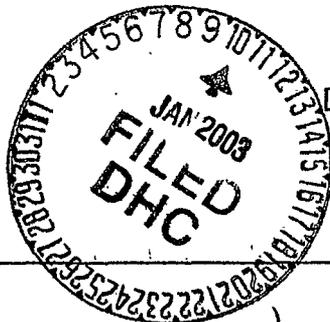


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WAKE COUNTY
NORTH CAROLINA



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
01.DHC 15

THE NORTH CAROLINA STATE BAR,)
Plaintiff)
v.)
DAVID H. ROGERS,)
Defendant)

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

This matter was heard on November 21-22 and, by consent of the parties, completed on December 10, 2002 before a hearing committee of the Disciplinary Hearing Commission composed of W. Steve Allen, Chair, Elizabeth Bunting, and Betty Ann Knudsen. Defendant, David H. Rogers, represented himself pro se. Douglas J. Brocker represented plaintiff, the North Carolina State Bar. Based upon the evidence introduced at the hearing, 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 North Carolina General Statutes and the Rules and Regulations of the North Carolina State Bar.
2. Defendant, David H. Rogers (hereafter, "Rogers"), was admitted to the North Carolina State Bar on June 8, 1979 and was at all times relevant hereto licensed to practice law in North Carolina, subject to the rules, regulations, and Rules of Professional Conduct of the North Carolina State Bar.
3. During the times relevant to this complaint, Rogers 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. Rogers was properly served with process and the hearing was held with due notice to all parties.

Hayes Matter

5. Rogers purchased residential real property located at 1108 Shetland Court in Raleigh, North Carolina (hereafter, "Rogers' property") on or about December 2, 1971.

6. Rogers has resided continuously at the Rogers' property since approximately December 2, 1971.

7. Bobby and Alinda Hayes have owned and resided at residential real property located at 1112 Shetland Court (hereafter, "Hayeses' property") since approximately October 4, 1971.

8. The Rogers' property and the Hayeses' property are located next door to one another.

9. Between the driveways to the two properties is a grassy median of land (hereafter, "median"). The property line between the two properties bisects the median.

10. Rogers planted a river birch tree within the median at some time during the 1970s.

11. In July 2000, the Hayes hired a surveyor to identify the property line so they could erect a fence and plant a hedgerow.

12. The surveyor placed stakes on the property line and indicated that the river birch tree was on the Hayeses' property.

13. Rogers subsequently removed the surveyor's stakes.

14. Rogers then sent the Hayes a letter dated September 26, 2000. In the letter, Rogers:

- (a) claimed that he had acquired the land surrounding the river birch tree by adverse possession; and
- (b) informed the Hayes that if they erected a fence including the tree and surrounding land on their property, he would file a civil lawsuit against them.

15. On July 14, 2000, over two months before sending the letter to the Hayes, Rogers executed a deed purporting to convey his interest in the Rogers property to his four children (hereafter, "purported deed"). Rogers recorded or had recorded the purported deed in the Wake County Register of Deeds Office on the same day, July 14, 2000.

16. In his September 26, 2000 letter, in which he claimed title to a portion of their adjoining property by adverse possession, Rogers did not disclose to the Hayeses the July 14, 2000 deed purporting to transfer his property.

17. After receiving Rogers' September 26 letter, the Hayeses consulted with an attorney, Robin Tatum Morris.

18. Ms. Morris wrote a letter to Rogers on or about October 12, 2000, in which she disputed Rogers' claim for adverse possession and noted the existence of the July 14, 2000 purported deed.

19. Rogers replied to Ms. Morris in a letter dated October 18, 2000. In that letter, Rogers:

- (a) acknowledged the existence of the July 14 purported deed and asserted that he had transferred his interest in the property to his children through that deed;
- (b) asserted that his children were asserting a claim for adverse possession, and
- (c) asserted that he was acting as attorney or agent for his children in asserting a claim for adverse possession of the Hayeses' property.

20. At the time Rogers wrote his October 18, 2000 letter, Rogers' children had not asserted any claim for adverse possession of the Hayeses' property and had not authorized him to act as their attorney or agent.

21. By asserting in his October 18, 2000 letter that his children were asserting a claim for adverse possession against the Hayeses' property, Rogers knowingly made a misrepresentation or false statement of material fact.

22. By asserting in his October 18, 2000 letter that he was the attorney or agent for his children in asserting a claim for adverse possession against the Hayeses' property, Rogers knowingly made a misrepresentation or false statement of material fact.

23. To resolve Rogers' claim for ownership by adverse possession, the Hayeses filed a complaint to quiet title (hereafter, "lawsuit").

24. Based on the July 14, 2000 deed and Rogers' above misrepresentations in his October 18, 2000 letter, the Hayeses filed the initial complaint against Rogers' children only.

25. Rogers' children filed an answer and motion to dismiss (hereafter, "answer") in the lawsuit on January 19, 2001. In their answer, Rogers' children:

- (a) asserted that they were not aware of Rogers attempt to transfer his interest in the property to them on July 14, 2000;
- (b) asserted that they had not received the original or a copy of the deed until they were served with the Hayeses' civil complaint;

- (c) denied that Rogers properly or effectively conveyed any of his interest in the property to them on July 14, 2000 or previously;
- (d) denied that Rogers was their attorney or agent with respect to their ownership of the Rogers' property or any claim for ownership of a portion of the Hayes' property by adverse possession;
- (e) denied that they had asserted a claim for any portion of the Hayeses' property by adverse possession; and
- (f) disclaimed any interest or title to any portion of the Hayeses' property and admitted that they had not adversely possessed any portion of it.

26. The defenses raised in the answer of the Rogers' children were in fact true. Specifically:

- (a) Rogers' children were not aware of his attempt to transfer his interest in the property to them on July 14, 2000;
- (b) Rogers' children did not receive the original or a copy of the deed until they were served with the Hayeses' civil complaint;
- (c) Rogers' children had never asserted a claim for any portion of the Hayeses' property by adverse possession;
- (d) Rogers' children had not authorized him to act as their attorney or agent with respect to their ownership of the Rogers' property or any purported claim for ownership of a portion of the Hayeses' property by adverse possession.

27. Based on the answer of Roger's children, the Hayeses subsequently amended their complaint to add Rogers as a defendant to the lawsuit and the filed the amended complaint on March 8, 2001.

28. On March 8, 2001, a summons was issued to the correct defendant, David H. Rogers, at his correct address.

29. This March 8, 2001 summons was the first and only one issued to defendant, David H. Rogers.

30. Rogers was served by certified mail with the summons and the amended complaint on March 9, 2001.

31. Ms. Morris filed an affidavit of service on March 12, 2001.

32. Rogers requested and was granted an extension of time to answer the amended complaint.

33. On May 8, 2001, Rogers filed a motion to dismiss pursuant to N.C. Civ. Pro. Rules 12(b)(4) and (5) based on insufficiency of process and service of process.

34. Rogers had no basis in fact or in law to assert any insufficiency of process or service of process. By filing a motion to dismiss after being properly served with the amended complaint and summons, Rogers asserted a frivolous defense.

35. Rogers filed the motion to dismiss for improper purposes, including to harass and to cause unnecessary delay and cost to the Hayeses.

36. Rogers' filing of the frivolous motion to dismiss also was prejudicial to the administration of justice.

37. In response to Rogers' motion, the Hayeses filed a motion for sanctions against Rogers.

38. Upon the Hayeses' motion, Superior Court Judge J.B. Allen entered an order of sanctions against Rogers in the lawsuit on August 14, 2001 (hereafter, "sanctions order"). Judge Allen also denied Rogers' motion to dismiss in an order entered on September 5, 2001.

Flanagan Matter

39. In 1998, Yolanda Flanagan (hereafter, "Flanagan") was the owner of residential real property located at 3851 Wendell Boulevard in Wendell, North Carolina (hereafter, "property").

40. On or about September 16, 1998, Flanagan entered into a contract for sale of the property (hereafter, "sales contract") with Michael Assad (hereafter, "Assad") for the sale of the property.

41. The sales contract provided that the parties would execute any and all documents and papers necessary to transfer title (hereafter, "closing") on or before April 1, 2000.

42. Under the sales contract, Flanagan maintained the existing mortgage on the property in her name until closing.

43. Under the sales contract, Assad was required to make the monthly mortgage payments directly to the mortgage lender and pay the ad valorem real property taxes from the date of the execution of the contract until the date of closing (hereafter, "interim period").

44. Assad subsequently failed to make monthly mortgage payments and pay ad valorem real property taxes on the property in the interim period.

45. Flanagan contacted Rogers in October 1999 about representing her regarding the problems she was having with Assad regarding the sales contract.

46. In their initial discussions and in his representation of her thereafter, Flanagan told Rogers that her primary objective was to sell the property and be free and clear of it and Mr. Assad.

47. In their initial discussions and in his representation of her thereafter, Flanagan also told Rogers that she was afraid that the mortgage holder would foreclose on the property, she would lose the money she had invested in it, and that her primary objective or goal in retaining him was to prevent this from occurring.

48. Rogers agreed to represent Flanagan on all matters concerning Assad. Rogers never limited his representation of Flanagan.

49. In discussions with Flanagan during the representation, Rogers told Flanagan that Assad would never qualify for a mortgage, and Rogers recommended and persuaded Flanagan that she should file a lawsuit against Assad for breach of contract.

50. Assad subsequently qualified for a mortgage and his attorney, John D. Thompson, scheduled a closing to transfer ownership of the property from Flanagan to Assad on March 4, 2000.

51. Rogers received several letters from Thompson and his law firm in February 2000 informing him that Assad had qualified for a mortgage and giving him notice that the closing would occur on March 4, 2000.

52. Thompson also attempted to contact Rogers by telephone to inform him that Assad had qualified for a mortgage and to notify him of the March 4, 2000 closing date.

53. Rogers failed to reply to any of Thompson's letters or phone calls regarding the March 4, 2000 closing.

54. At the time he received Thompson's letters and phone calls regarding the March 4, 2000 closing, Rogers had not filed a lawsuit for Flanagan against Assad.

55. Rogers also had not collected any fee from Flanagan for pursuing a potential lawsuit when he received Thompson's letters and phone calls regarding the March 4, 2000 closing.

56. After receiving Thompson's letters and phone calls, Rogers sent Flanagan a civil complaint for breach of contract against Assad (hereafter, "Assad complaint") and asked her to verify it before returning it to his office.

57. Rogers failed to provide Flanagan with the letters he received from Thompson or otherwise inform her that Assad had qualified for a mortgage and that a closing had been set for March 4, 2000.

58. The scheduled March 4, 2000 closing did not occur because Rogers failed to provide Flanagan with the letters he received from Thompson or inform her that a closing had been set for March 4, 2000.

59. Rogers thereafter received a March 6, 2001 letter from Thompson notifying him of a rescheduled closing date of March 11, 2000.

60. Rogers failed to provide Flanagan with the March 6 letter he received from Thompson or otherwise inform her that the closing had been rescheduled for March 11, 2000.

61. Flanagan returned the verification after discussing the matter with Rogers. During this conversation, Rogers advised and persuaded Flanagan that she should go forward with the Assad lawsuit. In returning the verification, Flanagan relied on Rogers' advice as her attorney.

62. On March 8, 2000 Rogers filed the Assad complaint on behalf of Flanagan with the Superior Court of Wake County (hereafter, "Assad lawsuit").

63. Rogers did not inform Flanagan that Assad had qualified for a mortgage and that closings had been set for March 4 and March 11, 2000, at any time before he filed the Assad lawsuit.

64. Rogers did not discuss with Flanagan, prior to filing the Assad complaint, the relative consequences of filing the Assad lawsuit as opposed to proceeding with a closing.

65. Specifically, Rogers did not inform, advise, or counsel Flanagan that her obligations and liabilities under her mortgage would remain in effect if she filed and even prevailed in the Assad lawsuit but would be eliminated if she proceeded with a closing.

66. Rogers also did not inform, advise, or counsel Flanagan that filing and even prevailing in the Assad lawsuit would not eliminate the risk that her property would be foreclosed and she would lose her equity but that proceeding with a closing would eliminate that risk.

67. Filing the Assad lawsuit would not have accomplished the goals or objectives that Flanagan had expressed to Rogers at the beginning and during the representation.

68. Completing a closing would have accomplished the goals or objectives that Flanagan had expressed to Rogers at the beginning and during the representation.

69. On or about the same day he filed the complaint, March 8, 2000, Rogers sent Flanagan a bill for legal fees and costs in filing the complaint.

70. Rogers charged Flanagan a fee of \$1,500.00 for pleadings, discovery, motion and hearing for TRO, and a motion for permanent injunction. The \$1,500 Rogers charged Flanagan was a flat fee and was the fixed, maximum fee for all the covered services listed in his March 8, 2000 bill.

71. Flanagan promptly paid Rogers the \$1,500 flat fee and the costs incurred in filing the Assad lawsuit.

72. The rescheduled March 11, 2000 closing did not occur because Rogers failed to provide Flanagan with the March 6 letter he received from Thompson or otherwise inform Flanagan that a closing had been rescheduled.

73. The closing was rescheduled again for April 1, 2000.

74. On or about March 24, 2000, Rogers also received a March 21, 2000 letter from Thompson, which informed him of the rescheduled April 1, 2000 closing date.

75. Rogers did not respond to Thompson's March 21, 2000 letter regarding the rescheduled April 1, 2000 closing date.

76. Rogers failed to provide Flanagan with the March 21 letter he received from Thompson or otherwise inform Flanagan that Assad had qualified for a mortgage and that a closing had been rescheduled for April 1, 2000.

77. The rescheduled April 1, 2000 closing did not occur because Rogers failed to provide Flanagan with the March 21 letter he received from Thompson or otherwise inform Flanagan that a closing had been rescheduled for April 1, 2000.

78. Flanagan found out from Thompson, the opposing attorney, that closings had been scheduled and rescheduled.

79. After receiving information from other sources that closings had been scheduled and rescheduled, Flanagan discussed it with Rogers. Rogers dismissed this information, told Flanagan not to communicate with Thompson or anyone else, and persuaded her that she needed to proceed with the Assad lawsuit. Flanagan relied on Rogers' advice as her attorney.

80. On April 10, 2000, Flanagan spoke with Rogers by telephone and asked him about the status of the lawsuit against Assad. When Rogers informed her that Assad had not even been served with the complaint yet, she told him that she no longer wanted to pursue the lawsuit and wanted to sell the house. Rogers told her that he "didn't do closings."

81. Rogers terminated his representation of Flanagan during this April 10 conversation.

82. In less than a month after Rogers terminated his representation, Flanagan, working directly with Assad's lawyers, was able to finalize the closing on the property and accomplish her objectives – sell the property to Assad, regain her equity, and eliminate any risk of foreclosure.

83. Rogers sent Flanagan a letter dated April 11, 2000 confirming that his representation of her had been terminated. Rogers made no mention in his April 11, 2000 letter to Flanagan that she allegedly owed him any additional fees for the representation.

84. On April 15, 2000, Flanagan wrote Rogers a letter requesting a partial refund of the \$1,500.00 fee.

85. On May 1, 2000, Rogers replied to Flanagan's request and refused to refund any portion of the fee she had paid him.

86. With his May 1 letter, Rogers included a bill dated April 30, 2000 and asserted that Flanagan owed him \$1,425.00 in additional fees for the representation.

87. The \$1,500 fee Flanagan had already paid Rogers in full was a flat fee for all the services set forth in his March 8, 2000 bill.

88. Rogers would not have been entitled to any additional fee if he had completed all the covered services including all pleadings, discovery, motion and hearing for TRO, and a motion for permanent injunction.

89. At the time he terminated the representation, Rogers had only filed the complaint and attempted to have it served on Assad.

90. Rogers was not entitled to any additional fees for the services he had provided to Flanagan relating to the Assad lawsuit, for which she already had paid him in full.

91. Also, Rogers' April 30, 2000 bill included an itemized statement of the date, hours, and activities he allegedly performed for Flanagan.

92. Rogers charged Ms. Flanagan for all the services in his April 30, 2000 bill at an hourly rate of \$180.

93. According to his own testimony in this proceeding, however, Rogers hourly rate during the time he represented Flanagan was \$150/hr.

94. Additionally, one of the entries set forth in Rogers' April 30, 2000 bill to justify these additional fees was for time he spent in October 1999 for canceling a Durable Power of Attorney that Flanagan had given to Assad. Rogers charged Flanagan for an hour of time at a rate of \$180/hr in his April 30, 2000.

95. Rogers canceled the Durable Power of Attorney, completed that work in October 1999, and previously charged Flanagan a fixed fee of \$50.

96. Flanagan had already paid Rogers in November 1999 the full \$50 fee for the completed work of canceling the Durable Power of Attorney.

97. Rogers was not entitled to any additional fees for the services he had provided to Flanagan relating to canceling the Durable Power of Attorney, for which she already had paid him in full.

98. Therefore, in his April 30, 2000 bill and May 1, 2000 cover letter, Rogers charged and attempted to collect from Flanagan for services for which she had already paid him in full and did so at an inflated hourly rate.

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 David H. Rogers and the subject matter of this proceeding.

2. 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 representing in his October 18, 2000 letter that his children were asserting a claim for adverse possession, Rogers knowingly made a misrepresentation or false statement of material fact in violation of Revised Rules 8.4(c);

(b) by representing in his October 18, 2000 letter that he was the attorney or agent for his children in asserting a claim by adverse possession to a portion of the Hayeses' property, Rogers knowingly made a misrepresentation or false statement of material fact in violation of Revised Rules 8.4(c);

(c) by filing a motion to dismiss after being properly served with the amended complaint in the Hayeses' lawsuit, Rogers:

(i) asserted a frivolous defense in violation of Revised Rule 3.1,

(ii) used means that had no substantial purpose other than to delay or burden the Hayeses in violation of Revised Rule 4.4, and

(iii) engaged in conduct that was prejudicial to the administration of justice in violation of Revised Rule 8.4(d);

(d) by failing to provide Flanagan with the letters he received from Assad's lawyers, by failing to inform her that Assad had qualified for a mortgage and that several closing had been scheduled, by failing to advise her of the relative consequences of filing a lawsuit against Assad as opposed to proceeding with a closing, and by advising and persuading her to pursue a lawsuit that did not meet her objectives of representation, Rogers:

(i) failed to abide by Flanagan's objectives for the representation in violation of Revised Rule 1.2(a),

(ii) did not keep Flanagan reasonably informed about the status of the matter in violation of Revised Rule 1.4(a), and

(iii) did not provide her with sufficient information to permit her to make an informed decision regarding the representation in violation of Revised Rule 1.4(b); and

(e) by sending Flanagan his April 30, 2000 bill and May 1, 2000 cover letter and thereby charging and attempting to collect from Flanagan for services for which she had already paid him in full, Rogers charged and attempted to collect an illegal or clearly excessive fee in violation of Revised Rule 1.5.

3. The Committee made its findings and conclusions regarding the second claim for relief involving Flanagan independent of its findings and conclusions regarding the first claim for relief involving the Hayeses.

4. The State Bar presented clear, cogent, and convincing evidence of the violations found regarding the first claim for relief involving the Hayeses independent of Judge Allen's sanction and other orders.

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the evidence of the parties concerning the appropriate discipline, the Hearing Committee hereby makes the additional:

FINDINGS OF FACT REGARDING DISCIPLINE

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

- a. prior disciplinary offenses,
- b. dishonest or selfish motive,
- c. a pattern of misconduct,
- d. multiple offenses,
- e. submission of false evidence, false statements, or other deceptive practice during the disciplinary process,
- f. refused to acknowledge the wrongful nature of the conduct, and
- g. substantial experience in the practice of law.

2. The weight given the prior disciplinary offenses as an aggravating factor is mitigated by the remoteness in time of the prior offenses.

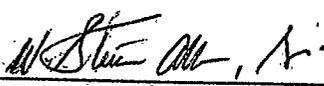
3. The aggravating factors substantially outweigh the one mitigating factor.

Based upon the foregoing Findings of Fact, Conclusions of Law, Aggravating and Mitigating Factors, and upon the evidence and arguments of the parties concerning the appropriate discipline, the Hearing Committee hereby enters the following:

ORDER OF DISCIPLINE

1. Defendant, David H. Rogers, is hereby suspended from the practice of law for 3 years beginning 30 days from service of this Order upon him.
2. Defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon him.
3. Defendant shall pay the costs of this proceeding, as assessed by the Secretary, within 90 days of service of the costs upon him.
4. Defendant shall comply with all provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the N.C. State Bar Discipline & Disability Rules and shall have 30 days from service of the Order upon him to wind down his practice, as set forth in that section.
5. Prior to reinstatement, defendant shall 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.
6. To be eligible for reinstatement at the end of the three-year period, Rogers must, in addition to the matters set forth in paragraphs 2-5, comply with all the following conditions:
 - a) Rogers shall pay all requisite bar dues and assessments; and
 - b) Rogers shall satisfy the mandatory Continuing Legal Education (CLE) requirements of the North Carolina State Bar required of all active members for each year of the three-year suspension. In addition to all the requisite CLE hours and requirements for the three years of his suspension, Rogers shall complete an additional 6 hours of CLE on ethics prior to the expiration of the period of suspension.

Signed by the chair with the consent of the other hearing committee members,
this the 9th day of January 2003.



W. Steven Allen, Sr.
Hearing Committee Chair