

4057

STATE OF NORTH CAROLINA
COUNTY OF WAKE

DEC 11 1980

BEFORE THE
DISCIPLINARY HEARING COMMITTEE
OF THE
NORTH CAROLINA STATE BAR
80 DHC 16

THE NORTH CAROLINA STATE BAR,
Plaintiff,

-vs-

JAMES W. SMITH, Attorney,
Defendant.

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

THIS cause was heard before a Hearing Committee composed of Warren Stack, Chairman; Osbourne Lee; and Leander Morgan on Friday, December 5, 1980, in the Council Chambers of The North Carolina State Bar at 208 Fayetteville Street Mall, Raleigh, North Carolina. The Defendant was present and represented by James E. Ferguson II, of the Mecklenburg County Bar and the Plaintiff was represented by David R. Johnson, Staff Attorney. Upon the presentation of evidence and the arguments of the respective counsel, the Hearing Committee makes the following FINDINGS OF FACT by clear, cogent, and convincing evidence:

1. 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, James W. Smith, was admitted to The North Carolina State Bar on September 2, 1971 and was at all times referred to herein an Attorney at Law, licensed to practice law in the State of North Carolina, subject to the Rules, Regulations, Canons of Ethics and Code of Professional Responsibility of The North Carolina State Bar and the laws of the State of North Carolina.
3. At and during all of the times hereinafter referred to, the Defendant was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the Town of Henderson, Vance County, North Carolina.
4. On or about August 13, 1978, one Duane Sherrill Morning died in an automobile accident and the deceased was a minor who left no will.

5. The mother of the deceased, Vernesteen Morning, contacted the Defendant shortly after the death regarding the representation of the estate of the minor child. Pursuant to such communication, the Defendant met with Ms. Morning in Robersonville, North Carolina, or or about August 28, 1978, and discussed the legal problems of the estate including a probable wrongful death action on behalf of the estate. Ms. Morning and the Defendant entered into a contract of employment for the Defendant to represent her as the Administratrix of the estate, such contract providing for a contingent fee based upon a recovery, if any, from a wrongful death action on behalf of the estate. The Defendant then accompanied Ms. Morning to the Clerk of Superior Court's office in Martin County and assisted Ms. Morning in qualifying as Administratrix of the estate.

6. In late August and early September 1978, the Defendant entered into negotiations on the wrongful death claim with one Sandi Littleton, an insurance adjuster with Aetna Life and Casualty Company. The Defendant agreed to settle the claim for \$16,000.

7. Aetna Life and Casualty delivered to the Defendant a release from liability to be executed by Vernesteen Morning and a check, numbered 66460252T drawn by the insurance company dated September 14, 1978 and made payable to "Vernesteen Morning as Adm. of the Estate of Duane S. Morning and to the Attorney, James W. Smith."

8. The Defendant signed Vernesteen Morning's name to the release described in paragraph 7.

9. The Defendant signed Vernesteen Morning's name on the back of the check described in paragraph 7 in the location reserved for endorsements.

10. The Defendant failed to deposit the check described into a trust bank account maintained by the Defendant.

11. The Defendant failed to inform Ms. Morning that the proceeds had been invested in a corporation of which the Defendant owned a ninety per cent interest.

12. During November and December 1978, Ms. Morning communicated with Defendant indicating her need for financial assistance.

13. The Defendant agreed to pay Ms. Morning the sum of \$400 in December 1978, as an "advance" or a "loan" and issued a check in that amount.

14. Ms. Morning delivered the check for payment at Wachovia Bank and Trust Company branch in Robersonville, North Carolina.

15. In January 1979, the check for \$400 was returned for insufficient funds from the Wachovia Bank and Trust Company and the Bank, in turn, notified Vernesteen Morning. Vernesteen Morning then contacted one Claude Wilson, Manager of the Bank.

16. Claude Wilson arranged for the Defendant to meet with him with regard to that check; however, the Defendant failed to attend that meeting.

17. Vernesteen Morning then consulted with attorney William R. Peel with regard to the returned check. Peel made arrangements with the Defendant for payment to cover the check to be made on February 17, 1979, a Saturday.

18. On February 17, 1979, the Defendant met with Vernesteen Morning at her sister's house in Robersonville and requested the matter be settled at the house. The Defendant presented Ms. Morning a document "Release", a copy of which is attached to the Complaint in this action as Exhibit "A" and is hereby incorporated by reference as if fully set out herein.

19. The Defendant invested the proceeds from the wrongful death claim in the total amount of \$16,000 recovered on behalf of the estate of the minor child, Duane Morning, in Lake East, Incorporated, a corporation in which the Defendant had approximately a ninety percent interest, without revealing that investment on the Defendant's interest in Lake East, Incorporated, to Ms. Morning. While representing Ms. Morning as Administratrix of the estate, the Defendant thereby entered into a business transaction with Ms. Morning at a time when the Defendant and Ms. Morning had different interests in the transaction and Ms. Morning could and did reasonably expect the Defendant to exercise his professional judgment for the protection of Ms. Morning as Administratrix, and did this without obtaining the consent of Ms. Morning and failed to fully disclose the transaction to Ms. Morning, in violation of Disciplinary Rule 5-104(A) of the Code of Professional Responsibility of The North Carolina State Bar.

20. The Defendant failed to file an accounting of the proceeds of the wrongful death claim and the Defendant failed to prepare a proper accounting or advise Ms. Morning as Administratrix of the estate of the necessity of such an accounting and by so doing the Defendant handled a legal matter without preparation adequate under the circumstances in violation of Disciplinary Rule 6-101(A)(2) of the Code of Professional

Responsibility of The North Carolina State Bar and the Defendant intentionally failed to seek the lawful objectives of his client, failed to carry out his contract of employment, and prejudiced and damaged his client during the course of his professional relationship in violation of Disciplinary Rule 7-101(A)(1), (2), and (3).

21. The Defendant knowingly made false statements of facts as alleged in paragraphs 23, 24, 26, and 28 of the First Cause of Action set forth in the Plaintiff's Complaint in violation of Disciplinary Rule 7-102(A)(5) of the Code of Professional Responsibility of The North Carolina State Bar.

22. The Defendant failed to deposit the Aetna Insurance Company check in a trust bank account maintained in the Defendant's name or his law firm's name in violation of Disciplinary Rule 9-102(A) and 9-102(B)(3) of the Code of Professional Responsibility of The North Carolina State Bar.

23. The Defendant failed to notify Ms. Morning, the Administratrix, of the receipt of the check in September 1978, and in so doing the Defendant failed to promptly notify the client of the receipt of the client's funds in violation of Disciplinary Rule 9-102(B)(1).

24. By presenting to Ms. Morning on February 17, 1979, the document entitled "Release" as described in paragraph 18 above and procuring Ms. Morning's signature on it, the Defendant attempted to exonerate himself from or limit his liability to his client for his personal malpractice in violation of Disciplinary Rule 6-102(A) of the Code of Professional Responsibility of The North Carolina State Bar.

25. On or about April 23, 1979, Ms. Morning discharged the Defendant by letter. Ms. Morning then hired William R. Peel to represent her in administering the estate. Peel proceeded to recover from the Defendant the proceeds from the wrongful death claim in the amount of \$12,000 and filed the final accounting in the estate on November 2, 1979.

Based upon the foregoing FINDINGS OF FACT, the Hearing Committee concludes as a MATTER OF LAW that the conduct of the Defendant was in violation of North Carolina General Statute 84-28(B)(2) in that the Defendant violated the Code of Professional Responsibility as follows:

1. The Defendant violated Disciplinary Rule 5-104(A) of the Code of Professional Responsibility of The North Carolina State Bar by investing

the proceeds from the wrongful death claim in the total amount of \$16,000 recovered on behalf of the estate of the minor, Duane Morning, in Lake East, Incorporated, a corporation in which the Defendant had approximately a ninety per cent interest, without revealing that investment of the Defendant's interest in Lake East, Incorporated, to Ms. Morning, the Defendant thereby entering into a business transaction with Ms. Morning at a time when the Defendant and Ms. Morning had different interests in the transaction and Ms. Morning could and did reasonably expect the Defendant to exercise his professional judgment for the protection of Ms. Morning as Administratrix, and did this without obtaining the consent of Ms. Morning and failed to fully disclose the transaction to Ms. Morning.

2. The Defendant handled a legal matter without preparation adequate under the circumstances in violation of Disciplinary Rule 6-101(A)(2), of the Code of Professional Responsibility of The North Carolina State Bar by failing to file an accounting of the proceeds of the wrongful death claim or by failing to prepare a proper accounting or advise Ms. Morning as Administratrix of the estate of the necessity of such an accounting.

3. The Defendant intentionally failed to seek the lawful objectives of his client, failed to carry out a contract of employment, and prejudiced and damaged his client during the course of his professional relationship with Ms. Morning in violation of Disciplinary Rule 7-101(A)(1)(2) and (3) by failing to file an accounting of the proceeds of the wrongful death claim or by failing to prepare a proper accounting or advise Ms. Morning of the necessity of such an accounting with the Clerk of Superior Court.

4. The Defendant knowingly made false statements of fact in violation of Disciplinary Rule 7-102(A)(5) of the Code of Professional Responsibility of The North Carolina State Bar by engaging in the conduct as alleged in paragraphs 23, 24, 26 and 28 of the First Cause of Action as set forth in the plaintiff's complaint.

5. The Defendant violated Disciplinary Rule 9-102(A) and 9-102(B)(3) of the Code of Professional Responsibility of The North Carolina State Bar by failing to deposit the Aetna Insurance Company check in a trust bank account maintained in the Defendant's name or his law firm's name.

6. The Defendant failed to promptly notify Ms. Morning of the receipt of her funds in violation of Disciplinary Rule 9-102(B)(1) by failing to notify Ms. Morning as the Administratrix of the estate of the receipt of the check in September 1978.

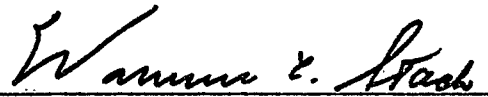
7. The Defendant attempted to exonerate himself from or limit his liability to Ms. Morning for his personal malpractice in violation of Disciplinary Rule 6-102(A) of the Code of Professional Responsibility of The North Carolina State Bar by presenting to Ms. Morning on February 17, 1979, the document entitled "Release" as described in paragraph 18 of the Findings of Fact and procuring Ms. Morning's signature on it.

These FINDINGS OF FACT and CONCLUSIONS OF LAW are unanimously agreed to by all Hearing Committee members.

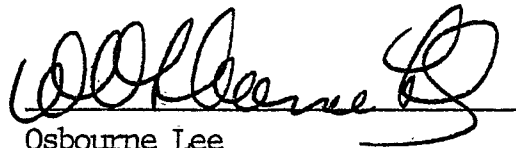
In addition, Hearing Committee member W. Osbourne Lee would make the following additional CONCLUSIONS OF LAW:

1. The Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Disciplinary Rule 1-102(A)(4).
2. That such conduct warrants disbarment.

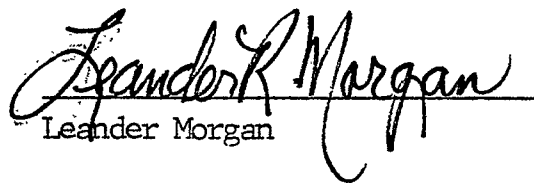
This the 9th day of JANUARY 1981.



Warren Stack, Chairman
Disciplinary Hearing Committee



Osbourne Lee



Leander Morgan

STATE OF NORTH CAROLINA
COUNTY OF WAKE

1031 JAN 10 1981

BEFORE THE
DISCIPLINARY HEARING COMMITTEE
OF THE
NORTH CAROLINA STATE BAR
80 DEC 16

THE NORTH CAROLINA STATE BAR,
Plaintiff,

-VS-

ORDER

JAMES W. SMITH, Attorney,
Defendant.

THIS cause was heard by the undersigned Hearing Committee of the Disciplinary Hearing Commission of The North Carolina State Bar on Friday, December 5, 1980. Based upon the Findings of Fact and Conclusions of Law entered in this cause, the Committee enters the following ORDER:

1. That the Defendant be and is hereby suspended from the practice of law for a period of eighteen (18) months commencing thirty (30) days after service of this Order upon the Defendant or affirmation of this Order on appeal.
2. The Defendant shall surrender his license to the Secretary of The North Carolina State Bar who will maintain it in his possession for the duration of the suspension.
3. The costs of this proceeding shall be taxed to the Defendant.

This the 9th day of JANUARY ~~December~~ 1980.

Warren C. Stack
Warren Stack, Chairman
Disciplinary Hearing Committee

Osbourne Lee
Osbourne Lee

Leander R. Morgan
Leander Morgan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

FILED

APR 24 1981

J. RICH LEONARD, CLERK
U. S. DISTRICT COURT
E. DIST. NO. CAR.

ORDER SUSPENDING ATTORNEY JAMES W. SMITH FROM THE PRACTICE OF LAW IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA FOR A PERIOD OF EIGHTEEN MONTHS

Misc. D.B. #1 P.2

It appearing to the court that Attorney James W. Smith of Henderson, was suspended from the practice of law by the North Carolina State Bar by order dated January 9, 1981, and it furthermore appearing that Attorney Smith was informed on March 10 that the identical discipline would be imposed by this court unless he within thirty days demonstrated that such action was unwarranted, and it furthermore appearing that on March 12, 1981, Attorney Smith received a copy of this court's order to which he has not responded,

It is hereby ORDERED that Attorney James W. Smith is suspended from the practice of law in the United States District Court for the Eastern District of North Carolina for a period of eighteen months from the date of receipt of this order. Disciplinary Rule 102.04, Eastern District of North Carolina.

F. T. Dupree, Jr.
F. T. DUPREE, JR.
CHIEF UNITED STATES DISTRICT JUDGE

April 21, 1981

Mr. James W. Smith acknowledged receipt of certified copy of this Order on April 27, 1981.

J. Rich Leonard, Clerk

I certify the foregoing to be a true and correct copy of the original.
J. Rich Leonard, Clerk
United States District Court
Eastern District of North Carolina
By *Annelle B. Perdue*
Deputy Clerk