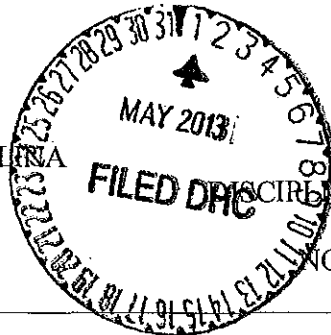


STATE OF NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
12 DHC 31

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

JEFFREY S. BERMAN, Attorney,

Defendant

ORDER OF DISCIPLINE

THIS MATTER was heard on 8 March 2013 by a hearing panel of the Disciplinary Hearing Commission composed of Walter E. Brock, Chair, William M. Claytor, and Karen B. Ray pursuant to 27 N.C.A.C. 1B § .0114 of the Rules and Regulations of the North Carolina State Bar. Carmen Hoyme Bannon represented Plaintiff, the North Carolina State Bar. Defendant, Jeffrey S. Berman was represented by Dudley A. Witt and David B. Freedman.

Based upon the pleadings, stipulations, and evidence presented at the hearing, the hearing panel hereby finds by clear, cogent, and convincing evidence the following

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar ("Plaintiff" or "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. Defendant, Jeffrey S. Berman ("Defendant" or "Berman"), was admitted to the North Carolina State Bar on 19 March 1988, 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 the relevant period referred to herein, Berman was actively engaged in the practice of law in Greensboro, Guilford County, North Carolina.

4. Defendant was properly served with process and received due notice of the hearing in this matter.

5. On 22 March 2011, Vanessa Greeson's five month old granddaughter, K.C., was admitted to the hospital with serious injuries. The Guilford County Department of Social Services (DSS) was notified.

6. DSS held a meeting at the hospital before K.C. was discharged to discuss concerns about her health and implement a plan for K.C.'s safety. Neither Greeson nor K.C.'s parents were permitted by DSS to take K.C. home because they had been her primary caretakers in the weeks preceding K.C.'s hospitalization.

7. Greeson, K.C.'s parents, and other family members agreed to a safety plan with DSS that provided K.C. would live with Greeson's sister, Teresa Staley, and the only visitation permitted would be supervised visitation by K.C.'s parents.

8. Greeson and other family members were concerned that DSS would try to take custody of K.C.

9. In late May 2011, Greeson sought legal advice from Berman regarding her granddaughter's status and placement. They met several times, and Greeson's daughter (K.C.'s mother) and K.C.'s father accompanied Greeson to one of the meetings with Berman.

10. Greeson told Berman that DSS was involved with the family and had placed K.C. with Staley. Greeson also told Berman that DSS had identified her as one of the people who could have inflicted K.C.'s injuries.

11. Berman told Greeson that if they acted immediately, he could file something with the court that would "trump" any action by DSS to take custody of K.C.

12. Berman prepared a verified complaint for child custody on behalf of Greeson. K.C.'s parents were named as defendants.

13. At the time he prepared the verified complaint, Berman was aware that in order for a nonparent to obtain custody under North Carolina law, there must be a showing that the child's parents acted in a manner inconsistent with their constitutionally-protected parental status.

14. Berman intentionally omitted from the custody complaint any allegation that K.C.'s parents acted in a manner inconsistent with their constitutionally-protected parental status.

15. N.C. Gen. Stat. § 50A-209 requires all parties to custody proceedings to state under oath the child's current address, where and with whom the child has lived in the preceding five years, and the names and addresses of any non-party who has physical custody of the child.

16. Berman prepared an Affidavit as to Status of Minor Child that Greeson executed and Berman attached to the custody complaint. The affidavit stated that from birth through the present, K.C. had lived with her "mother and/or third party." It provided no address(es) and did not reveal that Staley had physical custody of K.C.

17. At the time Berman prepared the Affidavit as to Status of Minor Child, he was aware of the requirements of N.C. Gen. Stat. § 50A-209. Berman also knew that K.C. (who was only five months old) had been living with Staley pursuant to a DSS safety plan for more than two months.

18. Berman prepared a consent order giving Greeson joint legal custody and primary physical custody of K.C. On 7 June 2011, Berman filed the verified complaint for child custody and affidavit, and presented the consent order only to the court *ex parte*.

19. Because Berman intentionally omitted pertinent information from the Affidavit as to Status of Minor Child, the document was misleading.

20. Berman did not provide the court with the complaint or affidavit, did not inform the court that DSS was involved with the family because of injuries to the child, or inform the court that K.C. had been living with a third party due to concerns about her health and welfare.

21. Berman falsely informed the court that K.C. was already living with Greeson.

22. But for Berman's false statement and intentional omission of material facts, the court would not have entered the order granting Greeson custody of K.C.

23. When DSS discovered that Greeson had obtained custody of K.C. by way of the consent order, it immediately filed a petition alleging that K.C. was abused, neglected, and dependent. As a result, K.C. was placed in foster care for at least six months before she was returned to her family.

24. Berman was certified as a mediator by the North Carolina Dispute Resolution Commission ("the Commission"), a statutorily-created agency established under the Judicial Department.

25. The Commission's role is to certify and regulate private mediators who serve North Carolina courts, which includes insuring that certified mediators are "of good moral character and adhere to any standards of practice for mediators acting pursuant to . . . Rules adopted by the Supreme Court."

26. To maintain his certification, Berman was required to submit to the Commission an annual Mediator Certification Renewal Application (hereafter "Renewal Application").

27. In August 2011, Berman received notice of North Carolina State Bar grievance #11G0891, relating to a complaint filed with the State Bar regarding his representation of Vanessa Greeson.

28. In September 2011, Berman submitted his annual Renewal Application to the Commission. Although the Renewal Application form specifically inquired whether any complaints or disciplinary proceedings were pending against him before any professional licensing or regulatory body, Berman failed to disclose that grievance #11G0891 was pending against him.

29. In August 2012, Berman again filed his annual Renewal Application. In the 2012 Application, Berman certified and affirmed that no complaints or disciplinary proceedings were pending against him with any professional licensing or regulatory body.

30. In both the 2011 and the 2012 Renewal Application, Berman certified that he had "given true, accurate, and complete information" on the renewal form.

31. At the time he submitted the September 2011 and the August 2012 Renewal Applications, Berman was aware that grievance #11G0891 was still pending against him.

32. Pursuant to Commission Rules, Berman was required to report to the Commission within 30 days of receiving notice of any "disciplinary complaint(s) filed with or actions taken by a professional licensing or regulatory body."

33. Berman was served with the complaint in this DHC case on 28 August 2012. He did not report the pending DHC proceeding to the Commission within 30 days after he was served with the DHC complaint.

34. Berman represented the plaintiff in *Goins v. Hyde*, Guilford County file no 12 CVD 11092, a domestic case.

35. On 5 December 2012, Berman presented the *Goins* complaint and a request for emergency custody to the Chief District Court Judge.

36. The Chief Judge denied Berman's request for emergency custody.

37. Berman then asked the Chief Judge if the case could be set later that month for a hearing on temporary custody. The Chief Judge said no, reminding Berman that pursuant to local rules the parties were required to participate in mediation prior to a custody hearing.

38. Berman then approached another District Court judge in the hallway of the courthouse and asked him to hear his request for emergency custody in the *Goins* matter on 18 December 2012. This oral request was not made in the course of official proceedings and Berman did not give the opposing party notice of his communication with the second judge.

39. Berman did not inform the second judge that his request for emergency custody in the *Goins* case had already been heard and denied by the Chief Judge.

Based on the record and the foregoing Findings of Fact, the hearing panel makes the following:

CONCLUSIONS OF LAW

1. All parties are properly before the hearing panel and this tribunal has jurisdiction over Defendant, Jeffrey S. Berman, and the subject matter of this proceeding.

2. Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Berman violated the Rules of Professional Conduct in effect at the time of the conduct as follows:

- (a) By filing a custody complaint on behalf of a non-parent that he knew did not contain legally sufficient allegations to justify the relief sought, Berman brought a proceeding that lacked basis in law and/or fact in violation of Rule 3.1;
- (b) By telling the court that K.C. already lived with Greeson, Berman knowingly made a false statement of material fact to the tribunal in violation of Rule 3.3(a);
- (c) By failing to disclose K.C.'s injury, current custodian, and DSS involvement to the court when presenting the consent order to the judge *ex parte*, Berman failed to disclose all material facts known to him that would enable the judge to make an informed decision in violation of Rule 3.3(d);
- (d) By misleading the court into ordering custody of K.C. to his client, Berman engaged in conduct involving dishonesty, deceit, or misrepresentation in violation of Rule 8.4(c) and conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
- (e) By failing to disclose the pending grievance against him on the 2011 Renewal Application, Berman engaged in conduct involving dishonesty, deceit, or misrepresentation in violation of Rule 8.4(c);
- (f) By falsely certifying and affirming on the 2012 Renewal Application that no complaints or disciplinary proceedings were pending against him, Berman engaged in conduct involving dishonesty, deceit, or misrepresentation in violation of Rule 8.4(c);
- (g) By failing to provide complete and truthful information to the Commission, thereby impeding the Commission's ability to carry out its regulatory function, Berman engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d); and
- (h) By failing to disclose to the second judge that his request for emergency custody in the *Goins* matter had already been denied by another judge, Berman failed to inform the tribunal in an *ex parte* proceeding of all material facts that would enable the tribunal to make an informed decision in violation of Rule 3.3(d).

Based upon the foregoing Findings of Fact and Conclusions of Law, and the additional evidence regarding discipline presented at the hearing, the hearing panel hereby finds by clear, cogent, and convincing evidence the following additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. The findings of fact in paragraphs 1 through 39 above are incorporated as if fully set forth herein.

2. Berman has substantial experience in the practice of law and in custody cases specifically.

3. K.C., an infant who was less than a year old at the time of these events, was extraordinarily vulnerable.

4. At the time Berman prepared, presented, and filed the custody order granting Greeson custody of K.C., Berman was aware that: (a) the baby had sustained serious injuries, (b) child protective services was involved with the family, and (c) DSS had identified his client as one of the people who could have inflicted K.C.'s injuries. By engaging in the course of conduct described above, Berman created a foreseeable risk of potentially catastrophic harm to the infant by seeking to place her in the care of someone who had not yet been ruled out as the perpetrator of abuse against K.C.

5. Greeson's stated purpose for hiring Berman was to try to avoid having her granddaughter placed in foster care. The custody order Berman prepared and filed was the impetus for DSS's decision to file a juvenile petition and place K.C. in foster care. Thus, Berman's actions in representing Greeson caused the very outcome she sought to avoid.

6. Greeson relied on Berman's professional judgment and legal knowledge to effectuate her goal of keeping K.C. out of foster care. Both Greeson and her daughter testified they would not have signed the consent custody order had they known what the consequences would be.

7. The juvenile court ultimately found that "there is no credible evidence . . . that either parent was responsible for [K.C.'s] injury." Berman's actions in representing Greeson caused significant harm to K.C.'s mother, in that she experienced substantial anxiety and distress about her daughter's placement in a foster home, her visitation with K.C. was very limited for a period of time after K.C. entered foster care, and her daughter was not returned to her care until more than six months later.

8. Greeson and her daughter indicated that due to their experience with Berman, they will be less trusting of attorneys in the future.

9. Lawyers have special duties as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. Causing or allowing the tribunal to be misled by false statements or material omissions is a breach of a lawyer's duty of candor to the tribunal. Berman's lack of candor with the court undermined the integrity of the adjudicative process.

10. The orderly and efficient administration of justice is undermined when lawyers are not forthright and truthful with the court.

11. In his initial response to the State Bar regarding the grievance related to his representation of Greeson, Berman sought to justify his actions and did not express remorse.

12. Berman has no prior professional discipline.

13. Berman's mediator certification was revoked by the Commission due to the allegations of misconduct in this matter and due to Berman's failure to report the pending grievance against him on his 2011 and 2012 Renewal Applications.

Based upon the foregoing Findings of Fact, Conclusions of Law, and additional Findings of Fact Regarding Discipline, and upon consideration of the factors set forth in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(w), the hearing panel hereby enters the following additional

CONCLUSIONS OF LAW REGARDING DISCIPLINE

1. The hearing panel considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w) of the Discipline and Disciplinary Rules of the North Carolina State Bar and concludes that the following factors are present in this case:

- (a) Intent of the defendant to commit acts where the harm or potential harm was foreseeable;
- (b) Circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;
- (c) Negative impact of the defendant's actions on client's and/or public's perception of the profession;
- (d) Negative impact of defendant's actions on the administration of justice;
- (e) Impairment of the client's ability to achieve the goals of the representation;
- (f) Effect of the defendant's conduct on third parties;
- (g) Acts of dishonesty, misrepresentation, or deceit;
- (h) Absence of prior disciplinary offenses;
- (i) A pattern of misconduct;
- (j) Multiple offenses;
- (k) Refusal to acknowledge the wrongful nature of the conduct in defendant's initial response to the State Bar;
- (l) Lack of remorse in defendant's initial response to the State Bar;
- (m) Vulnerability of the victim;
- (n) Significant experience in the practice of law; and
- (o) Imposition of other penalties or sanctions.

2. The hearing panel has considered admonition, reprimand, and censure as potential discipline but finds that admonition, reprimand, or censure would not be sufficient discipline because of the gravity of the harm to the administration of justice and the actual and potential harm to the public in the present case. Furthermore, the panel finds that any sanction less than suspension would fail to acknowledge the seriousness of the offenses committed by Defendant, would not adequately protect the public, and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar in this State.

3. In light of all the relevant facts and circumstances, the hearing panel finds and concludes that the public will be adequately protected by a one-year suspension of Defendant's license.

Based upon the foregoing Findings of Fact, Conclusions of Law, and Additional Findings and Conclusions Regarding Discipline, the hearing panel enters the following

ORDER OF DISCIPLINE

1. Defendant's license to practice law in the State of North Carolina is hereby suspended for one year, beginning 30 days from the date of service of this order upon Defendant.

2. Defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon Defendant.

3. Defendant shall comply with the wind down provisions contained in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124. As provided in § .0124(d), Defendant shall file an affidavit with the Secretary of the North Carolina State Bar within 10 days of the effective date of this order, certifying he has complied with the wind down rule.

4. The administrative fees and costs of this action, including deposition costs, are taxed to Defendant. Defendant must pay the costs of this action within 30 days of service upon him of the statement of costs by the Secretary.

1. At the conclusion of the one year active suspension of his license, Defendant may apply to be reinstated to the practice of law by filing a petition with the Secretary of the North Carolina State Bar demonstrating compliance with the general provisions for reinstatement set forth in 27 N.C. Admin. Code Chapter 1, Subchapter B § .0125(b) and demonstrating the following by clear, cogent, and convincing evidence:

- a. That he properly wound down his law practice and complied with the terms of § .0124 of the State Bar Discipline & Disability Rules;
- b. That he paid the costs of this proceeding within 30 days of service of the statement of costs upon him;
- c. That he has kept the North Carolina State Bar Membership Department advised of his current business and home address;

- d. That he has responded to all communications from the North Carolina State Bar received after the effective date of this order within 30 days of receipt or by the deadline stated in the communication, whichever is sooner;
- e. That he has not engaged in the unauthorized practice of law during the period of suspension; and
- f. That he has not violated the Rules of Professional Conduct or the laws of the United States or any state.

Signed by the Chair with the consent of the other hearing panel members, this the 1st day of May, 2013.

A handwritten signature in black ink, appearing to read "Walter Brock", written over a horizontal line.

Walter E. Brock, Chair
Disciplinary Hearing Panel