

NORTH CAROLINA
WAKE COUNTY

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BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
90 DHC 22

THE NORTH CAROLINA STATE BAR,
Plaintiff

vs.

W. P. BURKHIMER, ATTORNEY
Defendant

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter came on to be heard and was heard on May 3, 1991 before a hearing committee of the Disciplinary Hearing Commission composed of Maureen D. Murray, Chairman; Frank L. Boushee, and L. P. Hornthal, Jr. The North Carolina State Bar was represented by Fern E. Gunn and the Defendant was represented by J. Michael Correll. Based upon the stipulations of the parties and the evidence presented at the hearing, the Committee finds the following facts by clear, cogent, and convincing evidence:

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, W. P. Burkheimer, was admitted to the North Carolina State Bar on September 19, 1947, 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 of the periods referred to herein, 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 Lenoir, Caldwell County, North Carolina.
4. Defendant represented the plaintiff, Baton Ruritan Club in a lawsuit captioned Baton Ruritan Club vs. Wayne F. Bell and wife, Dorothy J. Bell (the Bells), 88 CVS 573. Donald T. Robbins represented the Bells.
5. On May 24, 1988, Defendant obtained a temporary

restraining order, signed by Judge Hollis Owens, Jr., on behalf of Baton Ruritan Club.

6. After a hearing on June 3, 1988, Judge Hollis Owens, Jr. denied Baton Ruritan Club's motion for temporary injunction and the temporary restraining order was dissolved.
7. Subsequent to the entry of Judge Owens' order denying the temporary injunction, the Defendant filed various pleadings or motions with the court.
8. On July 21, 1988, Defendant filed Amendments of Complaint in the case. Defendant certified that the Caldwell County Sheriff's Department personally served Robbins with the Amendments of Complaint.
9. On July 21, 1988, Defendant filed a Motion for Injunction in the Baton Ruritan Club case. Defendant certified that the Caldwell County Sheriff's Department personally served Robbins with the motion.
10. On July 25, 1988, Defendant filed a Show Cause Order which was signed by Judge Forrest A. Ferrell. Defendant certified that he had served Robbins with the Show Cause Order by mailing it to him.
11. Bernice Haas, a secretary in the Caldwell County Sheriff's Department, reviewed the records of the Sheriff's Department and determined that no papers were received or served on Robbins during July of 1988.
12. Robbins was not served with the Amendments of Complaint and Motion for Injunction by the Caldwell County Sheriff's Department as Defendant certified. Neither was Robbins served by mail with the Show Cause Order as Defendant certified.
13. Defendant obtained a Restraining Order and Injunction in the Baton Ruritan Club case on August 8, 1988. Neither Robbins nor his clients appeared at such hearing. The Restraining Order and Injunction, signed by Judge Kenneth A. Griffin, found that Robbins' clients were guilty of contempt for their disobedience of the Show Cause Order.
14. Robbins obtained a copy of the Amendments of Complaint, Motion for Injunction, Show Cause Order, and Restraining Order and Injunction from the court file.
15. Robbins filed a Motion to Strike the various pleadings which Robbins asserted he did not receive from the Defendant. This motion was not heard by the court.
16. Robbins filed a Motion for Rule 11 Sanctions relative to, among other things, Defendant's

failure to serve Robbins with the various pleadings. This motion was heard by Judge Claude Sitton. Judge Sitton sanctioned Defendant \$2,500.00 for, among other things, falsely certifying service of the pleadings on Robbins in July 1988.

17. While representing the Baton Ruritan Club, Defendant notarized the verifications in various pleadings or paper writings on behalf of his client. Defendant notarized the verifications in: the Complaint, two Motions for Injunction, Affidavit of Donald D. Jensen, and Amendments of Complaint.
18. Defendant's client was granted a temporary restraining order based upon a pleading which Defendant notarized.
19. Defendant's notarization of these pleadings was in violation of N.C.G.S. Section 47-8 which provides that "no practicing attorney at law has power to administer any oaths to a person to any paper writing to be used in any legal proceedings in which he appears as attorney."
20. Defendant represented Robin L. Shook in a domestic action captioned Shook v. Shook, 88 CVD 301, in Caldwell County. On March 14, 1988, Defendant filed on Shook's behalf a complaint requesting divorce from bed and board, alimony, alimony pendente lite, attorney's fees, court costs and equitable distribution.
21. In the complaint filed in Shook v. Shook, Defendant alleged that:
 - a) Mrs. Shook's husband earned a total income of \$5,000.00 per week with \$3,000.00 per week being earned from Mr. Shook's job with the U.S. Postal Service.
 - b) Mrs. Shook needed \$3,000.00 per week for temporary and permanent alimony.
 - c) Mrs. Shook needed \$10,000 in costs and expenses for bringing and maintaining the action.
 - d) Defendant should be paid attorney's fees estimated to be about 15% of the gross value of all Mr. Shook's assets.
22. Defendant filed Additional Filing in the Shook case on April 5, 1988. The Additional Filing contained a representation that "on 4 April 1988 copies thereof [1985 and 1986 tax returns of Mrs. Shook.] were furnished to Mr. Hugh Wilson ... attorneys for Defendant."

23. Hugh Wilson was not furnished copies of Mrs. Shook's 1985 and 1986 federal and state income tax returns on April 4, 1988 as certified by the Defendant.
24. On April 6, 1988, Wilson filed a Motion to Strike and for Appropriate Sanction for Defendant's representation in Additional Filing that he had furnished the tax returns to Wilson.
25. Several days after Wilson filed the Motion to Strike and for Appropriate Sanction, the Defendant personally delivered his client's income tax returns to Wilson.
26. On March 24, 1988, Wilson filed a Motion to Strike Complaint and for Appropriate Sanction in the Shook case. Wilson alleged that the allegations made by Defendant in the Shook case were untrue and ridiculous on their face and made with Defendant's full knowledge that they were untrue.
27. Prior to filing his client's complaint, Defendant had available to him the financial affidavit prepared by Ms. Shook. Many of the allegations made in the complaint relative to Mr. Shook's income and Mrs. Shook's financial needs were contradicted by Mrs. Shook's own financial affidavit.
28. At no time after receiving notice of Wilson's Motion to Strike Complaint and for Appropriate Sanctions did Defendant amend the complaint in the Shook case.
29. On April 20, 1988, Judge Ronald E. Bogle heard Wilson's Motion to Dismiss and for Sanctions. Judge Bogle entered an order dismissing Mrs. Shook's request for alimony and alimony pendente lite and imposing Rule 11 sanctions against Defendant. Judge Bogle ruled that Shook's complaint was not well grounded in fact or law and was not based upon any reasonable factual inquiry. The Defendant was ordered to pay the attorney's fees for Mr. Shook's attorney, Hugh Wilson.
30. Defendant appealed Judge Bogle's decision to the North Carolina Court of Appeals. In the case of Shook v. Shook, 95 N.C. App. 578 (1989), the Court of Appeals affirmed Judge Bogle's decision.
31. Delliott P. Oliver (Oliver) retained Defendant for representation in a personal injury action.
32. Oliver informed the Defendant in person and by telephone on several occasions that the Defendant was discharged from representation in the case.
33. Oliver asked that the Defendant return the file, but Defendant did not release it to Oliver.

34. Oliver retained Joe K. Byrd, Jr. (Byrd) in early March of 1989 to represent him in his personal injury case.
35. By letter dated March 20, 1989 to the Defendant, Byrd informed the Defendant that Oliver had retained Byrd's office for representation in the personal injury case. Byrd also informed the Defendant that Oliver wanted his file forwarded to Byrd's office.
36. Defendant did not release the file to Byrd.
37. As a result of Defendant's refusal to release Oliver's file to him or Byrd, Oliver was forced to pay for medical records which were contained in the file in Defendant's possession. Oliver was also deprived of the use of photographs pertaining to his accident which were in Defendant's possession.
38. Defendant did not release Oliver's file because Defendant had not been paid for his services.
39. By letter dated March 23, 1989, Defendant informed Byrd that he (Defendant) should receive a 25% contingent fee as agreed upon by Defendant and Oliver in a fee agreement dated February 3, 1988.
40. On more than one occasion, Byrd asked the Defendant to submit a statement of the amount of time he spent on Oliver's case and the amount of expenses he incurred. Defendant never provided such information to Byrd.
41. Although Oliver discharged Defendant, Defendant continued to negotiate with the insurance company to settle Oliver's claim. Furthermore, the Defendant continued to maintain that he was entitled to a 25% contingent fee despite Oliver's discharge of Defendant.

BASED UPON the foregoing Findings of Fact, the hearing committee makes the following:

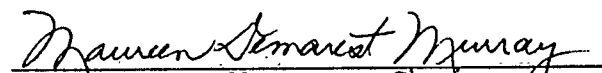
CONCLUSIONS OF LAW

1. By falsely certifying to the courts that he had served attorney Donald T. Robbins with various pleadings, Defendant engaged in conduct involving misrepresentation in violation of Rule 1.2(C); engaged in conduct that is prejudicial to the administration of justice in violation of Rule 1.2(D); and knowingly made a false statement of fact in violation of Rule 7.2(A)(4).
2. By notarizing the paper writings which were used in the action in which he appeared as the attorney and thereby violating N.C.G.S. Section 47-8, Defendant

has engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(D).

3. By filing a complaint on behalf of Robin Shook which was not well grounded in fact or law and not based on any reasonable factual inquiry, Defendant filed a suit, asserted a position, conducted a defense, or took other action on behalf of his client when he knew or when it was obvious that such action would be frivolous or would serve merely to harass or maliciously injure another in violation of Rule 7.2(A)(1) and knowingly made a false statement of law or fact in violation of Rule 7.2(A)(4).
4. By asserting that he had furnished copies of his client's tax returns to attorney Hugh Wilson, when in fact such had not been done, Defendant has engaged in conduct involving misrepresentation in violation of Rule 1.2(C) and engaged in conduct that is prejudicial to the administration of justice in violation of Rule 1.2(D).
5. By not withdrawing from employment and continuing to work on Oliver's case when Oliver had discharged him, Defendant failed to withdraw from employment when discharged by his client in violation of Rule 2.8(B)(4).
6. By not delivering to Oliver his file when he requested it, Defendant has failed to deliver to the client all papers and property to which the client is entitled in violation of Rule 2.8(A)(2) and engaged in conduct that is prejudicial to the administration of justice in violation of Rule 1.2(D).
7. By requesting the 25% contingent fee that was agreed upon originally by the Defendant and Oliver instead of seeking a quantum meruit recovery after Defendant's discharge from employment, Defendant charged a clearly excessive fee in violation of Rule 2.6.

Signed by the undersigned chairman with the full knowledge and consent of the other members of the hearing committee, this the 23rd day of May, 1991.


Maureen D. Murray, Chairman
Hearing Committee

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NORTH CAROLINA
WAKE COUNTY

MAY 91 10:05

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
90 DHC 22

THE NORTH CAROLINA STATE BAR,
Plaintiff

vs.

W. P. BURKHIMER, ATTORNEY
Defendant

ORDER OF DISCIPLINE

This cause was heard on May 3, 1991 by a duly appointed hearing committee of the Disciplinary Hearing Commission consisting of Maureen D. Murray, Chairman; Frank L. Boushee, and L. P. Hornthal, Jr. In addition to the findings of fact and conclusions of law made following the evidentiary hearing, the hearing committee makes the following findings of fact relative to the appropriate disciplinary sanction.

1. The following aggravating factors are present in this case:
 - a) Defendant has a prior disciplinary record as he was disbarred for misappropriation of client funds by order of the Superior Court on December 4, 1956;
 - b) Defendant had a selfish motive in his refusal to release Delliott Oliver's file to him or his attorney, Joe K. Byrd, Jr.;
 - c) Defendant engaged in a pattern of misconduct relative to his false certifications of service of pleadings in the Baton Ruritan Club and Shook cases;
 - d) Defendant was found to have engaged in multiple offenses respecting violations of the Rules of Professional Conduct;
 - e) Defendant has substantial experience in the practice of law; and
 - f) Defendant has refused to acknowledge the wrongful nature of his conduct.
2. There are no mitigating factors relative to Defendant's conduct in these matters.

Based upon the Findings of Fact, Conclusions of Law, and the additional Findings of Fact which have been set forth, the

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hearing committee enters the following:

ORDER OF DISCIPLINE

1. The Defendant is suspended from the practice of law for two years.
2. The Defendant shall wind up his practice in accordance with Section 24 of the Discipline and Disbarment Procedures of the North Carolina State Bar.
3. The reinstatement of the Defendant's license to practice law shall be conditioned upon his obtaining a passing grade on the regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners.
4. The Defendant shall pay the costs of this proceeding.

Signed by the undersigned chairman with the full knowledge and consent of the other members of the hearing committee, this the 23rd day of May, 1991.

Maureen D. Murray

Maureen D. Murray, Chairman
Hearing Committee

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