceal what had transpired. His entire course of conduct was one of self-interest and self-preservation of both himself and his co-counsel. His actions set out above evidence a complete lack of concern for his clients and the proper and just application of the law.

9. Supreme Court Rule 3.150-5.1(c)(1) provides in pertinent part:

> "[a] lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct only if: The lawyer orders or, with knowledge of specific conduct, ratifies the conduct involved..."

Respondent Chesley has violated this ethical provision in numerous respects. Chesley had to have learned that the settlement fund had not been properly administered and distributed to the clients when he learned after Mills' confrontation with Cunningham that a second distribution would be required. That evening he along with Gallion and Cunningham met with Judge Bamberger in their off-the-record "meeting". Chesley's

actions in attending that meeting and all actions he took subsequently were designed to assist his co-counsel in a "cover-up" of their thievery. It is clear from the evidence that from this point on Chesley became "counsel in chief". He attended meetings to settle David Stuart's suit against his former partner Mills and made a significant contribution to that settlement in order to avoid depositions and publicity. Counsel were instructed to obtain his approval before sending documents to the Inquiry Commission and he specifically approved a document sent by Whitney Wallingford to the KBA which was later determined to contain false and misleading information. He assisted Judge Bamberger in his presentation to the Judicial Conduct Commission. He accepted an additional $4 million fee after his "meeting" with Judge Bamberger to argue for an order allowing the second distribution and approval of attorneys' fees up to 49 %. From February of 2002 on the evidence clearly demonstrates that the Respondent Chesley was involved in, and at many points primarily orchestrating, the attempts of his co-counsel to conceal their fraud.

V. RECOMMENDED SANCTIONS

SCR 3.380 provides the following degrees of discipline upon findings of ethical violations defined in the Supreme Court Rules:

> "Upon findings of a violation of these rules, discipline may be administered by way of private reprimand, public reprimand, suspension from practice for a definite time with or without conditions as the Court may impose, or permanent disbarment."

Respondent Chesley took more than $7 million in fees beyond his contractual agreement with his co-counsel. These fees came not from the portions allotted to co-counsel, but from the Guard clients themselves. He took these fees with no notice to the

Guard clients and with no disclosure or accounting in any court proceeding or court order. Indeed, $4 million of these fees, his "bonus", came only after his clandestine "meeting" with Judge Bamberger wherein he participated in urging the Court's blanket approval of attorneys' fees totaling 49 % of the $200 million settlement funds. Chesley's greed may not be as eye-popping as that of his co-counsel, Gallion and Cunningham, but it is no less egregious.

It is difficult to discern exactly when Chesley must have become aware of the criminal enterprise undertaken by Gallion and Cunningham, but it is clear from the evidence that well before he received his $4 million "bonus", he was fully aware that a major portion of the funds had not been properly distributed to the clients. He willingly and actively participated in the February 6, 2002, "meeting" with Judge Bamberger in order to get the Court's stamp of approval upon this criminal enterprise. He subsequently received all orders signed by Judge Bamberger containing many statements which Chesley knew to be false and inaccurate. Never in any instance did Chesley, the experienced class action "expert", take action properly to inform the Court or his Guard clients that something was amiss. Every action taken by Chesley after this meeting with Judge Bamberger was calculated to assist in the cover-up of these misdeeds by Gallion, Cunningham and Mills. His callous subordination of the interests of his clients to his own greed is both shocking and reprehensible. His actions justify a permanent disbarment from the Kentucky Bar Association.

Bar Counsel have argued aggravating circumstances in this case. Other Kentucky disciplinary cases have called for consideration of aggregating factors in determining discipline. The ABA standards for imposing lawyer sanctions provides a guide as a

model system to assist in the determination of proper sanctions. These ABA standards have been cited favorably by the Kentucky Supreme Court. [See Anderson v. KBA, 262 SW 3rd 636 (Ky. 2008)]. The relevant aggravating circumstances are as follows:

"9.2 Aggravation

9.21 Definition. Aggravation or aggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.
9.22 Factors which may be considered in aggravation.
Aggravating factors include:

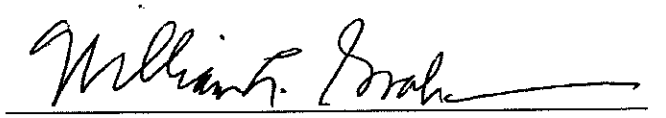
(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution."

With the exception of factors (a) and (e), all these factors apply emphatically to the Respondent.

Counsel for Chesley argue that mitigating factors exist in his favor. Indeed, he has never been disciplined by any bar association in a long and distinguished career. But his character witnesses and his prior unblemished record are insufficient to mitigate Chesley's egregious conduct in this case.

It is furthermore appropriate that Chesley disgorge the $7,555,000.00 excess fees which he received in this case. This sum should be provided as restitution to his clients either through the auspices of the Abbott case, should those clients prevail, or some other means designed by the Court.

This the 22nd day of February, 2011.



HON. WILLIAM L. GRAHAM
TRIAL COMMISSIONER

Certificate of Service

I certify that the original of this Report of Trial Commissioner was filed with the Disciplinary clerk of the Kentucky Bar Association, 514 West Main Street, Frankfort, Kentucky 40601-1883 this 22nd day of February, 2011.

HON. WILLIAM L. GRAHAM
TRIAL COMMISSIONER