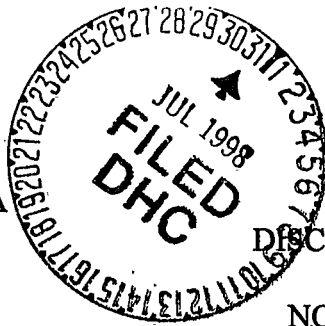


NORTH CAROLINA
WAKE COUNTY



6833

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
98 DHC 13

NORTH CAROLINA STATE BAR,)

Plaintiff)

v.)

GERALD E. RUSH,)

Attorney)

Defendant)

FINDINGS OF FACT
AND CONCLUSIONS OF LAW
AND ORDER OF DISCIPLINE

This matter was heard on July 10, 1998 before a hearing committee of the Disciplinary Hearing Commission composed of Robert B. Smith, Chair; Kenneth M. Smith, and Robert B. Frantz. The North Carolina State Bar was represented by Fern Gunn Simeon. The defendant, Gerald E. Rush, was represented by C. C. Malone Jr. Based upon the pleadings, the prehearing stipulations, and the evidence introduced at the hearing, the hearing committee hereby enters the following:

FINDINGS OF FACT

1. 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 North Carolina General Statutes and the Rules and Regulations of the North Carolina State Bar.

2. The Defendant was admitted to the North Carolina State Bar on October 6, 1975 and was at all times relevant hereto licensed to practice law in North Carolina, subject to the rules, regulations and Rules of Professional Conduct of the North Carolina State Bar.

3. During all times relevant hereto the Defendant was actively engaged in the practice of law in Salisbury, North Carolina, and maintained a law office in Salisbury, North Carolina.

4. The Defendant was properly served with process and the hearing was held with due notice to all parties.

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5. Joe D. Johnson (hereafter Johnson) died on July 26, 1993. Delilah C. Blackwell (hereafter Blackwell) was named the executrix of Johnson's estate pursuant to Johnson's will dated February 18, 1992.

6. In 1995, Blackwell paid the Defendant \$150.00 to help her administer the Johnson estate. The Defendant's representation in the Johnson estate matter included assisting Blackwell file estate papers and giving her advice about administering the estate.

7. Pursuant to Johnson's will, Johnson devised his home located at 440 Heiligtown Road in East Spencer, North Carolina (hereafter Heiligtown Road property), to his three nieces: Blackwell, Joyce Davis (hereafter Davis), and Carolyn Boozer (hereafter Boozer).

8. In November 1994, Defendant offered to purchase the Heiligtown Road property from Blackwell, Davis, and Boozer for \$20,000.00. However, the sale was not completed by the parties.

9. On December 19, 1995, Defendant entered into a contract to purchase the Heiligtown Road property for \$15,000.00 pursuant to a contract executed by Blackwell as executrix of Johnson's estate.

10. The Heiligtown Road property was listed as having a value of \$38,500.00 on the 90-day inventory filed in the Johnson estate on October 4, 1993.

11. On December 19, 1995, Defendant gave Blackwell \$500.00 as an earnest money deposit toward the purchase of the Heiligtown Road property.

12. On January 17, 1996, Defendant filed a petition before the Rowan County Clerk of Superior Court to sell the Heiligtown Road property to pay debts of Johnson's estate. Defendant represented Blackwell, individually and in her capacity as executrix of Johnson's estate, in the petition filed against Davis and Boozer.

13. A hearing was held on February 29, 1996 before the Rowan County Clerk of Superior Court, Terry E. Osborne (hereafter Osborne), regarding the petition filed by defendant.

14. On March 26, 1996, Osborne signed an order which allowed the Heiligtown Road property to be sold by private sale. Osborne also appointed Dumont L. Stockton (hereafter Stockton) as the commissioner to sell the Heiligtown Road property by private sale and to make a full report of the sale to the Clerk's office.

15. On April 2, 1996, Stockton filed a report of sale. Stockton recommended that Defendant purchase the Heiligtown Road property for \$15,000.00 in cash.

16. At some time after the February 29, 1996 hearing, Osborne learned from one of the Johnson heirs that the Defendant wanted to purchase the Heiligtown Road property. Osborne told the Defendant that he (defendant) was not to handle his purchase of the property because Osborne believed that Defendant had a conflict of interest in purchasing the property from Blackwell, his client.

17. Stockton did not conduct the sale of the Heiligtown Road property pursuant to Osborne's order because Defendant purchased the property in May of 1996 and he took a voluntary dismissal of the special proceeding on November 15, 1996.

18. On at least two occasions after February 29, 1996, Osborne asked the Defendant about the status of the petition to sell the property that he filed on behalf of Blackwell and the Johnson estate. Defendant never told Osborne that he (defendant) was handling his purchase of the Heiligtown property.

19. Defendant did not tell Stockton that Defendant was handling his purchase of the Heiligtown Road property.

20. At the time Defendant purchased the Heiligtown Road property, Blackwell expected Defendant to exercise his professional judgment for her protection as a beneficiary and executrix of the Johnson estate and for the protection of the Johnson estate.

21. Defendant did not advise Blackwell to consult independent counsel about Defendant buying the Heiligtown Road property.

22. Blackwell told Defendant about several debts of the estate which needed to be paid. Defendant agreed to pay the estate's debts from the proceeds of the sale of the Heiligtown Road property.

23. On May 22 and May 24, 1996, Blackwell, Davis, Boozer and their spouses deeded their interests in the Heiligtown Road property to Defendant and his wife.

24. On May 22, 1996, Defendant deposited personal funds in the amount of \$15,000.00 into his trust account at First Union National Bank, account number 2073582261787, for the purchase of the Heiligtown Road property.

25. On May 28, 1996, Defendant disbursed trust account check number 2443 in the amount of \$1,700.00 to himself as his attorney's fee and commission in his purchase of the Heiligtown Road property.

26. Osborne had not approved payment of an attorney's fee and commission to Defendant at the time he paid himself \$1,700.00 or at any time thereafter.

27. Defendant was not entitled to receive a commission relative to his purchase of the Heiligtown Road property.

28. Defendant also disbursed the following trust account checks to himself from the closing proceeds of the Heiligtown Road Property:

- a. May 28, 1996 - Check number 2444 in the amount of \$500.00;
- b. June 27, 1996 - Check number 2459 in the amount of \$1000.00; and
- c. July 3, 1996 - Check number 2460 in the amount of \$500.00.

29. Check number 2444 in the amount of \$500.00 was paid to Defendant as reimbursement for the \$500.00 earnest money deposit he paid on his purchase of the Heiligtown Road property.

30. Defendant paid himself \$1500.00 (check numbers 2459 and 2460) so that he could pay any inheritance and gift taxes due relative to the Heiligtown Road property.

31. Blackwell, Davis, and Boozer inherited the Heiligtown Road property by their late uncle's will. The Defendant paid the inheritance taxes in the amount of \$537.13 from his personal funds on December 20, 1996.

32. Defendant deposited check numbers 2459 and 2460 totaling \$1500.00 into his personal bank account.

33. Defendant kept \$962.87 from the closing on the Heiligtown Road property and he converted the \$962.87 to his own use. He has never accounted for this money to Blackwell, Davis, and Boozer.

34. Osborne had not approved Defendant paying himself a total of \$2000.00 by check numbers 2444, 2459, and 2460.

35. From May 22, 1996 to June 27, 1996, Defendant paid the following additional amounts from his trust account with respect to his purchase of the Heiligtown Road property:

- a. Check number 2439 in the amount of \$2,000.00 to Blackwell;
- b. Check number 2440 in the amount of \$2,000.00 to Boozer;
- c. Check number 2446 in the amount of \$2,000.00 to Davis;
- d. Check number 2447 in the amount of \$2,131.27 to the Rowan County Tax Collector;

- e. Check number 2456 in the amount of \$3,000.00 to Blackwell;
- f. Check number 2457 in the amount of \$150.00 to Noble & Kelsey Funeral Home; and
- g. Check number 2458 in the amount of \$118.73 to the Town of East Spencer.

36. Osborne had not approved the Defendant's disbursements set out in paragraph 35.

37. Defendant did not pay approximately \$300 of Johnson's debts from the proceeds of the sale of the Heiligtown Road property, although Blackwell gave Defendant the bills that needed to be paid.

38. Defendant did not give a written accounting of the receipt and disbursement of funds from the sale of the Heiligtown Road property to Osborne, Blackwell, or the other heirs of the Johnson estate.

39. Defendant represented Blackwell in a Chapter 13 bankruptcy action. Defendant filed the bankruptcy petition on Blackwell's behalf on February 24, 1995 and he was still the attorney of record as of the date of this disciplinary hearing.

40. According to the bankruptcy court's order, Blackwell, as a Chapter 13 debtor, could not convey any interest in real property that she owned without approval of the court.

41. Defendant never advised Blackwell that she was in violation of the bankruptcy court's prohibition when she sold her one-third interest in the Heiligtown Road property to Defendant in June 1996. Furthermore, Defendant never advised Blackwell that her Chapter 13 petition could be dismissed if the court found that she intentionally violated the court's order.

42. Kathryn L. Bringle (hereafter Bringle), the Chapter 13 trustee for the United States Bankruptcy Court for the Middle District of North Carolina, testified that Defendant telephoned her on February 28, 1997. Defendant told Bringle that Blackwell sold her one-third interest in real property without the court's authorization. Defendant never told Bringle that Blackwell had sold her one-third interest in the real property to Defendant.

Based upon the foregoing Findings of Fact, the hearing committee enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over the defendant, Gerald E. Rush, and the subject matter.

2. The 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) as follows:

a. By representing the executrix and the Johnson estate in a petition to sell the Heiligtown Road property and then purchasing the Heiligtown Road property from his client, Defendant engaged in a conflict of interest in violation of Rule 5.1(b).

b. By agreeing to purchase the Heiligtown Road property from Blackwell and the other heirs at a time when Blackwell expected Defendant to exercise his professional judgment for her (as executrix) and the estate's protection, and by entering into an agreement with Blackwell and the other heirs that proved to be unfair to them, Defendant violated Rule 5.4(a).

c. By handling the sale of the Heiligtown Road property himself instead of through the commissioner as ordered by the Clerk of Superior Court in the special proceeding, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c); and engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(d).

d. By paying himself an attorney's fee and a commission for the sale of the Heiligtown Road property without the Clerk's approval, Defendant charged and collected an illegal fee in violation of Rule 2.6(a).

e. By keeping and converting to his own use \$962.87 from the sale of the Heiligtown Road property, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c) and failed to pay or deliver promptly client funds to the client to which the client is entitled in violation of Rule 10.2(e).

f. By not paying all debts of the estate from the proceeds of the sale of the Heiligtown Road property, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c); failed to act with reasonable diligence and promptness in representing a client in violation of Rule 6(b)(3); and failed to pay or deliver promptly client funds to third persons as directed by the client in violation of Rule 10.2(e).

g. By not giving Blackwell and the other heirs a written accounting of the receipt and disbursement of funds regarding the closing of the Heiligtown Road property,

Defendant failed to provide a written accounting of funds to the client in violation of Rule 10.2(d).

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the evidence and arguments of the parties concerning the appropriate discipline, the hearing committee hereby makes the following additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. Blackwell suffered from physical disabilities during the time that Defendant represented her in her bankruptcy case and in the Johnson estate matter.

2. The defendant's misconduct is aggravated by the following factors:

- a. prior disciplinary offenses;
- b. dishonest or selfish motive;
- c. a pattern of misconduct;
- d. multiple offenses;
- e. refusal to acknowledge wrongful nature of conduct;
- f. vulnerability of victim;
- g. substantial experience in the practice of law;
- h. indifference to making restitution; and
- i. issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint.

3. The defendant did not offer any evidence in mitigation and the hearing committee finds that there are no mitigating factors.

4. The aggravating factors outweigh the mitigating factors.

Based upon the foregoing aggravating factors and the arguments of the parties, the hearing committee hereby enters the following

ORDER OF DISCIPLINE

1. The defendant is hereby disbarred from the practice of law.
2. The defendant shall submit his law license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon him.
3. The defendant shall pay the costs of this proceeding as assessed by the Secretary within 60 days of the effective date of this order of discipline.
4. The defendant shall comply with all provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the N.C. State Bar Discipline & Disability Rules.

Signed by the chair with the consent of the other hearing committee members, this
the 31 day of July, 1998.

Robert B. Smith, Jr.
Robert B. Smith
Hearing Committee Chair