

16985

STATE OF NORTH CAROLINA

COUNTY OF WAKE

BEFORE THE
GRIEVANCE COMMITTEE
OF THE
NORTH CAROLINA STATE BAR
92G0684 (II) R.

IN THE MATTER OF)

W. DAVID SMITH, JR.,)
ATTORNEY AT LAW)

REPRIMAND)

On October 27, 1993, the Grievance Committee of the North Carolina State Bar met and considered the grievance filed against you by Philip Tomolonius.

Pursuant to section 13(A) of article IX of the Rules and Regulations 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, reprimand, or 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 and I am certain that you will understand fully the spirit in which this duty is performed.

You represented Eric Tomolonius in 1991 regarding a DWI and a domestic matter. Mr. Tomolonius' father, Phillip Tomolonius, paid you \$300 toward your fee in the domestic case. Your staff apparently erroneously posted the \$300 fee as a payment in the DWI case, although no fee was due you in that matter.

In April 1992, Tomolonius discharged you and his father requested a refund of the \$300 which he had paid you in the domestic matter. Although the elder Tomolonius made several inquiries, it took you until Nov. 20, 1992 to mail the refund check to him. The delay appears to have been caused in part by several mistakes and oversights by your staff. Rule 2.8 of the Rules of Professional Conduct requires attorneys to refund unearned portions of fees paid to them promptly when requested to do so by the client. You violated this rule by delaying eight months to return Tomolonius' fee. The fact that the delay was apparently attributable in part to your staff mitigates, but does not excuse your misconduct, as Rule 3.3 of the Rules of Professional Conduct makes it clear that attorneys are ultimately responsible for training and overseeing their non-attorney staffs.

Of additional concern in this matter is your failure to respond promptly to disciplinary authorities about Tomolonius' grievance. The 12th Judicial District Grievance Committee notified you of this matter on July 24, 1992 and asked you to respond by Aug. 24, 1992. You failed to respond in writing to the grievance, however, until Nov. 20, 1992. Moreover, you did not respond promptly to inquiries by counsel for the N.C. State Bar which were sent to you on May 10 and June 15, 1993. You violated Rule 1.1(B) of the Rules of Professional Conduct by failing to respond promptly to the 12th Judicial District Grievance Committee and bar counsel's letters.

You are hereby reprimanded by the North Carolina State Bar due to 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 October 15, 1981 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 \$50.00 are hereby taxed to you.

Done and ordered, this 13th day of November, 1993.

W. Erwin Spainhour
W. Erwin Spainhour, Chairman
The Grievance Committee
North Carolina State Bar