

NORTH CAROLINA
WAKE COUNTY



8148

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
00 DHC 8

THE NORTH CAROLINA STATE BAR,
Plaintiff

v.

BARRY NAKELL, Attorney,
Defendant

)
)
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW AND
) ORDER OF DISCIPLINE
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)

This matter came on to be heard before a hearing committee of the Disciplinary Hearing Commission composed of Fred H. Moody, Jr., Chair; Joseph G. Maddrey; and Robert Hicks. James G. Exum, Jr. represented the Defendant, Barry Nakell. A. Root Edmonson represented the North Carolina State Bar. Based upon the pleadings and the stipulations contained in the pre-trial order, 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, Barry Nakell (hereinafter, "Nakell"), was admitted to the North Carolina State Bar on March 1, 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, and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During the times relevant to this complaint, Nakell actively engaged in the practice of law in the State of North Carolina and maintained a law office in the city of Chapel Hill, Orange County, North Carolina.

4. Nakell was properly served with process in this matter and is subject to the jurisdiction of the Disciplinary Hearing Commission.

5. On July 22, 1999, Nakell entered the Encore Bookstore in Albemarle, NC with a newspaper folded under his arm.

6. Nakell concealed a copy of the book, *A Civil Action*, under his newspaper and intentionally left the bookstore without paying for the book.

7. Nakell was subsequently charged with the misdemeanor crime of larceny for taking the book.

8. On November 22, 1999, Nakell entered a plea of guilty and was convicted of misdemeanor larceny in Stanly County District Court.

BASED UPON the foregoing Findings of Fact, the hearing committee makes the following:

CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over Nakell and the subject matter.

2. Nakell's conduct, as set out above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(a) & (b)(2) as follows:

By intentionally concealing and taking away a copy of the book, *A Civil Action*, from the Encore Bookstore, Nakell committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b) and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c).

Based upon the foregoing Findings of Fact, the Conclusions of Law, the stipulations contained in the pre-trial order and the evidence presented at the hearing, the hearing committee hereby makes the following:

FINDINGS OF FACT REGARDING DISCIPLINE

1. On January 6, 1991, Nakell intentionally removed a book valued at \$11.95 from the premises of Archive Records in Carrboro without paying for the book. On January 17, 1991 Nakell entered a plea of guilty to misdemeanor larceny in Orange County District Court and received a PJC. By order of the Disciplinary Hearing Commission in 91 DHC 11, Nakell received a one-year suspension of his license for this offense stayed for four years on certain conditions. Nakell complied with the conditions until the period of the suspension and stay terminated.

2. On October 1, 1996, Nakell concealed \$6.00 worth of deli food in his jacket at A Southern Season in Chapel Hill. On January 16, 1997, Nakell entered a plea of guilty to the offense of shoplifting in Orange County District Court and received a PJC. Citing Nakell's dismissal as a tenured professor at UNC School of Law as a penalty or sanction already imposed, Nakell received a Censure from the Grievance Committee of the North Carolina State Bar for this offense.

3. Nakell has suffered for many years from Dysthemic Disorder, a psychiatric condition that represents a low-grade chronic depression that impairs Nakell's ability to deal appropriately with stressful situations. Nakell's shoplifting incidents were a direct result of the dysthemia. Although Nakell received psychiatric treatment after both of his prior offenses, the treatments he previously received didn't improve Nakell's ability to understand the link between the stress in his life and his impulsive, inappropriate behavior or the signals that stress had built up and required an appropriate response to diffuse the stress.

4. Nakell began treatment with Dr. Nathan R. Strahl in the fall of 2000. Dr. Strahl has been successful in getting Nakell to understand his illness and to recognize and deal appropriately with stress. Dr. Strahl's prognosis is that Nakell has learned how to appropriately respond to stress and it is very unlikely that he will ever shoplift again.

5. In addition to his treatment with Dr. Strahl, Nakell has been involved in group therapy with the Lawyers Assistance Program since October 2001. Nakell's participation in that therapy has been beneficial to Nakell and to those in the group.

6. Others have noticed positive changes in Nakell since he began treatment with Dr. Strahl that they had not noticed when he previously received treatment. Lunsford Long, the councilor from Nakell's district, observed that Nakell's demeanor has had a positive change and his concentration and affect have improved.

7. Nakell has voluntarily refrained from entering stores alone since his last incident.

8. Nakell's misconduct was not related to his law practice.

9. Nakell has a long history of representing poor and disadvantaged clients in pursuit of cases that resulted in positive social change. He was instrumental, for example, in founding North Carolina Prisoner Legal Services and in helping to found North State Legal Services. Nakell has assisted many clients unable to afford legal representation on a pro-bono basis in ways that have brought credit to the legal profession.

10. Nakell voluntarily ceased taking on new client matters after the July 1999 incident except for a few pro-bono matters and one contingency fee matter.

11. Nakell's misconduct is aggravated by the following factors:

- (a) Prior disciplinary offenses;
- (b) Criminal conduct;
- (c) A pattern of misconduct;
- (d) Substantial experience in the practice of law.

12. Nakell's misconduct is mitigated by the following factors:

- (a) Personal or emotional problems;
- (b) Timely good faith efforts to rectify the consequences of his misconduct by seeking treatment from Dr. Strahl and cooperating with the Lawyers Assistance Program;
- (c) Full and free disclosure to the hearing committee and cooperative attitude toward the proceedings;
- (d) Good character and reputation, including support from the councilor and the Senior Resident Superior Court Judge from his district;
- (e) Physical or mental disability or impairment that led to his misconduct;
- (f) Interim rehabilitation; and
- (g) Remorse.

BASED UPON the foregoing Findings of Fact Regarding Discipline and the arguments of the parties, the hearing committee hereby enters the following:

ORDER OF DISCIPLINE

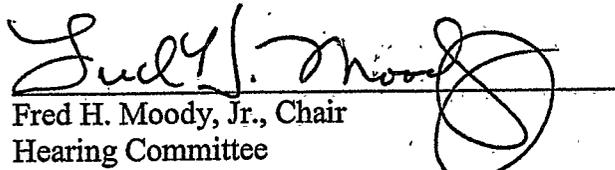
1. The license of the defendant, Barry Nakell, is suspended for four years.
2. The four-year suspension is stayed for five years on the following terms and conditions:
 - a. Nakell shall violate no federal or state laws (other than minor traffic offenses).
 - b. Nakell shall violate no provisions of the Revised Rules of Professional Conduct.
 - c. Nakell shall continue treatment with Dr. Nathan R. Strahl, or some other psychiatrist acceptable to the North Carolina State Bar, during the entire period the stay is in effect. Nakell shall follow all treatment recommendations made by the psychiatrist and shall direct the psychiatrist to report any failure to follow the psychiatrist's treatment plan, and the specifics related thereto, to the Office of Counsel. Even if the psychiatrist concludes in the future that Nakell needs treatment less often, Nakell must continue to see the psychiatrist at least quarterly.
 - d. Nakell shall provide semi-annual reports to the Office of Counsel during the period of the stay, signed by Nakell and the psychiatrist, certifying that Nakell is in compliance with the terms and conditions of the above paragraph of this order. The

reports shall be completed and transmitted to the Office of Counsel by each six-month anniversary of the date of this order.

e. Nakell shall enter into a contract with the Lawyer Assistance Program by June 1, 2002. Nakell shall comply with the terms of that contract. As a part of that contract, Nakell shall direct the Lawyer Assistance Program to report any failure to comply with the terms of this paragraph, and the specifics related thereto, to the Office of Counsel.

f. Nakell shall pay the costs of this proceeding by June 1, 2002.

Signed by the chair with the consent of the other hearing committee members, this the 12 day of March, 2002.


Fred H. Moody, Jr., Chair
Hearing Committee