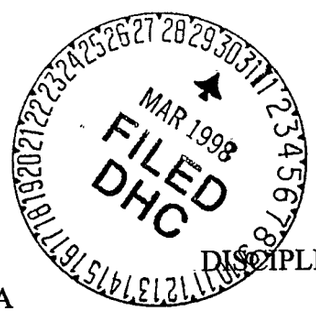

4047

WAKE COUNTY

NORTH CAROLINA

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
97 DHC 25

THE NORTH CAROLINA STATE BAR PLAINTIFF	)	
v.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF DISCIPLINE
FRANKLIN D. SMITH, ATTORNEY DEFENDANT	)	

This matter was heard on the 27th day of February, 1998 before a hearing committee of the Disciplinary Hearing Commission composed of Henry C. Babb, Jr., Chair; R. B. Smith and A. James Early, III. The defendant, Franklin D. Smith, was represented by Fred Crumpler and Dudley A. Witt. The plaintiff was represented by Carolin Bakewell. Based upon the pleadings and the evidence introduced at the trial, 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 General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. The Defendant, Franklin Smith (hereafter, Smith), was admitted to the North Carolina State Bar in 1964, 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 relevant 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 Elkin in Surry County, North Carolina.

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

5. In October, 1990, a Wilkes County home owned by James Daniel Holloway, Jr. and Angela Holloway (hereafter, the Holloways), was destroyed by fire.

6. The Holloways filed a claim with their insurance companies, N.C. Farm Bureau Mutual Ins. Co. (Farm Bureau) and Austin Claims, Inc. (Austin Claims). The Holloways' claim was denied.

7. Ultimately, James Holloway was charged with filing a false insurance claim and with arson, but was acquitted after a jury trial at which he was represented by Smith.

8. In 1991, the Holloways filed a civil action in Wilkes County Superior Court against Farm Bureau and Austin Claims arising out of the denial of the Holloways' insurance claim.

9. The Holloways voluntarily dismissed their civil action in 1992, but refiled the claim in 1993. They were represented in both civil actions by Smith.

10. Austin Claims was represented in both civil actions by W. Harold Mitchell (hereafter, Mitchell). Prior to June 23, 1994, Farm Bureau was represented by William F. Lipscomb (hereafter, Lipscomb). After June 25, 1994, Farm Bureau was represented by Lloyd Caudle (hereafter, Caudle).

11. Farm Bureau and Austin Claims filed answers to the Holloways' complaint, denying the material allegations of the complaint. Farm Bureau filed a counterclaim against the Holloways.

12. In January 1994, following the filing of the answers and counterclaim, Farm Bureau and Austin Claims noticed the depositions of the Holloways.

13. Prior to beginning the depositions of James and Angela Holloway, the parties stipulated that only objections as to the form of questions needed to be raised to preserve them and all other objections would be deemed preserved for hearing.

14. On at least 15 occasions during the depositions of James and Angela Holloway on Feb. 24, 1994, Smith instructed his clients not to answer proper questions propounded by defense counsel. In addition to instructing his clients not to answer certain questions, Smith also made other objections and interrupted the defense attorneys' examination of the Holloways on numerous occasions. Many of these instructions,

objections and interruptions were made in an intemperate manner and in an uncivil tone of voice.

15. On Feb. 24, 1994, during the deposition of Ms. Holloway, Smith made derogatory statements to Mitchell on at least ten occasions. During the deposition of Mr. Holloway, Smith made derogatory statements to Mitchell on at least four occasions. Smith also made several derogatory remarks to Lipscomb during the Holloways' depositions.

16. During the Holloways' depositions, Smith made, inter alia, the following derogatory remarks to opposing counsel:

a) "You're the most gregarious, overbearing man I've ever seen. Now sit back down there and – "

. . .

b) "Well, maybe you need to take a break and need to refresh your mind. This ain't nothing but buffoonism. That's all you are is a buffoon. Why don't you – you're supposed to be a capable lawyer. Why don't you do it right? I've seen all of you."

. . .

c) "You're just a joke to me. You run around, defend a few malpractice cases and think you own the world."

. . .

d) "Why don't you shut your mouth and ask proper questions?"

. . .

e) "I know you're taking the deposition – just like it was the second coming of Christ."

17. In March 1994, Austin Claims and Farm Bureau filed motions to compel James Holloway to submit himself for the completion of his oral deposition and to compel the Holloways to answer questions propounded at the depositions on Feb. 24, 1994. Austin Claims also moved for sanctions against the Holloways and Smith.

18. On April 11, 1994, Smith filed a response to Austin Claims' motion to compel and for sanctions in which he made further derogatory remarks about Mitchell.

19. Specifically, in his April 11, 1994 response, Smith stated, that

> On February 24, 1994, W. Harold Mitchell did unlawfully, willfully, with malice, forethought and premeditation, in a deliberate, vicious and unprofessional manner, verbally attack the Plaintiff, Angela Holloway, during her deposition; that his conduct far exceeded the realms of bad faith; that he attempted to intimidate Angela Holloway by mocking and grinning at her and by getting up in her face; that he attempted to threaten her, to annoy and embarrass her and made every effort to coerce her; that during the course of the deposition of Angela Holloway, W. Harold Mitchell demonstrated marked senility and total disrespect for the witness because he knew, or should have known, what her responses would be to his questions regarding the uncertified payment schedule and purported transcript from the October 24, 1990 interview . . . that the conduct of W. Harold Mitchell on February 24, 1994 was not only unbecoming to him as an attorney, but was an embarrassment and an insult to the legal profession; that by his conduct and by his own volition, he reduced himself to a buffoon by bullying his way through the depositions from 10:20 a.m. until 5:00 p.m. with only thirty (30) minutes being taken off for lunch; that the acts and conduct of W. Harold Mitchell were such to establish sufficient factual basis to constitute a criminal charge of obstruction of justice.

20. Instead of discussing the substantive allegations in Austin Claims' motion to compel discovery and for sanctions, Smith confined the majority of his response to an attack upon Mitchell.

21. A hearing was held before Hon. Julius A. Rousseau on Sept. 6, 1994 respecting Austin Claims' motion to compel and motion for sanctions.

22. During the hearing before Judge Rousseau, Smith made a number of additional derogatory statements about Mitchell. For instance, Smith stated that, during the Holloways' depositions, Mitchell would "do his Edward G. Robinson act" and accused him of "[r]attling his papers, and jerking them around" in an attempt to intimidate the witness.

23. Following the hearing, Judge Rousseau entered an order on Sept. 16, 1994 which required the Holloways to submit to a continuation of their depositions and to give responsive answers to the questions which they had previously refused to answer upon instruction of their counsel, Smith.

24. Judge Rousseau also granted the motion for sanctions and ordered Smith to pay $1,000 in attorneys fees to Mitchell and to pay $450 in attorneys fees to Caudle. Judge Rousseau found that Smith had made "unprovoked, unprofessional and derogatory statements to counsel for defendants" during the depositions and that Smith had made

numerous objections to questions and instructed his clients not to respond to other questions even though the questions were proper.

25. In October 1994, Smith filed an immediate notice of appeal with the N.C. Court of Appeals respecting Judge Rousseau's Sept. 16, 1994 order. This appeal was dismissed by the Court of Appeals in February 1995 as interlocutory.

26. In January 1996, the Holloways settled the underlying lawsuit against Farm Bureau and Austin Claims, but expressly reserved the right to appeal from the order requiring Smith to pay attorneys' fees in connection with the defendants' motion to compel discovery.

27. In January 1996, the Holloways and Smith filed notice of appeal with the N.C. Court of Appeals respecting the order awarding attorneys' fees.

28. Following the filing of the notice of appeal, the defendants filed in the N.C. Court of Appeals motions for sanctions against the Holloways and against Smith, alleging that the Holloways' appeal was frivolous.

29. In his brief filed with the N.C. Court of Appeals, Smith asserted that the Holloways voluntarily dismissed their action against Farm Bureau and Austin Claims "because of the relationship between Harold Mitchell, attorney from Valdese, and the Honorable Julius A. Rousseau, Jr., the Resident Judge on the Twenty-Third Judicial District and on the grounds that neither the Plaintiffs nor counsel felt they would get a fair trial before Judge Rousseau."

30. In his appellate brief, Smith also made the following remarks about Judge Rousseau:

> a) that Judge Rousseau was known as "an insurance company lawyer judge. . . ."
>
> b) that Judge Rousseau had chosen to disbelieve the Holloways and "to shout at them and intimidate them;" and
>
> c) that the Holloways "became scared to proceed with their lawsuit" after the "vicious abuse that was inflicted upon [Smith] by Judge Rousseau."

31. Smith further stated in his appellate brief that Mitchell had

a) subjected his clients to "cruel and barbaric treatment;"

b) acted in "bad faith" and was guilty of "misconduct" in the depositions of the Holloways; and

c) that he "came to the depositions of the [Holloways] for purposes of harassing and tormenting them, to scare them from prosecuting the claims. . ."

32. On Jan. 7, 1997, the N.C. Court of Appeals entered an order affirming Judge Rousseau's order awarding attorneys fees to Mitchell and Caudle against Smith and sanctioning Smith for filing a frivolous appeal. The Court of Appeals remanded the matter for a hearing respecting the appropriate amount of attorneys' fees to be awarded based upon the Court's finding that the 1996 appeal was frivolous.

33. Thereafter, the parties entered into a consent order respecting the attorneys' fees issue. As of the date of the hearing herein, Smith had paid approximately $18,000 in attorneys' fees as a result of the orders of Judge Rousseau and the Court of Appeals.

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 person of Franklin D. Smith and of the subject matter.

2. Smith'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 derogatory remarks respecting Mitchell and Lipscomb, objecting and interrupting defense counsel in an intemperate manner on numerous occasions and by instructing his clients not to answer proper questions posed by defense counsel during the Holloways' depositions, Smith took action on behalf of a client when he knew or it was obvious that such conduct would be frivolous or would serve merely to harass or maliciously injure another in violation of Rule 7.2(a)(1) and engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(d).

(b) By making derogatory remarks respecting Mitchell in his April 11, 1994 response to the Austin Claims' motion to compel discovery and for sanctions rather than responding to the substantive issues raised by the motion, Smith took action on behalf of a client when Smith knew or it was obvious that such conduct would be frivolous or

would serve merely to harass or maliciously injure another in violation of Rule 7.2(a)(1) and engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(d).

(c) By making remarks in his appellate brief to the effect that Judge Rousseau had improperly intimidated the Holloways in the course of their litigation and by stating that Judge Rousseau would not give the Holloways a fair trial and was biased in favor of insurance companies, Smith engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(d) and took action when he knew or it was obvious that such action would be frivolous or would serve merely to harass or maliciously injure another in violation of Rule 7.1(a)(1).

(d) By making derogatory remarks about Mitchell in his appellate brief after Judge Rousseau had previously sanctioned Smith for making similar remarks, Smith engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(d) and took action when he knew or it was obvious that such action would be frivolous or would serve merely to harass or maliciously injure another in violation of Rule 7.1(a)(1).

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 additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. Smith's defendant's misconduct is aggravated by the following factors:

a) imposition of prior discipline.
b) pattern of misconduct.
c) multiple violations of the Rules of Professional Conduct.
d) substantial experience in the practice of law at the time of the offenses.

2. Smith's misconduct is mitigated by the following factors:

a) full and free disclosure to the State Bar.
b) good character and reputation.
c) imposition of other penalties or sanctions.
d) remorse.
e) remoteness of prior offenses.

3. Although the Committee found that more mitigating than aggravating factors were present in this case, it nevertheless found that the severity of the aggravating factors outweighed the mitigating factors.

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

ORDER OF DISCIPLINE

1. The Defendant, Franklin D. Smith, is hereby CENSURED.

2. The Defendant shall pay the costs of this proceeding as assessed by the Secretary within 30 days of service of this order upon the Defendant.

Signed by the chair with the consent of the other hearing committee members, this the 26 day of March, 1998.

Henry C. Babb, Jr., Chair
Disciplinary Hearing Commission

WAKE COUNTY

NORTH CAROLINA

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
97 DHC 25

THE NORTH CAROLINA STATE BAR PLAINTIFF	)	
v.	)	PUBLIC CENSURE
FRANKLIN D. SMITH, ATTORNEY DEFENDANT	)	

This matter was heard on the 27th day of February, 1998 before a hearing committee of the Disciplinary Hearing Commission composed of Henry C. Babb, Jr., Chair; R. B. Smith and A. James Early, III. Based upon the pleadings and the evidence introduced at the trial, the argument of counsel and the evidence introduced at the second or disciplinary phase of the case, the hearing committee unanimously voted to issue this Public Censure to you.

This case has its genesis in a civil action filed in Wilkes County in 1993 by James and Angela Holloway against N.C. Farm Bureau Mutual Ins. Co. and Austin Claims, Inc. The Holloways, whom you represented in the civil action, claimed that the defendants had engaged in fraud and unfair trade practices by denying the Holloways' claim following the destruction of their home by fire in October 1990. Farm Bureau was initially represented by William Lipscomb and W. Harold Mitchell represented Austin Claims.

In February 1994, Lipscomb and Mitchell took the depositions of your clients, the Holloways. During the depositions, which lasted all day, you interrupted the defense attorneys' examination of your clients and objected to proper questions on numerous occasions and instructed your clients not to answer at least 15 proper questions. Many of these interruptions, which were documented by the written transcript, were made in an intemperate manner and tone of voice. It was not necessary for you to state an objection on the record to preserve your right to raise objections at trial, as the parties had stipulated that only objections as to the form of questions had to be stated upon the record.

In addition to the interruptions, objections and instructions not to respond which you made during the depositions, you leveled a number of derogatory remarks at defense counsel. For instance, when Mitchell asked to take a short break during one of the depositions, you stated that "maybe you need to take a break and need to refresh your mind. This ain't nothing but buffoonism. That's all you are is a buffoon. Why don't you – you're supposed to be a capable lawyer. Why don't you do it right? I've seen all of you."

Later, Mrs. Holloway testified that whatever cash she and her husband had accumulated was kept in the house. When Lipscomb asked her where the cash was kept, you instructed her not to answer the question because Lipscomb "might send somebody from Farm Bureau and steal it."

Your frequent interruptions, objections and instructions not to respond to legitimate questions, coupled with the insults which you leveled at defense counsel, made it difficult for Mitchell and Lipscomb to obtain information to which they were entitled. Consequently, your conduct in this regard constituted conduct prejudicial to the administration of justice in violation of Rule 1.2(d) of the Rules of Professional Conduct and also constituted action taken on behalf of a client which obviously was intended to harass or maliciously injure another, in violation of Rule 7.2(a)(1) of the Rules of Professional Conduct.

After the depositions of your clients, both defense attorneys filed motions to compel responses from the Holloways. Mitchell also filed a motion on behalf of Austin Claims seeking sanctions. You filed a response to his motion in April 1994. Instead of discussing whether Mitchell was entitled to the information which he sought, you devoted most of your response to a lengthy diatribe against Mitchell. For instance, you stated that he had "unlawfully, willfully, with malice, forethought and premeditation . . . in a deliberate, vicious and unprofessional manner, verbally attack[ed] Angela Holloway during her deposition." You also stated that Mitchell had "demonstrated marked senility and total disrespect for the witness," was guilty of "bad faith," had "reduced himself to a buffoon" and was, in essence, guilty of criminal obstruction of justice. There was nothing in the record to support these remarks.

Your derogatory remarks about Mitchell did not end with your written response to his motion for sanctions. On Sept. 6, 1994, during the hearing on the motion to compel, the transcript of that proceeding reflects that you continued to attack Mitchell, whom you accused, among other things, of attempting to intimidate Mrs. Holloway by "rattling his papers and jerking them around" and by "going into his Edward G. Robinson act." Following the hearing, Judge Rousseau granted the motion to compel and ordered you to pay $1,000 in attorneys' fees to Mitchell and another $450 in attorneys' fees to Lloyd Caudle, who, by that time, had replaced Lipscomb as attorney for N.C. Farm Bureau.

In 1996, after the Holloways' case was resolved, you reserved the right to appeal from Judge Rousseau's order awarding sanctions and filed notice of appeal to the N.C.

Court of Appeals. In your appellate brief, you made a number of derogatory remarks, not only about Mitchell, but also about Judge Rousseau, who, you stated, is known as "an insurance company lawyer judge. . . ." You also charged that Judge Rousseau had shouted at the Holloways during the hearing on the motion to compel and that the Holloways "became scared to proceed with their lawsuit" after the "vicious abuse that was inflicted upon [you] by Judge Rousseau."

Further, you stated that Mitchell had subjected the Holloways to "cruel and barbaric treatment" during their depositions, that he had acted in "bad faith" and had come "to the depositions of the [Holloways] for purposes of harassing and tormenting them, to scare them from prosecuting the claims."

The remarks which you leveled at opposing counsel during the Holloways' depositions and in the later filings in the case, as well as the derogatory statements which you made about Judge Rousseau in your appellate brief were without any basis in fact and were as unwarranted as they were unprofessional. While the remarks which you made during the Holloways' depositions might have been, to some degree, the result of the heat of the moment, the same cannot be said for the insults which you directed at opposing counsel and Judge Rousseau in later proceedings in the case. Even if there had been some basis for your remarks about Judge Rousseau (which the Commission found is not the case), by attacking him in an appellate brief, you chose a method calculated to cast public doubt upon the integrity of the judicial system while at the same time virtually ensuring that Judge Rousseau would have no opportunity to respond and that nothing constructive could result from your remarks.

This is not to say that counsel may never disagree with one another or with a trial judge during the course of litigation. But these disagreements must be handled in an appropriate manner and at an appropriate time. Your choice of language and forum were equally inappropriate and your intemperate and uncivil conduct in making unwarranted derogatory remarks about opposing counsel and Judge Rousseau constitutes conduct prejudicial to the administration of justice in violation of Rule 1.2(d) and conduct taken on behalf of a client taken for the purpose of harassing or maliciously injuring another, in violation of Rule 7.2(a)(1).

The hearing committee was greatly disturbed by the suggestion, raised in the trial of this matter, that your misconduct was mandated by your duty of zealous representation of your clients. This duty, while important, is not the only provision in the Rules of Professional Conduct nor does it outweigh every other mandate in the Rules. Zealous representation does not and cannot include insulting opposing counsel and the court, whose officer you are, in the hopes of gaining some advantage for your clients.

Of additional concern was the suggestion that because other attorneys may also be engaging in unprofessional and uncivil conduct, that your own behavior does not warrant discipline. Rule .0101 of the N.C. State Bar Discipline & Disbarment Rules makes it clear that the fact that similar misconduct has not been punished in the past is not a

defense to a disciplinary charge. Were the rule as you suggest, the practice of law would quickly descend to the lowest common denominator of conduct.

At a point in time when the legal profession is besieged by complaints about unprofessional behavior, your egregious shortcomings in this area have embarrassed not only yourself but all North Carolina lawyers and have lent credence to the arguments of those who have denigrated the profession in the popular press and on the campaign trail.

Your misconduct is mitigated by the fact that you have already paid a substantial amount in attorneys' fees as a result of the sanctions orders entered by Judge Rousseau and the Court of Appeals, because your offenses occurred some years ago, you at least expressed remorse for your misconduct and made full disclosure to the hearing committee. Had these mitigating factors not been present, the committee might well have imposed more substantial discipline.

It is the hope of the Disciplinary Hearing Commission that this Censure will be heeded by you and that you will be benefited by it. The Commission also trusts that this order will serve as a reminder to all members of the Bar that the Rules of Professional Conduct require attorneys to treat opposing counsel, the judiciary, parties and witnesses with respect and civility.

This the 26 day of March, 1998.

Signed by the chair with the consent of all members of the committee.

Henry C. Babb, Jr., Chair
Disciplinary Hearing Commission