

NORTH CAROLINA
WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
88 DHC 10

THE NORTH CAROLINA STATE BAR,
Plaintiff

vs.

O R D E R

JIM R. FUNDERBURK, Attorney,
Defendant

THIS MATTER was heard on the 4th day of November, 1988,
before a hearing committee of the Disciplinary Hearing Commission
composed of Karen Paden Boyle, chairman, Robert C. Bryan and Sam
L. Beam, pursuant to Section 14 of Article IX of the Rules and
Regulations of the North Carolina State Bar. The hearing
committee, after reviewing evidence, hearing testimony, and
arguments of counsel, makes the following findings of fact and
conclusions of law based thereon:

FINDINGS OF FACT

1. The plaintiff, the North Carolina State Bar, is a body
duly organized under the laws of North Carolina and the Rules and
Regulations of the North Carolina State Bar promulgated
thereunder.

2. The defendant, Jim R. Funderburk, was admitted to the North Carolina State Bar in the fall of 1972 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, Canons of Ethics, and Code of Professional Responsibility of the North Carolina State Bar and the laws of the State of North Carolina.

3. During all of the periods referred to herein, the defendant was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the City of Gastonia, Gaston County, North Carolina.

4. The defendant represented Lowell Clark Senter in a personal injury action. In February of 1984, the defendant filed a lawsuit on Mr. Senter's behalf in the matter of Lowell Clark Senter vs. Belmont Lumber Company, Inc.

5. In July of 1985, Betty Senter, wife of Lowell Clark Senter, informed the defendant that her husband had piloted a plane to Florida, and she had not heard from her husband in several months.

6. In July of 1985, Mrs. Senter requested that the defendant settle Mr. Senter's case because of her family's financial difficulties. The defendant offered to settle the Senter case for \$50,000.00 in a July 11, 1985, letter to Mr. Mark Kurdys. Mr. Kurdys' law firm, Hedrick, Eatmon, Gardner & Kincheloe, represented Belmont Lumber Company.

7. Sometime prior to September 30, 1985, Mrs. Senter told the defendant that she thought her husband was dead.

8. In a letter dated September 30, 1985, to Phillip R. Hedrick of the Hedrick Eatmon law firm the defendant again offered to settle Mr. Senter's case for \$50,000.00.

9. On or about December 9, 1985, the day set for trial of the Senter case, the defendant, Mrs. Senter, and her three children were present in Court as if the defendant were prepared for trial. Mr. Senter was not present or available to be in Court.

10. The defendant was prepared to proceed to trial without Mr. Senter if the case could not be settled.

11. No one from the Hedrick Eatmon law firm asked whether Mr. Senter were alive or available for trial.

12. On or about December 9, 1985, the defendant negotiated with Thomas Williams of the Hedrick Eatmon law firm a settlement of Mr. Senter's case for \$35,000.00.

13. On or about December 9, 1985, prior to settlement of the claim, defendant informed Judge Forrest Farrell, the trial Judge, that his client Mr. Senter was missing and unavailable for trial. He informed Judge Farrell that he was trying to settle the case and that opposing counsel had not inquired about his client's availability. He asked Judge Farrell to sign the appropriate documents appointing Mrs. Senter temporary receiver of her husband's estate in the event that the case settled.

14. At no time prior to the negotiations or during the negotiations of the settlement did the defendant make an affirmative representation to the Hedrick Eatmon law firm that Mr. Senter could be present at trial, and no one from the Hedrick

Eatmon law firm inquired about Mr. Senter's presence or availability.

15. On December 11, 1985, defendant filed a missing persons complaint (85 CvS 3251) in Gaston County Superior Court for the appointment of Mrs. Senter as a temporary receiver of the estate of her husband, Mr. Senter. The defendant represented Mrs. Senter in this action.

16. Attorney Tom Williams of the Hedrick Eatmon law firm was not present when the defendant informed Judge Forrest Farrell and attorney Douglas Arthurs that his client Mr. Senter was missing.

17. In paragraph 2 of the missing person's complaint, the defendant alleged that the "plaintiff (Mrs. Senter) believes and alleges that the absentee (Mr. Senter) is deceased." In the prayer for relief, the defendant requested the Court to declare Mr. Senter dead.

18. On December 11, 1985, Judge Forrest Farrell entered an Order appointing Betty Jane Senter as temporary receiver for the estate of Lowell Clark Senter.

19. On December 16, 1985, a release was signed by Mrs. Senter in the name of her husband Lowell Clark Senter. Mr. Senter did not sign the release.

20. The release contained a provision to be signed by the defendant certifying that he had explained the release to Lowell Clark Senter prior to its execution.

21. The defendant modified the certification by adding after Lowell Clark Senter the words "or representative."

22. The defendant signed the certification as modified.

23. Prior to signing the certification and prior to Mrs. Senter's signing the release, defendant reviewed the release with Mrs. Senter to be certain that she understood its terms. Defendant then sent Mrs. Senter into the waiting room to read over the release again and to sign it before the notary, defendant's secretary Helen Purser.

24. Defendant did not review the release or see it again after Mrs. Senter signed.

25. Defendant was not aware that Mrs. Senter signed Mr. Senter's name to the release.

26. The defendant's secretary Helen Purser had typed the Order appointing Mrs. Senter temporary receiver and giving her general authority over Mr. Senter's estate and specific authority to sign, negotiate, release, dismiss and do all acts and things necessary to complete the settlement of the case of Lowell Clark Senter vs. Belmont Lumber Company, Inc. Although defendant was careless in not reviewing the release after Mrs. Senter signed, the defendant did not know that Mrs. Senter had signed Mr. Senter's name without indicating her representative capacity.

27. Although defendant as he acknowledges did not properly supervise his secretary Mrs. Purser in notarizing the release, the defendant did not direct Mrs. Purser to falsely acknowledge the release and agreement.

28. On December 16, 1985, a settlement check was endorsed in the name of Lowell Clark Senter by Mrs. Senter. Mr. Senter did not endorse the settlement check. Mrs. Senter did not

indicate her representative capacity on the check.

29. Defendant endorsed the settlement check prior to Mrs. Senter's endorsing the check. Defendant did not see Mrs. Senter's endorsement and was not aware that she had not indicated her representative capacity on the endorsement.

30. The release signed by Mrs. Senter contained a certificate of acknowledgement which recited that Lowell Clark Senter personally appeared before Helen Purser, a notary, and signed the release.

31. Helen Purser was employed as the defendant's secretary when she notarized the release. The defendant directed Mrs. Purser to notarize the release, although he did not direct her to falsely acknowledge the release and was unaware that the release had not been signed in a representative capacity.

32. A release and notice of dismissal with prejudice (prepared by Hedrick Eatmon law firm) and settlement draft in the amount of \$35,000.00 were forwarded to the defendant by Mark Kurdys.

33. Mark Kurdys first learned that Mr. Senter was missing or presumed dead in May of 1986.

34. Mark Kurdys was unlicensed in North Carolina and served as a legal assistant to the Hedrick Eatmon law firm. He assisted attorney Phillip Hedrick in defending the Senter lawsuit. He was later admitted by comity to the North Carolina Bar. Mr. Kurdys was actively involved in the Senter case and is competent to testify about the law firm's involvement or position relative to the Senter case.

35. The State Bar concedes that the defendant had no affirmative duty to inform the defense counsel that Mr. Senter was missing in the absence of an inquiry on defense counsel's part.

36. The defendant did not have an executed Power of Attorney from Mr. Senter to agree to the \$35,000.00 of the case on December 9, 1985.

37. On December 9, 1985, Mr. Senter was missing and presumed dead by his wife. Mrs. Senter was appointed temporary receiver of her husband's estate, and the defendant acted with her authority in settling the case. Defendant therefore did not act without the authority of his client since Mrs. Senter is the legal representative of Mr. Senter's estate and gave her consent to the settlement.

38. The rules and regulations governing the conduct of Notaries Public and contained in the North Carolina Manual for Applicants to the Office of Notary Public and the Notary Public Guidebook for North Carolina set forth the proper procedures for a Notary's acknowledging signatures on documents.

39. Although the defendant was careless in his handling of the release and settlement agreement endorsements and acknowledgements, the defendant did not affirmatively act to deceive the opposing party and did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

BASED UPON THE FOREGOING FINDINGS OF FACT THE HEARING COMMITTEE CONCLUDES AS A MATTER OF LAW:


1. That the conduct of the defendant did not

constitute grounds for discipline pursuant to N.C.G.S. 84-28B and did not violate the Rules of the North Carolina Code of Professional Responsibility or the Rules of Professional Conduct in effect at the time of his actions.

IT IS THEREFORE ORDERED:

1. That the action against defendant be dismissed and costs be taxed against the plaintiff.

This the 6th day of January, 1989.



KAREN PADEN BOYLE, Chairman
Disciplinary Hearing Commission