

NORTH CAROLINA
WAKE COUNTY

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BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
91 DHC 8

THE NORTH CAROLINA STATE BAR,
Plaintiff

vs.

DARRYL G. SMITH, ATTORNEY
Defendant

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This cause was heard by a Hearing Committee of the Disciplinary Hearing Commission consisting of Fred Folger, Chairman; Steve Smith and Emily Turner on Friday, July 19, 1991. The Plaintiff was represented by Carolin Bakewell. The Defendant was represented by Fred Williams. Based upon the pleadings, pre-trial stipulations and the evidence, the Committee makes the following:

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, Darryl G. Smith, (hereafter, Smith), was admitted to the North Carolina State Bar in September 1977, 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, Smith was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the City of Durham, Durham County, North Carolina.

4. Smith was married to Valora Washington (hereafter, Washington), in March 1982.

5. Washington and Smith owned a condominium in the State of Maryland in 1986, where Washington lived for most of that year. Smith lived in a home the couple owned in North Carolina during 1986.

6. Washington obtained a divorce from Smith in Ohio in 1988.

7. As of the date of the hearing herein, Washington and Smith were engaged in an ongoing dispute regarding custody and

support of their adopted son.

8. In early 1987, Smith and Washington had several discussions about how to handle their 1986 taxes. Washington provided information about her income to Smith and/or his accountants.

9. Prior to May 15, 1987, Washington told Smith that she would file separate tax returns and that she did not wish to file any joint returns for 1986.

10. On or about May 15, 1987, Washington filed separate tax returns with the State of Maryland, the State of North Carolina and the Internal Revenue Service. Washington received a refund from the State of Maryland and the Internal Revenue Service for 1986. Washington owed a total of \$1,749 to the N.C. Department of Revenue for 1986, which sum she paid on or about May 15, 1987.

11. On or about June 30, 1988, Smith filed an income tax return with the North Carolina Department of Revenue for 1986. The return purported to be a combined return for himself and Washington.

12. As of June 30, 1988 Smith was aware that Washington had already filed a separate North Carolina return for 1986 and that he did not have her permission to file a combined North Carolina return.

13. The Plaintiff failed to prove by clear, cogent and convincing evidence that Smith failed to notify Washington that he had filed a combined North Carolina return for 1986.

14. The combined 1986 tax return filed by Smith indicated that the couple owed \$1,898.21 to the State of North Carolina. Smith did not remit any payment to the N.C. Department of Revenue when he filed the return in June, 1988.

15. As a result of Smith's filing the combined return without payment of the taxes owed, the N.C. Department of Revenue issued a tax warrant to Washington in April 1989.

16. Washington paid \$1,312.90, the amount of the tax warrant, plus additional interest to the N.C. Department of Revenue, under protest on or about May 19, 1989. Washington informed the Department of Revenue that she had previously filed a separate return and had paid her entire tax obligation and asked the Department of Revenue to investigate the situation.

17. Thereafter, the N.C. Department of Revenue determined that Washington had filed a prior separate return for the 1986 tax year and in February 1990, refunded the amount paid by Washington in May 1989, plus interest from the date of the payment.

18. On or about June 30, 1988, Smith filed a tax return with the Internal Revenue Service for 1986. The return purported to be a joint return for Smith and Washington. Smith claimed a number of deductions on the U.S. return and a lower tax rate, to which he would not have been entitled, had he filed a separate tax return for 1986.

19. Along with the 1986 federal tax return, Smith sent the IRS a cover letter which stated that "[Washington] may have paid a part of our tax liability last year under a separate filing. We separated last year but agreed to file jointly for 1986."

20. Smith filed the joint federal return to obtain a tax advantage for himself.

21. Based on the 1986 joint federal return filed by Smith, Smith owed a total of \$6,256.66 in additional taxes.

22. At the time he filed the joint federal tax return for 1986, Smith knew that Washington had already filed a separate federal return for 1986 and that she did not wish to file a joint return for 1986.

23. The Plaintiff failed to demonstrate by clear, cogent and convincing evidence that Smith failed to notify Washington that he had filed a joint federal return for 1986.

24. In September 1990, the Internal Revenue Service seized a refund owed Washington for her 1989 taxes and applied it to the taxes owed by Smith for 1986.

25. In November, 1990, following a protest by Washington, the IRS returned to Washington the refund it had seized and applied to Smith's 1986 tax obligation.

26. On or about May 19, 1989, a 1986 non-resident tax return bearing Smith's signature was filed with the Maryland Department of Revenue. The return purported to be a joint filing for Smith and Washington.

27. In March, 1990, Washington filed a grievance against Smith with the North Carolina State Bar, in which she alleged that Smith had filed a joint North Carolina tax return without her consent. Washington also complained that Smith had filed the 1986 non-resident tax return with the Maryland Department of Revenue in 1989 without her permission.

28. The North Carolina State Bar referred Washington's grievance to the 14th Judicial District Grievance Committee, for investigation. Tracy Lischer, a member of the 14th Judicial District Grievance Committee, was assigned to handle the investigation.

29. On or about April 12, 1990, Smith responded to the 14th Judicial District regarding Washington's grievance.

30. In his April 12, 1990 letter of response, Smith stated that he had "never lived in the State of Maryland and never filed taxes there."

31. The Plaintiff failed to show by clear, cogent and convincing evidence that Smith filed the tax return in Maryland in 1989 and therefore failed to demonstrate that Smith's response to the State Bar's letter of notice was false.

32. On or about May 7, 1990, Ms. Lischer wrote to Smith and requested a copy of his 1986 tax returns.

33. Smith provided only the signature page of his 1986 North Carolina return in response to Ms. Lischer's request.

34. Smith did not provide the remaining portion of his 1986 tax returns to Ms. Lischer or the 14th Judicial District Grievance Committee, nor did he provide a release permitting the 14th Judicial District Grievance Committee to obtain the tax returns.

35. In November, 1990, Dave Frederick, the North Carolina State Bar's investigator, asked Smith to produce a copy of his full 1986 federal, North Carolina and Maryland tax returns, along with a copy of the amended Maryland tax return filed in 1989.

36. Smith failed to provide the requested information to the N.C. State Bar.

Based upon the foregoing Findings of Fact, the Committee makes the following:

CONCLUSIONS OF LAW

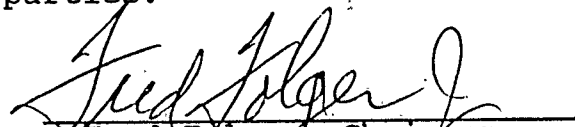
1. By failing to obtain Washington's permission prior to filing joint U.S. and a combined North Carolina tax return for 1986, Smith engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1.2(C) of the Rules of Professional Conduct.

2. By filing a joint federal income tax return for 1986 when he knew Washington had already filed a separate return and by claiming deductions and a lower tax rate to which he was not entitled, Smith engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1.2(C) of the Rules of Professional Conduct.

3. By failing to provide the 14th Judicial District Grievance Committee and the North Carolina State Bar with copies of his tax returns or releases as requested, Smith failed to respond to lawful inquiries of a disciplinary authority in violation of Rule 1.1(B).

This the 31 day of July, 1991.

Signed by the Chairman for the Committee with the full consent of the Committee and all parties.


Fred Folger, Chairman

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ORDER

This cause was heard by a Hearing Committee of the Disciplinary Hearing Commission consisting of Fred Folger, Chairman; Steve Smith and Emily Turner on Friday, July 19, 1991. Based upon the Findings of Fact and Conclusions of Law, the Hearing Committee enters the following:

ORDER OF DISCIPLINE

1. The Defendant, Darryl G. Smith, is hereby Reprimanded for each of the three violations of the Rules of Professional Conduct set out in the Findings of Fact and Conclusions of Law.
2. The Defendant shall pay the costs of this proceeding.

This order is signed by the Chairman with the express consent of all Committee members and parties.

This the 31 day of July, 1991.


Fred Folger, Chairman