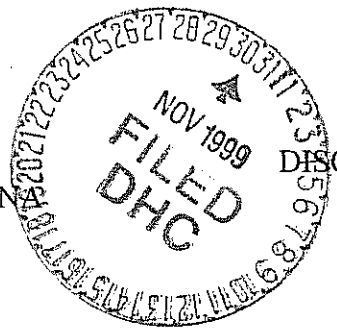


WAKE COUNTY

NORTH CAROLINA

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
99 DHC 19

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| THE NORTH CAROLINA STATE BAR<br>Plaintiff | |
| v. | FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF DISCIPLINE |
| J. WES COVINGTON, ATTORNEY<br>BRIAN BEASLEY, ATTORNEY<br>RALPH STRICKLAND, ATTORNEY<br>Defendants | |

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This matter came on to be heard and was heard before a Disciplinary Hearing Committee of the Disciplinary Hearing Commission composed of Richard T. Gammon, Chair; Elizabeth Bunting and Anthony Foriest on Oct. 27 – 30, 1999. James B. Maxwell represented Defendant J. Wesley Covington; Richard Watson represented Defendant Ralph Strickland; and Edward Embree represented Defendant Brian Beasley. Root Edmonson and Carolin Bakewell represented the N.C. State Bar.

Based upon the evidence and the stipulations, the Hearing Committee hereby makes the following:

## Findings of Fact

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, J. Wesley Covington (hereafter, Covington), was admitted to the North Carolina State Bar in 1981, 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, Brian T. Beasley (hereafter, Beasley), was admitted to the North Carolina State Bar in 1997, 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. The Defendant, Ralph B. Strickland, Jr., (hereafter, Strickland), was admitted to the North Carolina State Bar in 1975, 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.

5. During all of the relevant periods referred to herein, all Defendants were actively engaged in the practice of law in the State of North Carolina and maintained offices for the practice of law in the City of Durham, Durham County, North Carolina.

6. All Defendants were properly served with process herein and the Disciplinary Hearing Commission had jurisdiction over the persons of all Defendants and over the subject matter of this proceeding.

7. On Feb. 6, 1998, Dr. Kenneth A. Podger, Jr. (hereafter, Dr. Podger), was arrested and charged with driving while impaired (DWI) in Durham, N.C.

8. Prior to Dr. Podger's arrest, Durham police Officers Mike Evans and R. A. Wiggins (hereafter Officer Evans and Officer Wiggins) observed Dr. Podger operating a vehicle on Highway 147 in Durham. Officers Evans and Wiggins detained Dr. Podger after they saw Dr. Podger's vehicle skid and spin around in the northbound lane of Highway 147.

9. After detaining Dr. Podger, Officer Wiggins administered several field sobriety tests to Dr. Podger, all of which Dr. Podger failed.

10. After Officers Evans and Wiggins stopped Dr. Podger, a third police officer, Officer Terry Cullinan, (hereafter, Officer Cullinan), responded to their call for assistance. Upon Officer Cullinan's arrival, he arrested Dr. Podger and Officers Evans and Wiggins left the scene. Officer Cullinan recognized Dr. Podger has his personal dentist, but did not offer Dr. Podger any leniency or special consideration based upon this relationship.

11. Office Cullinan did not personally observe Dr. Podger operating his vehicle on Feb. 6, 1998.

12. Following his arrest, Dr. Podger submitted to a chemical breath test, which revealed that he had a blood alcohol level of .15. Thereafter, Dr. Podger was charged with DWI.

13. In 1992, Podger had been charged with driving while impaired and subsequently entered a plea of guilty to DWI in July 1992. Consequently, Podger's 1998 arrest was his second DWI charge within 7 years.

14. Within a week or two after Dr. Podger's Feb. 6, 1998 arrest, Covington undertook to represent Dr. Podger respecting the 1998 DWI charges.

15. Shortly after Dr. Podger retained Covington to represent him respecting the 1998 DWI charge, Covington told Dr. Podger that Covington was a close friend of Jim Hardin (Hardin), the elected District Attorney in the 14th Judicial District. Covington indicated that if anybody could do anything for Dr. Podger in his current circumstances, that Covington could, by virtue of his relationship to Hardin.

16. Covington also told Dr. Podger that there were "ways around" the DWI charge pending against Dr. Podger and that it was possible that some favorable result might be achieved in the case. Covington further stated that if the case "worked out" as hoped, Dr. Podger would be pleased and that he should be "grateful." Dr. Podger interpreted this remark to mean that Covington desired him to make some contribution to Hardin.

17. In the spring of 1998, Covington conferred with Officer Evans and Officer Cullinan about Dr. Podger's arrest. Covington was therefore aware that only Officer Evans and Officer Wiggins had seen Dr. Podger drive. Covington also acknowledged to Officer Evans that the state had had probable cause to stop Dr. Podger on Feb. 6, 1998.

18. Covington asked Officer Evans if he would be displeased if Covington resolved Dr. Podger's case without Officer Evans being present. Officer Evans stated that he did not have a problem with that, but that he (Officer Evans) would appear in court if he was subpoenaed to appear.

19. In July 1998, Covington met with Strickland, who was then an Assistant District Attorney in the 14th Judicial District and was chiefly responsible for the negotiation of traffic matters in district court. Covington told Strickland that he represented Dr. Podger and that Dr. Podger was facing his second DWI charge in seven years. Covington also told Strickland that Podger had "spun out" on the Durham freeway and that he had blown a .15 on the breathalyzer test following his Feb. 6, 1998 arrest.

20. During the July 1998 meeting, Covington asked Strickland to dismiss the DWI charge against Dr. Podger and permit Dr. Podger to plead to a charge of careless and reckless driving. Strickland declined this request.

21. Nevertheless, Strickland advised Covington that Durham County District Court Judge Craig Brown (hereafter, Brown) had recently entered a judgment of careless and reckless driving following the trial of a DWI case involving a Duke professor named Debraeckleer, despite the fact that Debrackleer was not charged with careless and reckless driving. Strickland also agreed that Covington could request Judge Brown to hear Dr. Podger's DWI case.

22. At the time of the July 1998 meeting and conversation, Strickland and Covington were aware that careless and reckless driving was not a lesser included offense of DWI. Both were also knew that Judge Brown could not properly enter a judgment of careless and reckless driving in Dr. Podger's case, unless the state dismissed the DWI charge and filed a new misdemeanor statement of charges against Dr. Podger.

23. Strickland, Covington and Beasley were aware that it was the written policy of James Hardin, the District Attorney of the 14th Judicial District (hereafter, Hardin), not to "break down" any DWI cases in which the defendant's blood alcohol level at the time of arrest exceeded .09. It was also Hardin's policy to require his staff to try all DWI cases in which the defendant had a prior DWI conviction, even if it was obvious that the state could not win the case owing to a flaw in the state's evidence. Beasley had no authority to "break down" any DWI case.

24. In late August 1998, William C. Fleming Jr. (hereafter, Fleming) joined Covington's law firm as an associate. In the first day or two of Fleming's employment with Covington's firm, Covington bragged to Fleming of Covington's close friendships with Hardin and Brown. Covington also instructed Fleming to tell potential new clients that Covington had an "in" with the DA's office and could therefore "get things done" in criminal cases that other lawyers were unable to accomplish.

25. On Sept. 1, 1998, at Covington' request, Fleming accompanied Covington to the Durham County Courthouse.

26. While at the courthouse, Covington sought out Judge Brown and asked to discuss a matter with him. During this conversation, which took place in a hall outside a courtroom, Covington told Judge Brown that he represented a dentist named Dr. Podger who had been charged with DWI earlier in 1998 after "spinning out" on the Durham Freeway. Covington stated that Dr. Podger had pled guilty to a DWI charge in 1994, although he had had a blood alcohol level of .08 in the prior case. Covington asked Judge Brown to hear Dr. Podger's case on Thursday, Sept. 3, and to impose a judgment of careless and reckless driving in the pending DWI case. Covington suggested that Dr. Podger should have been permitted to plead to careless and reckless driving in the earlier case and that it would therefore be equitable to enter a judgment of careless and reckless driving in the 1998 case. Covington indicated that he had spoken to the District Attorney's staff and that they did not object to the imposition of a judgment of careless and reckless driving.

27. Covington further advised Judge Brown that Podger was a rich dentist, that he had paid a "huge fee" in the pending DWI case and that if Judge Brown convicted Dr. Podger of careless and reckless driving only, a part of the fee would "flow to the appropriate campaigns." Fleming interpreted that statement to mean that part of the fee paid by Dr. Podger would be donated to political campaigns for Hardin and/or Judge Brown. After this discussion, Judge Brown agreed to hear the Dr. Podger case on Thursday, Sept. 3, 1998 and to find Dr. Podger guilty of careless and reckless driving.

28. Although he was originally assigned to traffic court for the week of Aug. 31 – Sept. 4, 1998, Judge Brown was re-assigned to domestic violence court for that week and a visiting judge was assigned to traffic court.

29. After the hallway conversation with Judge Brown, Covington and Fleming proceeded to Strickland's office. Beasley, who was an Assistant District Attorney in the 14th Judicial District primarily assigned to traffic court, was present in Strickland's office for at least a portion of the conversation.

30. Covington told Strickland that Judge Brown had agreed to hear Dr. Podger's case at noon on Sept. 3, 1998. Strickland asked Covington who the State's witness would be. Covington told him that the State would call the arresting officer on the scene as the witness in the case. This step would leave missing a vital link in the state's case against Dr. Podger, since Officer Cullinan had not witnessed Dr. Podger drive on the night of his arrest. Strickland agreed that Covington would be responsible for getting the State's witness to the hearing on Sept. 3.

31. Beasley offered to handle the Podger case for the State, whereupon Strickland told him that he might not want to do it because the case was one which Beasley "would have to lose."

32. Between January 1998 when he began work at the District Attorney's Office and September 1998, the only DWI cases which Strickland had tried were those matters which the State could not win, owing to a fatal defect in the State's case. Because of the District Attorney's policy regarding DWI cases, it was Strickland's practice to call these cases, sometimes referred to as "losers," for trial and permit the judge to dismiss the case against the defendant.

33. As of September 1998, Beasley had been employed with the Durham County District Attorney's office for approximately 11 months. During that time period he had been chiefly responsible for handling traffic cases in district court and had tried approximately 160 – 180 DWI cases.

34. After leaving Strickland's office, Covington invited Fleming to accompany him to the office of Ann Robinson, the secretary for the Superior Court judges in Durham County.

35. Covington inquired into Ms. Robinson's health and she responded that she was in considerable pain and stated that she "could use some Valium."

36. Covington told Ms. Robinson that he would obtain some Valium for her, whereupon he telephoned Upchurch's Drugstore and asked the pharmacist on duty to prepare 6 or 8 dosages of Valium and to charge it to his (Covington's) bill. Covington indicated that the Valium was for a friend and stated that Ms. Robinson would come by later in the day to pick up the Valium.

37. Covington ordered the Valium with the intent and purpose of giving the Valium to Ms. Robinson.

38. After ordering the Valium from Upchurch's Pharmacy, Covington telephoned his personal physician, Dr. Eugene Wright, and asked Dr. Wright to telephone Upchurch's Pharmacy to authorize the prescription for the Valium. Covington did not tell Dr. Wright that Covington intended to give the Valium to Ms. Robinson or any other individual.

39. Ms. Robinson was not a patient of Dr. Wright's and Dr. Wright would not have telephoned in a prescription for the Valium if he had known the medication was for someone other than Covington.

40. On the morning of Sept. 2, 1998, Fleming telephoned Carl Fox, the elected District Attorney in District 15B, for whom Fleming had worked while Fleming was in law school. Fleming told Fox what he had seen at the Durham County Courthouse on Sept. 1, 1998 and sought Fox's advice concerning the appropriate course of conduct.

41. At Fox's suggestion, Fleming reported what he had witnessed on Sept. 1, 1998 to the State Bureau of Investigation (SBI). The SBI began an investigation of the matter and suggested that Fleming accompany Covington to court on Sept. 3, 1998 when Dr. Podger's case was set for resolution.

42. On the morning of Sept. 3, 1998, Covington told Fleming to come with him "to see a bogus trial." Fleming accompanied Covington and Dr. Podger to the Durham County Courthouse.

43. Podger's case did not appear on any trial calendar for Sept. 3, 1998 and that day was not a regular court date for Officers Evans, Wiggins or Cullinan. In fact, the Podger case was calendared for Sept. 14, 1998.

44. Although Covington contacted Officer Cullinan and subpoenaed him to court on Sept. 3, none of the defendants subpoenaed Officer Evans or Officer Wiggins to court on Sept. 3, nor did any of the defendants herein advise Wiggins or Evans that the Podger case would be resolved on Sept. 3.

45. Covington, Dr. Podger and Fleming went to the Domestic Violence courtroom where Juudge Brown was holding court, and approached the bench. Covington reminded Judge Brown about the Podger case and stated that Judge Brown was "going to find Podger guilty of careless and reckless driving, fine him $1,000 and give him 48 hours of community service."

46. Following this conversation, Covington sent Fleming to search for Strickland, who had not yet appeared. Fleming found Strickland and Beasley on the second floor and reminded them that the Podger case was ready to be resolved. Srickland advised that he or Beasley would be up shortly.

47. While they were awaiting for Strickland or Beasley to appear, Dr. Podger approached Officer Cullinan and offered him a discount on future dental services. Officer Cullinan declined the offer.

48. Shortly thereafter, Beasley appeared in Judge Brown's courtroom and requested time to find the shuck relating to Dr. Podger's case and to speak with Officer Cullinan, who had arrived in court at the same time as Covington and Fleming.

50. While searching for the shuck and speaking with Officer Cullinan Beasley learned that Dr. Podger's case was calendared for Sept. 14, not Sept. 3, and that Officer Cullinan was only the charging officer and had not seen Dr. Podger drive on the night of Dr. Podger's arrest.

51. After Beasley returned to the Domestic Violence courtroom, Covington told him he did not need the shuck to dispose of the Podger case. Following this conversation, Judge Brown left the bench and asked the participants in the Podger case to join him in the hall behind the courtroom. Covington, Fleming, Beasley, Officer Cullinan and Dr. Podger followed Judge Brown into the hallway.

52. While in the hallway, Covington identified for Judge Brown the individuals who were present and gave a brief summary of the facts of the Feb. 6, 1998 arrest. Covington pointed out that Officer Cullinan had not seen Dr. Podger drive but that Dr. Podger was willing to accept some responsibility in the case and therefore would not oppose a judgment of careless and reckless driving.

53. Beasley indicated that the State did not object to Covington's proposal. Beasley did not attempt to call Officer Evans or Officer Wiggins nor did he object to proceeding with Dr. Podger's case on a date on which it was not scheduled and in the absence of an essential witness.

54. Judge Brown then entered an order finding Podger guilty of careless and reckless driving, fined him $1,000 and ordered him to perform 48 hours of community service.

55. With the exception of the conference at the bench, all of the proceedings before Judge Brown regarding Dr. Podger's 1998 DWI occurred in the hallway outside Courtroom 402, and not in open court.

56. No sworn testimony was given and no court reporter or courtroom clerk was present during the proceedings.

57. The judgment entered in Podger's case reflects that the DWI charge against Podger was voluntarily dismissed, although there was no signed dismissal in the file and no indication that the State in fact dismissed the charge. The file does not contain a misdemeanor statement of charges for careless and reckless driving.

58. Pursuant to N.C. Gen. Stat. § 20-138.4, the State is required to file a detailed explanation concerning the reasons for a reduction or dismissal of a charge involving impaired driving. Although Strickland and Beasley were aware of this requirement, no such explanation was provided in the Podger case.

59. Reckless driving is not a lesser included offense of driving while impaired and Covington, Strickland and Beasley were each aware that a judge could not legally find a defendant charged with DWI guilty of careless and reckless driving.

60. After Dr. Podger's case was resolved in the hallway of the Durham County Courthouse, Covington told Fleming that this was the "kind of deal that everyone must keep quiet." Covingtonn also cautioned Dr. Podger not to discuss the outcome of the case.

61. The disposition of the Podger case in a hallway of the Durham County Courthouse was designed to and had the effect of improperly removing the proceeding from the public domain.

62. After the disposition of the Podger case in the hallway of the Durham County Courthouse, Covington advised Podger that Podger owed him an additional fee of $9,000. Podger later paid this amount to Covington. Podger had previously paid Covington a $1,000 retainer.

Based upon the foregoing Findings of Fact, the Hearing Committee, makes the following

CONCLUSIONS OF LAW REGARDING DEFENDANT COVINGTON

1. By arranging and participating in the disposition of Podger's DWI case in the back hall of the Durham County Courthouse rather than in open court, and by arranging the absence of a material witness to the Podger case, Covington engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct.

2. By arranging and participating in the resolution of Podger's DWI case by the entry of a judgment of careless & reckless driving in contravention of the normal judicial process for the purpose of obtaining a large fee, Covington engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) and engaged in dishonest conduct in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct.

3. By requesting and facilitating the entry of a judgment of careless and reckless driving in Podger's DWI case when the State had not taken a dismissal of the DWI charges and had not charged Podger with careless and reckless driving, Covington

engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct.

4. By requesting and assisting Judge Brown to circumvent the law and ordinary judicial processes in the resolution of the Podger DWI case, Covington knowingly assisted a judge in conduct that is a violation of applicable rules of judicial conduct or other law, in violation of Rule 8.4(f) of the Revised Rules of Rules of Professional Conduct.

5. By obtaining Valium, a Schedule IV controlled substance, by falsely telling his physician that the Valium was for his own use when in fact Covington intended to distribute it to and did in fact distribute the Valium to a third party, Ann Robinson, Covington engaged in conduct involving misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct.

Based upon the foregoing Findings of Fact, the Hearing Committee, makes the following

CONCLUSIONS OF LAW REGARDING DEFENDANT STRICKLAND

1. By agreeing to and facilitating the entry of a judgment of careless and reckless driving in Podger's DWI case upon Covington's request rather than upon the merits of the case, Strickland engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct.

2. By agreeing to and facilitating the entry of a judgment of careless and reckless driving in Podger's DWI case when the State had not taken a dismissal of the DWI charges and had not charged Podger with careless and reckless driving, Strickland engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct.

Based upon the foregoing Findings of Fact, the Hearing Committee, makes the following

CONCLUSIONS OF LAW REGARDING DEFENDANT BEASLEY

1. By agreeing to and assisting in the entry of a judgment of careless and reckless driving in Podger's DWI case when the State had not taken a dismissal of the DWI charges and had not charged Podger with careless and reckless driving, Beasley engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct.

Based upon the evidence and arguments of counsel respecting the appropriate discipline, the Hearing Committee hereby enters the following

ADDITIONAL FINDINGS OF FACT REGARDING DEFENDANT COVINGTON RELEVANT TO DISCIPLINE

1. Covington's misconduct is aggravated by the following factors:

    a) dishonest or selfish motive
    b) multiple offenses
    c) substantial experience in the practice of law
    d) refusal to acknowledge the wrongful nature of conduct
    e) submission of false statements during the disciplinary hearing

2. Covington's misconduct is mitigated by the following factors:

    a) good character or reputation
    b) no prior discipline

3. The aggravating factors outweigh the mitigating factors.

Based upon the evidence and arguments of counsel respecting the appropriate discipline, the Hearing Committee hereby enters the following

ADDITIONAL FINDINGS OF FACT REGARDING DEFENDANT STRICKLAND RELEVANT TO DISCIPLINE

1. Srickland's misconduct is aggravated by the following factors:

    a) substantial experience in the practice of law
    b) refusal to acknowledge wrongful nature of conduct
    c) submission of false statements during disciplinary hearing

2. Strickland's misconduct is mitigated by the following factors:

    a) good character or reputation
    b) no prior discipline

3. The aggravating factors outweigh the mitigating factors.

Based upon the evidence and arguments of counsel respecting the appropriate discipline, the Hearing Committee hereby enters the following

ADDITIONAL FINDINGS OF FACT REGARDING DEFENDANT BEASLEY RELEVANT TO DISCIPLINE

1. There are no aggravating factors.

2. Beasley's misconduct is mitigated by the following factors:

a) good character or reputation
b) no prior discipline
c) inexperience in the practice of law
d) remorse
e) absence of dishonest motive
f) cooperation with the N.C. State Bar.

3. The mitigating factors outweigh the aggravating factors.

Based upon the Findings of Fact and Conclusions of Law and the Additional Findings of Fact Relevant to Discipline, the Hearing Committee hereby enters the following

ORDER OF DISCIPLINE REGARDING DEFENDANT COVINGTON

1. The Defendant, J. Wesley Covington is hereby suspended from the practice of law for a period of three years. All but the first 180 days of the suspension of Covington's law license is hereby stayed for five years on the condition that Covington:

a) violates no provisions of the Revised Rules of Professional Conduct

b) violates no laws of the State of North Carolina or the United States

c) pays 1/3 of the costs of this proceeding within 30 days after service of the disciplinary order upon him

d) complies with all provisions of Section .0124 of the State Bar Discipline & Disability Rules.

2. Covington's active 180 day suspension of his law license shall commence as soon as Covington files the affidavit required by Section .0124 of the State Bar Discipline & Disability Rules with the State Bar. If no affidavit is filed by Covington prior thereto, the suspension shall commence on Jan. 1, 2000.

Based upon the Findings of Fact and Conclusions of Law and the Additional Findings of Fact Relevant to Discipline, the Hearing Committee hereby enters the following

ORDER OF DISCIPLINE REGARDING DEFENDANT STRICKLAND

1. The Defendant, Ralph Strickland is hereby suspended from the practice of law for a period of three years. All but the first 120 days of the suspension of Strickland's law license is hereby stayed for five years on the condition that Strickland:

a) violates no provisions of the Revised Rules of Professional Conduct

b) violates no laws of the State of North Carolina or the United States

c) pays 1/3 of the costs of this proceeding within 30 days after service of the disciplinary order upon him

d) complies with all provisions of Section .0124 of the State Bar Discipline & Disability Rules.

2. Strickland's active 120 day suspension of his law license commenced on November 2, 1999, the date he filed his affidavit required by Section .0124 of the State Bar Discipline & Disability Rules with the State Bar.

Based upon the Findings of Fact and Conclusions of Law and the Additional Findings of Fact Relevant to Discipline, the Hearing Committee hereby enters the following

ORDER OF DISCIPLINE REGARDING DEFENDANT BEASLEY

1. The Defendant, Brian Beasley, is hereby reprimanded.

2. Defendant Beasley shall pay 1/3 of the costs of this proceeding within 30 days of service of the order of discipline upon him.

Signed by the Chair of the Hearing Committee with the consent of the other Hearing Committee members.

This the 29th day of November, 1999.

Richard T. Gammon, Chair
Disciplinary Hearing Committee