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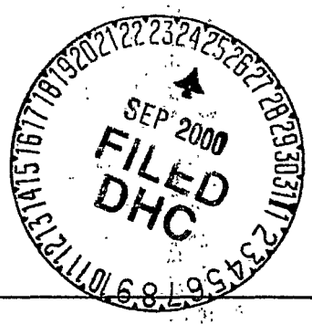
WAKE COUNTY

NORTH CAROLINA




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

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| THE NORTH CAROLINA STATE BAR, Plaintiff<br><br>Vs.<br><br>BERTRAM ERVIN BROWN, II, Attorney, Defendant | FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF DISCIPLINE |

This matter comes before a hearing committee of the Disciplinary Hearing Commission composed of Kenneth M. Smith, Chair, T. Paul Messick, Jr., Esq. and Catharine Sefcik. The Plaintiff was represented by Clayton W. Davidson, III, Deputy Counsel. The Defendant, B. Ervin Brown, II, was represented by David Freedman. The hearing committee heard and granted a summary judgment motion filed by the Plaintiff. Waiving arguments and hearing, the parties agreed to various stipulations, including a stipulation that all issues, including the imposition of discipline, could be decided on the written record, and the parties waived arguments and hearing. Based upon the stipulations, pleadings, affidavits, briefs and other written materials submitted by the parties, the hearing committee enters the following:

**FINDINGS OF FACT REGARDING MISCONDUCT**

1. The Plaintiff, the North Carolina State Bar (the "State Bar"), is a body duly organized under the laws of the State of North Carolina and is the proper body to bring this proceeding under the authority granted to it in Chapter 84 of the General Statutes of North Carolina and the rules and regulations of the State Bar promulgated pursuant thereto (the "State Bar Rules and Regulations").



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2. The Defendant, Bertram Ervin Brown, II (the "Defendant") was admitted to the State Bar in or about August 1971 and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina and subject to the State Bar Rules and Regulations and the Rules of Professional Conduct of North Carolina.

3. During all or a part of the time periods relevant to this matter, the Defendant was engaging in the practice of law in the State of North Carolina and maintained a law office in Winston-Salem, North Carolina.

THE ARNOLD DEPOSITION[1]

4. On May 29, 1997, the Defendant took the deposition of Laurel Arnold in a case *Reninger v. T.G.F. Socks, Inc.*, 97 CVS 1922 (Superior Court Forsyth County).

5. During that deposition, the Defendant repeatedly interrupted the witness while she was trying to answer the Defendant's questions. The Defendant repeatedly questioned the witness about domestic difficulties and her home life, subjects that had no relevance to the action.

6. After numerous interruptions, opposing counsel objected and asked the Defendant to allow the witness to respond before asking additional questions.

7. The Defendant began raising his voice. When opposing counsel told the Defendant not to yell, the Defendant responded, "I'll do whatever I want to."

8. When opposing counsel threatened to terminate the deposition if the Defendant continued to yell, the Defendant responded, "Terminate it. If you'd keep your mouth shut, we could keep it down - the tension level down." At one point, the Defendant told the witness to listen to the question. When opposing counsel responded that the witness had been listening to the

[1] All headings are for ease of reference only, correspond to the headings contained in the complaint in this matter, and should not be deemed to expand or limit the substantive findings of fact contained in this order.

Defendant's questions, the Defendant said, "Well she can't because you're running your damn mouth, Lingle. So shut up and maybe she can hear."

9. Opposing counsel continued to object and the Defendant told opposing counsel to, "Shut up and sit there, OK?" When opposing counsel continued to object to the Defendant's abuse of the witness, the Defendant said, "I'm trying to get you to shut up so we can go on with the deposition." When opposing counsel suggested again that he was going to terminate the deposition, the Defendant responded, "Well either terminate it or shut up ... either terminate it or shut up, one way or the other. All right?"

10. When opposing counsel continued to object to the Defendant's tone of voice and manner, the Defendant's response was, "Fuck you."

11. Opposing counsel made one last attempt to get the Defendant to calm down, and the Defendant responded, "Fuck you, you piece of shit."

12. When opposing counsel tried to state on the record the basis for the termination of the deposition, the Defendant responded, "Well don't sit here and tell me I'm a juvenile, you little shit of five years out of law school. Don't tell me I'm a goddamn juvenile. Either sit here and do your damn business, or else."

THE VENTURA DEPOSITION

13. In the matter of *Industrie Natuzzi Spa v. Klaussner Corporation and Klaussner Furniture Industries, Inc.*, 92 CV 00750 (the "Industrie Natuzzi" matter), pending in the United States District Court for the Middle District of North Carolina in Greensboro, North Carolina, the court entered an order finding that an exchange occurred whereby the plaintiff's counsel in a deposition stated, "This is crap." The Defendant responded, "I don't give a damn. Go home and just run at the goddamn mouth ... Well, if you were not just sitting there on your ass, I guess you could put one [a document] in front of her." The court order stated that there is no

place for such a verbal exchange in the deposition, and stated that any repeat of the actions would justify sanctions.

14. On November 15, 1993, Defendant took the deposition of Alberto Ventura (the "Ventura Deposition") in the *Industrie Natuzzi* matter.

15. Following an exchange about whether or not an Italian translator was translating everything the witness said, the Defendant turned to opposing counsel and said, "Off the record. You're full of shit." Opposing counsel then requested that the statement be placed on the record.

THE ADAMCZYK DEPOSITION

16. In the matter of *Wellfleet Communications, Inc. v. Dilan, Inc.*, pending in the Commonwealth of Massachusetts, Superior Court Middlesex, ss. Civil Action number 93-6412, the Defendant took the deposition of Stanley Adamczyk on June 7, 1994 (the "Adamczyk Deposition").

17. During the Adamczyk Deposition, the Defendant accused the witness of lying, and stated to opposing counsel in discussing the witness, "He's just going to lie some more? ... Come on, let's get some more lies on the record, we need some, go ahead."

18. The Defendant further stated to opposing counsel, "You really are abrasive, and an asshole. Probably one of the worst assholes I've ever met." When opposing counsel told the Defendant that those comments were unnecessary, the Defendant's response was, "I think you're unnecessary, OK? I think you're unnecessary."

Based on 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 the defendant and the subject matter of this proceeding.

2. The Defendant's foregoing actions constitute grounds for discipline pursuant to N. C. GEN. STAT. § 84-28(b)(2), in that the Defendant violated the North Carolina Rules of Professional Conduct[1] as follows:

   a) By making derogatory and profane remarks to and about opposing lawyers and a witness in the presence of others, and by conducting the deposition in a grossly improper manner the Defendant engaged in conduct prejudicial to the administration of justice in violation of Superseded Rule 1.2(d); and

   b) by making derogatory and profane remarks to and about opposing lawyers and a witness in the presence of others, and by conducting the deposition in a grossly inappropriate manner, the Defendant took action intended to harass or maliciously injure others in violation of Superseded Rule 7.2(a)(1).

Based on 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 violations;

   b) substantial experience in the practice of law;

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

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[2] The conduct in this matter occurred prior to July 24, 1997, the effective date of the North Carolina Revised Rules of Professional Conduct (hereafter the "Revised Rules"). Consequently, the North Carolina Rules of Professional Conduct in existence prior to July 24, 1997 (hereafter the "Superseded Rules") are at issue this matter.

a) absence of a prior disciplinary record;

b) full and free disclosure to the hearing committee and cooperative attitude towartd proceedings;

c) evidence of good character and reputation was offered by the Defendant;

d) evidence of interim rehabilitation;

e) imposition of other penalties or sanctions; and

f) remorse.

Based on the forgoing findings of fact regarding misconduct, conclusions of law, and findings of fact regarding discipline, the hearing committee enters the following:

**ORDER OF DISCIPLINE**

1. The Defendant, B. Ervin Brown, III, is hereby censured in the attached Public Censure.
2. The Defendant shall pay all costs of this proceeding required by law within thirty days of service of notice of the amount of costs as assessed by the Secretary.

Signed by the undersigned chair with the full knowledge and consent of all other members of the hearing committee this 21 day of September, 2000.

Kenneth M. Smith

WAKE COUNTY

NORTH CAROLINA

SEP 2000 FILED DHC

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

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| THE NORTH CAROLINA STATE BAR, Plaintiff, | ) | |
| v. | ) | PUBLIC CENSURE |
| BERTRAM ERVIN BROWN, II, Attorney, Defendant | ) | |

This matter was heard before a hearing committee of the Disciplinary Hearing Commission composed of Kenneth M. Smith, Chair, T. Paul Messick, Jr., Esq. and Catharine Sefcik. Based upon the stipulations, pleadings, affidavits, briefs and other written materials submitted by the parties, the hearing committee unanimously voted to issue this Public Censure to you.

On May 29, 1997, you took the deposition of Laurel Arnold in a case *Reninger v. T.G.F. Socks, Inc.*, 95 CVS1922 (Superior Court Forsyth County). During that deposition, you repeatedly interrupted a witness while a witness was trying to answer your questions. You repeatedly questioned the witness about domestic difficulties and her home life, subjects that had no relevance to the action. After numerous interruptions, opposing counsel objected and asked you to allow the witness to respond before asking additional questions. You began raising your voice. When opposing counsel told you not to yell, you responded, "I'll do whatever I want to." When opposing counsel said that he was going to terminate the deposition if you continued to yell, your response was, "Terminate it. If you'd keep your mouth shut, we could keep it down – the tension level down." At one point, you told the witness to listen to your question. When defense counsel responded that the witness had been listening to your questions, you said, "Well she can't because you're running your damn mouth, Lingle. So shut up and maybe she can hear." When opposing counsel continued to object, you told opposing counsel, "Shut up and sit there, OK?" When he suggested that he was going to terminate the deposition, your response was, "Well either terminate it or shut up . . . either terminate it or shut up, one way or the other. All right?" When opposing counsel continued to object to your tone of voice and your manner, your response was, "Fuck you." When he made one last attempt to calm you, your response was, "Fuck you, you piece of shit." When opposing counsel tried to state on the record the basis for the termination of the deposition, your response was, "Well don't sit here and tell me I'm a juvenile, you little shit five years out of law school. Don't tell me I'm a goddamn juvenile. Either sit here and do your damn

business or else." As a result of your conduct in that deposition, the court heard a Motion for Sanctions and entered an order specifically finding that you engaged in abusive and unprofessional acts, including numerous interruptions of the witness and opposing counsel, yelling at the witness and opposing counsel and using profane and vulgar language. The court also found that the defendant's counsel properly and for good cause terminated the examination of the witness due to your abusive and unprofessional conduct. The court further ordered that the deposition could resume only in the Forsyth County Hall of Justice and that you would be fined $500 for each and every profanity you uttered during the course of any future deposition taken by any party in this action.

In addition, you appeared in the matter *Industrie Natuzzi Spa v. Klaussner Corporation and Klaussner Furniture Industries, Inc.*, 92 CV 00750, in the United States District Court for the Middle District, Greensboro, North Carolina. In that matter, the Court found unacceptable behavior by both counsel. When the plaintiff's counsel stated, "This is crap," you responded, "I don't give a damn. Go home and just run at the goddamn mouth . . . Well, if you were not just sitting there on your ass, I guess you could put one [a document] in front of her." The court ruled that any repeat of those actions would result in sanctions.

In a June 7, 1994 deposition taken in *Wellfleet Communications, Inc. v. Dilan, Inc.*, you accused the opposing party of lying. You stated to opposing counsel in discussing the witness, "He's just going to lie some more? . . . Come on, let's get some more lies on the record, we need some, go ahead." You further stated to opposing counsel, "You really are an asshole, one of the worst assholes I've ever met." When opposing counsel told you that those comments were unnecessary, your response was, "I think you're unnecessary, OK? I think you're unnecessary."

The abusive manner in which you conducted these depositions constituted conduct prejudicial to the administration of justice in violation of Rule 1.2(d) of the Rules of Professional Conduct. *See also* Rule 8.4(d) of the Revised Rules of Professional Conduct. Your conduct also constitutes action taken on behalf of a client which was intended to harass or maliciously injure others in violation of Rule 7.2(a)(1) of the Rules of Professional Conduct. Your remarks to and about opposing lawyers and a witness were unwarranted and unprofessional. Without a doubt, counsel may disagree with opposing counsel during the course of a deposition, but these disagreements must be handled in an appropriate manner. Your choice of language and your intemperate, uncivil conduct in making derogatory remarks were indefensible. You have an obligation to zealously represent your client, but zealous representation does not and cannot include insulting opposing counsel and witnesses in order to gain an advantage for your client. At a time when the legal profession is besieged by complaints about unprofessional behavior, your egregious shortcomings in this area have embarrassed not only yourself, but all North Carolina lawyers who have lent credence to the arguments of those who have disparaged the profession in the popular press and on the campaign trail. Your misconduct is mitigated by the fact that you have already been subject to sanctions in other courts. Had this mitigating factor not been present, the Disciplinary Hearing

Commission might have concluded that more substantial discipline was more appropriate.

You are hereby censured by the North Carolina State Bar for your violation of the Rules of Professional Conduct. The Disciplinary Hearing Commission hopes that you will ponder this Censure, will recognize the errors you have made, and will never again allow yourself to depart from the high ethical standards of the legal profession. This Censure should serve as a strong reminder and inducement for you to weigh carefully in the future your responsibilities to the public, your clients, your fellow attorneys and the courts so that you conduct yourself as a respected member of the legal profession whose ethical and professional conduct may be relied upon without question.

This the 21 day of September, 2000.

Signed by the Chair with consent of all members of the hearing committee.

Kenneth M. Smith
Disciplinary Hearing Commission