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STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF JOHNSTON SUPERIOR COURT DIVISION
FILE NO: 08 CVS 142

SECURITY CREDIT CORPORATION,)
INC.,)
Plaintiff)
VS.)
MICHAEL BAREFOOT, et al.)
Defendants)

ORDER OF DISCIPLINE

This matter came before the undersigned judge of the superior court of Johnston County on a report of professional misconduct filed 16 July 2010 by plaintiff's counsel, L. Lamar Armstrong, Jr., against defense counsel, Willie D. Gilbert, II. By order entered in open court on 26 July 2010, the court notified Mr. Gilbert that an evidentiary hearing would be held on the allegations in the report on 27 August 2010. The court specifically advised Mr. Gilbert that the court would consider whether or not sanctions should be imposed against him in the event the court found that he had engaged in professional misconduct.

The court conducted an evidentiary hearing on 27 August 2010. Mr. Armstrong appeared as the complainant. Mr. Gilbert personally appeared and represented himself. At the conclusion of the hearing, Mr. Gilbert moved the court to strike Mr. Armstrong's report from the record and for Rule 11 sanctions against Mr. Armstrong.

Based on the record and the testimony, affidavits, and other evidence received at the hearing, and after considering the arguments of Mr. Armstrong and Mr. Gilbert, the court, by clear, cogent, and convincing evidence, makes the following

FINDINGS OF FACT:

Relevant Background

1. This case, involving claims for fraud, conversion, breach of fiduciary duty, and unfair and deceptive trade practices, was tried before the Honorable Richard T. Brown and a jury at the 11 January 2010 session of Johnston County civil superior court. Following a seven week trial that ended on 1 March 2010 with a split verdict, Judge Brown filed judgment on or about 15 April 2010.

2. The trial of the case originally was scheduled to begin 16 November 2009. On 3 November 2009, Mr. Gilbert filed a motion seeking a continuance of the trial. In his motion, Mr. Gilbert stated that he had been retained by defendants Michael Barefoot, Frankie Barefoot, and Security Auto Sales on 24 September 2009 after their original counsel was disqualified by the court. Mr. Gilbert cited a number of reasons for his continuance request, asserting *inter alia*, that since being retained he “. . . has been required, and continues to be required, to prepare a multitude of legal documents for filing in matters that are pending in the United States Court of Appeals for the Fourth Circuit and in a California federal district court” and that he “. . . has been required to devote a significant amount of time to preparing a lengthy document for filing in the North Carolina Court of Appeals.”

4. The undersigned continued the trial until 14 December 2009.

5. On Friday, 11 December 2009, Mr. Gilbert filed another continuance motion with this court. Again, Mr. Gilbert set forth a number of reasons for the request, including a statement that he was “. . . in need of a short delay in the trial of this matter because, within the past 10 days, counsel for the moving defendants has been confronted with several unanticipated and unforeseeable deadlines to respond before December 15, 2009, to events transpiring in both state and federal cases in which such counsel is involved.”

6. On the morning of 14 December 2009, Judge Brown, over plaintiff's objection, continued the trial until 11 January 2010.

7. Following the trial, on 26 April 2010, plaintiff filed a motion for judgment notwithstanding the verdict on defendant Michael Barefoot's counterclaims or, in the alternative, a motion for a new trial on the counterclaims.

8. On 29 April 2010, defendants responded by filing a motion for judgment notwithstanding the verdict, or alternatively, a motion for a new trial.

9. On 29 June 2010, the trial court coordinator (TCC) for this district notified Mr. Armstrong and Mr. Gilbert that their post-trial motions would be heard by Judge Brown on 16 July 2010.

10. On Monday, 12 July 2010, Mr. Gilbert sent an email to the TCC requesting a continuance of the hearing, stating that he was in California and had a continuing need to be there until the end of July because he was “. . . attending to numerous discovery and dispositive-motion related matters in a federal civil action.”

11. Mr. Armstrong sent an email to Mr. Gilbert and the TCC on 13 July 2010 objecting to the continuance request.

12. Later that day, Mr. Gilbert responded in an email to the TCC and Mr. Armstrong that “. . . I have already received continuances in two other matters due to the conflict created by the very same federal court obligations that have necessitated the continuance request that I am making now.” He further asserted that “. . . until July 1, 2010, I actually thought that I would be in a position to return to NC for the July 16th hearing in the *Barefoot* matter. On July 1, 2010, however, ‘all h_ll broke loose’ in the Los Angeles litigation, and I have since been working 18-20 hours per day attempting to overcome dire circumstances that were beyond my control to prevent, and that I had no reason to anticipate would interfere with my ability to attend the *Barefoot* hearing on July 16, 2010.”

13. The undersigned granted Mr. Gilbert’s request for a continuance and rescheduled the hearing for 6 August 2010.

14. On 16 July 2010, Mr. Armstrong filed the Report of Professional Misconduct, alleging that Mr. Gilbert, in his motions to continue the trial and in his written request for a continuance of the hearing on the post-trial motions, violated Rule 3.3 (Candor Toward the Tribunal), Rule 4.1 (Truthfulness in Statements to Others), and Rule 8.4 (Misconduct) of the Revised Rules of Professional Conduct. Mr. Armstrong moreover alleged that Mr. Gilbert violated Rule 5.5(a) by engaging in the unauthorized practice of law in California.

15. Mr. Armstrong filed a calendar request asking that this court conduct a hearing on his report of professional misconduct on 26 July 2010.

16. On 26 July 2010, the court denied Mr. Gilbert’s motion to quash the report, denied his motion to refer the report to Judge Brown, and allowed his motion to continue the hearing on the report. The court scheduled this matter for an evidentiary hearing on 27 August 2010.

Hearing on post-trial motions

17. At no time has Mr. Gilbert appeared as counsel of record in any matter in the federal courts of California.

18. Mr. Gilbert’s wife is the plaintiff in *Sheri H. Gilbert v. New Line Productions, Inc., et al.*, Case No. 2:09-CV-02231, a copyright infringement case pending in the United States District Court for the Central District of California.

19. Mr. Gilbert’s application to appear *pro hac vice* in his wife’s case had been denied by the federal district court on 6 May 2009.

20. In May of 2010, Ms. Gilbert’s original California counsel, Mr. Steven T. Lowe, withdrew from her case, and Ms. Gilbert retained Ms. Nanette G. Reed, an associate with the Los Angeles law firm of Murchison & Cumming, LLP., on or about 18 June 2010.

21. On or about 21-23 June 2010, the defendants in Ms. Gilbert's case filed motions for summary judgment. These motions were scheduled for hearing on 26 July 2010.

22. Mr. Gilbert provided substantial legal assistance to both of his wife's California attorneys. His work included reviewing discovery and drafting pleadings and briefs.

23. By his own admission in his email of 13 July 2010, Mr. Gilbert was aware as early as 1 July 2010 of the 16 July 2010 hearing date for the post-trial motions. Still, Mr. Gilbert failed to notify the court or opposing counsel until 12 July 2010 that the hearing date imposed a personal hardship upon him.

24. By the language of his 12 and 13 July 2010 emails to the TCC and opposing counsel, Mr. Gilbert intimated that he was appearing as counsel in a federal court civil case in California.

25. This language of Mr. Gilbert's 12 and 13 July 2010 emails is misleading.

First trial continuance motion

26. At the time of his 3 November 2009 motion to continue, Mr. Gilbert was not counsel of record in any case pending in a California federal district court, in the United States Court of Appeals for the Fourth Circuit, or in the North Carolina Court of Appeals.

27. At that time, Mr. Gilbert was assisting his attorney, Mr. Eric C. Michaux, in the preparation of a 100 page long Motion for a Temporary Stay and Petition for a Writ of *Supersedeas* filed with the North Carolina Court of Appeals on 11 November 2009 in connection with Mr. Gilbert's own disciplinary proceeding before the State Bar (*North Carolina State Bar v. Willie D. Gilbert, II*, Case No. 03 DHC 16).

28. Mr. Gilbert also was assisting Mr. Michaux in preparing an Emergency Motion for An Injunction Pending Appeal and a memorandum of law in support of that motion filed on 4 November 2009 in the United States District Court for the Eastern District of North Carolina in Mr. Gilbert's own lawsuit against the North Carolina State Bar (*Willie D. Gilbert, II v. North Carolina State Bar*, Case No. 5:09-CV-00383-D).

29. Mr. Gilbert's wife's case was pending in federal court in California at that time. Mr. Steven T. Lowe represented Ms. Gilbert.

30. Mr. Gilbert's 3 November 2009 motion to continue did not mention that the matters in which he was preparing legal documents were his own cases in which he had counsel. His language implies that he was counsel in matters pending in the California federal district court, the United States Court of Appeals for the Fourth Circuit, and the North Carolina Court of Appeals.

31. This language of Mr. Gilbert's 3 November 2009 motion to continue is misleading.

Second trial continuance motion

32. Mr. Gilbert was not counsel of record in any other case referenced at this hearing when he filed his 11 December 2009 motion to continue.

33. On or about 3 April 2009, Mr. Marshall B. Pitts, Jr., an attorney in Cumberland County, hired Mr. Gilbert to assist him in the preparation of an appellant's brief to be filed in the North Carolina Court of Appeals in the case of *Dorothy Harris v. Clarence Barefoot, et al.*, File No. COA09-1313.

34. The original deadline for the filing of the brief was 30 November 2009. On or about 23 November 2009, Appellant moved for a 30 day extension of this deadline. The Court of Appeals extended the deadline until 15 December 2009.

35. Neither the original nor the extended deadline for filing this brief was "unanticipated and unforeseeable."

36. Mr. Gilbert prepared for his attorney, Mr. Michaux, a 31 page Docketing Statement filed on 14 December 2009 in Mr. Gilbert's own appeal in the United States Court of Appeals for the Fourth Circuit (*Willie D. Gilbert, II v. The North Carolina State Bar*, Case No. 09-2193).

37. The filing of this Docketing Statement was neither unanticipated nor unforeseeable.

38. To the extent that Mr. Gilbert's second continuance motion refers to his wife's California case, she filed a Notice of Motion and Motion for Reconsideration in that action on 9 and 11 December 2009. Mr. Gilbert was not counsel of record in that case, and the filing of that motion was neither unanticipated nor unforeseeable.

39. Mr. Gilbert's representation to the court in his 11 December 2009 motion to continue that he was facing "unanticipated and unforeseeable deadlines" in "both state and federal cases in which [he] is involved" suggested that he was counsel in such cases.

40. The language in Mr. Gilbert's 11 December 2009 motion to continue intimating that he was counsel in those cases is misleading. His statement that he had been confronted with several unanticipated and unforeseeable deadlines is false.

Additional findings common to all the continuance requests

41. Each of Mr. Gilbert's misleading statements was material, even if not determinative of the court's decision as to a particular motion or request to continue.

42. Considered *in toto*, Mr. Gilbert's misleading statements in support of his continuance motions and requests evidence a pattern by Mr. Gilbert of carefully crafting his words so to create the impression that he was counsel of record in other pressing cases.

Applicable law, rules, and ethical considerations

43. The regulation of the conduct of attorneys is a responsibility shared by the North Carolina State Bar and the courts of this state. See N.C. Gen. Stat. 84-36.

44. The civil case management plan for Judicial District 11-B, promulgated pursuant to Rule 2(a) of the General Rules of Practice for the Superior and District Courts, provides that all communications with the court shall be addressed to the attention of the TCC and may be by email.

45. Rule 3.3 of the Revised Rules of Professional Conduct provides in relevant part: "(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal. . ."

46. Comment 3 to Rule 3.3 states: "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

47. Rule 4.1 of the Revised Rules of Professional Conduct provides: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."

48. Comment 1 to Rule 4.1 affirms: "Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

49. Rule 5.5(a) of the Revised Rules of Professional Conduct provides: "A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction."

50. Rule 8.4 of the Revised Rules of Professional Conduct provides in relevant part: "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice. . ."

Based on the foregoing findings of fact and the application of the relevant law and Revised Rules of Professional Conduct to those facts, the court reaches the following

CONCLUSIONS OF LAW:

1. This court has jurisdiction over Mr. Gilbert and the subject matter of this disciplinary proceeding.

2. Mr. Gilbert has been afforded due process in that this proceeding was initiated by the written complaint of opposing counsel, he was advised of the specific allegations of misconduct, he was ordered by the court to appear for an evidentiary hearing on the charges and advised that the court would consider whether or not disciplinary sanctions were warranted, he was granted a reasonable time to answer and prepare his defense, and he was permitted to have counsel for his defense had he so chosen. See *In re Northwestern Bonding Co.*, 16 N.C. App. 272, 276 (1972).

3. Mr. Gilbert's personal obligations to his own attorney and in his own cases, his personal or legal obligations to his wife or her attorneys, and his legal obligations to other attorneys for whom he was doing work can not supersede or override his obligations to this court and to his own clients in this case.

4. The evidence does not support a finding by clear, cogent, and convincing evidence that Mr. Gilbert engaged in the unauthorized practice of law in the state of California.

5. In his first continuance motion, Mr. Gilbert failed to disclose: (a) that he was a party and was represented by counsel in that matter pending in the United States Court of Appeals for the Fourth Circuit; (b) that the California federal civil action on which he was working was his wife's case and that she was represented by counsel; and (c) that he was preparing a lengthy document for his own case in the North Carolina Court of Appeals and that he was represented by counsel in that case. Each of these failures to disclose a material fact was the equivalent of an affirmative misrepresentation in violation of Rule 3.3 of the Revised Rules of Professional Conduct.

6. Each of these failures to disclose a material fact rendered his first continuance motion partially true, and, hence, the equivalent of an affirmative false statement in violation of Rule 4.1 of the Rules of Professional Conduct.

7. In his second continuance motion, Mr. Gilbert, in referring to 15 December 2009 deadlines he was facing "in both state and federal cases in which [he was] involved," failed to disclose that: (a) the state case involved his assisting another lawyer in preparing an appellant's brief for the North Carolina Court of Appeals; (b) one federal case was his own appeal in the United States Court of Appeals for the Fourth Circuit and that he was represented by counsel in that case; and (c) to the extent that he was referring to any other federal case, it was his wife's California action and that she was represented by counsel. Each of these failures to disclose a material fact was the equivalent of an affirmative misrepresentation in violation of Rule 3.3 of the Revised Rules of Professional Conduct.

8. Each of these failures to disclose a material fact rendered his second continuance motion partially true, and, hence, the equivalent of an affirmative false statement in violation of Rule 4.1 of the Revised Rules of Professional Conduct.

9. Moreover, Mr. Gilbert's statement in his second continuance motion that he had "been confronted with several unanticipated and unforeseeable deadlines" was a false statement of a material fact in violation of Rule 3.3 of the Revised Rules of Professional Conduct.

10. In his request for a continuance of the post-trial motions hearing, Mr. Gilbert failed to disclose that the federal civil action in California in which he was "attending to numerous discovery and dispositive-motion related matters" was his wife's case and that she was represented by counsel. This failure to disclose a material fact was the equivalent of an affirmative misrepresentation in violation of Rule 3.3 of the Revised Rules of Professional Conduct.

11. This failure to disclose a material fact rendered his post-trial hearing continuance request partially true, and, hence, the equivalent of an affirmative false statement in violation of Rule 4.1 of the Revised Rules of Professional Conduct.

12. By making affirmative misrepresentations and false statements in support of each of his continuance motions and requests, Mr. Gilbert committed professional misconduct by engaging in conduct involving dishonesty, deceit, or misrepresentation and by engaging in conduct that is prejudicial to the administration of justice in violation of Rule 8.4 of the Revised Rules of Professional Misconduct.

13. Mr. Gilbert's professional misconduct has caused significant harm to the administration of justice in this case by creating unnecessary delays and by disrupting the schedules of the court.

14. Mr. Gilbert's professional misconduct, specifically his dishonesty, deceit, and misrepresentation, has caused significant harm or potential significant harm to the profession.

15. There is no basis to support Mr. Gilbert's motion to strike Mr. Armstrong's Report of Professional Misconduct from the record or his motion to impose Rule 11 sanctions against Mr. Armstrong for filing the report.

Based on the court's analysis of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. Mr. Willie D. Gilbert, II is CENSURED for violating one or more provisions of the Revised Rules of Professional Conduct and for causing significant harm or potential significant harm to the administration of justice and to the profession of law.

2. Mr. Gilbert's oral motion to strike the Report of Professional Misconduct from the record is DENIED.

3. Mr. Gilbert's oral motion for the imposition of Rule 11 sanctions against L. Lamar Armstrong, Jr. is DENIED.

4. The Clerk of the Superior Court shall forward copies of this order to Mr. Gilbert, Mr. Armstrong, and Ms. Katherine Jean, Counsel for the North Carolina State Bar, P.O. Box 25908, Raleigh, North Carolina 27611.

This the 16th day of September, 2010.

A handwritten signature in black ink, appearing to read "Thomas H. Lock", written over a horizontal line. The signature is stylized and includes a long horizontal flourish extending to the left.

THOMAS H. LOCK
Senior Resident Superior Court Judge
Judicial District 11-B