

NORTH CAROLINA

WAKE COUNTY



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

THE NORTH CAROLINA STATE BAR,
Plaintiff

v.

NICOLLE T. PHAIR, Attorney,
Defendant

COMPLAINT

Plaintiff, complaining of Defendant, alleges and says:

1. Plaintiff, the North Carolina State Bar ("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 (Chapter 1 of Title 27 of the North Carolina Administrative Code).

2. Defendant, Nicolle T. Phair ("Defendant"), was licensed to practice law in North Carolina on August 24, 1996, and is and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar, and the Rules of Professional Conduct.

3. During all or part of the relevant periods referred to herein, Defendant was engaged in the practice of law in the State of North Carolina and maintained a law office in Sanford, North Carolina.

CLAIM ONE: FRAUD UPON TRIBUNAL AND OBSTRUCTION OF JUSTICE

4. The allegations in Paragraphs 1-3 of this Complaint are incorporated by reference here.

5. Defendant represented a client, K. Hart, charged with criminal and infraction offenses in Lee County District Court stemming from an alleged hit and run incident.

6. Mr. Hart's case was on the court's docket for June 10, 2022, with District Court Judge O. Henry Willis, Jr. presiding.

7. The victim in the case was present in the district criminal courtroom on June 10.

8. The State's case required the victim to positively identify Mr. Hart.

9. Defendant also attended the June 10 court session and was in the district criminal courtroom with Mr. Hart

10. Shortly before the prosecutor called Mr. Hart's case to be heard, Defendant directed Mr. Hart to leave the courtroom with her.

11. After they left the courtroom, Defendant directed Mr. Hart to remain in the lobby for the remainder of the events at issue, and he did not return to the district criminal courtroom.

12. Defendant then went to an adjacent courtroom where child support matters were being heard.

13. There, she initiated contact with a man (Mr. Harrington) and his wife.

14. Mr. Harrington was in court as a party to a child support matter.

15. Defendant did not know Mr. Harrington or his wife in any capacity before initiating contact with them in the child support courtroom.

16. Mr. Harrington had no connection to Mr. Hart or his case.

17. In the child support courtroom, Defendant introduced herself to Mr. Harrington and his wife as a lawyer.

18. After introducing herself, Defendant asked Mr. Harrington if he would come to the district criminal courtroom with her and do her a favor.

19. Defendant told Mr. Harrington that she needed him to stand beside her in the district criminal courtroom to see if someone would pick him out.

20. Defendant told Mr. Harrington that she would do all the talking and he simply needed to stand in for the person she represented.

21. Mr. Harrington's wife asked Defendant if this approach was legal and if Mr. Harrington would get in trouble.

22. Defendant assured Mr. Harrington and his wife that the judge knew what was going on.

23. Defendant further assured Mr. Harrington and his wife there would be no problems and he would not get into trouble.

24. Defendant's assurance to Mr. Harrington and his wife was false in that the court was not aware of Defendant's subterfuge.

25. Defendant's assurance to Mr. Harrington and his wife was also dishonest in that it tended to mislead Mr. Harrington and his wife about the personal risk to Mr. Harrington from participating in Defendant's subterfuge.

26. Defendant knew at the time she made the assurances that they were false and dishonest.

27. Mr. Harrington agreed to Defendant's request.

28. After Defendant and Mr. Harrington re-entered the district criminal courtroom, the prosecutor called Mr. Hart's case to be heard.

29. At Defendant's direction, Defendant and Mr. Harrington approached and stood behind the defense table without Mr. Hart, who remained in the lobby.

30. The court directed the prosecutor to arraign Mr. Hart.

31. While Defendant and Mr. Harrington stood behind the defense table, the prosecutor read to Defendant and Mr. Harrington the charges brought against Mr. Hart.

32. The court then asked the prosecutor and Defendant to approach and discuss the possibility of a plea agreement on the charges against Mr. Hart.

33. While they did so, Defendant left Mr. Harrington at the defense table.

34. At the bench, Defendant declined to discuss a plea to a lesser offense, explaining that Mr. Hart wanted a trial because he did not believe the witnesses could identify him.

35. The court therefore announced a lunch recess before trial.

36. Defendant did not inform the court or prosecutor at any time before the recess that Mr. Harrington was not her client, Mr. Hart, and was not the named defendant in the action being heard.

37. Defendant consciously chose not to disclose Mr. Harrington's identity to the court or prosecutor as a strategy so that she could reach the examination of the victim and test whether the victim would assume that Mr. Harrington was the defendant in the action and therefore incorrectly identify him as the perpetrator of the crime.

38. Defendant was aware or believed that if she disclosed to the court or prosecutor her strategy for the examination of the victim, the court would not permit it.

39. By calling Mr. Harrington to stand and then sit at the defense table, next to Mr. Hart's counsel, while Mr. Hart's case was called and the charges against Mr. Hart were read and while Defendant discussed the prospects of negotiating a plea agreement in Mr. Hart's case with the court and prosecutor at the bench, Defendant represented to the court and the prosecutor that Mr. Harrington was the defendant charged in the case—Mr. Hart.

40. Defendant's representation to the court and the prosecutor that Mr. Harrington was the defendant charged in the case, Mr. Hart, was false.

41. Defendant knew her misrepresentation to the court and the prosecutor that Mr. Harrington was the defendant charged in the case, Mr. Hart, to be false when she made it.

42. Defendant had Mr. Harrington impersonate Mr. Hart with the intent to deceive.

43. By deceiving the court and prosecutor as to the identity of Mr. Harrington during court proceedings against Mr. Hart, Defendant prevented, obstructed, impeded, or hindered public or legal justice.

44. As court began to recess, the prosecutor and court discovered that Mr. Harrington may have been someone other than Mr. Hart.

45. In Defendant's presence, the prosecutor and a law enforcement officer asked Mr. Harrington for his name.

46. Mr. Harrington did not answer and looked to Defendant for guidance.

47. Defendant instructed Mr. Harrington to continue leaving the courtroom.

48. In instructing Mr. Harrington to ignore the prosecutor and law enforcement officer and continue leaving the courtroom, Defendant intended to prevent or obstruct the prosecutor, law enforcement officer, and court from discovering the identity of the man she presented to the court.

49. As a result, Mr. Harrington left the courtroom and returned to the child support courtroom.

50. Judge Willis then directed that both Defendant and Mr. Harrington return and appear before the court.

51. Law enforcement officers retrieved Mr. Harrington from the child support courtroom.

52. Judge Willis informed Mr. Harrington that the court was considering holding both Defendant and Mr. Harrington in contempt for the events.

53. Defendant's subterfuge deceived the court and prosecutor to believe that Mr. Harrington was her client, the named defendant in the action during court proceedings in the action, and constituted felony obstruction of justice under North Carolina law.

THEREFORE, Plaintiff alleges that Defendant's foregoing actions constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct in effect at the time of the conduct as follows:

- i. By misrepresenting Mr. Harrington as the named defendant in Mr. Hart's case, Defendant knowingly made a false statement of material fact to a tribunal, in violation of Rule 3.3(a)(1); knowingly made a false statement of material fact to a third person, in violation of Rule 4.1; committed a criminal act that reflected adversely on Defendant's honesty, trustworthiness or fitness as a lawyer, in violation of Rule 8.4(b); engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflected adversely on Defendant's fitness as a lawyer, in violation of Rule 8.4(c); and engaged in conduct prejudicial to the administration of justice, in violation of Rule 8.4(d).
- ii. By attempting to prevent the prosecutor and law enforcement from talking with Mr. Harrington, Respondent requested a person other than a client to refrain from voluntarily giving relevant information to another party, in violation of Rule 3.4(f).
- iii. By misrepresenting to Mr. Harrington and his wife that the judge knew what was going on, Defendant knowingly made a false statement of material fact to a third person, in violation of Rule 4.1, and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflected adversely on Defendant's fitness as a lawyer, in violation of Rule 8.4(c).
- iv. By misleading Mr. Harrington and his wife about the risk to Mr. Harrington from assisting Defendant with her request, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflected adversely on Defendant's fitness as a lawyer, in violation of Rule 8.4(c).

CLAIM TWO: DISOBEDIENCE OF TRIBUNAL AND DISHONESTY

54. The allegations in Paragraphs 1-3 of this Complaint are incorporated by reference here.

55. On January 29, 2020, Defendant represented clients J. Herring, P. Walley, A. Kelly, and N. Butler in criminal matters in Lee County District Court with District Court Judge Resson Faircloth presiding.

56. Each client had their case set on the court's probable cause calendar for that day.

57. Mr. Herring, Mr. Walley, and Ms. Kelly were being held in custody pending disposition of their cases.

58. Mr. Butler was on pretrial release and was present in Courtroom #1 (the "probable cause courtroom") on the morning of January 29.

59. As of January 29, the district court in Lee County had adopted a policy that matters set for hearing in the probable cause courtroom were to be disposed of that same day, with continuances generally not being permitted.

60. Lawyers regularly practicing in that locale, including Defendant, were aware of this policy.

61. Defendant appeared in the probable cause courtroom on the morning of January 29 and addressed other matters.

62. The matters of Mr. Herring, Mr. Walley, Ms. Kelly, and Mr. Butler were not resolved before the morning session of court recessed.

63. When the morning session of court recessed, Defendant was aware that the matters of Mr. Herring, Mr. Walley, Ms. Kelly, and Mr. Butler remained unresolved.

64. The court specifically addressed Defendant and directed her and Mr. Butler to return at 2:00 p.m. to resolve her remaining client matters on the calendar that day.

65. Neither Defendant nor Mr. Butler returned at 2:00 p.m.

66. Without Defendant present, the court could not dispose of her clients' matters.

67. In Defendant's absence, the court disposed of all other matters on its docket.

68. Since Defendant was still absent, the court then attempted unsuccessfully to locate her.

69. After approximately 30-40 minutes of waiting for Defendant, the court decided to conclude its business for the day.

70. Due to Defendant's absence, the court was forced to continue the matters of Mr. Herring, Mr. Walley, and Ms. Kelly until the next probable cause court session two weeks later.

71. During the intervening two weeks, Mr. Herring, Mr. Walley, and Ms. Kelly remained in jail.

72. Due to Defendant's and Mr. Butler's failures to return, the court issued an order for Mr. Butler's arrest and an order for Defendant to appear and show cause why she should not be held in criminal contempt.

73. The court then recessed for the day at approximately 3:30 p.m.

74. Before the court recessed, neither Defendant nor her staff contacted the court, the clerk's office, the prosecutor, or her clients about her absence.

75. Before the court recessed, Defendant did not make any reasonable efforts to contact the court, the clerk's office, the prosecutor, her clients, or her associate about her absence.

76. Before the court recessed, Defendant had no communications with Mr. Herring, Mr. Walley, Ms. Kelly, or Mr. Butler about Defendant not returning for the afternoon session of Lee County probable cause court or the implications of that decision on their cases.

77. At approximately 4:00 p.m., Defendant returned to the courthouse.

78. When speaking with the deputy clerk from the probable cause courtroom, Defendant told her that Defendant had not returned to the probable cause courtroom at 2:00 p.m. because Defendant had been in domestic court.

79. Defendant's statement to the deputy clerk was false.

80. Defendant was not in domestic court during the afternoon session of probable cause court on January 29.

81. Defendant knew her statement to the deputy clerk to be false when she made it.

82. Defendant's failure to comply with the order to return to the courtroom at 2:00 p.m. with Mr. Butler was:

- a) a willful disobedience of the court's lawful order, directive, or instruction;
- b) a willful and grossly negligent failure to perform her duties in an official transaction; and
- c) a willful and grossly negligent failure to comply with the schedules and practices of the court resulting in substantial interference with the business of the court.

83. Defendant's conduct constituted criminal contempt under N.C. Gen. Stat. §§ 5A-11(3), (6), and (7).

84. Later, during a February 12, 2020 hearing on the show cause order before Judge Faircloth, Defendant testified that she had not returned to the probable cause courtroom at 2:00 p.m. because she had a family emergency related to her father's death and had been making arrangements in connection with the same.

85. The district court found the elements of criminal contempt by Defendant to be established beyond a reasonable doubt and entered a judgment of criminal contempt against Defendant.

86. Subsequently, during a September 9, 2021 hearing before Superior Court Judge James Hardin, Jr., Defendant testified that she had not returned to the Probable Cause Courtroom at 2:00 p.m. because her family had contacted her about being unable to get in touch with her mother.

87. The superior court found the elements of criminal contempt by Defendant to be established beyond a reasonable doubt and entered a judgment of criminal contempt against Defendant.

88. The superior court specifically found: "With the defendant providing three explanations for her failure to appear before Judge Faircloth as directed on January 29, 2020 at 2:00, this Court concludes that none of the explanations is credible."

89. The superior court further found beyond a reasonable doubt that Defendant's failure to comply with the order to return to the courtroom at 2:00 p.m. with Mr. Butler was:

- a) a willful disobedience of the court's lawful order, directive, or instruction;
- b) a willful and grossly negligent failure to perform her duties in an official transaction; and
- c) a willful and grossly negligent failure to comply with the schedules and practices of the court resulting in substantial interference with the business of the court.

THEREFORE, Plaintiff alleges that Defendant's foregoing actions constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct in effect at the time of the conduct as follows:

- i. By failing to communicate with Mr. Herring, Mr. Walley, Ms. Kelly, or Mr. Butler about her decision not to return for the afternoon session of Lee County probable cause court or the implications of that decision on their cases, Defendant failed to keep clients reasonably informed about the status of their matters, in violation of Rule 1.4(a)(3), and failed to explain a matter to the extent reasonably necessary to permit clients to make informed decisions regarding their representations, in violation of Rule 1.4(b).
- ii. By failing to timely return to court to handle the matters of Mr. Herring, Mr. Walley, Ms. Kelly, and Mr. Butler when they were on the calendar, Defendant failed to act with reasonable diligence and promptness in representing clients, in violation of Rule 1.3, and failed to make reasonable efforts to expedite litigation, in violation of Rule 3.2.
- iii. By failing to comply with the court's order that she return at 2:00 p.m. to the probable cause courtroom, Defendant: knowingly disobeyed an order of the court, in violation of Rule 3.4(c); committed a criminal act that reflected adversely on Defendant's honesty, trustworthiness or fitness as a lawyer, in violation of Rule 8.4(b); and engaged in conduct prejudicial to the administration of justice, in violation of Rule 8.4(d).
- iv. By falsely representing to the deputy clerk that Defendant had been in domestic court during the afternoon session of Lee County probable cause court, Defendant knowingly made a false statement of material fact to a third person, in violation of

Rule 4.1, and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflected adversely on Defendant's fitness as a lawyer, in violation of Rule 8.4(c).

WHEREFORE, Plaintiff prays that:

- (1) Disciplinary action be taken against Defendant in accordance with N.C. Gen. Stat. § 84-28 as the evidence on hearing may warrant;
- (2) Defendant be taxed with the administrative fees and costs permitted by law in connection with this proceeding; and
- (3) For such other and further relief as is appropriate.

Respectfully submitted June 30, 2023.



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Signed pursuant to 27 N.C. Admin. Code 1B.0113(m) and .0105(a)(10).



Kevin G. Williams, Chair
Grievance Committee