

NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
95 DHC 16

THE NORTH CAROLINA STATE BAR,)
Plaintiff)
vs.)
OLIVER E. ATWATER, ATTORNEY)
Defendant)

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

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This matter coming on to be heard and being heard on November 10, 1995 before a hearing committee of the Disciplinary Hearing Commission composed of Paul L. Jones, Chair; Mary Elizabeth Lee, and James Lee Burney; with Fred J. Williams representing the Defendant, and Harriet P. Tharrington representing the North Carolina State Bar; and based upon the pleadings, the Stipulation on Prehearing Conference, the exhibits admitted into evidence and the testimony of the witnesses, the hearing committee finds the following to be supported by clear, cogent and convincing evidence:

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. Oliver E. Atwater, Sr. was admitted to the North Carolina State Bar in 1982 and was at all times relevant hereto 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 times relevant hereto, Atwater was actively engaged in the practice of law in the State of North Carolina and maintained a law office in Durham, North Carolina.
4. Sometime before August 26, 1991, Atwater undertook to represent Donnell Thompson in a personal injury claim.
5. On or about August 26, 1991, Atwater settled Thompson's claim with The Travelers Insurance Company for \$1,350.00 without informing Thompson that he was settling the case and without getting authorization for a settlement

Thompson.

6. On or about August 26, 1991, the Travelers Insurance Company issued its check in the amount of \$1,350.00 made out to Atwater and Thompson in settlement of Thompson's personal injury claim.
7. On or about September 16, 1991, Atwater deposited the \$1,350.00 check to Atwater's office account. He withheld \$350.00 in cash making a net deposit of \$1,000.00.
8. Atwater endorsed the check by signing Donnell Thompson's name and his own name to the back of the check.
9. Atwater did not have Thompson's permission to sign Thompson's name to the back of the check as an endorsement.
10. After the deposit of Thompson's settlement proceeds to the office account on September 16, 1991, the balance dropped to \$37.10 by the end of the month.
11. Of the twelve checks that cleared the office account in September, nine were written to Atwater. No checks were written to Thompson or on Thompson's behalf from Atwater's trust account or office account until May 1994. There were two insufficient funds charges for Atwater's office account during October 1991.
12. On or about August 26, 1991, Atwater disbursed to himself \$450.00 from his attorney trust account at Farmers & Mechanics Bank in Durham, N.C. account number 1104359701 (hereafter, trust account) as a fee for the Thompson settlement.
13. On August 26, 1991, there was no money in Atwater's trust account for Thompson.
14. Atwater deposited \$6,000.00 for his client Marie Cameron on August 13, 1991. Atwater's disbursement of \$450.00 as his attorney's fee in the Thompson case on August 26, 1991 mistakenly and inadvertantly resulted in Atwater's trust account balance falling below what he should have been holding in trust for Marie Cameron between September 20, 1991 and October 31, 1991.
15. On or about July 10, 1991, Atwater deposited \$10,000 for his client Cynthia Lyons. Atwater's disbursement of \$450.00 as his attorney's fee in the Thompson case on August 26, 1991 mistakenly and inadvertantly resulted in Atwater's trust account balance falling below what he should have been holding in trust for Cynthia Lyons between September 20, 1991 and November 27, 1991 and on December 17, 1991.
16. Atwater also signed Thompson's name to the insurance company's release form without Thompson's knowledge or

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permission.

17. Atwater did not inform Thompson that he had settled Thompson's case until on or about June 1993.
18. From about August 1993 until approximately April 1994, Thompson's family attempted to get Atwater to disburse to Thompson the proceeds from the settlement.
19. On or about May 12, 1994, Atwater deposited \$1,350 of his personal funds to his trust account in Thompson's name.
20. On or about May 12, 1994, Atwater issued the following disbursement checks from his trust account pursuant to the settlement in Thompson's case:

\$225.00	Oliver Atwater
\$390.00	Chiropractic Health Services
\$ 75.00	N.C. Dept. of Human Services
\$ 19.68	Smart Corporation for med file
\$640.32	Donnell Thompson

21. Atwater issued Thompson's disbursement checks only after Thompson's family contacted the Orange County Dispute Settlement Center about Atwater's failure to disburse the settlement funds.
22. Atwater did not send the check to Chiropractic Health Services until on or about August 4, 1994 and only after Dr. David Williamson of the Chiropractic Health Services called Donnell Thompson requesting payment.
23. Atwater's failure to send the \$390.00 to Chiropractic Health Services until August 1994 was an oversight on Atwater's part and not intentional.
24. Over three years elapsed between the time Atwater misappropriated Thompson's money and the State Bar's audit of Atwater's trust account.
25. Pursuant to its audit, the State Bar found no other evidence of misappropriation of client funds by Atwater.
24. Atwater advanced costs for legal representation to nine (9) clients between August 1991 and October 1992. These costs are reflected in the clients' settlement sheets.
25. After the clients' cases were settled, the settlement proceeds were deposited to Atwater's trust account. Atwater failed to promptly disburse to himself costs which he had advanced for the following clients:
 - a. On or about August 13, 1991, Atwater settled a case for Marie Cameron. Atwater did not disburse to himself \$85.00 in costs but left the funds in the trust account.

- b. On or about May 8, 1992, Atwater settled a case for Reverend Robert Daniels. Atwater did not disburse to himself \$78.30 in costs but left the funds in the trust account.
- c. On or about June 1, 1992, Atwater settled a case for Christie Evans. Atwater did not disburse to himself \$82.55 in costs but left the funds in the trust account.
- d. On or about July 27, 1992, Atwater settled a case for Nekita Teel. Atwater did not disburse to himself \$25.24 in costs but left the funds in the trust account.
- e. On or about August 27, 1992, Atwater settled a case for Santario Asbury. Atwater did not disburse to himself \$21.25 in costs but left the funds in the trust account.
- f. On or about August 28, 1992, defendant settled a case for John Mack. Atwater did not disburse to himself \$84.55 in costs but left the funds in the trust account.
- g. On or about September 29, 1992, Atwater settled a case for Nathaniel Harris. Atwater did not disburse to himself \$70.01 in costs but left the funds in the trust account.
- h. On or about October 15, 1992, defendant settled a case for John Brodie. Atwater did not disburse to himself \$83.55 in costs but left the funds in the trust account.
- i. On or about December 23, 1992, Atwater settled a case for Barry Johnson. Atwater did not disburse to himself \$80.98 in costs but left the funds in the trust account.
26. On or about October 18, 1993, Atwater deposited \$3,000.00 into his trust account which was his fee for handling the Massenburg estate. Massenburg was his father-in-law. This fee had previously been earned.
27. Sometime prior to April 12, 1993, Atwater undertook to represent Maurice Ormond in a personal injury case.
28. Or about April 12, 1993, Atwater settled Ormond's case for \$7,381.96.
29. According to the settlement sheet, Atwater was to disburse \$1,237.32 to Durham Hospital.
30. On or about February 24, 1995, Durham Hospital advised Atwater that the bill had not been paid and the outstanding balance was \$1,224.32.

31. The records show that all but \$1,244.51 has been disbursed on behalf of Ormond. The \$1,224.32 should have been paid to the hospital, and the remaining \$20.19 should have been paid to Ormond.
32. Atwater willfully failed to file his Federal or North Carolina individual income tax returns for the calendar years 1992, 1993, and 1994.

BASED UPON the foregoing Findings of Fact, the hearing committee makes the following:

CONCLUSIONS OF LAW

The conduct of Defendant, as set forth above, constitutes grounds for discipline pursuant to N. C. Gen. Stat. Section 84-28(b) (2) in that Defendant violated the Rules of Professional Conduct as follows:

1. By settling Thompson's personal injury claim with the insurance company without first getting authorization from Thompson to settle the claim, Atwater failed to abide by a client's decision whether to accept an offer of settlement in a matter in violation of rule 7.1(c)(1), engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(d).
2. By signing Thompson's name on the insurance release form and on the back of Thompson's \$1,350.00 settlement check and converting those funds to his own use, Atwater committed criminal acts which reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in violation of Rule 1.2(b), engaged in conduct dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(d).
3. By failing to inform Thompson until June 1993 that he had settled Thompson's case, Atwater engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c).
4. By depositing Thompson's settlement proceeds into his office account instead of his trust account, Atwater failed to deposit client funds into his lawyer trust account in violation of Rule 10.1(c).
5. By failing to notify Donnell Thompson of the August 1991 receipt of the settlement proceeds until June 1993, Atwater failed to promptly notify his client of the receipt of funds belonging to the client in violation of Rule 10.2(a).
6. By failing to pay Thompson any part of the proceeds

from Thompson's settlement until May 12, 1994, Atwater failed to promptly pay to Thompson funds in Atwater's possession belonging to the client to which the client was entitled in violation of Rule 10.2(e).

7. By allowing his trust account balance to drop below what should have been held in trust for Marie Cameron from September 20, 1991 until October 31, 1991, Atwater failed to maintain client funds in his trust account in violation of Rules 10.1(a) and (c).
8. By allowing his trust account balance to drop below what should have been held in trust for Cynthia Lyons from September 20, 1991 until November 27, 1991 and on December 17, 1991, Atwater failed to maintain client funds in his trust account in violation of Rules 10.1(a) and (c).
9. By leaving personal funds in his attorney trust account between August 1991 and December 1992, while client funds were present in the trust account, Atwater commingled personal and client funds in violation of Rule 10.1(c).
10. By depositing into his trust account his \$3,000.00 fee in the Massenburg estate matter, Atwater commingled personal and client funds in violation of Rule 10.1(c).
11. By failing to promptly pay \$1,224.32 to Durham Hospital as directed by Ormond and by failing to pay Ormond the \$20.19 balance which should have remained in the trust account after proper disbursements, Atwater failed to promptly pay over client funds as directed by the client in violation of Rule 10.2(e).
12. By failing to timely file state and federal income tax for the years 1992, 1993, and 1994, Atwater committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 1.2(b), and he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c) of the Rules of Professional Conduct.

Signed by the undersigned chairman with the full knowledge and consent of the other hearing committee members, this the 21st day of December, 1995.


Paul L. Jones, Chairman
Hearing Committee

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THE NORTH CAROLINA STATE BAR,
Plaintiff

vs.

OLIVER E. ATWATER, ATTORNEY
Defendant

ORDER OF DISCIPLINE

This cause was heard on November 10, 1995 by a hearing committee of the Disciplinary Hearing Commission composed of Paul L. Jones, Chair; Mary Elizabeth Lee, and James Lee Burney. After entering the Findings of Fact and Conclusions of Law in this matter, the committee received evidence and considered arguments of counsel concerning the appropriate discipline to be imposed. Based upon the evidence and arguments presented, the committee finds the following aggravating and mitigating factors:

AGGRAVATING FACTORS

1. Dishonest or selfish motive;
2. A pattern of misconduct;
3. Multiple offenses;
4. Vulnerability of the victim; and
5. Substantial experience in the practice of law.

MITIGATING FACTORS

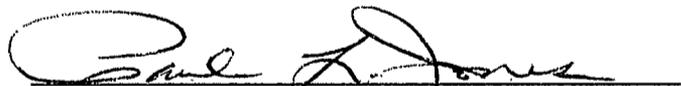
1. Absence of prior disciplinary record;
2. Personal or emotional problems;
3. Full and free disclosure to the hearing committee or a cooperative attitude to the proceedings;
4. Good character and reputation;
5. Physical or mental disability or impairment; and
6. Remorse.

Based upon the Findings of Fact and Conclusions of Law and the above aggravating and mitigating factors, the committee hereby enters this

ORDER OF DISCIPLINE

1. Defendant is hereby suspended from the practice of law for a period of three years, commencing 30 days after service of this order upon defendant.
2. Defendant shall violate no laws of the State of North Carolina and shall violate no provisions of the Rules of Professional Conduct during the period of suspension.
3. Defendant shall comply with all the provisions of 27 N.C. Admin. Code, Chapter 1 Subchapter B, Rule .0124 of the Rules and Regulations of the North Carolina State Bar.
4. As a condition of reinstatement to the practice of law, defendant must do the following:
 - (a) satisfactorily participate in the Positive Action for Lawyers (PALS) program by having a comprehensive 96-hour chemical dependency evaluation and comply with all recommendations of this evaluation which the PALS program will monitor. Before being reinstated to the practice of law, the director of the PALS program must certify to the Secretary of the State Bar that defendant has had the required evaluation and complied with the recommendations of this evaluation.
 - (b) present clear, cogent and convincing evidence to the Secretary of the State Bar proving that he is physically and mentally fit to resume the practice of law.
5. Within one month after his reinstatement to the practice of law, defendant must contact the Lawyers' Management Assistance Program (LMAP) and satisfactorily participate and complete LMAP, including the payment of all fees related to the program.
4. Defendant is taxed with the costs of this proceeding.

Signed by the Chair of the hearing committee with the full knowledge and consent of all parties and the other members of the hearing committee this the 21st day of December, 1995.


Paul L. Jones, Chair
Disciplinary Hearing Committee