

NORTH CAROLINA :
WAKE COUNTY :

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
89 DHC 11

THE NORTH CAROLINA STATE BAR,)
)
 Plaintiff)
)
 v.)
)
 RICHARD B. HAGER,)
)
 Defendant)

PUBLIC CENSURE

This Public Censure is delivered to you pursuant to Section 23 of Article IX of the Rules and Regulations of The North Carolina State Bar as ordered by a Hearing Committee of The Disciplinary Hearing Commission following a hearing in the above-captioned proceeding on July 28, 1989. At that hearing, the Hearing Committee found that you had violated various provisions of the Code of Professional Responsibility of The North Carolina State Bar.

Jewell F. Cole had been a client of your law firm prior to your admission to the Bar and in 1976 Orton J. Cameron of the firm you later joined prepared a will for her wherein Mr. Cameron was named Executor. In the fall of 1984, Mr. Cameron was notified by Mrs. Dessie Mildred Wallace of Alexandria, Virginia, a sister of Mrs. Cole, that Mrs. Cole had died in Florida in July of 1984. In December of 1984, while making preparation for his retirement from the practice of law, Mr. Cameron found Mrs. Cole's will in the law firm safe. Mr. Cameron informed Mrs. Wallace that he had located the will and Mrs. Wallace, along with one of her sisters, Mrs. Margaret F. Longshore requested that the will be probated. Mr. Cameron renounced his right to qualify as Executor of Mrs. Cole's estate in favor of you. You

determined that there were no relatives of Mrs. Cole living in North Carolina and that the devisees and beneficiaries named in the will all resided outside of North Carolina. In addition to the two sisters who had requested that you probate the will, Mrs. Cole left surviving additional relatives who were also beneficiaries named in the North Carolina will including a sister, Essie Mary Sheehan and a contingent beneficiary, Mary L. Brooks, a daughter of Essie Mary Sheehan.

You improperly qualified as Administrator C.T.A. of the Cole estate and the failure to properly qualify ultimately resulted in your being removed as Administrator C.T.A. by an Order of the acting Clerk of Court which was affirmed by Honorable Giles R. Clark, Superior Court Judge whose Order was affirmed by the North Carolina Court of Appeals. During your initial investigation of Mrs. Cole's affairs, you formed the opinion that estate assets may have been misappropriated by some of Mrs. Cole's relatives in Florida. You further determined that although the estate had substantial assets, including real property and notes receivable, you were unable to locate any cash assets with which to pursue the assets which you believed had been misappropriated by the Florida relatives. You therefore contracted with Southern National Bank for a line of credit in the name of the estate and secured the line of credit by placing a Deed of Trust on real property owned by the testamentary devisees of the Cole estate. Although you filed a Petition with the Clerk of Superior Court for authority to mortgage this property, you proceeded with the transaction and actually drew \$30,000.00 against the line of credit prior to any hearing on that Petition. In fact, you withdrew the Petition relying on the powers granted the personal representative

in the Cole will as authority for opening the line of credit, mortgaging the property and drawing money against the line of credit. You subsequently drew another \$10,000.00 against the line of credit relying on the same authority.

In further reliance on the authority granted in the will, you paid yourself \$33,104.71 in attorneys' fees without applying for, or receiving, Court approval or obtaining the consent of the Cole heirs.

The conduct of encumbering assets of the estate without obtaining Court approval violated numerous provisions of the Code of Professional Responsibility. You engaged in a conflict of interest in violation of DR 5-101(A) and DR 5-105(A). By authorizing payment of your firm's bills for legal services rendered to the Cole estate without first obtaining a Court Order or approval of all of the heirs, you collected an illegal fee in violation of DR 2-106(A) as well as engaged in a conflict of interest in violation DR 5-101(A) and DR 5-105(A). Throughout your involvement with the Cole estate, you engaged in professional conduct adversely reflecting on your fitness to practice in violation of DR 5-102(A)(6).

The Hearing Committee was ultimately persuaded that your misconduct in this case was generally the product of gross negligence rather than deliberation. Primarily for that reason, you were not suspended from the practice of law. The fact that the Hearing Committee has chosen to impose the relatively moderate sanction of Public Censure should not be taken by you to indicate that The Disciplinary Hearing Commission in any way feels that your conduct in this matter was excusable.

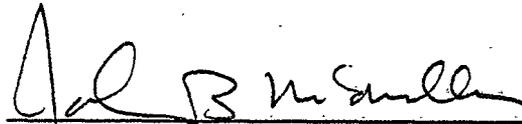
It has been uncontroverted law in North Carolina for many years that the personal representative has no right to fix and determine the compensation to be received by him. This applies to fees the personal representative pays himself as his attorney. A case precisely on point was handed down by the North Carolina Court of Appeals a few weeks before you began paying yourself attorneys' fees in the Cole estate without approval of the Clerk. It should be abundantly clear to all attorneys and to all Clerks of Court, Deputy Clerks of Court and Assistant Clerks of Court who deal with probate and estate matters that the practice of retroactive approval of attorneys' fees for personal representatives who employ themselves as attorneys is a dangerous practice to follow. Although there are indications that this practice is widespread, those who engage in that practice who are also attorneys are violating the Rules of Professional Conduct of The North Carolina State Bar.

Rule 1 of Article IX of the Rules and Regulations of The North Carolina State Bar states "Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the Courts and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, when done at other times or that it has not been made the subject of disciplinary proceedings earlier, shall not be an excuse for any member of the Bar". The Hearing Committee was very concerned to hear that the practice of paying estate assets to lawyers who are both the personal representative of the estate and attorney for the estate without approval of the Court or consent of the heirs may be a common practice. Such conduct amounts to a clear conflict of interest and

any such payments are illegal fees. The work you performed all went for naught. You spent hundreds of hours attempting to correct a wrong, had to return the fees, underwent a disciplinary proceeding and in the end accomplished nothing because you did not recognize or acknowledge this obvious conflict.

The Hearing Committee which heard your case is confident that you now understand this conflict, that this Public Censure will be heeded by you and that you will never again allow yourself to depart from strict adherence to the highest standards of the legal profession.

This the 21st day of August, 1989.



John B. McMillan, Chairman
The Disciplinary Hearing Commission

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ORDER OF DISCIPLINE

Based upon the additional evidence offered at the disposition phase of this hearing, the Hearing Committee finds the following additional facts to be supported by clear, cogent and convincing evidences:

FINDINGS OF FACT

1. On March 19, 1989, the Defendant was issued a private reprimand by the Grievance Committee of the North Carolina State Bar which private reprimand arose out of facts constituting a conflict of interest.

2. Although in violation of N. C. Gen. Stat. 28A-23-4, the common practice during 1985 and 1986 in the Lee County Clerk of Court's office was for attorneys who were serving as the personal representative of an estate and who employed themselves or their firm as attorney for the personal representative, to pay attorneys fees to themselves without prior approval of the Clerk and to rely upon court approval after the fact at the time of the annual account or final account.

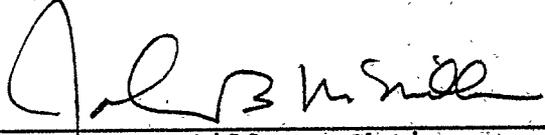
3. Defendant did not profit by his acts of wrongdoing and did not have a dishonest motive for his actions.

4. Defendant believed that he was attempting to correct a series of wrongs committed by certain relatives of Mrs. Cole who had profited by those wrongs.

Based upon the Findings of Fact and Conclusions of Law entered in this case and the further Findings of Fact set forth above in regard to the appropriate disciplinary sanction, the Hearing Committee enters the following Order of Discipline:

1. Defendant shall be publicly censured for his misconduct.
2. Defendant shall pay the costs of this proceeding.

This the 21st day of August, 1989.



John B. McMillan, Chairman
The Disciplinary Hearing Commission

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came on to be heard on July 28, 1989 before a Hearing Committee of the Disciplinary Hearing Commission composed of John B. McMillan, Chairman, L. P. Hornthal, Jr. and Emily W. Turner. Carolin D. Bakewell appeared as attorney for the North Carolina State Bar and Michael L. Stephenson appeared as attorney for the Defendant. Based upon the stipulations entered into by the parties and the evidence presented at the hearing, the Hearing Committee finds the following facts to be supported by clear, cogent and convincing evidence:

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, Richard B. Hager, was admitted to the North Carolina State Bar in 1979 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, Code of Professional Responsibility

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

3. During all of the periods referred to herein, Defendant was actively engaged in the practice of law in the State of North Carolina and maintained an office in the City of Sanford, Lee County, North Carolina.

4. On April 16, 1985, Defendant was appointed Administrator C.T.A. of the estate of Jewell Cole (hereafter "Cole"). The will of Mrs. Cole which was presented to the Clerk named Orton J. Cameron as Executor and Defendant also presented to the Clerk an instrument dated February 25, 1985 wherein Mr. Cameron renounced his right to administer the estate.

5. Pursuant to his duties as Administrator C.T.A. of the Cole estate, Hager learned that estate assets may have been misappropriated by some of Cole's relatives in Florida.

6. Defendant employed his law firm, then known as Hager and Kinnaman, to serve as legal counsel to the Administrator C.T.A. and to attempt to discover all estate assets.

7. On June 6, 1985 Defendant filed a Petition with the Clerk of Lee County Superior Court to permit him to pledge the estate property as security for a line of credit at Southern National Bank.

8. On June 13, 1985 and prior to any hearing on his Petition, Defendant opened a line of credit at Southern National Bank in Sanford. The line of credit was secured by real property owned by the testamentary devisees of the Cole estate. Both of these actions were taken without the consent of all of the testamentary devisees of the Cole estate.

9. Also on June 13, 1985 Defendant recorded the Deed of Trust describing real property owned by the testamentary devisees of the Cole estate and drew \$30,000.00 against the line of credit.

10. On June 14, 1985 a Petition for Revocation of Letters was filed by Jimmy L. Love, attorney for Essie M. Sheehan, one of Jewell F. Cole's sisters. A hearing on the Petition to remove the Defendant as Administrator C.T.A. was noticed for June 27, 1985 but was subsequently continued until July 5, 1985.

11. On July 5, 1985 and prior to the hearing on Defendant's Petition to permit him to pledge the estate property as security for the line of credit at Southern National Bank, Defendant withdrew his Petition for permission to pledge estate property.

12. Also on July 5, 1985, the Defendant drew an additional \$10,000.00 against the line of credit at Southern National Bank.

13. Also on July 5, 1985, a hearing was held on the Motion to remove Defendant as Administrator C.T.A. and to revoke the Letters of Administration C.T.A. previously issued. On July 8, 1985, Lucille York, acting Clerk of Lee County Superior Court entered an Order revoking and setting aside the Letters of Administration C.T.A. heretofore issued to Defendant and ordering Defendant to forthwith surrender all assets of the estate under his control to the Court and to file an accounting of his activities within thirty days. The basis of the Clerk's order was the following:

"Upon Orton Cameron's renouncing, G. S. 28A-4-1 vests an absolute right to administer the estate of Jewell F. Cole in the persons in the order named therein. In granting letters of administration, the Court must observe these preferences unless the Court determines they are disqualified. No such finding was made by the Court."

14. Defendant appealed the Order of the acting Clerk and continued to perform duties as Administrator C.T.A. of the estate of Jewell F. Cole.

15. The appeal from the Order of the Clerk revoking Defendant's Letters of Administration was heard during the October 21, 1985 Session of the Civil Superior Court of Lee County and on October 25, 1985, Honorable Giles R. Clark entered an Order affirming the July 8, 1985 Order of Lucille York.

16. Defendant appealed the Order of Judge Clark and continued performing duties as Administrator C.T.A. of the estate.

17. In an Opinion filed on May 20, 1986, the Order of Judge Clark was affirmed by the North Carolina Court of Appeals.

18. On five occasions in 1985 and 1986, Defendant's law firm submitted bills for legal services rendered to the Cole estate as follows:

A.	May 30, 1985	\$ 6,201.63
B.	June 14, 1985	\$17,669.37
C.	July 5, 1985	\$ 5,067.83
D.	December 13, 1985	\$ 3,536.48
E.	April 24, 1986	<u>\$ 629.40</u>
	Total	\$33,104.71

19. Defendant, as Administrator C.T.A., approved payment of each bill listed in Paragraph 18 above and all of those bills were paid from the assets of the Cole estate. On May 5, 1986, Defendant filed an annual account in the Estate of Jewell F. Cole showing that the sums set out in Paragraph 18 above were paid to his law firm.

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20. Defendant did not seek nor obtain the approval of the Clerk of Court or any other Court official prior to paying his firm's bills for legal services to the Cole estate.

21. On June 11, 1986, Defendant filed a final account in the Cole estate.

22. By Order dated August 19, 1988, Honorable Wiley F. Bowen, Resident Superior Court Judge of the Eleventh Judicial District, approved the final account of the Defendant and discharged him as Administrator C.T.A. of the Cole Estate.

23. Prior to the approval of the final account, Defendant settled the pending litigation filed by Southern National Bank against the Cole estate seeking recovery of the \$40,000.00 advanced against the Letter of Credit plus interest, costs and attorneys fees. Defendant was a third party defendant in that litigation and paid the amount necessary to settle the case with the exception of the sum of \$3,000.00 which was paid by the Cole estate.

24. From the beginning of Defendant's involvement with the Cole estate, Defendant was convinced that Cole's sister Essie Sheehan and Sheehan's daughter Mary Lou Brooks, either individually, or in combination, had converted to their own use and enjoyment the assets, bank accounts, income and other personal property of Cole, and Defendant was convinced that he was acting properly in attempting to recover those assets for the estate from persons he felt were wrongdoers.

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

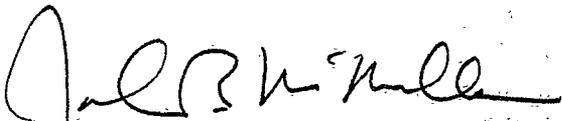
CONCLUSIONS OF LAW

The conduct of the Defendant, as set forth in Paragraphs 1 through 24 above, constitutes grounds for discipline pursuant to N. C. Gen. Stat. 84-28(b)(2) in that the Defendant violated the Code of Professional Responsibility as follows:

A. By encumbering assets of the Cole estate in order to pay his law firm's attorneys fees without obtaining a Court Order, Defendant engaged in a conflict of interest in violation of DR 5-101(A) and DR 5-105(A) and engaged in conduct adversely reflecting on his fitness to practice in violation of DR 1-102(A) (6).

B. By authorizing payment of his firm's bills for legal services rendered to the Cole estate without first obtaining a Court Order or approval of the heirs, Defendant charged or collected an illegal fee in violation of DR 2-106(A), engaged in a conflict of interest in violation of DR 5-101(A) and DR 5-105(A) and engaged in professional conduct adversely reflecting on his fitness to practice in violation of DR 1-102(A) (6).

Signed with the full accord and consent of the other members of the Hearing Committee, this 21st day of August, 1989.



John B. McMillan, Chairman
The Disciplinary Hearing Commission