NORTH CAROLINA

WAKE COUNTY

BEFORE THE
GRIEVANCE COMMITTEE
OF THE
NORTH CAROLINA STATE BAR
07G0878

IN THE MATTER OF)
)
Benjamin F. Clifton,) CENSURE
ATTORNEY AT LAW)
)

On January 14, 2010, the Grievance Committee of the North Carolina State Bar met and considered the grievance filed against you by the North Carolina State Bar.

Pursuant to section .0113(a) of the Discipline and Disability Rules of the North Carolina State Bar, the Grievance Committee conducted a preliminary hearing. After considering the information available to it, including your response to the letter of notice, the Grievance Committee found probable cause. Probable cause is defined in the rules as "reasonable cause to believe that a member of the North Carolina State Bar is guilty of misconduct justifying disciplinary action."

The rules provide that after a finding of probable cause, the Grievance Committee may determine that the filing of a complaint and a hearing before the Disciplinary Hearing Commission are not required and the Grievance Committee may issue various levels of discipline depending upon the misconduct, the actual or potential injury caused, and any aggravating or mitigating factors. The Grievance Committee may issue an admonition, a reprimand, or a censure.

A censure is a written form of discipline more serious than a reprimand, issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or a member of the public, but the misconduct does not require suspension of the attorney's license.

The Grievance Committee believes that a hearing before the Disciplinary Hearing Commission is not required in this case and issues this censure to you. As chairman of the Grievance Committee of the North Carolina State Bar, it is now my duty to issue this censure.

For many years, you frequently conducted real estate closings for Cartus Financial Corporation ("Cartus"), a relocation company which acquires properties from employees of certain companies and then resells them. Your representation of buyers and lenders in transactions where Cartus was the seller may have been materially limited by your responsibilities to Cartus and by your personal interest in Cartus's continued business. Although this type of conflict may be consented to after full disclosure, your practice was to disclose your relationship with Cartus to the other parties on the day of closing, which did not provide buyers and lenders a meaningful opportunity to decide whether they wished to consent to the conflict. By failing to timely explain this conflict of interest to the affected clients, you violated Rule 1.7(a).

You closed several types of transactions for Cartus, including "one deed" and "two deed" closings. In a "one deed closing," Cartus acted merely as a broker, in that only one deed (from the original seller to the ultimate buyer) was prepared and filed. In at least some of the "one deed closings" you conducted for Cartus, you allowed Mississippi attorney Fred Ross, who is employed by a Cartus subsidiary, to prepare the deed between two private parties in a North Carolina transaction. In so doing, you assisted in the unauthorized practice of law in violation of Rule 5.5(d)

A "two deed closing" was essentially an A-B-C transaction in which the original owner was "A," Cartus was "B"—the middleman, and the ultimate buyer was "C." You routinely performed a "one owner" title examination for Cartus in connection with the A-B transaction in which it acquired the property. When Cartus sold the property (the B-C transaction), you received a $250 title fee from Cartus for the "one owner" search you performed on Cartus's behalf in connection with the A-B transaction. Your earlier title work was not directly related to the B-C transaction, and the settlement agent for the B-C transaction received a separate fee for performing the title work necessary to that transaction. RESPA regulations prohibit fees for services that were not rendered in connection with the transaction at issue.

In closings you conducted for Cartus, you completed the HUD-1 Settlement Statement ("HUD-1") and disbursed funds in accordance with instructions provided to you by Cartus. Cartus's instructions provided that a variety of "fees" to Cartus and its various subsidiaries had to be itemized on the HUD-1. The instructions also provided that all of these identified "fees" had to be disbursed to another Cartus subsidiary which was not identified on the HUD-1. It was misleading to combine multiple disbursements shown on the HUD-1 and direct them to an entity that was not identified on the HUD-1. By following Cartus's instructions on HUD-1 completion and disbursement regardless of whether the resulting HUD-1 was accurate or compliant with RESPA, you allowed a third party to direct your professional judgment in violation of Rule 5.4(d).

In some or all of the transactions involving Cartus, you represented the mortgage lenders. The lenders relied on you for accurate information. By completing HUD-1s per Cartus's instructions, rather than as a completely accurate reflection of receipts and disbursements, you lacked diligence in representing the lenders, in violation of Rule 1.3. By preparing HUD-1s that did not accurately reflect the disbursement of some funds from the transaction, you engaged in conduct involving misrepresentation in violation of Rule 8.4(c).

Finally, although Cartus and its realtors recommended you as closing attorney, in some instances the buyer hired his or her own attorney. In those transactions, you received $150.00 for "supervising the closing," which included providing deeds to the closing lawyer and "making sure the closing lawyer follow[ed] Cartus's instructions" regarding preparation of the HUD-1 and disbursements. By requesting that closing lawyers hired by buyers disburse closing funds consistent with Cartus's instructions but inconsistent with some of the recipients listed on the HUD-1, you induced or attempted to induce other lawyers to violate the Rules of Professional Conduct in violation of Rule 8.4(a).

You are hereby censured by the North Carolina State Bar for your violation of the Rules of Professional Conduct. The Grievance Committee trusts that you will ponder this censure, recognize the error that you have made, and that you will 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.

In accordance with the policy adopted January 24, 2008 by the Council of the North Carolina State Bar regarding the taxing of the administrative and investigative costs to any attorney issued a censure by the Grievance Committee, the costs of this action in the amount of $100.00 are hereby taxed to you.

Done and ordered, this 7th day of January, 2011.

Ronald G. Baker, Sr., Chair
Grievance Committee
The North Carolina State Bar