

6. On or about 5 January 1999, Janice D. Hess (hereinafter Hess) retained Defendant to represent her in defending an action for absolute divorce that had been filed by her husband, Homer Hess. At the time Defendant was retained, an Answer to the husband's Complaint was due on or before 1 February 1999.

7. At the time of engaging Defendant, Hess had become aware of a problem with the ability to enforce a separation agreement with her husband prepared earlier by another attorney and so informed Defendant.

8. The separation agreement in dispute had, among other items, a provision under which the husband would make a monthly payment to Hess for life as part of the property settlement as well as other provisions for the distribution of the marital property.

9. The signatures of Hess and her husband on the separation agreement had not been acknowledged before a Notary Public as required by statute. By statute, the separation agreement was, therefore, null and void. The husband had honored the agreement for a matter of months following its execution, but had stopped making the monthly payments at the time the Complaint for divorce had been filed.

10. At that time, Hess understood that the separation agreement was more favorable to her than equitable distribution would likely be. Hess wanted Defendant to protect her interests in the distribution of the marital property in defending the action for divorce. Hess did not object to the granting of divorce.

11. The Complaint filed and verified by Hess' husband alleged in part: "The parties entered into a separation [sic] which by its terms [sic] not to be incorporated into their divorce decree."

12. Defendant agreed she would prepare an appropriate Answer to the divorce action for review and verification by Hess by 13 January 1999. An appointment for Hess to meet with Defendant at Defendant's law office was scheduled for the morning of 13 January 1999.

13. Hess informed Defendant on 13 January 1999 that she would be unable to keep her scheduled appointment that day.

14. Hess and the Defendant then agreed to meet on the morning of 14 January 1999.

15. When Hess arrived at Defendant's office on 14 January 1999, Defendant did not have an Answer prepared. Defendant asked Hess to sign a sheet of paper that had Hess' typed name and a signature line. Defendant told Hess that it was all right for her to sign the paper bearing her typed name and signature line and that Defendant would protect Hess' interests.

16. Defendant prepared an Answer with a Counterclaim asking for equitable distribution dated 18 January 1999 and signed it as attorney for Hess. The Answer denied that the parties had entered into a valid separation agreement. By denying the validity of the separation agreement, the Answer effectively precluded enforcement of it. Further, the Answer did not ask for alimony or post-separation support and, as a result, waived any potential claim for alimony or post-

separation support. The Answer also requested that it "be used as an affidavit in support of all orders issuing therefrom." The Answer was filed with the court on 25 January 1999.

17. A Verification to the Answer with Hess' signature and a jurat of a Notary Public to the Verification was attached to the Answer as filed with the court. The Verification attached to the Answer was the document signed by Hess on 14 January 1999. The Verification recites that Hess had read the contents of the Answer and that they were true, except those matters alleged upon information and belief, which matters Hess believed to be true. The jurat of the Notary Public indicates that Hess had signed the Verification under oath before the Notary Public on 18 January 1999.

18. Hess was not in Defendant's office at any time on 18 January 1999.

19. Hess did not read the Answer before it was filed in court.

20. Hess did not sign the Verification to the Answer on 18 January 1999.

21. Hess did not sign the Verification before the Notary Public who executed the jurat on 18 January 1999.

22. Hess did not sign the Verification under oath before a Notary Public or other official qualified to administer oaths at any time.

23. The Notary Public who executed the jurat to the Verification signed by Hess to the Answer was not an employee of the Defendant and worked in a separate office from the Defendant.

24. The court entered a judgment of absolute divorce on 8 February 1999 but held open the question of equitable distribution.

25. Hess discharged Defendant sometime between 11 March 1999 and 24 May 1999 and retained another attorney to represent her concerning distribution of the marital property after the divorce judgment was entered. A post-judgment motion to set aside the divorce judgment and amend the Answer and Counterclaim was filed in which the authenticity of Hess' Verification of the Answer was an issue. A hearing on the motion was held on 8 December 1999 in Iredell County District Court and Defendant testified at that hearing. By the time of the hearing on 8 December 1999, the former husband of Hess had remarried.

26. At the hearing on 8 December 1999, Defendant knowingly and falsely testified under oath that she had reviewed the Answer and Counterclaim with Hess on 18 January 1999 in Defendant's office.

27. At the hearing on 8 December 1999, Defendant knowingly and falsely testified under oath that Hess had signed the Verification to the Answer in her presence on 18 January 1999 in Defendant's office.

28. At the hearing on 8 December 1999, Defendant testified under oath that she had instructed and allowed the Notary Public to notarize Hess' signature on the Verification to the

Answer and Counterclaim on 18 January 1999 without Hess being present before the Notary Public to swear to or affirm the verification under oath.

29. By letter dated 21 September 2000, in response to an inquiry from the Chair of the Grievance Committee of the North Carolina State Bar, Defendant falsely represented to the North Carolina State Bar Grievance Committee that Hicks had been present in her office on 18 January 1999 and had signed the Verification on that day when she knew that Hess had not appeared at her office that day and signed the Verification on that day.

Based upon 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 Carole A. Hicks and the subject matter.

2. The defendant's conduct, 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 preparing a verification to an Answer and Counterclaim that indicated that Hess had read the contents of the answer and signed the verification before a notary public on 18 January 1999 when Hess had not in fact read the answer or signed the verification on that date, the Defendant has engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct.

(b) By instructing and allowing a notary public to attest falsely in a jurat that Hess had personally appeared before the notary and executed the Verification to the Answer under oath on 18 January 1999 when the notary public did not personally see Hess sign the Verification or administer any oath to Hess, the Defendant has falsified evidence in violation of Rule 3.4(b) of the Revised Rules of Professional Conduct; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct; engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct; committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4(b) of the Revised Rules of Professional Conduct; and violated the Rules of Professional Conduct through the acts of another in violation of Rule 8.4(a) of the Revised Rules of Professional Conduct.

(c) By filing an Answer in a court proceeding with a verification by a client knowing that the verification was not made in the presence of a notary or under oath, although it so recites, the Defendant has knowingly made a false statement of material fact to a tribunal in violation of Rule 3.3(a)(1) of the Revised Rules of Professional Conduct; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct; and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct; committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4(b) of the Revised Rules of Professional Conduct.

(d) By falsely testifying under oath in a court proceeding that she met with Hess in Defendant's office on 18 January 1999 and that Hess had signed the verification to the Answer and Counterclaim after reviewing it, Defendant knowingly made a false statement of material fact to a tribunal and offered evidence that the Defendant knew to be false in violation of Rule 3.3(a)(1) and (4) of the Revised Rules of Professional Conduct; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional conduct; committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4(b) of the Revised Rules of Professional Conduct; and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct.

(e) By falsely representing to the North Carolina State Bar Grievance Committee that Hess had been present in her office and signed the Verification to the Answer on 18 January 1999 when she knew that Hess had not appeared at her office that day, the Defendant knowingly made a false statement of material fact in connection with a North Carolina State Bar Disciplinary Matter in violation of Rule 8.1(a) of the Revised Rules of Professional Conduct; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct; and engaged in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct.

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the evidence and arguments of the parties concerning the appropriate discipline, the hearing committee hereby makes the additional

Findings of Fact Regarding Discipline

1. There are no aggravating factors related to defendant's misconduct.
2. The defendant's misconduct is mitigated by the following factors:
 - (a) Absence of selfish motivation; and
 - (b) No prior disciplinary record.
3. The mitigating factors outweigh the aggravating factors.

Based upon the foregoing aggravating and mitigating factors and the arguments of the parties, the hearing committee hereby enters the following

Order of Discipline

1. The Defendant is hereby reprimanded.

2. The defendant shall pay the costs of this proceeding as assessed by the Secretary.

Signed by the chair with the consent of the other hearing committee members, this the 5th day of July, 2002.

Elizabeth Bunting
Elizabeth Bunting
Hearing Committee Chair

WAKE COUNTY
NORTH CAROLINA



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
02 DHC 5

THE NORTH CAROLINA STATE BAR,
PLAINTIFF

v.

CAROLÉ A. HICKS, ATTORNEY,
DEFENDANT

REPRIMAND

Following a hearing on 14 June 2002, a hearing committee of the Disciplinary Hearing Commission issued an Order of Discipline imposing a Reprimand against you based on your conduct as found in the above captioned matter.

A Reprimand is a formal, written form of discipline issued in cases in which the attorney has violated one or more provisions of the Rules of Professional Conduct and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the hearing committee has determined that the misconduct does not require more serious discipline.

As Chair of the hearing committee that heard this matter, it is my duty to issue this Reprimand to you. I trust that you will fully understand the spirit in which this duty is performed.

In early January 1999, Ms. Janice Hess engaged your services to represent her in defending a complaint for divorce filed by her husband, Homer Hess, in December, 1998 and to assist her in enforcing a separation agreement between them or otherwise protecting her interests in the marital estate. At your initial conference on January 5, 1999, Ms. Hess informed you that she did not object to the divorce, but primarily wanted to make sure her interests were protected. She also informed you that she had learned of a problem with the enforceability of the separation agreement, that under the terms of the agreement she was to receive monthly payments from her husband for life, and that her husband had complied with the terms for several months but was no longer complying. She provided you with a copy of the separation agreement. The complaint for divorce alleged that there was a separation agreement.

You and Ms. Hess agreed to meet again and go over an Answer. The meeting was scheduled for January 13, but Ms. Hess had to cancel. Ms. Hess testified, and the Hearing Committee believes, that she met with you on the morning of January 14 at which time you asked her to sign a blank form that was later attached to the Answer you filed on her behalf and that you had not yet prepared the Answer.

The Answer that you prepared and filed with the Court was dated January 18, the Monday Martin Luther King, Jr. holiday. The jurat of the notary public on the verification to the Answer signed by Ms. Hess recites that it was "sworn to and subscribed before me [the notary public] on January 18. You have admitted that Ms. Hess did not actually appear before the notary who executed the jurat and was not under oath at the time she signed the verification. You also admitted directing the notary to execute the jurat on your word that the client had signed it that day.

The Answer you prepared on behalf of Ms. Hess denied the validity of the separation agreement. The judge then granted the divorce on February 8, 1999, but did hold open the issue of equitable distribution.

At some point between your second meeting with Ms. Hess and May 24, the attorney-client relationship was terminated and Ms. Hess hired another attorney. That attorney filed a motion in the divorce action to set the divorce judgment aside and allow Ms. Hess leave to amend her Answer and Counterclaim. The issue in the post-judgment motion was whether the verification to the answer was correct and whether Ms. Hess had understood the ramifications of the Answer filed on her behalf. Ms. Hess contended in that motion, as she still does today, that you could not have met with her on January 18 as recited in the verification notary jurat because she was in the Myrtle Beach, South Carolina vicinity at the time of the supposed meeting.

You were called to testify under oath at the hearing on the post-judgment motion. Even though you knew that Ms. Hess testified that she was in Myrtle Beach, you testified that she was in your office on January 18, the same day as the notary jurat. Your testimony was false and you knew it to be false. Further, this testimony directly contradicted the testimony of your former client.

Later, when the Chair of the Grievance Committee asked you for an explanation of your conduct at the post-judgment motion hearing, you repeated your statement that Ms. Hess was in your office on January 18 to the Grievance Committee.

Perhaps the most troubling aspect of your conduct is your continued insistence that Ms. Hess was in your office on January 18 even when confronted with third party business records and witness testimony that she was in Myrtle Beach at the time you claim she was in your office. Had you at any point said that you may have been mistaken or attempted to correct the record, perhaps nothing further would have come of this matter. By continuing to falsely claim that she was in your office on that date, you have compounded a minor incident into circumstances where the Bar was compelled to begin disciplinary action. You damaged both the legal profession and your own reputation for honesty.

The Hearing Committee believed that your conduct was mitigated by your lack of any prior discipline and a belief that you had no selfish motive for your testimony. The Hearing Committee also believed this to be out of character and an aberration. As a result, the Hearing Committee believed that more serious discipline was not warranted. The Hearing Committee was mindful that others have received suspensions and disbarments for false testimony in court, but concluded that the aggravating circumstances of those cases were not present here. The Hearing Committee felt you would learn from this experience and were not likely to repeat your mistakes.

The Hearing Committee reminds you that attorneys cannot continue to remain self-regulating if members of the Bar do not conduct themselves with honesty and integrity at all

times, especially before the courts and the Bar itself. The Hearing Committee trusts that you will take this Reprimand to heart, benefit from it, and never again violate the Rules of Professional Conduct.

Signed by the Chair with consent of all committee members, this the 5th day of

July, 2002.

Elizabeth C. Bunting
Elizabeth Bunting, Chair
Disciplinary Hearing Committee