

NORTH CAROLINA
WAKE COUNTY

8149

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
91 DHC 11

THE NORTH CAROLINA STATE BAR,
Plaintiff

vs.

BARRY DAVID NAKELL, ATTORNEY
Defendant

CONSENT ORDER
OF DISCIPLINE

This matter, coming before the undersigned Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar pursuant to section 14(H), (U), and (Y) of article IX of the Discipline & Disbarment Rules of the N.C. State Bar; and it appearing that, following the presentation of the State Bar's case and argument of the parties respecting the Defendant's motion to dismiss the State Bar's charges, that both parties have tendered to the Committee for consideration and the Committee has accepted the following disposition:

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, Barry David Nakell (hereafter, Nakell), was admitted to the North Carolina State Bar in 1979, 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, Nakell was employed as a professor of law at the University of North Carolina School of Law in Chapel Hill.

4. On Jan. 31, 1989, Nakell filed a complaint in the United States District Court for the Eastern District of North Carolina on behalf of eight named plaintiffs, alleging that the defendants, who included a number of state and local officials, had deprived the plaintiffs of their constitutional rights. The plaintiffs in the 1989 federal civil rights action, who included Eddie Hatcher and Timothy Jacobs, sought injunctions against the alleged constitutional violations, damages and an order enjoining the criminal prosecution of Hatcher and Jacobs in state court.

5. On March 16, 1989, Nakell and his co-counsel filed an amended complaint in the 1989 federal civil rights action.

6. On April 24, 1989, Nakell filed a motion to dismiss the 1989 federal civil rights action with prejudice. The court granted the motion and entered an order of dismissal on May 2, 1989.

7. Six weeks later, the defendants in the civil rights action filed motions to impose sanctions against Nakell and his co-counsel pursuant to Rule 11 the Federal Rules of Civil Procedure.

8. The federal court later granted the motion and imposed sanctions upon Nakell and his co-counsel pursuant to Rule 11. Portions of this matter are still on appeal.

9. On Jan. 6, 1991, Nakell intentionally removed a book valued at \$11.95 from the premises of Archive Records in Carrboro without first paying for the book.

10. On Jan. 17, 1991, Nakell entered a guilty plea in Orange County District Court to a charge of misdemeanor larceny respecting the Jan. 6 incident.

11. Hon. Stanley Peele entered a prayer for judgment continued in the case, and ordered Nakell to pay \$151 in court costs, contribute \$100 to a charity, and to perform 75 hours of community service.

12. Nakell has successfully completed the terms of the prayer for judgment and the larceny charge has been dismissed.

13. In November 1989, while representing Hatcher on the state criminal charges in Robeson County Superior Court, Nakell was held in contempt of court. Nakell anticipates filing a petition for writ of certiorari regarding the contempt matter before the U.S. Supreme Court.

Based upon the foregoing Findings of Fact, the Committee enters the following

CONCLUSIONS OF LAW

As to Count One of the State Bar complaint:

1. The Hearing Committee does not find by clear, cogent, and convincing evidence that Nakell lacked a factual basis for alleging that Hatcher and Jacobs could not be subjected to prosecution in the state court criminal proceeding and for alleging that his clients may have been subjected to civil rights violations at the time of the filing of the federal civil rights action.

2. The Hearing Committee does not find by clear, cogent, and convincing evidence that the civil rights claims regarding Hatcher and Jacobs were brought for an improper purpose.

3. The Hearing Committee finds by clear, cogent, and convincing evidence that Nakell did not have a sufficient legal

basis to assert the civil rights actions regarding the various defendants and that his actions embarrassed state officials and may have affected the prosecution of a pending criminal action.

As to Count Two of the State Bar complaint

4. The Hearing Committee finds by clear, cogent and convincing evidence that by knowingly and intentionally removing a book from the premises of Archives Records without first paying for it, Nakell engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1.2(C).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Committee hereby enters the following

ORDER OF DISCIPLINE

Based upon the Committee's Findings of Fact and Conclusions of Law respecting the State Bar's First Claim for Relief, it is hereby ordered:

1. The Hearing Committee considered the disposition of the Rule 11 proceeding in federal court and of the 1989 state court contempt proceeding and determined that no additional discipline is necessary or required as to that claim.

Based upon the Committee's Findings of Fact and Conclusions of Law respecting the State Bar's Second Claim for Relief, it is hereby ordered:

1. The license of Barry D. Nakell to practice law in the State of North Carolina is hereby suspended for one year. The suspension of the Defendant's license is stayed for a period of four years from the effective date of the entry of the order herein, based upon the following conditions:

a. The Defendant shall violate no provisions of the Rules of Professional Conduct during the four year stay period.

b. The Defendant shall violate no laws of the State of North Carolina during the four year stay period.

c. The Defendant shall complete 45 hours of continuing legal education courses during four-year stay period. At least 23 hours of the CLE courses must be in the subject of ethics or professional responsibility and all courses must be offered by a sponsor approved by the Continuing Legal Education Department of the N.C. State Bar. The Defendant shall submit written proof of completion of the CLE courses to the Secretary of the N.C. State Bar no later than one week prior to the expiration of the four-year stay period.

d. The Defendant shall continue receiving psychological treatment until he provides to the Secretary of the N.C. State Bar a certificate from his treating physician terminating that treatment. He shall submit written certification to the Secretary of the N.C. State Bar by December 31 of each year of the four year stay period indicating compliance with the treatment plan.

e. The costs have been assessed pursuant to an agreement between the N.C. State Bar and the Defendant.

Signed by the Chairman for the Committee with the express consent of all members of the Disciplinary Hearing Committee and the parties.

This the 4th day of February, 1992.

Samuel Jerome Crow
Samuel Jerome Crow, Chairman
Disciplinary Hearing Committee

Seen and consented to:

Joseph B. Cheshire, V
Attorney for the Defendant

Alan M. Schneider
Alan M. Schneider
Attorney for the Defendant

Barry D. Nakell
Barry D. Nakell, Defendant

Carolyn D. Bakewell
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