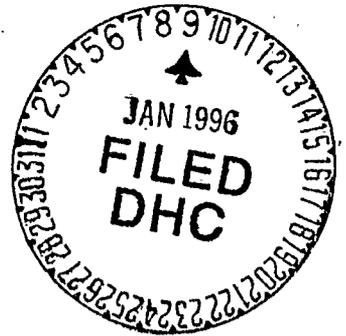


2852

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR



95 DHC 11

THE NORTH CAROLINA STATE BAR,)	
Plaintiff)	FINDINGS OF FACT
vs.)	AND
CLARENCE C. MALONE, JR., ATTORNEY,)	CONCLUSIONS OF LAW
Defendant)	

This matter came on to be heard on December 5, 1995, before a duly appointed hearing committee of the Disciplinary Hearing Commission consisting of Henry C. Babb, Jr., Chair, Stephen T. Smith, and B. Stephen Huntley. The North Carolina State Bar was represented by R. David Henderson and the defendant, Clarence C. Malone, Jr., was represented by Albert L. Willis. Based upon the Stipulation on Prehearing Conference and the evidence presented at the hearing, the committee finds that the following facts have been established by clear, cogent, and convincing evidence:

1. The North Carolina State Bar (hereafter "plaintiff") 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. Clarence C. Malone, Jr. (hereafter "Malone") was admitted to the North Carolina State Bar on September 11, 1961, and is, and was at all times referred to herein, 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 of the periods referred to herein, Malone was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the City of Durham, Durham County, North Carolina.
4. Sonya R. McNeil hired Malone on January 15, 1992 to represent her with regard to obtaining custody of her two children, Linwood Yates, Jr. and Anitra Yates, who, at that time, were in the physical custody of their father, Linwood Yates, without benefit of a court order.
5. On January 27, 1992, Malone filed a complaint styled Sonya R. McNeil v. Linwood Yates, 92 CVD 298 (Durham County) requesting, among other things, that Ms. McNeil have custody of the children and that Mr. Yates be required to pay reasonable support.
6. On February 28, 1992, counsel for Mr. Yates filed an answer and counterclaim.
7. Hearings were held in this matter on October 21, 1992, December 17, 1992, and February 2, 1993. As a result of these hearings, Ms. McNeil was awarded custody of the children. The presiding judge, Judge Richard G. Chaney, ordered Malone to prepare an order for his signature (hereafter "the custody order").
8. On April 6, 1993, Judge Chaney wrote Malone and reminded him that he needed to prepare the custody order.
9. On numerous occasions over the next several months,

Ms. McNeil pleaded with Malone to prepare the custody order so that the transfer of custody could occur. However, Malone never prepared the custody order.

10. Owing primarily to Malone's failure to prepare the custody order, transfer of physical custody from Mr. Yates to Ms. McNeil, as ordered by the court, did not occur until August 1995.
11. Also due to Malone's failure to prepare the custody order, Ms. McNeil's case was placed on the administrative or "clean-up" calendar for October 20, 1993. Malone failed to notify Ms. McNeil of this court date and failed to appear at the hearing on her behalf. As a result, the custody case was dismissed for failure to prosecute or to timely present judgment.
12. Also due to Malone's failure to prepare the custody order, Ms. McNeil was forced to hire another attorney, Nancy McKenzie Kizer, to:
 - a. prepare and file a motion dated April 7, 1994, to set aside the order of dismissal;
 - b. appear in court on May 27, 1994 to argue the motion;
 - c. draft an order dated June 10, 1994, setting aside the order of dismissal;
 - d. appear in court on June 10, 1994, to determine who should reconstruct and prepare the custody order;
 - e. prepare an order dated June 17, 1994, requiring Malone to reconstruct and prepare the custody order;
 - f. prepare an order to show cause dated July 19,

1994, following Malone's failure to comply with the June 17, 1994 order;

g. prepare an order dated October 7, 1994, citing Malone for contempt for his failure to comply with the June 17, 1994 order;

h. appear in court from November 29, 1994 through December 1, 1994 to defend Ms. McNeil against a motion filed by Mr. Yates for a change of custody;

i. reconstruct and prepare the original custody order which Malone had been ordered to prepare; and

j. prepare an order dated January 26, 1995 denying Mr. Yates' motion for change of custody and providing that custody of the children was to be transferred within one week after the last day of the school year.

13. Ms. McNeil has incurred attorney's fees of \$8,672 as the result of Malone's failure to prepare and file the custody order as required by the court.

14. From April 1993 through February 1994 (when Ms. McNeil discharged Malone as her attorney), Ms. McNeil tried to reach Malone by telephone on at least eighteen different occasions to determine the status of her case. Each time, Ms. McNeil left a message for Malone to return her call. However, Malone only returned two of these phone calls and during these conversations, assured Ms. McNeil that he was working on her case.

15. From July 1993 through December 1993, Ms. McNeil made four appointments to see Malone concerning the status of her case. However, Ms. McNeil was only able to meet with Malone on one occasion. During this

meeting, Malone continued to assure Ms. McNeil that he was working on her case.

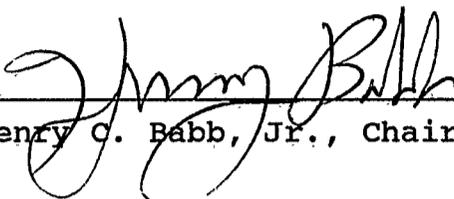
16. In the Spring of 1993, Malone ceased doing any further work on behalf of Ms. McNeil and in effect, terminated the attorney-client relationship with Ms. McNeil. However, before terminating his attorney-client relationship, Malone failed to obtain permission from the court to withdraw and failed to prepare the custody order which, as indicated above, resulted in significant harm to Ms. McNeil.
17. Malone testified at the hearing that he deliberately withheld the preparation and filing of the final custody order because that was the only work he had remaining to do and if it were done, he would have no further leverage by which he could "coerce" (Malone's exact word) the remainder of his fee from Ms. McNeil.

Based upon the foregoing Findings of Fact, the committee enters the following Conclusions of Law:

1. By not preparing the order in a timely fashion, Malone failed to act with reasonable diligence and promptness in representing Ms. McNeil in violation of Rule 6(b)(3), and intentionally prejudiced or damaged Ms. McNeil in violation of Rule 7.1(a)(3).
2. By failing to reasonably communicate with Ms. McNeil concerning her case and promptly comply with reasonable requests for information, Malone violated Rule 6(b)(1).
3. By withdrawing as Ms. McNeil's attorney without obtaining permission of the court, Malone violated Rule 2.8(a)(1).

4. By withdrawing as Ms. McNeil's attorney without taking reasonable steps to avoid foreseeable prejudice to the rights of Ms. McNeil, i.e., preparing the custody order, Malone violated Rule 2.8(a)(2).

Signed by the Chair of the hearing committee with the consent of the other hearing committee members, this the 8 day of January, 1996.


Henry C. Babb, Jr., Chair

suspended from the practice of law in North Carolina for five years.

2. At any time after the first year of the five year suspension, the remaining portion of the five year suspension shall be stayed so long as defendant complies with the following conditions:

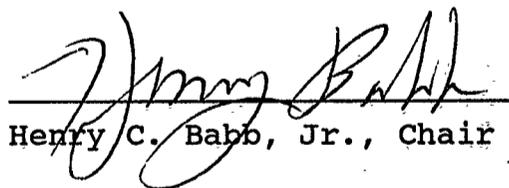
a. Pay Foil Law Offices the sum of \$8,672 plus any interest that may have been charged on this amount. In transmitting this payment, defendant shall instruct attorney N. Joanne Foil to reimburse Ms. McNeil for all fees and costs paid by her to Foil Law Offices and to apply the balance of the \$8,672, if any, to Ms. McNeil's account.

b. Comply with the Rules of Professional Conduct during the remainder of the five year suspension period. Any violation of the Rules of Professional Conduct by defendant will be grounds to activate the remainder of the stayed portion of the suspension period.

3. Defendant shall pay the costs of this proceeding.

4. Defendant shall comply with the obligations set forth in Rule .0124 of the Discipline and Disability Rules of the North Carolina State Bar concerning the wind down of his practice and shall submit his license and membership card to the State Bar with the affidavit required by Rule .0124(d).

Signed by the Chair of the hearing committee with the consent of the other hearing committee members, this the 8 day of January, 1996.


Henry C. Babo, Jr., Chair

[191]