

NORTH CAROLINA
WAKE COUNTY

MAY 92 10:27

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BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
92 DHC 3

THE NORTH CAROLINA STATE BAR,
Plaintiff

vs.

BILL BARKER. Attorney
Defendant

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

This matter coming on to be heard and being heard on April 3, 1992 by a hearing committee of the Disciplinary Hearing Commission composed of Maureen D. Murray, Chairperson, Stephen T. Smith, and James Lee Burney; with A. Root Edmonson representing the North Carolina State Bar and Charles William Kafer representing Bill Barker; and based upon the pleadings, the stipulations entered into by the parties, the evidence presented at the hearing and the arguments of counsel, the hearing committee finds the following to be supported by clear, cogent and convincing evidence:

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, Bill Barker, was admitted to the North Carolina State Bar on September 3, 1969, 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, the Defendant was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the City of New Bern, Craven County, North Carolina.

4. J. C. Silverthorne and wife, Jo Hazel Silverthorne, owned approximately 46.2 acres adjoining Brown Creek in the Whortonsville community of Pamlico County. The Silverthornes planned to develop a residential subdivision to be known as Sunset Shores on the waterfront. The development was to consist of eighteen lots with each having a common ownership interest in a pier with eighteen boat slips.

5. By application dated October 18, 1987, the Silverthornes

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requested a Coastal Area Management Act (CAMA) permit which would allow their existing pier to be extended from 86 feet to 150 feet in length and increase the number of boat slips from six to eighteen.

6. By letter dated February 5, 1988, the Division of Coastal Management (DCM) denied the Silverthornes' permit application citing anticipated adverse impacts on water quality and resulting closure of shellfish waters in the vicinity of the proposed project.

7. On or about February 12, 1988, the Silverthornes discussed their matter with Barker who made phone calls on their behalf trying to resolve the matter through negotiation.

8. On or about March 10, 1988, the Silverthornes retained Barker to represent them in appealing the denial of their permit application by DCM.

9. By petition filed March 14, 1988 with the Office of Administrative Hearings (OAH), Barker appealed the denial of the Silverthornes' application for a CAMA permit by the DCM.

10. By letter dated March 22, 1988 to Preston Pate, assistant director of DCM, Barker confirmed an agreement they had reached by telephone that day to the effect that the Silverthornes would submit an amended application for a ten slip permit and, when granted, would withdraw the appeal previously filed in the OAH.

11. A June 3, 1988 letter from DCM to Mr. Silverthorne indicated that the ten slip permit was enclosed and if Silverthorne signed the ten slip permit it meant he had waived his right of appeal.

12. Barker subsequently had another client, Nicholas J. Santoro, whose application to DCM for a 61 slip permit on Browns Creek in Whortonville was denied on July 22, 1988. Santoro appealed the denial of his permit. In December, 1988, Santoro was granted a ten slip permit by DCM without having to give up his appeal.

13. As a result of the statement to Mr. Silverthorne about dropping his appeal contained in the June 3, 1988 letter and the perceived change in policy by DCM based upon DCM allowing Santoro to have a ten slip permit without dropping his appeal, Barker became convinced his clients, the Silverthornes, had been treated unfairly by DCM.

14. By letters dated July 5, 1988 and September 19, 1988, an agency legal specialist for DCM, David G. Heeter (Heeter) requested Barker to dismiss the petition in the OAH. Barker took no action to do so.

15. On August 16, 1989, Heeter filed a motion for summary judgment in the OAH contending that the March 22, 1988 settlement had made the appeal of the 18 slip permit denial moot.

16. On November 21, 1989, a hearing was conducted in Pamlico County, North Carolina before Acting Chief Administrative Law Judge Beecher R. Gray (Gray) on the motion for summary judgment. Barker's contention was that the agreement to drop the appeal was coerced by DCM and that the agreement was void for lack of consideration and violated public policy.

17. In his argument to Gray, Barker stated that he had a conversation with Gray's predecessor, former Chief Administrative Law Judge Robert A. Melott, who advised him to agree to drop the appeal to get the ten slip permit because Melott did not regard such an agreement as having any legal effect.

18. Barker stated this knowing that he had not sought Melott's advice on the agreement entered into by Barker nor had he received any advice about the agreement from Melott, either before or after the agreement was entered into by Barker on behalf of his clients.

19. Gray denied the motion for summary judgment and heard the contested case on the merits of the Silverthornes' permit appeal. Gray subsequently issued a Recommended Decision holding that the DCM had failed to show there were sufficient oysters in Brown Creek to justify denying the Silverthorne's application for a CAMA permit for 18 slips.

20. The matter was next heard by the Coastal Resources Commission (CRC) on December 7, 1990.

21. In his argument to the commissioners of the CRC, Barker again argued that the March 22, 1988 agreement to drop the appeal was coerced. He stated that he advised Melott what was happening, that Melott advised him how to proceed, and that that is how he proceeded.

22. When asked by Commissioner Tomlinson whether the administrative law judge (Melott) recommended that he renege on the agreement, Barker answered that Melott advised him that the agreement would be of no force and effect, that it was coerced and would not be binding, and that he (Melott) would not uphold it.

23. Commissioner Besse asked whether Melott in fact advised Barker in an ex parte communication to tender a settlement offer which he had no intention of complying with. Barker answered, "yes."

24. Barker had occasions to hear Melott discuss his views on coerced settlements on several occasions. However, Barker had not discussed the Silverthornes' matter with Melott and had not gotten any advice from Melott about how he should proceed in representing the Silverthornes.

25. Since Barker had no specific conversations with Melott about his clients' matter with DCM, his statements to the commissioners about having had such conversations and relating Melott's alleged advice were misrepresentations.

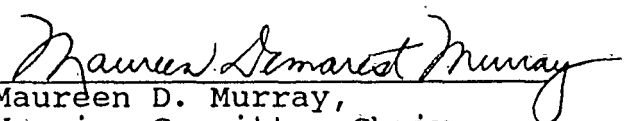
BASED UPON the foregoing Findings of Fact, the hearing committee concludes as a matter of law that Barker's conduct constitutes grounds for discipline pursuant to N. C. Gen. Stat. Sec. 84-28(b)(2) in that the Defendant, Bill Barker, violated the Rules of Professional Conduct as follows:

- a) By making statements to Acting Chief Administrative Law Judge Beecher R. Gray during the course of a hearing that he had a conversation with Gray's predecessor, Robert A. Melott, who advised him to agree to drop the appeal to get the ten slip permit because Melott did not regard such an agreement to have any legal effect when he had not had such a conversation with Melott and Melott had offered no advice on the matter, Barker engaged in conduct involving misrepresentation in violation of Rule 1.2(C) and knowingly made a false statement of fact in violation of Rule 7.2(A)(4).
- b) By making statements to the commissioners of the CRC that he had been advised by Melott about the effect of the agreement and whether Melott would uphold it, when no such conversation had occurred with Melott and Melott had offered no such advice, Barker engaged in conduct involving misrepresentation in violation of Rule 1.2(C) and knowingly made a false statement of fact in violation of Rule 7.2(A)(4).
- c) The conclusion that Barker's misleading statements to Gray and to the commissioners of the CRC during his argument in the Silverthornes' case violated Rule 7.2(A)(4) is supported by the comment to that rule which states:

However, an assertion purporting to be of the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

Signed by the undersigned Chairperson with the full knowledge and consent of the other members of the hearing committee this

30th day of April, 1992.


Maureen D. Murray,
Hearing Committee Chair

NORTH CAROLINA
WAKE COUNTY

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BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
92 DHC 3

THE NORTH CAROLINA STATE BAR,
Plaintiff

vs.

BILL BARKER, Attorney,
Defendant

ORDER OF DISCIPLINE

Based upon the Findings of Fact and Conclusions of Law of even date herewith, the character evidence offered in the first phase of this hearing and the arguments of counsel, the hearing committee further finds the following:

FACTORS IN AGGRAVATION

1. Barker engaged in multiple offenses of the same misconduct.
2. Barker has substantial experience in the practice of law.

FACTORS IN MITIGATION

1. The absence of a prior disciplinary record.
2. A cooperative attitude toward the proceedings.

BASED UPON all of the factors listed above, the hearing committee enters the following ORDER OF DISCIPLINE:

- a) The appropriate discipline to be imposed in this matter is a censure.
- b) The Defendant, Bill Barker, is taxed with the costs of this hearing as assessed by the Secretary.

Signed by the undersigned Chairperson with the full knowledge and consent of the other members of the hearing committee, this the 30th day of April, 1992.

Maureen D. Murray
Maureen D. Murray,
Hearing Committee Chair

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NORTH CAROLINA
WAKE COUNTY

MAY 92 10:27

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
92 DHC 3

IN THE MATTER OF)

BILL BARKER,)
ATTORNEY AT LAW)

CENSURE

This censure is delivered to you pursuant to Section 23A(3) of the Discipline and Disbarment Procedures of the North Carolina Hearing Commission following a hearing in the above captioned proceeding on April 3, 1992. At that hearing, the hearing committee found that you had violated various provisions of the Rules of Professional Conduct of the North Carolina State Bar.

In representing your clients, the Silverthornes, in appealing the denial of a CAMA permit for an eighteen slip dock to be built in Brown Creek in the Whartonsville community in Pamlico County, you represented to Acting Chief Administrative Law Judge Beecher R. Gray, on November 21, 1989, that you had discussed the Silverthornes matter with former chief Administrative Law Judge Robert A. Melott. You further represented that Melott advised you to agree to drop the appeal in exchange for a ten slip permit because Melott did not regard such an agreement as having any legal effect. You said this to Judge Gray knowing that you had not sought Judge Melott's advice about the agreement or gotten any advice from him.

When the permit appeal was heard before the Coastal Resources Commission on December 7, 1990, you told the commissioners that you had advised Melott what was happening in the Silverthornes' case, that Melott had advised you how to proceed and that you had proceeded based upon his advice. You made this argument although you had not had any specific conversation with Melott about the Silverthornes' matter and had not received any advice from Melott in the matter.

Your statements in your arguments to Judge Gray and to the Coastal Resources Commission constituted misrepresentations in violation of Rule 1.2(C) and constituted false statements of fact in violation of Rule 7.2(A)(4).

In deciding to impose this censure, the hearing committee considered your argument that you had heard Melott express his general feeling about coerced settlement agreements in such cases, and had not misrepresented his position to Judge Gray or to the Coastal Resources Commission. However, the hearing committee's determination that your statements violated the rules cited was based upon the comment to rule 7.2(A)(4) which reads:

However, an assertion purporting to be of the lawyer's

own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonable diligent inquiry.

Although the hearing committee has chosen to impose a relatively moderate sanction of a censure, you should not assume that the Disciplinary Hearing Commission in any way feels that your conduct in this matter was excusable. The hearing committee trusts that you will consider this censure, recognize the errors that you have made, and never again allow yourself to depart from adherence to the high ethical standards of the legal profession. This censure should serve as a strong reminder and inducement for you to weigh carefully in the future your responsibility to the public, your clients, your fellow attorneys, and the courts to the end that you demean yourself as a respected member of the legal profession whose conduct may be relied upon without question.

Signed by the undersigned chairman with the full knowledge and consent of the other members of the hearing committee, this the 30th day of April, 1992.

Maureen Stewart Murray
Maureen Murray, Chairman
Hearing Committee
Disciplinary Hearing Commission

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