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NORTH CAROLINA
WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
95 DHC 4

THE NORTH CAROLINA STATE BAR,
Plaintiff,
vs.
BARBARA K. MORENO, Attorney
Defendant.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

THIS MATTER, coming on to be heard on Friday, June 30, 1995, by a Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar, composed of Stephen T. Smith, Chair; Paul L. Jones; and B. Stephen Huntley. The Plaintiff, the North Carolina State Bar, was represented by R. David Henderson. The Defendant, Barbara K. Moreno, was represented by James B. Maxwell. Based upon the pleadings herein and the evidence introduced at trial, the Hearing Committee 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, Barbara K. Moreno (hereinafter "Moreno") was admitted to the North Carolina State Bar on May 2, 1985, 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 North Carolina.
3. During all of the periods referred to herein, Moreno was actively engaged in the practice of law in the state of North Carolina and maintained a law office in the city of High Point, Guilford County, North Carolina.
4. On February 12, 1994, Tommie Jerald Gathings was charged with Driving While Impaired and Driving While License Revoked. Soon thereafter, Mr. Gathings received a letter from The Legal Alternative, a law firm which Moreno owns, inviting Mr. Gathings to contact The Legal Alternative in connection with representing him on those charges.

5. After receiving the letter, Mr. Gathings called The Legal Alternative and was given an appointment with Karen Fisher. Ms. Fisher was an attorney employed by the firm who ordinarily handled criminal and traffic matters in Davidson County, the county in which Mr. Gathings' case would be heard.

6. Mr. Gathings agreed to hire The Legal Alternative to represent him in this matter. He asked Ms. Fisher to continue the case as long as possible to allow him sufficient time to pay the fee, costs and anticipated fine. After Ms. Fisher obtained several continuances on March 9, March 28 and April 18, the charges against Mr. Gathings were set for trial on Monday, May 16, 1994, in the city of Lexington, Davidson County, North Carolina. Due to other commitments in court for Ms. Fisher, she was unable to go to Davidson County on May 16. Barbara K. Moreno therefore agreed to appear in court on behalf of the firm's client.

7. From the intake sheet that had been prepared in Moreno's office, Ms. Fisher and then Ms. Moreno knew that Mr. Gathings had two factors which would be considered "grossly aggravating" factors in a DWI charge. These two factors included an offense of DWI within a seven-year period of time, as well as the charge of Driving While License Revoked. These two grossly aggravating factors would have indicated that the normal sentence for such a charge would have been 7 - 14 days in jail, which more likely than not could be spent on weekends, since Mr. Gathings was, in fact, employed at the time.

8. It is the custom in Davidson County for two Assistant District Attorneys to participate in criminal/traffic calendars. Once the calendar is called, the group of cases with attorneys who desire to negotiate with an ADA are taken to another room outside the courtroom where an ADA begins the process of attempting to negotiate pleas that will allow those cases to be disposed of. On May 16, 1994, Chris Gentry was the ADA assigned to the courtroom and Georgia Nixon was the ADA assigned to the negotiation of pleas.

9. A practice that occurs in Davidson County District Court is for attorneys to speak "informally" with judges about "hypothetical cases" in order to get some prediction as to what is apt to happen should the attorney plead his/her client to a specific charge with specific background information. In this manner, cases are often continued to a later date after the judge has indicated what his/her judgment would likely be in the "hypothetical situation" and these continuances are often then sought from the ADA without the judge being directly involved.

10. The Honorable Jessie M. Conley was the District Court Judge presiding in Davidson County Traffic/Criminal Court on Monday, May 16, 1994. Judge Conley did not typically engage in the informal "predictions" described above.

11. After the calendar was called and Ms. Nixon had gone to the adjacent room to negotiate pleas with attorneys, Moreno, on behalf of Mr. Gathings, went to Ms. Nixon to discuss a plea arrangement. A plea agreement was reached between Ms. Nixon and Ms. Moreno whereby Mr. Gathings agreed to plead Guilty to Driving While Impaired and to Driving with No Operators License. The charge of Driving While License Revoked would be dismissed. A notation to that effect was made by Ms. Nixon for the benefit of the ADA in court (Mr. Gentry).

12. Ms. Moreno returned to the courtroom and shortly thereafter, Mr. Gentry called the case against Mr. Gathings for trial. Mr. Gentry inquired how Mr. Gathings would plead to Driving While Impaired and Driving with No Operators License, consistent with the plea notation noted in the file. Moreno, on behalf of Gathings, answered that Gathings would plead Guilty to these charges.

13. After the entry of plea, there was a brief summary of the case by Mr. Gentry, based upon the traffic ticket itself, and Judge Conley asked about Mr. Gathings' criminal and traffic record. A computer printout is normally available and in the file and on this occasion Ms. Moreno also handed up to the judge her office's DMV check, which is a seven-year check. On his driving record there was a notation that in 1990, Mr. Gathings had a 10-day revocation, but there was no corresponding conviction shown for Driving While Impaired, although that would normally accompany the 10-day revocation. Judge Conley inquired about that, because such a conviction would have been a grossly aggravating factor, having occurred within seven years of sentencing.

14. Scott Idol, a probation officer, was in the courtroom and was asked to check the Davidson County records to determine whether or not Mr. Gathings' 10-day revocation was in connection with a conviction of DWI. At some point during discussions, Mr. Idol confirmed that Mr. Gathings was convicted of DWI in 1990 and placed on probation. Mr. Idol also reported to Judge Conley that it was his recollection or belief that Mr. Gathings may, in fact, be in violation of the 1990 probation order. That information was unable to be obtained at that particular time, but Judge Conley indicated a strong desire to learn specifically about the potential probation violation, if, in fact, that applied.

15. Mr. Gathings strongly denied to Ms. Moreno that he was on probation or that he had ever violated probation and assured her that the probation officer was making a mistake. This was not information that Ms. Moreno had from the file maintained by her office, nor in the brief conversation she had earlier had with Mr. Gathings.

16. At that point, Ms. Moreno and Mr. Gentry approached the bench and Ms. Moreno inquired of Judge Conley what sentence she

would be likely to impose based upon the alleged probation violation. Judge Conley indicated to her that she would be inclined to give Mr. Gathings a two-year active sentence. Ms. Moreno informed Judge Conley that she needed a few minutes to talk with her client.

17. Mr. Gathings and Ms. Moreno went outside the courtroom to confer. Judge Conley went on with other matters in the absence of the probation officer, who was seeking additional information on Mr. Gathings. In the conference outside the courtroom, Mr. Gathings acknowledged that he had been convicted of DWI in 1990, which was already known by Ms. Moreno, her office and the court. He adamantly denied that he was on probation or that he had violated any prior probation and insisted that Mr. Idol had him confused with someone else. Mr. Gathings strongly urged Ms. Moreno to get the case continued for him.

18. Ms. Moreno was of the opinion, at that point, that Judge Conley was going to sentence her client to two years in prison, regardless of what information ultimately was received from the probation officer and it was agreed that she would try and get a continuance from the ADA. Thereafter, Moreno met with Ms. Nixon and advised her that she needed one more continuance. She told Ms. Nixon that Judge Conley had indicated she was going to give Mr. Gathings a two-year active sentence and she also advised Ms. Nixon that Mr. Gentry would be opposed to a continuance. She did not inform Ms. Nixon that her client had been arraigned, had entered a plea of Guilty, and that evidence had been received and the case was awaiting sentencing with more information from the probation officer.

19. Ms. Nixon agreed to a continuance under the circumstances as they were related to her and, in fact, noted on the file a new date of June 7, 1994.

20. Thereafter, Ms. Moreno and her client left the courthouse, Mr. Gathings returning to work and Ms. Moreno returning to her office in High Point.

21. Later in the morning, Judge Conley inquired about the status of Ms. Moreno's case, as she had heard many other matters. The Clerk advised the judge that according to the shuck notation, Ms. Nixon had continued the case till June 7, 1994. Judge Conley indicated that at that point, only she could have granted a continuance and requested that both Ms. Nixon and Ms. Moreno return to court as soon as possible.

22. Ms. Moreno was reached at her office between 11:00 - 11:30 a.m. and told that Judge Conley desired to see her back in court in regard to the Gathings matter. She immediately got back in her car and drove to Lexington, arriving at the courthouse at approximately 12:00 Noon.

23. When she arrived at the courtroom, Judge Conley inquired about where her client was and why the case was not proceeding, whereupon Ms. Moreno explained that she had talked with Ms. Nixon about continuing the matter, but that if Judge Conley wanted to proceed she would attempt to get her client there, even though he was out on the job. Judge Conley indicated that the plea could be completed the following morning.

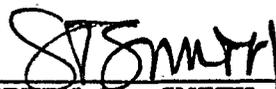
24. On May 17, 1994, Ms. Moreno appeared before Judge Conley with her client and the probation officer reported that Mr. Gathings was not on probation, nor in violation of probation. The judge sentenced Mr. Gathings to 14 days in jail, which was to be handled through the probation office, and he complied with all terms of his sentence thereafter.

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

CONCLUSIONS OF LAW

By failing to disclose to Georgia Nixon, Assistant District Attorney for Davidson County, that a plea had been entered in open court when she asked for another continuance in the matter, and in obtaining a continuance on behalf of her client after a plea had been entered and while the court was awaiting additional information prior to sentencing, Barbara K. Moreno engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(D) of the North Carolina Rules of Professional Conduct.

Signed by the undersigned Chair of the Disciplinary Hearing Committee with the full knowledge and consent of the other Hearing Committee members this the 3 day of AUGUST, 1995.



STEPHEN T. SMITH, Chair
Disciplinary Hearing Committee

NORTH CAROLINA
WAKE COUNTY



BEFORE THE
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95 DHC 4

THE NORTH CAROLINA STATE BAR,)
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Plaintiff,)
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vs.)
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BARBARA K. MORENO, Attorney)
)
Defendant.)

ORDER OF DISCIPLINE

BASED UPON THE FINDINGS OF FACT AND CONCLUSIONS OF LAW entered herein and the evidence presented at the second phase of the hearing, the Hearing Committee, composed of Stephen T. Smith, Chair; Paul L. Jones; and B. Stephen Huntley, enter the following:

FINDINGS OF FACT RELATING TO DISCIPLINE

1. The Hearing Committee finds that the Defendant's conduct is subject to two aggravating factors in this case:
 - A. Substantial experience in the practice of law;
 - B. Issuance of a letter of warning to the Defendant within the three years immediately preceding the filing of the complaint.
2. The Hearing Committee finds that the Defendant's conduct is mitigated by the following factors:
 - A. Absence of a dishonest or selfish motive
 - B. Cooperative attitude toward the proceedings
 - C. Absence of a prior disciplinary record

NOTE: The Hearing Committee found as an aggravating factor the issuance of a letter of warning to the Defendant which was dated January 12, 1995. At the same time, the Committee found as a mitigating factor that Ms. Moreno had no prior discipline. This apparent inconsistency is occasioned by the fact that the issuance of a letter of warning is specifically listed as an aggravating factor pursuant to Rule .0114(w) (1) (K) of Subchapter B of the Rules of the State Bar but, at the same time, is not considered to be discipline as defined in Rule .0103 of Subchapter B of the Rules of the State Bar. Therefore, the Committee finds that Ms. Moreno does not have a prior disciplinary record which is a mitigating factor pursuant to Rule .0114(w) (2) (A) of the State Bar Rules.

Based upon the evidence presented at trial and the arguments of counsel, the Committee enters the following:

ORDER OF DISCIPLINE

1. The Defendant, Barbara K. Moreno, is hereby REPRIMANDED pursuant to Rule .0123 of Subchapter B of the Rules of the State Bar, in that she engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(D) of the North Carolina Rules of Professional Conduct.

2. The Disciplinary Hearing Commission is confident that this Reprimand will be heeded by Barbara K. Moreno and will ultimately prove beneficial to her. The Committee trusts that she will never again allow herself to depart from strict adherence to the highest standards of the legal profession.

3. Defendant shall pay the costs of this proceeding.

This the 3 day of AUGUST, 1995.



STEPHEN T. SMITH, Chair
Disciplinary Hearing Committee