

NORTH CAROLINA

WAKE COUNTY

BEFORE THE  
GRIEVANCE COMMITTEE  
OF THE  
NORTH CAROLINA STATE BAR  
08G0856

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IN THE MATTER OF )

James C. Cunningham, II )  
Attorney At Law )

REPRIMAND

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On January 22, 2009 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 to the respondent attorney.

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

The Grievance Committee was of the opinion that a censure is not required in this case and issues this reprimand to you. As chairman of the Grievance Committee of the North Carolina State Bar, it is now my duty to issue this reprimand.

You represented Ms. Selman in a domestic matter involving divorce and related issues as well as equitable distribution. Pursuant to written fee agreements, you and Ms. Selman agreed to a 40% contingency fee on the equitable distribution matter and an hourly rate for the divorce matter. It was understood that Ms. Selman would not be able to pay her bill until she received a distribution. In November 2007, you agreed to reduce the contingency fee if Ms. Selman paid

her bill buy the end of the year. When Ms. Selman failed to pay her balance, you withdrew the reduced contingency.

Thereafter, Ms. Selman filed a fee dispute petition with the Bar disputing the contingency fee and the hourly rate fees. The fee dispute mediator conducted an investigation as to both fees. After discussing the contingency fee with you and Ms. Selman, the fee dispute mediator asked if you would agree to accept the reduced contingency fee on the equitable distribution matter. You agreed to consider it. In a follow up e-mail to you, the fee dispute mediator wrote, "Please let me know if you are still willing to accept this reduced balance and I will let the client know immediately and get back with you. If this is accepted, I trust this resolves the ED balance." You never responded to the mediator and instead filed suit against Ms. Selman to recover the full 40% contingency. The Committee concluded that filing a lawsuit prior to completing the fee dispute process is a violation of Rule 1.5(f): Fees.

Throughout the representation, you sent Ms. Selman bills for the divorce action. Those bills included a \$50.00 charge for every time you reviewed the bill and a \$50.00 charge for every time you sent Ms. Selman a form letter enclosing the bill. Your review of the bills to ensure compliance with Rule 1.5: Fees, is an obligation every lawyer owes to a client and is an overhead expense incidental to the practice of law. The Committee concluded that charging Ms. Selman \$50.00 to review a bill constitutes task padding, is excessive and thus a violation of Rule 1.5(a): Fees. The Committee further concluded that charging a client \$50.00 every time a bill is mailed along with a form cover letter also constitutes task padding and is excessive. Task padding is dishonest and a violation of Rule 1.5(a): Fees and Rule 8.4(c): Misconduct.

Lastly, your final bill included a charge to prepare and argue a Motion to Withdraw representation of Ms. Selman. Rule 1.16(c) requires a lawyer "to comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." Thus, the act of withdrawal is a professional obligation of the lawyer and the cost of withdrawal cannot be shifted to the client. You have therefore violated Rule 1.16(c): Declining or Terminating Representation.

You are hereby reprimanded by the North Carolina State Bar for your professional misconduct. The Grievance Committee trusts that you will heed this reprimand, that it will be remembered by you, that it will be beneficial to you, and that you will never again allow yourself to depart from adherence to the high ethical standards of the legal profession.

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 reprimand by the Grievance Committee, the costs of this action in the amount of \$100.00 are hereby taxed to you.

Done and ordered, this the 12th day of February, 2009

  
James R. Fox, Chair  
Grievance Committee