

14035

WAKE COUNTY
NORTH CAROLINA

BEFORE THE DISCIPLINARY HEARING COMMISSION
OF THE NORTH CAROLINA STATE BAR
00 DHC 13

THE NORTH CAROLINA STATE BAR,)	
Plaintiff)	
v.)	CONSENT ORDER OF DISCIPLINE
KENNETH N. BARNES,)	
Defendant)	

This matter came before a Hearing Committee of the Disciplinary Hearing Commission composed of James R. Fox, chair, T. Paul Messick, Jr., and Charles Barnes, pursuant to Section .0114 of the Discipline and Disability Rules of the North Carolina State Bar (hereinafter "Bar Rules"). Defendant represented himself. Douglas J. Brocker represented plaintiff. Both parties stipulate and agree to the findings of fact and conclusions of law recited in this consent order and to the discipline imposed. Based upon the consent of the parties the hearing committee hereby enters the following:

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar (hereafter "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. Defendant, Kenneth N. Barnes, (hereafter "Barnes"), was admitted to the North Carolina State Bar on August 22, 1987 and was at all relevant times, an Attorney at Law licensed to practice in North Carolina, subject to the Rules and Revised Rules of Professional Conduct of the North Carolina State Bar (hereafter "Rules" and "Revised Rules" respectively) and the laws of the State of North Carolina.

100

3. During the times relevant to this complaint, Barnes actively engaged in the practice of law in the State of North Carolina and maintained a law office in the city of Raleigh, Wake County, North Carolina.
4. Sheelagh M. Anderson (hereafter "Anderson") was involved in a serious automobile accident on February 7, 1994 (hereafter "accident").
5. Anderson retained the law firm of Stratas & Weathers to represent her in pursuing claims for personal injuries and worker's compensation benefits arising out of the accident.
6. Anderson signed two contracts for legal services with Stratas & Weathers, one for her personal injury claim and a separate one for her worker's compensation claim (hereafter "contracts for legal services").
7. Stratas & Weathers filed a proceeding before the North Carolina Industrial Commission for recovery of the worker's compensation benefits.
8. Stratas & Weathers obtained worker's compensation benefits for Anderson through this proceeding.
9. Stratas & Weathers also filed a complaint in Orange County Superior Court for her personal injuries caused by the accident.
10. At a mediated settlement conference on August 7, 1997, a settlement was reached on Anderson's personal injury claim.
11. On September 2, 1997, Anderson signed a final settlement agreement on both the personal injury and worker's compensation claims.
12. The North Carolina Industrial Commission subsequently entered an order approving the final settlement agreement.
13. After signing the final settlement agreement and after the Industrial Commission had approved it, Anderson refused to pay Stratas & Weathers the fees called for in the contracts for legal services.
14. Anderson subsequently hired Barnes to represent her regarding her refusal to pay Stratas & Weathers' fees.
15. Barnes wrote to Stratas & Weathers about the disputed fee on October 8, 1997. In that letter, Barnes, among other things, threatened to involve the State Bar if the fee dispute was not resolved.

16. Barnes continued to demand that Stratas & Weathers accept a significant fee reduction and threaten to involve the State Bar and damage the firm's reputation if the firm did not agree to a substantial fee reduction.

17. Both contracts for legal services provided that the parties would submit to binding fee arbitration through the Tenth Judicial District Bar.

18. Barnes, on behalf of Anderson, refused to submit to binding fee arbitration as provided in the contract.

19. After Stratas & Weathers refused to agree to a substantial fee reduction, Barnes filed a grievance with the North Carolina State Bar on April 28, 1999, against Nicholas A. Stratas, IV (hereafter "Stratas"), senior partner of Stratas and Weathers.

20. On May 8, 1998, Stratas & Weathers, through retained counsel, filed a declaratory judgment action against Anderson (hereafter "declaratory judgment action").

21. The declaratory judgment action sought a declaration of the parties' rights and duties under the contracts for legal services.

22. On September 3, 1998, Barnes, on behalf of Anderson, filed an Answer and Counterclaims in the declaratory judgment action.

23. The Answer and Counterclaims were signed by Barnes and verified by Anderson.

24. Barnes advised or counseled Anderson to verify the Answer and Counterclaims.

25. Barnes, on behalf of Anderson, asserted nine different defenses and four different counterclaims.

26. Stratas & Weathers, through counsel, filed a motion for summary judgment in January 1999.

27. The Honorable Superior Court Judge Narley L. Cashwell entered an order on February 15, 1999, granting Stratas & Weathers' motion for summary judgment. The order granted judgment in favor of Stratas & Weathers on its declaratory judgment claim and against Anderson on her counterclaims.

28. On March 12, 1999, Stratas & Weathers, through counsel, filed a motion for costs, attorneys' fees, and sanctions against Anderson and Barnes pursuant to Rule 11 of the Rules of Civil Procedure.

29. After a hearing, Judge Cashwell entered an order on March 24, 1999, awarding costs, attorneys' fees and sanctions against Anderson and Barnes (hereafter "sanction order").

30. In the sanction order, Judge Cashwell concluded that the defenses and counterclaims, asserted by Barnes and verified by Anderson, were not well grounded in fact and not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

31. Judge Cashwell also found that the defenses and counterclaims pled by Barnes on behalf of Anderson were "interposed for the improper purpose of harassment of Stratas & Weathers and to needlessly increase the cost to Stratas & Weathers of th[e] litigation."

32. Judge Cashwell further concluded that the grievance filed by Barnes against Stratas was brought for the improper purpose of seeking to force a resolution of the fee dispute on Barnes' and Anderson's terms.

33. Judge Cashwell ordered that Anderson and Barnes pay Stratas & Weathers \$85,000 in attorneys' fees and sanctions and \$1,529 in costs. Judge Cashwell also authorized Stratas and Weathers to deduct Anderson's portion of the sanctions from the proceeds of the settlement of the civil suits.

34. Barnes appealed the sanction order and that appeal is currently pending. The parties agree, however, that the disposition of the appeal will not be a basis to set aside this consent order unless Judge Cashwell's findings that the defenses and counterclaims asserted by Barnes were not well grounded in fact and not warranted by existing law are reversed or vacated. In that event, if a subsequent order is entered setting aside the consent order, the State Bar shall have the right and discretion to proceed on all the original allegations in the complaint in this matter.

35. On October 14, 1997, Mr. Gus Zapantis suffered injuries when a tree limb fell on his head while he was walking along Hillsborough Street in Raleigh, North Carolina (hereafter "tree limb accident").

36. On October 20 1997, less than a week later, Barnes agreed to represent Mr. Zapantis on a claim arising from the tree limb accident.

37. In approximately December 1997, Barnes' assistant requested some medical records for Zapantis related to the tree limb accident.

38. For the next six months approximately, Barnes took no further action to pursue Zapantis' claim.

39. On June 3, 1998, Barnes wrote the Attorney for the City of Raleigh requesting a statement about the existence of liability coverage for the City to cover Mr. Zapantis' claim.

40. Associate City Attorney, Dorothy K. Woodward, advised Barnes, in a letter date June 8, 1998, that the City was uninsured for any claim less than \$1,000,000.

41. Ms. Woodward also informed Barnes that the City's investigation disclosed that A-1 Tree Service felled a nearby oak tree for a homeowner at the time of Mr. Zapantis' injuries.

42. After sending his June 3, 1998 letter and receiving a response, Barnes took no further action to pursue Mr. Zapantis' claim for over one year.

43. Barnes did not identify or locate A-1 Tree Service or determine whether it was still in business.

44. Mr. Zapantis regularly called Barnes' office to request a status on his claim throughout the course of the representation.

45. Barnes failed to keep Mr. Zapantis' reasonably informed about the status of his claim.

46. In July 1999, Mr. Zapantis requested that Barnes return his file.

47. Barnes returned the file with a letter dated July 27, 1999, which was approximately three months before the statute of limitations expired on his claim.

48. Mr. Zapantis was unable to file suit on his claim before the statute of limitations expired.

49. Mr. Zapantis incurred medical bills and other expenses as a result of the tree limb accident.

50. Mr. Zapantis also suffered personal injuries from the laceration to his head caused by the tree limb accident.

51. Mr. Zapantis' claim is now time barred.

52. In 1998, Kimberly Turnage Moore was involved in a child support dispute with her ex-husband, Jeffrey Scott Moore, in Wake County District Court, file number 94CVD 2386 (hereafter "child support action").

53. On October 7, 1998, Barnes signed and filed a motion for attorney's fees (hereafter Motion") in Wake County District Court on behalf of Ms. Moore in the child support action.

54. In the motion, Barnes requested that Mr. Moore be ordered to pay Ms. Moore attorney's fees.

55. As a basis for the motion, Barnes represented to the court that: "[a]s a result of Defendant's [Mr. Moore's] continuing contempt, Plaintiff has been made to suffer substantial legal bills to enforce the Orders of this Court."

56. Ms. Moore had not paid Barnes any fees for his representation of her on the child support action at the time he filed the motion, or thereafter.

57. Barnes had not billed Ms. Moore, or otherwise attempted to collect any attorney's fees from her, either before or after he filed the motion for attorney's fees.

58. Ms. Moore had not paid any other lawyer any fees for representing her in contempt proceedings in the child support action.

59. Barnes knew that Ms. Moore had not paid any other lawyer any fees for representing her in contempt proceedings in the child support action.

60. Barnes' motion was heard before the honorable Wake County District Court Judge Ann Marie Calabria on October 20, 1998.

61. Judge Calabria heard but denied Barnes' motion.

62. Barnes did not tell Judge Calabria at any time that:

- (a) Ms. Moore had not paid him any attorney's fees;
- (b) he had not billed Ms. Moore or attempted to collect any attorney's fees from her; and
- (c) Ms. Moore had not paid any other lawyer any fees for representation of her in contempt proceedings in the child support action;

Judge Calabria was not aware of these facts at the time of the hearing.

63. Whether Ms. Moore had paid or been charged legal fees for representation of her in contempt proceedings in the child support action was material to Barnes' motion for attorney's fees.

64. Barnes waived his right to a formal hearing.

65. Barnes was properly served with process.

Based upon the consent of the parties and the foregoing Findings of Fact, the hearing committee enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over defendant and the subject matter of this proceeding.
2. Barnes' conduct in representing Sheelagh M. Anderson, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:
 - (a) By asserting frivolous defenses and counterclaims on behalf of Anderson, Barnes violated Revised Rule 3.1; and
 - (b) By advising and counseling Anderson to verify frivolous defenses and counterclaims and thereby subjecting her to sanctions and additional attorneys' fees, Barnes prejudiced and damaged his client during the course of their professional relationship, in violation of Revised Rule 8.4(g).
3. Barnes' conduct in representing Gus Zapantis, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:
 - (a) By failing to failing to pursue Mr. Zapantis' claim in a reasonably diligent and prompt manner, Barnes violated Revised Rule 1.3 and prejudiced or damaged his client during the course of their professional relationship, in violation of Revised Rule 8.4(g); and
 - (b) By failing to keep Mr. Zapantis reasonably informed about the status of his case, Barnes violated Revised Rule 1.4(a).
4. Barnes' conduct in representing Kimberly Moore, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(1) & (2) as follows,

By representing to the Wake County District Court that Ms. Moore "had been made to suffer substantial legal bills to enforce orders of this Court," Barnes:

- (a) made a false or misleading statement of material fact to a tribunal in violation of Revised Rule 3.3(a)(1); and
- (b) engaged in conduct prejudicial to the administration of justice in violation of Revised Rule 8.4(d).

Based upon the consent of the parties, the hearing committee also enters the following:

FINDINGS OF FACT REGARDING DISCIPLINE

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

- A. Multiple Offenses
- B. Substantial Experience in the Practice of Law
- C. Previous Sanctions

The Honorable Wake County Superior Court Judge Donald W. Stephens previously sanctioned Barnes \$5,000 in an order filed on November 20, 1997. Barnes was sanctioned for a knowing, willful, and intentional violation of Rule 37 of the Rules of Civil Procedure and Rule 8.4(d) of the Revised Rules of Professional for intentionally failing to appear at a deposition of his client in a civil matter. Judge Stephens subsequently reduced the amount of sanctions to \$750 after Barnes personally tendered an apology to the court for his conduct.

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

- A. Personal problems
- B. Cooperative Attitude Toward Proceedings
- C. Imposition of Other Sanctions
- D. Remorse

3. The aggravating factors do not outweigh the mitigating factors.

Based upon the foregoing findings of fact and conclusions of law and the findings regarding discipline and based upon the consent of the parties, the hearing committee enters the following:

ORDER OF DISCIPLINE

1. The license of Kenneth N. Barnes is hereby suspended for six months, effective 30 days from service of this order upon him. The period of suspension is stayed for three years upon the following conditions:

- a. Barnes shall not violate any Revised Rules of Professional Conduct during the stayed suspension.
- b. Barnes shall not violate any local, state, or federal criminal law during the stayed suspension.
- c. Barnes shall pay the costs of this proceeding as assessed by the Secretary within 60 days from the service of the costs upon him by the Secretary.
- d. During each of the three years of the stayed suspension, Barnes must take the required 12 hours of CLE, plus an additional three-hour ethics block of CLE, for a total of 15 CLE hours for each of the three years of the stayed suspension. At least one hour per year, which can include the three-hour ethics block, must be on the topic of professionalism.
- e. Barnes must designate an active member of the North Carolina State Bar, practicing in the county where Barnes primarily or most frequently practices or an adjoining county, to monitor all legal matters he agrees or is appointed to handle (other designated bar member hereafter referred to as "monitor"). The State Bar must approve the monitor in writing and reserves the right to reject any person submitted by Barnes as a monitor. Vaughan S. Winborne, Jr. is designated initially as the monitor.

Throughout the course of the stayed suspension, if he is handling any legal matters, Barnes shall meet monthly with the monitor. During these meetings, Barnes and the monitor shall:

- (1) review all active, ongoing legal files Barnes is handling;
- (2) review all actions that have been taken to ensure that all client matters are being handled in an appropriate and timely manner, and assist Barnes in taking any action necessary to correct any problem(s).

Barnes shall be responsible for filing with the State Bar a quarterly progress report. This quarterly report shall include:
(1) the dates of meetings between the monitor and Barnes,
(2) a discussion of all problems Barnes experienced in the handling of any legal matters in that quarter, or alternatively if none existed, a representation that they were no such problems.

Barnes shall ensure that the monitor reviews and signs this report and that it is filed with the State Bar on a quarterly basis no later than January 1, April 1, July 1, and October 1, in each year of the stayed suspension. If Barnes did not handle any legal matters during any given quarter, he must file a quarterly report with the State Bar so stating.

The State Bar shall not be responsible for making any compensation or reimbursement to any person selected by Barnes as a monitor.

- f. Barnes has participated in a preliminary evaluation by the North Carolina State Bar Lawyer Assistance Program (hereafter "LAP"). The initial evaluation by LAP disclosed the existence of a mental health problem. Therefore, during the stayed suspension, Barnes shall:

- (1) enter into a Recovery Contract and agree to participate in the Lawyer Assistance Program (LAP) of the North Carolina State Bar within 30 days of the professional evaluation,

- (2) comply with all recommendations for treatment and counseling of all medical personnel required by LAP, and

- (3) ensure that all his treating medical personnel forward written reports to the State Bar certifying that he has followed all recommendations for treatment of any diagnosed condition(s). These reports shall be provided semi-annually, no later than January 1 and July 1 of each year of the stayed suspension.

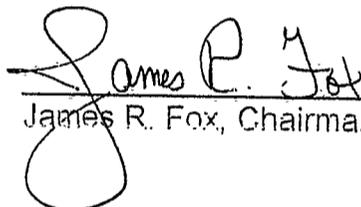
Barnes also shall authorize any physician or medical personnel who evaluates or treats him during the suspension, to release, upon request, to the State Bar Office of Counsel and LAP only, information about his status as a patient, including a copy of the evaluation and recommendations for treatment.

2. If a Hearing Committee of the DHC finds that Barnes has violated any of the conditions in Section 1(a)-(f) of this Order, the suspension of Barnes' license shall be activated, and the Disciplinary Hearing Commission retains jurisdiction to impose any additional conditions on the practice of law by Barnes, which a duly impaneled Hearing Committee believes are necessary for the protection of the public. If the suspension is activated, prior to seeking reinstatement of his license, Barnes must:

- (a) comply with all provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0125(b) of the N.C. State Bar Discipline & Disability Rules; and
- (b) provide the State Bar with evidence that he has satisfactorily complied with the conditions set forth in section 1(a)-(f) for at least the six months immediately preceding the filing of his petition for reinstatement.

Signed by the undersigned hearing committee chair, with the consent of the other hearing committee members.

This the 23rd day of June 2000.


James R. Fox, Chairman

We consent.


Kenneth N. Barnes
Defendant


Douglas J. Brocker
Attorney for plaintiff