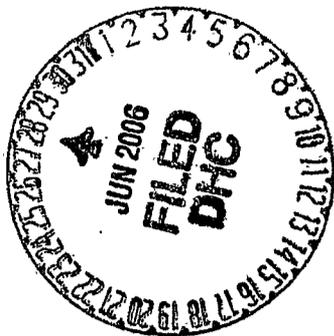


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NORTH CAROLINA

WAKE COUNTY



BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 05 DHC 27

The North Carolina State Bar, Plaintiff

v.

Kenneth B. Darty, Attorney, Defendant

Order of Discipline

This matter was heard on the 1st day of June, 2006, before a Hearing Committee of the Disciplinary Hearing Commission composed of the Chair, W. Steven Allen, Sr., and members Michael A. Grace, and Donald G. Willhoit, pursuant to North Carolina Administrative Code, Title 27, Chapter 1, Subchapter B, § .0114(h). The Plaintiff, the North Carolina State Bar, was represented by David R. Johnson. The Defendant, Kenneth B. Darty, was present and represented by David Freedman and Dudley Witt. By clear, cogent, and convincing evidence based upon the stipulations of the parties, the admissions of the Defendant in his Answer, the record, the evidence introduced at the hearing, and the reasonable inferences drawn therefrom, the Hearing Committee hereby 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, Kenneth B. Darty (hereinafter Defendant), was admitted to the North Carolina State Bar on April 22, 1994, 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 all or a portion of the relevant periods referred to herein, Defendant was actively engaged in the private practice of law in the town of Statesville, Iredell County, North Carolina.

Findings of Fact with respect to the First Claim for Relief

4. Defendant was a named party defendant in a civil action in Iredell County filed by Phillip Redmond, James Craven, Clarence Harris, Darren Campbell, and Ronald Lambert as plaintiffs, Iredell County file number 03CVS1909 (hereafter "*Redmond v. Darty*").

5. At some time before September 2, 2003, Defendant had filed motions on his own behalf in *Redmond v. Darty*, including a motion to dismiss the Plaintiffs' complaint.

6. On or about August 4, 2003, Defendant sent plaintiffs' counsel, Charles Viser and William Diehl with the Charlotte firm of James, McElroy & Diehl, a notice of hearing on Defendant's motions on September 2, 2003 in Iredell County.

7. The calendar call in Iredell County on September 2, 2003 was conducted before the Honorable Judge Richard L. Doughton. At the call of the court calendar on September 2, 2003, the Defendant moved to continue the hearing on his motions in *Redmond v. Darty*. In support of his motion to continue, Defendant represented to the court that he had engaged two attorneys to represent him in the proceeding, Stephen Ball and Teresa Hier.

8. At that same proceeding and in further support of his motion to continue, Defendant represented to the court that he had the authority of Ball and Hier to enter their appearances as his attorneys of record.

9. After the continuance was granted, plaintiffs' counsel communicated with Ball and Hier. Both Ball and Hier informed plaintiffs' counsel that neither of them represented Defendant in *Redmond v. Darty*. Both Ball and Hier further informed plaintiffs' counsel that neither had given Defendant any authority to enter their appearance as attorney(s) of record in the case.

10. Ball and Hier both then wrote to the court before September 29, 2003 and advised the court that they were not appearing on behalf of Defendant in *Redmond v. Darty* and that they

had not authorized the Defendant to enter their appearances because neither had agreed to represent the Defendant.

11. Neither Ball nor Hier had told the Defendant that either of them would represent him in the case of Redmond v. Darty or that they authorized Darty to enter any notice of appearance on their behalf with the court before the hearing on September 2, 2003.

Findings of Fact with respect to the Second Claim for Relief

12. During calendar years 1998, 1999, and 2000, Defendant received sufficient income to require Defendant to file federal and state income tax returns and to pay federal and state income taxes.

13. For each of these tax years, Defendant knew the deadlines for the filing of his federal and state income tax returns.

14. Defendant filed both his federal and state tax returns for tax years 1998, 1999, and 2000 at the same time. Defendant filed his federal and state tax returns for tax years 1998, 1999, and 2000 on or about October 14, 2001.

15. Defendant knowingly and voluntarily failed to file his individual federal income tax returns for tax years 1998, 1999, and 2000 at the time or times required by law.

16. Defendant knowingly and voluntarily failed to file his individual state income tax returns for tax years 1998, 1999, and 2000 at the time or times required by law.

17. Defendant's failure to file the required federal and state income tax returns on a timely basis for each tax year 1998, 1999, and 2000 was willful.

Findings of Fact with respect to the Third Claim for Relief

18. On or about December 22, 2003, Defendant met with Robin May (hereafter "May"), a criminal defendant facing multiple charges, who was at the time incarcerated in Women's Prison in Raleigh, North Carolina.

19. Defendant agreed to represent May with respect to the pending criminal charges at that meeting on December 22, 2003. Defendant and May signed a fee contract prepared by Defendant on December 22, 2003. The fee agreed upon for Defendant's services was \$50,000.

20. The fee contract recited that the fee for representation was a flat fee, but does not specify the amount of the fee. The fee contract also stated that the fee was non-refundable.

21. In addition to the fee contract, Defendant had May sign an addendum to the contract by which May agreed to convey real property located at 145 Doubletree Lane in Statesville, North Carolina to Defendant as compensation for his representation. May also signed a deed to the property prepared by Defendant conveying the property to the Law Offices of Kenneth B. Darty, PLLC, which is Defendant's law practice.

22. Defendant recorded the deed to the property with the Iredell County Register of Deeds on December 23, 2003. Defendant reported or represented to the Iredell County Register of Deeds that no excise tax was due on the conveyance of the property from May to Defendant's law office at the time he presented the deed for recording, even though the transfer was for consideration, in violation of N.C. Gen. Stat. § 105-228.32. Defendant knew that he had given consideration for the deed.

23. At the time May conveyed the property to Defendant, the tax value of the property was \$84,650.00.

24. The actual terms of the agreement between May and the Defendant were that the Defendant would sell the property and pay May the difference between the value of the property, less any costs of repairs, and his fee of \$50,000. The property has not yet been sold and Defendant may not be able to sell it because of potential issues with the title and the existence of federal tax liens filed against the Defendant.

25. Defendant did not fully disclose to May in writing the actual terms and conditions of their agreement with respect to the disposition of the property, including any agreement to pay May the difference between the value of the property and his fee less any costs of repairs, in a manner that could be reasonably understood by May.

26. Defendant did not advise May in writing that she might want independent advice or give May a reasonable opportunity to seek independent advice before accepting the deed to May's property.

27. Defendant did not pay May any amount for the difference in value between the property and his fee.

28. Defendant has treated the property as his since accepting and recording the deed. He has rented the property and treats the rent money as his funds. Defendant has also listed the property for sale for an amount at or above the tax value of the property.

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 personal jurisdiction over Kenneth B. Darty and subject matter jurisdiction. By appearing and participating in the proceedings without objection, Defendant waived any and all defects in the service of the summons and complaint and in the notice of the hearing.
2. Willful failure to file or pay a state income tax when due is a Class 1 misdemeanor under N.C. Gen. Stat. § 105-236(9). Willful failure to file or pay a federal tax when due is a misdemeanor under 26 USC § 7203.
3. 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) in that the conduct violated the Revised Rules of Professional Conduct in effect at the time of the conduct as follows:
 - a. By representing to the court that he had engaged Ball and Hier to represent him in *Redmond v. Darty* when he had not and, further, that he had their authorization to enter their appearance of record when he did not, Defendant made false statements of material fact to the court in violation of Rule 3.3(a) and engaged in conduct involving dishonesty, deceit, and misrepresentation in violation of Rule 8.4(c);
 - b. By using the false representation that he had engaged Ball and Hier as his counsel as the grounds for a continuance of the hearing on his own motions, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
 - c. By failing to timely file required federal and state income tax returns, Defendant committed criminal acts that reflect 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);

- d. By obtaining the title to May's real property for payment of his fee without complete written disclosure to May of all of the terms and conditions of the conveyance and giving May an opportunity for review by independent counsel, Defendant obtained an adverse ownership interest in a client's property without full disclosure and consent in violation of Rule 1.8(a); and
- e. By entering into a contract in which he termed the flat fee for his services to be non-refundable, Defendant made a false or misleading communication with his client in violation of Rule 7.1(a).

Based upon the foregoing **Findings of Fact and Conclusions of Law**, and upon clear, cogent, and convincing evidence and the reasonable inferences drawn therefrom, the Hearing Committee hereby makes these additional

Findings of Fact Regarding Discipline

1. Defendant was found in contempt of court and censured from the bench in a state court proceeding in 1996.
2. Defendant has been held in contempt of court in his personal, domestic matter with his former spouse on three different occasions in 2001, 2003, and 2004.
3. Defendant's misrepresentation to the court required opposing counsel, Mr. Ball and Ms. Hier, and the court to spend considerable time and effort over the course of a month to resolve issues of representation and service of discovery issues that would have been unnecessary without Defendant's statements.
4. Defendant has a federal tax lien on record in Iredell County that will require a substantial payment of back taxes, penalties, and interest to clear. Although Defendant now claims that the transfer of May's property to him was intended as a security instrument rather than an outright conveyance, the transfer was nevertheless made by a general warranty deed that he prepared. As a result of the tax lien, any attempt to change the character of this conveyance or to reconvey the property to May will require Defendant to obtain a release of this property from the tax lien. Because May's former property is now subject to Defendant's tax lien, there has

been substantial prejudice to the interests in the property of Defendant's former client. Additionally, it is unclear if Defendant can legally convey the property to any third parties without the consent of John May, also a former client, who may still have an interest in the property based upon his marriage to Robin May.

5. Defendant has regularly displayed an attitude of anger, resentment, and lack of respect toward his colleagues at the bar and the courts. Defendant regularly blames others for his own actions and fails to accept responsibility for his own conduct that was the subject of this proceeding or to acknowledge the violations of the Rules of Professional Conduct.

Based on the **Findings of Fact and Conclusions of Law** above and the additional **Findings of Fact Regarding Discipline**, the Hearing Committee makes the following:

Conclusions with Respect to Discipline

1. Defendant's misconduct is aggravated by the following factors:
 - a. A prior disciplinary offense;
 - b. a pattern of misconduct;
 - c. substantial experience in the practice of law; and
 - d. a refusal to acknowledge wrongful nature of the conduct.
2. Defendant's misconduct is mitigated by the following factors:
 - a. Lack of a selfish or dishonest motive;
 - b. personal or emotional problems; and
 - c. the prior discipline is remote in time and subject matter.
3. The mitigating factors outweigh the aggravating factors.
4. The Defendant's conduct has caused substantial harm to the administration of justice and, because Defendant's personal tax liens now encumber May's interest in the real property that was improperly deeded to Defendant, Defendant's conduct has caused substantial harm to the interests of Robin May and her former spouse in the real property owned by them, both of whom were clients. Further, Defendant's failure to file taxes on a timely basis had the potential to cause significant harm to the standing of the legal profession in the eyes of the public

because it shows disdain for his obligations as a citizen and as an officer of the court to obey the law.

5. To that end, the Hearing Committee has carefully considered all of the different forms of sanction available to it and finds that any of the sanctions of less than suspension would not be appropriate in this case. The Hearing Committee has considered lesser alternatives and finds that a public censure or reprimand would not be sufficient discipline because of the gravity of the harm caused by the conduct of the Defendant to the public and the administration of justice.

6. The Committee finds that because of the significant harm and potential harm to clients and the administration of justice, to the profession, to members of the public caused by Defendant, entry of any Order imposing lesser discipline than suspension would fail to acknowledge the seriousness of the offenses that the Defendant has committed and sends the wrong message to attorneys and the public regarding the conduct expected of members of the Bar. The only sanction in this case that can adequately protect the public is suspension of the Defendant's license for a period of time that is stayed only upon Defendant's compliance with certain conditions.

Based upon the foregoing **Findings of Fact, Conclusions of Law and the Findings of Fact Regarding Discipline**, and the **Conclusions with Respect to Discipline**, the Hearing Committee enters the following:

Order of Discipline

1. The Defendant's license to practice law in the State of North Carolina is hereby suspended for two years effective upon service of this Order of Discipline on the Defendant. The suspension is stayed for a period of five years after its effective date so long as Defendant complies with the following conditions:

- a. Beginning immediately upon service of this Order of Discipline and at his sole expense, Defendant will undergo treatment by a qualified mental health professional acceptable to the Office of Counsel of the North Carolina State Bar for anger management and any other mental health problems that may be diagnosed by such medical care providers during the

period of treatment. Defendant will submit the name and credentials of his proposed treatment professional and an alternate to the Office of Counsel within 10 days after the effective date of this order. If either proposed treatment professional is unacceptable to the Office of Counsel, Defendant will provide the name and another proposed treatment professional within 10 days of notice from the Office of Counsel. Defendant will have his initial treatment evaluation completed within 15 days after the effective date of this order or five days after acceptance of his proposed treatment professional by the Office of Counsel, whichever is later. Defendant may elect to have his treatment program supervised by the North Carolina State Bar Lawyer Assistance Program. If he does so elect, he will cooperate fully with the Lawyer Assistance Program to develop an appropriate treatment program under the supervision of the Lawyer Assistance Program, and will comply with the requirements of such treatment program. If he does not elect to have his treatment program supervised by the Lawyer Assistance Program, Defendant, at his expense, will direct his mental health professional to directly provide quarterly written reports to the Office of Counsel describing in detail his current treatment regimen, compliance, and prognosis or treatment plan for the next quarter within 15 days of the end of each calendar quarter (i.e., by January 15, April 15, July 15, and October 15). The Defendant will execute written waivers and releases authorizing the Office of Counsel to confer with the Lawyer Assistance Program and/or with Defendant's medical care providers for the purpose of determining if the defendant has cooperated and complied with all requirements of the prescribed treatment program. The Defendant will not revoke the waivers and releases at any time during the period the suspension is stayed. All expenses of his treatment and any reports provided to the Office of Counsel will be at Defendant's sole expense. The Defendant will continue with the treatment program for a period of one year or until released by his treating mental health professional, whichever is later;

- b. Defendant will take steps to obtain a full and complete release of all federal tax liens on the property conveyed by Ms. Robin May to him on or before May 31, 2007. In the event any legal action is filed by Ms. Robin May and/or John May to set aside the transfer of this property on any basis, Defendant will cooperate fully with said legal proceedings and admit that he intended the conveyance to be a deed of trust or other security instrument on the property. Defendant will fully cooperate with them to set aside any liens that may be on that property as a result of the original transaction and quit-claim or convey any legal title to this property that he may have as determined by any orders of an appropriate court;
- c. Defendant will pay satisfy all delinquent taxes owed to either the Internal Revenue Service or the North Carolina Department of Revenue by the end of the period of stay. Defendant will comply with all terms and conditions of any agreements with the Internal Revenue Service and/or the North Carolina Department of Revenue that currently exist or are executed during the period of stay. If Defendant has not previously executed an agreement for the payment of any delinquent taxes with either the Internal Revenue Service or the North Carolina Department of Revenue, he will, within 60 days of the effective date of this Order, execute such agreements for payment of all delinquent taxes, including penalties and interest, by the end of the stay of the suspension as may be acceptable to the Internal Revenue Service or the North Carolina Department of Revenue. Defendant will provide a copy of any existing agreements with the Internal Revenue Service or the North Carolina Department of Revenue to the Office of Counsel within 10 days of the effective date of this Order and will provide a copy of any later agreements to the Office of Counsel within 10 days after entering into any such agreements. Defendant will report his progress on satisfying all delinquent taxes during the period of stayed suspension to the State Bar in writing no later than May 1 of each calendar year during the stay, including providing cancelled checks

showing payments and any returns showing compliance. Defendant will execute any necessary written waivers and releases authorizing the Office of Counsel to confer with the Internal Revenue Service or the North Carolina Department of Revenue for the purpose of determining if the defendant has cooperated and complied with all requirements of the agreements to satisfy his delinquent taxes. The Defendant will not revoke the waivers and releases at any time during the period the suspension is stayed;

- d. Defendant will file and pay all future state and federal income taxes in a timely manner. Defendant will file and pay quarterly estimated taxes as required by law. Defendant will use the services of a certified public accountant or other tax service provider to help him file his returns and make his payments as required by law. Defendant will provide copies of all returns to both taxing authorities, including satisfactory evidence of any payments due, to the Office of Counsel within 15 days of their due date. For his individual tax returns, Defendant will provide the copy to the return by May 1 of each year. If he obtains an extension of time, he will provide a copy of the extension, an explanation of the reason for the extension from his CPA, and satisfactory evidence of compliance with its terms, including payment of estimated taxes owed, within 15 days of filing or obtaining the extension. Defendant will then provide a copy of the return within 15 days of the end of the extension. For his estimated tax payments, Defendant will provide a copy of the return and evidence of payment by February 1, May 1, August 1, and October 1 of each year during the suspension. If no estimated tax return or payment is due, Defendant will submit a certification from his CPA that no estimated payment is due that quarter instead of the return;
- e. Defendant will satisfactorily complete a law office management course by an approved CLE provider and approved by the Office of Counsel of the North Carolina State Bar at his own expense and pay the costs thereof within six months of the effective date of this Order. Defendant will

provide the Office of Counsel with written confirmation of the successful completion of the law office management course within 10 days of completion;

- f. Defendant will not violate the Revised Rules of Professional Conduct or the laws of the United States or any state during his suspension;
- g. Defendant will keep the North Carolina State Bar Membership Department advised of his current business and home address;
- h. Defendant will respond to all communications from the North Carolina State Bar within 30 days of receipt or by the deadline stated in the communication, whichever is sooner;
- i. Defendant will pay all Membership dues and Client Security Fund assessments and comply with all Continuing Legal Education (CLE) requirements on a timely basis during the stay of the suspension; and
- j. Defendant will pay the costs of this proceeding, including the costs of Plaintiff's depositions, within sixty (60) days of service upon him of the statement of costs from the Office of the Secretary.

2. If the Defendant fails to comply with any one or more of the conditions referenced in Paragraph 1 above, then the stay of the suspension of his law license may be revoked as provided in § .0114(x) of the North Carolina State Bar Discipline and Disability Rules.

3. If the stay of the suspension is revoked, Defendant must comply with all of the conditions set out in paragraph 1 above before seeking reinstatement of his license to practice law.

4. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(x) of the North Carolina State Bar Discipline and Disability Rules throughout the period of the stayed suspension.

5. The Defendant will pay all costs of this proceeding permitted by law, including the costs of Plaintiff's depositions, within sixty (60) 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 the other members of the Hearing Committee.

This the 23rd day of June, 2006.



W. Steven Allen, Sr., Chair
Disciplinary Hearing Committee