

STATE OF NORTH CAROLINA

WAKE COUNTY

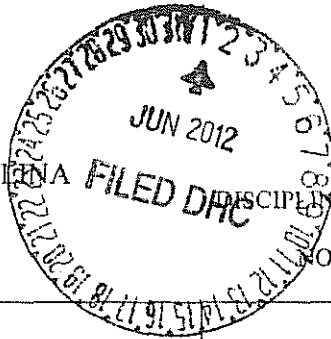
THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

BENJAMIN S. SMALL, Attorney,

Defendant



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

ORDER OF DISCIPLINE

This matter was heard on 12 and 13 April 2012, before a hearing panel of the Disciplinary Hearing Commission composed of M. H. Hood Ellis, Chair, Ronald R. Davis, and Patti Head. Leanor Bailey Hodge represented Plaintiff, the North Carolina State Bar. Defendant, Benjamin S. Small, appeared *pro se*.

Based upon the evidence presented at the hearing, the Hearing Panel makes by clear, cogent, and convincing evidence the following:

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar (hereafter "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. Defendant, Benjamin S. Small (hereafter "Defendant" or "Small"), was admitted to the North Carolina State Bar on 3 December 2002 and is an Attorney at Law 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 the relevant period referred to herein, Small was actively engaged in the practice of law and maintained a law office in Concord, Cabarrus County, North Carolina.

4. Small was appointed as counsel for the defendant in the Cabarrus County case of *State of North Carolina v. James Neal Halley*, 07 CRS 53055. Halley was charged with child abuse resulting in serious bodily injury, a Class C felony.

5. In August 2008, Small filed a motion for speedy trial on Halley's behalf. Soon thereafter, the case was scheduled for trial during the 19 January 2009 session of court.

6. On 4 December 2008 and less than 90 days from the scheduled trial in the Halley case, Small filed a Designation of Secured Leave for the dates of 21-23 January 2009 in an effort to secure leave so that he could attend a continuing legal education class.

7. Small failed to file his Designation of Secured Leave in accordance with the North Carolina General Rules of Practice. Specifically, Small failed to file his Designation within the time allotted under the rules and before the *Halley* case was scheduled for trial. Although untimely, Small's Designation was not prohibited. Instead, it was rendered ineffective because it was filed outside of the timeline set by the General Rules of Practice which do not prohibit untimely filing.

8. On 26 November 2008, Small filed a motion in the *Halley* case entitled "Motion to Recuse for Conduct Prejudicial to the Administration of Justice" (hereafter "motion to recuse"). Pursuant to this motion, Small sought a court order recusing the Office of the District Attorney from further participation in Halley's prosecution.

9. There was no basis in law or fact for the motion to recuse.

10. Small's motion to recuse impugned the integrity of the ADA assigned to the *Halley* case and the entire DA's office.

11. Small's motion to recuse was heard by Superior Court Judge W. Erwin Spainhour on 18 December 2008.

12. The Superior Court denied Small's motion to recuse, specifically rejecting Small's factual allegations as completely without merit and concluding that there was "no basis in fact or law" for the motion. The Court found that Small's motion to recuse was "vexatious" and "filed for the improper purpose of harassing [the ADA]."

13. In September 2006, the Clerk of Cabarrus County Superior Court (the "Clerk"), who at the time was M. G. Morris, appointed Small to serve as guardian ad litem (GAL) for Clevie Hatley in a proceeding to determine Hatley's competence and to determine whether a general guardian should be appointed for Hatley.

14. After a contested hearing in November 2006, Hatley was declared incompetent. Hatley's daughters, G. Ervin and S. Furr were appointed as his general guardians.

15. After the November 2006 hearing, at the direction of the Clerk, Hatley's general guardians paid Small \$275.00 as his GAL fee for the work he performed during the hearing.

16. In 2007, Attorney Russell was retained to assist Hatley in seeking to restore his legal competency.

17. In September 2007, Russell filed a Motion to Restore Competency on Hatley's behalf. The Clerk, who at the time was Fred Biggers, again appointed Small as GAL for Hatley in the action to restore competency.

18. Attorney Rogers represented the general guardians in opposition to Hatley's motion to restore competency.

19. The Clerk denied Hatley's motion to restore competency.

20. After Small submitted his invoice for payment of his GAL fee to the Clerk, the Clerk directed Small to submit his invoice to Attorney Rogers. Hatley's guardians paid the invoice Small submitted for his service as GAL. Small charged \$75 per hour for his service as Hatley's GAL during this matter.

21. Hatley appealed to Superior Court for trial in December 2008.

22. The Honorable Cressie H. Thigpen presided over the Superior Court jury trial on Hatley's motion to restore competency. The court never rendered a decision on Mr. Hatley's motion to restore competency because Hatley died during jury selection before the trial on his motion to restore competency was concluded.

23. After Hatley died, Attorney Russell dismissed Hatley's motion to restore competency. Small did not seek Judge Thigpen's approval of or an order for his GAL fee before the case was dismissed.

24. After Hatley's motion was dismissed, Small submitted to the Hatley Estate for payment his fee invoice for services he rendered to Hatley as GAL in December 2008.

25. The fee Small sought to collect was \$100.00 more per hour than the fee he previously sought and accepted while serving as GAL for Hatley in the hearing before the Clerk in 2007.

26. On 21 May 2009, Attorney Grant, counsel for the Hatley Estate Administrator responded to Small's invoice by sending a letter to Small asking to meet with Small to discuss settlement of Small's claim for GAL fees, which the Hatley Estate Administrator thought was excessive.

27. Small declined the Hatley Estate Administrator's request to meet.

28. On 20 August 2009 and before the Hatley Estate Administrator submitted any proposed fee for Small to the Clerk for approval, Small filed a Complaint and Notice of Hearing in District Court Case No. 09 CVD 3465 (the "Complaint").

29. Pursuant to the Complaint, Small sought judgment against the Hatley Estate, its Administrator and Beneficiaries individually and collectively for GAL fees that Small claimed he was owed for his service as GAL for Hatley during the December 2008 appeal from the Clerk's 2007 denial of Hatley's motion to restore competency.

30. Small did not have any basis to seek payment of his GAL fees from the heirs of the Hatley Estate individually.

31. The Complaint against the heirs of the Hatley Estate was not warranted by existing law or good faith argument for extension, modification or reversal of existing law.

32. Small's District Court lawsuit against the heirs of the Hatley Estate was frivolous.

33. The Hatley Estate Administrator (who was also an individual heir of the estate) was served with the Complaint on 14 September 2009.

34. Attorney Grant represented the Hatley Estate and its administrator in Small's District Court lawsuit. The other defendants named in the Complaint (the remaining Hatley heirs) were represented by Attorney Rogers.

35. On or about 23 September 2009, Attorney Grant filed a motion to dismiss the Complaint pursuant Rule 12(b)(1), (3) and (6). Attorney Rogers also filed a Rule 12(b)(6) motion to dismiss Small's claims against the individual heirs of the Hatley Estate. The time for Attorneys Grant and Rogers' clients to answer the Complaint had not yet expired when they filed their motions to dismiss the Complaint. Pursuant to N.C. Rule of Civil Procedure 12(a)(1)a, the time for Attorneys Grant and Rogers' clients to answer the complaint was extended until after the court ruled on their Rule 12 motions.

36. On 28 September 2009, Small, Attorney Grant and Attorney Rogers appeared in District Court in response to a Notice of Hearing that Small served with the Complaint.

37. At the 28 September 2009 hearing, Small announced in open court that Attorney Rogers was violating his ethical duties by failing to withdraw from his representation of the heirs of the Hatley Estate. Small contended that Attorney Rogers was needed as a witness in Small's lawsuit against the Hatley Estate and its heirs.

38. Attorney Rogers was willing to withdraw from his representation of the heirs of the Hatley Estate if the Complaint was not dismissed. Attorney Rogers was never called as a witness in the case.

39. Despite the fact that Attorneys Grant and Rogers' motions to dismiss were timely filed, Small filed motions for entry of default and default judgment on 16 October 2009. When Small filed these motions, there was no basis in law or fact for Small's motions for default and default judgment. Small's motions for default and default judgment were frivolous.

40. On 21 October 2009, Small, Grant and Rogers appeared before the Honorable Charles E. Brown for hearing on the motions to dismiss Small's lawsuit filed by Grant and Rogers. At the hearing, there was discussion about the propriety of having Judge Thigpen consider Small's request for GAL fee. However, Small did not agree to seek approval from Judge Thigpen nor did Small inform Grant or Rogers that he intended to contact Judge Thigpen regarding payment of his GAL fee.

41. By order dated 6 November 2009, the Judge Brown dismissed the Complaint pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. After Judge Brown dismissed the Complaint, Small asked Judge Brown to consider his motions for entry of default and default judgment though they had been rendered moot by Judge Brown's dismissal of the Complaint. Judge Brown denied Small's request.

42. On 13 November 2009, Small filed an appeal from dismissal of the District Court case and from the denial of his motions for entry of default and default judgment. Small filed a calendar notice with the court and gave notice to Attorneys Grant and Rogers that his appeal was set for hearing in Superior Court on 25 January 2010.

43. Superior Court was not the proper court to hear Small's appeal of the 6 November 2009 order dismissing his complaint.

44. At some time after the appeal of the Clerk's order denying Hatley's Motion to Restore Competency was dismissed, Small submitted to Judge Thigpen *ex parte* a one page document titled "Motion and Order for Payment of Guardian Ad Litem Fees."

45. Although the document Small submitted was captioned "Motion and Order for Payment of Guardian Ad Litem Fees," Small did not sign the "motion." Also, the Motion and Order falsely indicated that "this matter" came on before Judge Thigpen on 8 December 2008 though the issue of Small's GAL fee was not raised before Judge Thigpen on 8 December 2008.

46. Although Small knew that the fee he sought to collect pursuant to the Motion and Order was disputed in his District Court lawsuit and the Hatley Estate matter, Small did not send the Motion and Order to Judge Thigpen under cover of letter that copied Attorneys Grant and Rogers, nor did Small inform or otherwise give Attorneys Grant and Rogers notice that he sent the Motion and Order to Judge Thigpen. Grant and Rogers did not become aware of Small's Motion and Order until Small submitted it during a 22 March 2010 hearing before Judge Crosswhite.

47. Attorneys Grant and Rogers filed three motions for sanctions against Small: (i) on 16 November 2009 in the District Court case, (ii) on 14 December 2009 in the District Court case, and (iii) on 31 December 2009 in Superior Court where Small purported to calendar a hearing on his notice of appeal.

48. Small's appeal and Attorneys Grant and Rogers' 31 December 2009 motion for sanctions were added to the 25 January 2010 Cabarrus County Superior Court Motions Calendar.

49. On 6 January 2010, Small dismissed his appeal. However, Attorneys Grant and Rogers' motion for sanctions remained on the 25 January 2010 calendar for hearing.

50. A hearing on the issue of whether Small should be sanctioned was held before the Honorable Joseph N. Crosswhite on 25 January 2010. Small did not appear in court for this hearing.

51. Small was sanctioned by the Superior Court at the 25 January 2010 hearing before Judge Crosswhite.

52. On 28 January 2010, Attorney Grant hand delivered to Small a copy of his letter to the Trial Court Coordinator enclosing the proposed order for sanctions against Small.

53. The written Order imposing sanctions against Small was entered on 9 February 2010. On this date, Attorney Grant mailed Small a stamped "filed" copy of the order for sanctions issued by the Honorable Joseph N. Crosswhite.

54. Small failed to timely comply with the Judge Crosswhite's order for sanctions.

55. After the deadline to comply passed, Small filed motions for appropriate relief and to set aside the order for sanctions. The other parties filed a motion for contempt based on Small's failure to comply with the order for sanctions. The hearing on these motions was set for 22 March 2010 and continued to 25 March 2010.

56. Judge Crosswhite denied Small's motion and Small was ordered to comply with the court's order for sanctions.

57. Upon receipt of information about Small's conduct in the Hatley matter, The North Carolina State Bar opened grievance file no. 10G0398.

58. Small acknowledged receipt on or about 27 May 2010 of a copy of a Letter of Notice notifying him of the allegations in file 10G0398.

59. The Letter of Notice informed Small that he was required to respond within 15 days.

60. Small requested, and was allowed, approximately two additional months in which to submit his response to the State Bar. Under the extended deadline Small's response was due 6 August 2010.

61. Small failed to submit a response to grievance file 10G0398 by the 6 August 2010 deadline. On 17 August 2010, the Office of Counsel sent Small a letter informing him that his response was late and reminding him that failure to respond to a letter of notice may in itself form the basis for discipline.

62. Small did not respond to the Office of Counsel's 17 August 2010 letter.

63. On 2 September 2010, the Office of Counsel sent a letter informing Small that if he did not respond immediately, file 10G0398 would be reviewed by the Grievance Committee without a response.

64. Small failed to submit his response to the Letter of Notice until 22 September 2010.

Based on the record and the foregoing Findings of Fact, the Hearing Panel makes the following:

CONCLUSIONS OF LAW

1. All parties are before this hearing panel of the Disciplinary Hearing Commission and the Hearing Panel has jurisdiction over Defendant and over the subject matter.

2. Defendant's conduct, as set out above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:

- a. By filing the motion to recuse the DA's Office without basis in law or fact which impugned the integrity of the DA's Office, Defendant filed a frivolous motion and raised an issue therein for which there was no basis in fact or law in violation of Rule 3.1, used means that had no substantial purpose other than to embarrass or burden a third party in violation of Rule 4.4(a), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
- b. By filing the Complaint against the heirs of the Hatley Estate, individually, seeking to collect a \$175.00 per hour fee for his service as GAL, Small made a frivolous claim in violation of Rule 3.1;
- c. By asserting at the 28 September 2009 hearing that Attorney Rogers was required to withdraw from his representation of the Hatley heirs because he was a witness in the case, Small made baseless assertions and used means that have no substantial purpose other than to embarrass, delay or burden a third person in violation of Rule 4.4(a);
- d. By filing motions for entry of default and default judgment before the time to answer the Complaint expired, Small made frivolous claims in

violation of Rule 3.1 and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);

- e. By submitting the “Motion and Order for Payment of Guardian Ad Litem Fees” *ex parte* to the Honorable Cressie H. Thigpen when he knew the matter was being contested in both the estate matter and in the lawsuit he filed, Small communicated *ex parte* with a judge in violation of Rule 3.5(a) and engaged in conduct prejudicial to the administration of justice in violation for Rule 8.4(d);
- f. By failing to comply with the 9 February 2010 Order awarding sanctions, Small knowingly disobeyed the rules of a tribunal in violation of Rule 3.4(c); and
- g. By failing to timely respond to the Letter of Notice in grievance file 10G0398, Small knowingly failed to respond as required to a lawful inquiry by a disciplinary authority in violation of Rule 8.1(b).

Based upon the foregoing Findings of Fact and Conclusions of Law and the evidence presented at the hearing, the Hearing Panel hereby makes by clear, cogent and convincing evidence the following:

ADDITIONAL FINDINGS OF FACT REGARDING DISCIPLINE

1. Defendant’s misconduct in the *Halley* case resulted in limited court resources being wasted to consider Defendant’s frivolous motion.
2. Defendant was sanctioned on 18 December 2008 for his frivolous filing in the *Halley* case.
3. Despite this sanction, Defendant proceeded to make frivolous filings in the Hatley matter.
4. Defendant was sanctioned on 9 February 2010 for his misconduct in the Hatley matter and sanctioned again on 5 May 2010.
5. Despite these sanctions, Defendant failed to acknowledge at the disciplinary hearing the wrongful nature of his conduct.
6. Ms. Furr and Ms. Ervin were vulnerable because they lacked the legal expertise to respond to Defendant’s frivolous filings without the assistance of a lawyer.
7. Ms. Furr and Ms. Ervin suffered harm as a result of Defendant’s misconduct in that they were required to advance legal fees to defend against the frivolous actions Defendant filed. Prior to this disciplinary proceeding, Defendant was required by the court to reimburse Ms. Furr and Ms. Ervin for these fees.

8. After Defendant's misconduct, Ms. Furr and Ms. Ervin's opinion of the legal profession was diminished.

9. Defendant's failure to timely respond to the disciplinary process interfered with the State Bar's ability to regulate attorneys and undermined the privilege of lawyers in this State to remain self-regulating.

Based on the foregoing Findings of Fact, Conclusions of Law and Additional Findings of Fact Regarding Discipline, the Hearing Panel enters the following:

CONCLUSIONS OF LAW REGARDING DISCIPLINE

1. The Hearing Panel has considered all of the factors contained in 27 N.C.A.C. 1B § .0114(w)(1), the Rules and Regulations of the State Bar and concludes that the following factors that warrant suspension of Defendant's law license are present:

- a. intent of the defendant to commit acts where the harm or potential harm was foreseeable;
- b. circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;
- c. elevation of the defendant's own interest above that of the client;
- d. the negative impact of the defendant's actions on the client and the public's perception of the profession;
- e. the negative impact of the defendant's actions on the administration of justice;
- f. the adverse effect of defendant's conduct on third parties.

2. The Hearing Panel has considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(2), the Rules and Regulations of the State Bar and concludes no factors are present in this instance that would warrant disbarment.

3. The Hearing Panel has considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(3), the Rules and Regulations of the State Bar and concludes that the following factors are applicable in this matter:

- a. a pattern of misconduct;
- b. multiple offenses;
- c. refusal to acknowledge wrongful nature of conduct;

- d. vulnerability of the victim;
- e. imposition of other penalties or sanctions, to wit, the sanction orders previously issued against Defendant by the courts.

4. Defendant's conduct caused significant harm to his clients and other parties to the proceeding, the public, the administration of justice and the profession and potential significant harm to his clients.

5. Defendant's conduct caused harm to the legal profession by undermining the public's trust and their confidence in lawyers and the legal system.

6. The Hearing Panel has considered lesser alternatives and finds that a censure, reprimand or admonition would be insufficient discipline because of the harm to the administration of justice and the public caused by Defendant's conduct.

7. The Hearing Panel finds that discipline short of suspension would not adequately protect the public because of the gravity of harms Defendant's conduct caused to his clients, the public, the profession and the administration of justice.

8. The Hearing Panel finds and concludes that the public will be adequately protected by suspension of Defendant's law license.

Based upon the foregoing Findings of Fact, Conclusions of Law, Additional Findings of Fact Regarding Discipline and Conclusions of Law Regarding Discipline, the Hearing Panel hereby enters the following:

ORDER OF DISCIPLINE

1. The law license of Defendant, Benjamin S. Small, is hereby suspended for two (2) years effective thirty (30) days from the date this Order of Discipline is served upon him.

2. Defendant shall submit his law license and membership card to the Secretary of the State Bar no later than thirty (30) days following the date that this Order is served upon Defendant.

3. Defendant shall comply with the wind down provisions contained in 27 N.C.A.C. 1B § .0124, the North Carolina State Bar Discipline and Disability Rules.

4. Defendant shall file an affidavit with the Secretary of the State Bar within ten (10) days of the effective date of this Order of Discipline certifying that he has complied with the wind down rule.

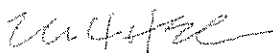
5. Within fifteen (15) days of the effective date of this Order, Defendant will provide the State Bar with a street address (not P.O. box or drawer address) and mailing address at which clients seeking return of their files and records in Defendant's possession or control may obtain such files and records and at which time the State Bar may serve any notices or other matters upon him.

6. All costs of this action are taxed to Defendant, including the costs of Defendant's deposition and the deposition of Brandy L. Cook. Defendant shall pay the costs and administrative fees of this proceeding within thirty (30) days of service of the statement of costs upon him by the Secretary of the State Bar.

7. Defendant must show the following by clear, cogent and convincing evidence in addition to those requirements set out in 27 N.C.A.C. 1B § .0125(b)(3) in order to be reinstated to the practice of law at the conclusion of his active suspension:

- a. That Defendant has completed fifteen hours of CLE; specifically five hours of CLE devoted to professional responsibility, five hours of CLE devoted to civil procedure and five hours to CLE of Defendant's choosing.

Signed by the Chair with the full knowledge and consent of the other hearing panel members, this the 15th day of June, 2012.



M. H. Hood Ellis, Chair
Disciplinary Hearing Panel