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BEFORE THE DISCIPLINARY HEARING COMMISSION
OF THE NORTH CAROLINA STATE BAR

THE NORTH CAROLINA STATE BAR,)
)
 Plaintiff,)
)
 vs.)
)
 WESLEY F. TALMAN, JR.,)
 Attorney,)
)
 Defendant.)

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

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This case was heard before the undersigned Hearing Committee of the Disciplinary Hearing Commission on September 25, 1981, in the Council Chamber of the North Carolina State Bar. Aldert Root Edmonson appeared as counsel for the North Carolina State Bar. The Defendant appeared pro se. The parties offered evidence as appears of record and, based upon that evidence, the Committee makes the following:

FINDINGS OF FACT

1. Pursuant to the judicial admissions of the Defendant and the first paragraph of the Pre-Trial Order, the Hearing Committee finds those facts as contained in the first three numbered paragraphs of the Complaint filed herein which are hereby incorporated by reference.
2. Based upon the stipulation of facts contained in the Pre-Trial Order, the Hearing Committee hereby finds the facts as set forth in Paragraph 2A through and including 2W of the Pre-Trial Order as appears of record herein which are hereby incorporated by reference.

3. Mrs. Houston, during the Defendant's visits with her during November and December of 1975, was suffering from carcinoma of the rectum and had reached a progressive state of senility and was not capable of lucid intervals.

4. From November 24, 1975 until her death in March, 1976, the Defendant considered himself to be Mrs. Houston's attorney as well as attorney for her nieces, Mrs. Gage and Mrs. Fletcher. At the time the Defendant took the shares of stock from Mrs. Houston to Asheville, North Carolina, Defendant made no attempt to inquire as to the relative portion of Mrs. Houston's estate represented by the stock. The Defendant made no attempt to determine whether or not Mrs. Houston had a current will in effect at that time or the persons to whom property would be distributed under Mrs. Houston's will. The Defendant was aware of controversy in Mrs. Houston's family between his clients, Mrs. Houston's nieces, and Mrs. Houston's stepdaughter. The Defendant did not contact the attorney that represented Mrs. Houston prior to November of 1975.

5. After his return to Asheville in November of 1975, the Defendant forwarded powers of attorney to Mrs. Houston which were to be executed before a Notary Public authorizing the Defendant to transfer the stock he had taken to Asheville, North Carolina, to certain of Mrs. Houston's nieces, nephews and their spouses.

6. On or about December 9, 1975, the Defendant traveled to Florida, went to Mrs. Houston's house and obtained

her signature on a power of attorney which was acknowledged before his secretary, who at the time had a notary public seal from the State of Florida.

7. The Defendant testified both before this Committee and in the trial in Pinnellas County, Florida that his first knowledge of the competency proceeding involving Mrs. Houston was in January of 1976 when he received a telephone call from a representative of a bank which had been appointed as Mrs. Houston's guardian. Before this Committee the Defendant vigorously denied having made the telephone call which is described in the testimony of Margaret E. Brady, Plaintiff's Exhibit E-4. The Defendant was a party to the action in which the testimony was given and was represented by counsel, such testimony was admitted without objection or cross-examination of the witness, and the subject matter of the action obviously involved the pending matters before this Committee. Notwithstanding the Defendant's vigorous denial before this Committee that he made the telephone call to Margaret E. Brady, the Defendant admitted that he actually became aware of the incompetency proceedings against Mrs. Houston during late January of 1976 and, at that time, advised his clients, Mrs. Gage and Mrs. Fletcher, that the stock certificates should be returned to Florida to the guardian. The Defendant further testified in Florida that had he known of the competency proceedings in November of 1975, he would never have been at the subsequent trial in Florida, his explanation being "Well, there would have

been much more done, more investigation done, or I wouldn't have become involved if I had any question in my mind that there was any problem with this lady at all." We find the evidence to be clear, cogent and convincing--indeed overwhelming--proof that the Defendant was aware that there were "problems with this lady." Defendant then stated before the Committee that upon receiving indemnity from Mrs. Gage and Mrs. Fletcher he agreed to resist efforts to have the stocks delivered to the Florida guardian.

8. We find the evidence to be clear, cogent and convincing proof of the fact that the Defendant knew or should have known of Mrs. Houston's mental condition at the time he obtained the transfer of the stock certificates from her in November and December of 1975 to the benefit of her nieces and thereafter persisted in a course of conduct in perfecting the transfer of said stocks for the beneficial use of his clients, Mrs. Gage and Mrs. Fletcher. In this regard we note that the Defendant testified that the transfer of stocks had not been completed in accordance with the oral instructions given to him by Mrs. Houston in November, 1975 even at the time of Mrs. Houston's death in March of 1976. We find the defendant to be impaled upon the horns of his own testimony in that he stated had he known there was any problem with this lady he would not have become involved. He was obviously aware of a problem in November of 1975 and made no investigation. When confronted with the claim of the guardian for delivery

of the stock, ^{he} resisted the return upon receiving indemnity from Mrs. Gage and Mrs. Fletcher--in spite of an acknowledged sense of duty to return the same. As the triers of fact we do not believe the Defendant's explanation relative to knowledge of the competency proceeding in Florida during November and December of 1975 and find that he was aware of the same; however, even giving credence to his claim of lack of knowledge, we find other evidence of conduct of the Defendant to be clear, cogent and convincing proof of the fact that he was engaging in conduct involving dishonesty, fraud, deceit and misrepresentation and further counseled and assisted his clients, Mrs. Gage and Mrs. Fletcher, in conduct that the Defendant knew to be illegal or fraudulent.

9. We find the evidence to be clear, cogent and convincing proof of the fact that at the time the Defendant testified to the Circuit Court of Pinnellas County, Florida in Civil Action 76-3578-11 that he had not filed a Federal Estate Tax Return for the estate of Mrs. Houston and had not paid Federal Estate Tax shown on the return filed. The Defendant's testimony before the Circuit Court of Pinnellas County, Florida was unequivocal as to the filing of the return and payment of the taxes shown due thereupon. In this regard we note the Defendant's testimony at the hearing which was offered in explanation of non-receipt of the return by the Internal Revenue Service was non-persuasive and, even viewed in the light most favorable to the Defendant, shows the Defendant to be guilty of gross negligence amounting to willful misconduct in that the return to which he testified was erroneous on its face; the Defendant was unable

to produce any letter of transmittal, registered mail receipt, or affidavit of mailing; and, moreover, we take judicial notice of the regulations of the Internal Revenue Service which provide that the Defendant was not the proper party to file the return and that certain documents required to be filed with the return were not included by the Defendant.

10. We further note that the Defendant admitted that after he became aware of the fact that the testimony in Pinnellas County, Florida in Civil Action No. 76-3578-11 as to the filing of the Federal Estate Tax Return had been discovered to have been false, he persisted in resisting the imposition of the liability for restoring the sum of \$10,638.37 which his clients had gained by virtue of such testimony, causing the personal representatives of the estate of Mrs. Houston to bring suit against the Defendant and his clients on the Judgment in the Superior Court of Buncombe County, North Carolina for that and other sums still due by virtue of the Judgment entered in Civil Action No. 76-3578-11 in Pinnellas County, Florida. Defendant's explanation for such conduct was that forcing the suit on the Judgment in Buncombe County was designed to give his clients, Mrs. Gage and Mrs. Fletcher, the opportunity to again assert in North Carolina, claims that they had asserted unsuccessfully in the probate courts of Florida for certain services allegedly rendered to Mrs. Houston prior to her death. The Defendant took such position only upon the agreement of said clients to indemnify him from loss in the matter. As triers of the facts, we find the explanation of the Defendant non-persuasive

and, even if true, it would be a clear violation of Disciplinary Rule 7-102(B)(2). The fraud upon the Florida Court in this particular instance was perpetrated by the Defendant himself through his testimony that he paid estate taxes.

11. The Defendant, from November of 1975 until Mrs. Houston's death in March of 1976, was Mrs. Houston's attorney. Defendant failed to render appropriate account to Mrs. Houston's guardian during her lifetime and to her personal representative after her death for the stock certificates coming into his possession as her attorney. Moreover, the Defendant did not promptly pay and deliver to Mrs. Houston's guardian during her lifetime or her personal representative after her death the stock certificates in his possession that such personal representative and guardian were entitled to receive. In this regard we note the Defendant testified that he refused to render such accounting and make delivery upon receipt of indemnity from Mrs. Gage and Mrs. Fletcher.

12. We note that the Defendant admitted at the hearing that he had not properly and promptly responded to the letters of notice issued by the Grievance Committee of the North Carolina State Bar and offered an explanation of illness and relocation of offices. In the light of other findings contained herein, we deem it unnecessary to make additional findings with respect to failure to respond to the notice as alleged in the Complaint.

Based upon the foregoing Findings of Fact we make the following:

CONCLUSIONS OF LAW

1. All of the foregoing Findings of Fact were established by clear, cogent and convincing evidence.
2. The Defendant engaged in dishonesty, fraud, deceit or misrepresentation in obtaining the stock certificates from Mrs. Houston in November of 1975 and in procuring a power of attorney for their transfer in December of 1975 in violation of Disciplinary Rule 1-102(A) (4).
3. The Defendant counseled and assisted his clients in conduct that he know to be illegal or fraudulent in procuring the stock certificates and resisting efforts of the guardian in Florida to obtain the property represented thereby in violation of Disciplinary Rule 7-102(A) (7).
4. The Defendant knowingly made a false statement of law or fact when he testified that he had paid estate taxes when in fact they had not been paid and violated Disciplinary Rule 7-102(A) (5).
5. The Defendant knowingly used perjured testimony or false evidence when he used his false testimony about having paid estate taxes to acquire a set-off in the amount of the taxes in violation of Disciplinary Rule 7-102(A) (4).
6. The Defendant failed to maintain complete records of all funds, securities and other properties of Mrs. Houston coming into his possession and render appropriate accounts, and he failed to render an account to Mrs. Houston's personal representative for estate taxes alleged to have been paid and to her personal representative and guardian for the stock certificates obtained in violation of Disciplinary Rule 9-102(B) (3).

7. The Defendant perpetrated a fraud upon the Circuit Court for Pinnellas County, Florida by use of his false testimony concerning the payment of estate taxes and did not promptly reveal the fraud to the tribunal, and rectify the same and continued to represent his clients in violation, of Disciplinary Rule 7-102(B) (1). Defendant further violated Disciplinary Rule 9-102(B) (3) and (4) by failing to render an appropriate account to Mrs. Houston's personal representative and promptly pay the amount thereof to such representative.

8. The Defendant violated North Carolina General Statutes §84-28(b) (3) by failing to answer a second Letter of Notice as alleged in the Complaint.

This the 16th day of October, 1981.

for September 25, 1981

Dudley Humphrey
Dudley Humphrey, Chairman

W. Osborne Lee, Jr.
W. Osborne Lee, Jr.

Leander R. Morgan
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Attorney,)

Defendant)

NOTICE OF DISBARMENT

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The Hearing Committee having made the Findings of Fact and Conclusions of Law and heard argument of the parties and considered evidence relative to the discipline to be imposed,

IT IS ORDERED that the Defendant be disbarred from further practice of law.

This the 16th day of October, 1981.

for September 25, 1981

Dudley Humphrey, Chairman

W. Osborne Lee, Jr.

Leander R. Morgan