

NORTH CAROLINA
WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
80 DHC 19

THE NORTH CAROLINA STATE BAR,
Plaintiff,

-vs-

GENE GURGANUS, Attorney,
Defendant.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

THIS CAUSE was heard before a duly appointed Hearing Committee of the Disciplinary Hearing Commission composed of E. James Moore, Chairman; Garrett Bailey; and Leander Morgan on February 13 and 14, 1981, at the North Carolina State Bar Building. The Plaintiff was represented by David R. Johnson, Esquire, and the Defendant was present and represented by Ron Dilthey, Esquire of the Wake County Bar. Upon the conclusion of the presentation of evidence and the arguments of the respective counsel, the Committee makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT

First Claim for Relief

The Hearing Committee finds that the State Bar did not prove the allegations in the First Claim for Relief by clear, cogent, and convincing evidence.

Second Claim for Relief

The Hearing Committee finds the following facts by clear, cogent, and convincing evidence:

1. That 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, Gene Gurganus, was admitted to The North Carolina State Bar on October 10, 1973, and is 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 of 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 City of Jacksonville, Onslow County, North Carolina.

4. All parties are properly before the Hearing Committee and the Hearing Committee has jurisdiction over the Defendant and the subject matter.

5. On October 21, 1975, one Jamie Sharpe, the minor daughter of Mr. James F. Sharpe, was hit by an automobile while attempting to cross a highway. The automobile was owned by the United States Navy and was driven by an employee of the United States Navy. At the time of the accident Jamie Sharpe was a student at Onslow Academy, a private school owned and operated by Quality Education, Inc., a non-profit corporation. Jamie Sharpe had been a passenger on a school bus owned by Quality Education, Inc., driven by one Bonnie Hood, a student at and an employee of Quality Education, Inc., when the bus broke down. The driver allowed Jamie Sharpe to cross the highway to call for help and as Jamie Sharpe was coming back to the bus she was struck by the car.

6. James F. Sharpe employed the Defendant after the accident to represent himself and his daughter, Jamie to prosecute negligence claims against the United States Navy and Quality Education, Inc.

7. The Defendant settled the claim against the United States Navy for \$20,000.00 in June of 1977.

8. In October of 1978, the Defendant filed a Complaint on behalf of James F. Sharpe individually and in his capacity as guardian for his daughter Jamie against Quality Education, Inc. and the driver of the bus individually, a copy of said Complaint being attached to the Complaint in this cause as Exhibit B and incorporated by reference as if fully set out herein. Attorney Carl Milsted entered an appearance on behalf of Quality Education, Inc. and the driver in November of 1978, by filing Motions.

9. At the time of filing the suit James F. Sharpe was Chairman of the Board of Directors and President of Quality Education, Inc.

10. The Defendant had a continuing professional relationship at the time with James F. Sharpe and had no professional relationship with Quality Education, Inc.

11. During the spring of 1979 Quality Education, Inc., ran into financial difficulties. James F. Sharpe invited the Defendant to discuss

the ramifications of the Bankruptcy Act with the Board of Directors of Quality Education, Inc. in May of 1979. Subsequently, the Board of Directors decided to employ the Defendant to represent the corporation in bankruptcy and the Defendant accepted this employment. The Defendant was still representing Plaintiff in the Complaint against the corporation, Exhibit B.

12. On June 7, 1979, the Defendant filed on behalf of Quality Education, Inc., a petition in bankruptcy under Chapter XI arrangements. On July 26, 1979, an arrangement was filed with the court and on July 31, 1979, the Court issued its Order for First Meeting of Creditors, which included a provision staying continuation of any court proceedings against Quality Education, Inc.

13. That a motion to strike the punitive damages paragraphs of the Complaint in 78-CvS-1031, Onslow County, Exhibit "B" attached to the Complaint in this action, was filed on November 2, 1978, on behalf of Quality Education, Inc. and on November 28, 1978 on behalf of Bonnie Hood and that Gene Gurganus amended the Complaint on January 23, 1979 to delete the paragraphs relating to punitive damages.

14. That an Answer was filed in 78-CvS-1031 on behalf of Quality Education, Inc. on July 16, 1979 and on behalf of Bonnie Hood on August 3, 1979.

15. The Defendant, while employed by one James F. Sharpe, to represent him individually and in his capacity as guardian for his daughter Jamie, had instituted a civil action against Quality Education, Inc., and the driver of a vehicle owned by Quality Education, Inc., to recover for certain personal injuries received by the said Jamie Sharpe, daughter of James F. Sharpe, arising out of an automobile accident.

16. Initially, this action sought actual and punitive damages, but that by amendment of the Complaint prior to the matters herein referred to, the action for punitive damages was dropped by the plaintiff.

17. That while the action was still pending the Defendant was approached by his client, James F. Sharpe, who at that time was also president of Quality Education, Inc., and was asked to attend a board meeting of Quality Education, Inc., to discuss with the board various aspects, manners, and methods of bankruptcy, which the corporation was then considering.

18. The Defendant attended the meeting and discussed with the board of directors of the corporation that various methods were available by which bankruptcy should be accomplished.

19. That the Defendant did not know at that time whether or not his demand in the civil action for damages for injuries to Jamie Sharpe exceeded the insurance coverage of Quality Education, Inc. and he made no independent judgment whether or not he would be obtaining an excess judgment against the defendant, Quality Education, Inc. if he prevailed on his original suit.

20. While the Defendant may have been informed by his client, James F. Sharpe, who was then president and chairman of the board of the defendant, Quality Education, Inc. that the board members knew of the fact that the Defendant represented Mr. Sharpe in the civil action against the corporation, the Defendant took no positive action on his own account to so advise members of the board of directors, but instead relied on the statement made to him by Mr. Sharpe. In accepting this employment and failing to advise the board of directors that he represented a claimant against the corporation on a tort action and attempting simultaneously to render legal advice to the Corporation, the Defendant placed himself in the position where the great possibility existed that he could not exercise independent professional judgment on behalf of his initial client, James F. Sharpe or his new client, Quality Education, Inc.

21. Subsequent events may or may not have established any harm by way of of a financial nature to Quality Education, Inc. or perhaps even to James Sharpe. This factor was not known to the Defendant at the time he accepted employment, and in doing so he ran an extremely high risk of compromising the independent professional judgment so necessary to him in the given situation and to the appropriate practice of law under the Code of Professional Responsibility.

CONCLUSION OF LAW

First Claim for Relief

The Hearing Committee concludes as a matter of law the The North Carolina State Bar has failed to prove the allegations of the First Claim for Relief.

Second Claim for Relief

Based upon the FINDINGS OF FACT entered above on the Second Claim for Relief, the Hearing Committee CONCLUDES AS A MATTER OF LAW:

1. That 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.

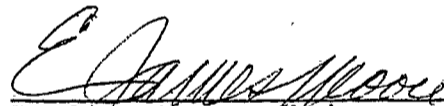
2. The Defendant, Gene Gurganus, was admitted to The North Carolina State Bar on October 10, 1973, and is and was at all times referred to herein, an Attorney at Law, licensed to practice law in the State of North Carolina, subject to the Rules, Regulations, Canons of Ethics and Code of Professional Responsibility of The North Carolina State Bar and of the laws of the State of North Carolina.

3. All parties are properly before the Hearing Committee and the Hearing Committee has jurisdiction over the Defendant and the subject matter.

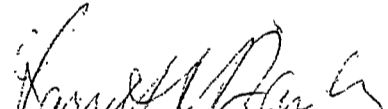
4. The conduct of the Defendant was in violation of North Carolina General Statute 84-28(b) (2) as a violation of Disciplinary Rule 5-105(A) of the Code of Professional Responsibility in that by accepting employment from Quality Education, Inc. at the time that he was pursuing a civil action against the company, which civil action is still pending at the time of the hearing of this cause, the Defendant accepted employment where the exercise of his independent professional judgment in behalf of his original client and his new client was likely to be adversely affected.

5. The North Carolina State Bar has failed to prove a violation of Disciplinary Rule 7-104(A) of the Code of Professional Responsibility.

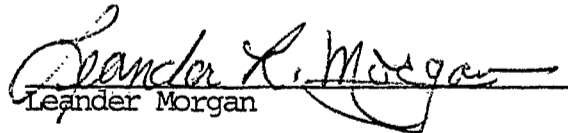
This the 18 day of March, 1981.



E. James Moore, Chairman.
Disciplinary Hearing Committee



Garrett Bailey



Leander Morgan

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ORDER

THIS CAUSE was heard before a duly appointed Hearing Committee of the Disciplinary Hearing Commission composed of E. James Moore, Chairman; Garrett Bailey; and Leander Morgan on February 13 and 14, 1981, at the North Carolina State Bar Building. The Plaintiff was represented by David R. Johnson, Esquire, and the Defendant was present and represented by Ron Dilthey, Esquire of the Wake County Bar. Based upon the evidence and arguments of counsel and the FINDINGS OF FACT AND CONCLUSIONS OF LAW entered in this cause, the Hearing Committee hereby ORDERS, ADJUDGES, AND DECREES that:

1. The First Claim for Relief is dismissed with respect to all allegations contained therein;
2. With regard to the Second Claim for Relief, discipline shall be imposed upon the Defendant for a violation of Disciplinary Rule 5-105(A);
3. The discipline imposed upon the Defendant for said violation will be a Private Reprimand issued by the Chairman of the Disciplinary Hearing Commission pursuant to Rule 23(A) (1) of the Discipline and Disbarment Rules; and
4. The costs of the Second Claim for Relief are hereby taxed to the Defendant.

This the 18 day of March, 1981.

E. James Moore
E. James Moore, Chairman
Disciplinary Hearing Committee

Garrett Bailey
Garrett Bailey

Leander R. Morgan
Leander Morgan

