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WAKE COUNTY
NORTH CAROLINA

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
98 DHC 15

THE NORTH CAROLINA STATE BAR
Plaintiff

v.

OLIVER E. ATWATER, ATTORNEY
Defendant

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) FINDINGS OF FACT
) AND CONCLUSIONS OF LAW
) AND ORDER OF DISCIPLINE
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THIS MATTER came on to be heard and was heard by a hearing committee of the Disciplinary Hearing Commission composed of Franklin E. Martin, Chair; Michael L. Bonfoey and B. Stephen Huntley on Friday, Oct. 30, 1998. Carolin Bakewell represented the Plaintiff. The Defendant, Oliver E. Atwater, did not appear and was not represented by counsel. Based upon the pleadings filed herein, the allegations of which are deemed admitted by virtue of the entry of the Defendant's default and upon the evidence presented by the N.C. State Bar, the hearing committee makes the following:

FINDINGS OF FACT

1. The Plaintiff, 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. The Defendant, Oliver E. Atwater, (hereafter, Atwater) was admitted to the North Carolina State Bar in 1982, 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 relevant periods referred to herein, Atwater 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. On April 7, 1998, the State Bar filed a formal complaint in this matter against Atwater.

5. On April 13, 1998, Atwater was personally served with the State Bar's summons and complaint in this matter by the Durham County Sheriff's Department.

6. Atwater did not file an answer or other responsive pleading.

7. On May 7, 1998, the Secretary of the N.C. State Bar entered Atwater's default pursuant to N.C. Civ. Pro. Rule 55 and § .0114(f) of the State Bar's Discipline & Disability Rules.

8. On May 7, 1998, counsel for the State Bar served Atwater with a motion for order of discipline and a notice, setting the hearing for the motion for 10 a.m. on July 9, 1998.

9. On May 11, 1998, the Chair of the Disciplinary Hearing Commission entered an order, rescheduling the hearing for 10 a.m. on July 24, 1998. A copy of the order was delivered to Atwater by the Secretary of the N.C. State Bar on May 11, 1998.

10. On July 23, 1998, an order was entered, continuing the hearing until a later date.

11. On Oct. 5, 1998, an order was entered, rescheduling the hearing on the State Bar's motion for discipline in this case for 10 a.m. on Oct. 30, 1998. A copy of the order rescheduling the hearing was served upon Atwater by certified mail on Oct. 6, 1998.

12. Atwater was given proper notice of the hearing herein and the Disciplinary Hearing Commission has jurisdiction of the subject matter of this proceeding and over Atwater's person.

13. On or after July 29, 1994, Atwater undertook to represent Ronald McNeil respecting a personal injury claim and workers' compensation claim.

14. Atwater failed to communicate adequately with McNeil about McNeil's legal matters.

15. Atwater settled McNeil's personal injury claim before McNeil had completed medical treatment for his injuries.

16. Atwater failed to keep McNeil adequately informed about the negotiations respecting settlement of his personal injury claim and failed to explain to McNeil the significance of the settlement of the case.

17. Atwater failed to file a worker's compensation claim on McNeil's behalf.

18. Atwater failed to write to McNeil's employer confirming that McNeil had been injured, despite numerous requests by McNeil that he do so.

19. On or about May 14, 1996, Atwater was served with a Substance of Grievance and Letter of Notice from the N.C. State Bar respecting a grievance filed against Atwater by Ronald McNeil.

20. Pursuant to the State Bar's Discipline & Disability Rules, Atwater's response to the Letter of Notice was due no later than May 29, 1996.

21. Atwater did not request or receive an extension of time in which to respond to the Letter of Notice regarding McNeil's grievance. Atwater did not respond to the Letter of Notice concerning McNeil's grievance.

22. On June 5, 1996, the N.C. State Bar Office of Counsel sent a letter to Atwater, reminding him that his response to the Letter of Notice regarding McNeil's grievance had not been received.

23. On July 23, 1996, Atwater filed a written response to the Letter of Notice regarding McNeil's grievance.

24. Atwater's July 23, 1996 response did not constitute a full and fair response to the Letter of Notice as required by § .0112 of the State Bar Discipline & Disability Rules, however, and the N.C. State Bar issued a subpoena to Atwater to appear in the N.C. State Bar's offices to provide a more complete response to the grievance.

25. Atwater was personally served with the subpoena on Sept. 20, 1996 by the Durham County Sheriff's Department. The subpoena commanded Atwater to appear in the offices of the N.C. State Bar on Oct. 17, 1996 to testify concerning his representation of Ronald McNeil and to bring with him all records relating to his representation of McNeil.

26. Atwater failed to appear in compliance with the subpoena and failed to produce any documents relating to his representation of Ronald McNeil.

27. Joyce R. Jeffries (hereafter, Jeffries) was injured in an automobile accident on Sept. 13, 1988.

28. Thereafter, Atwater undertook to represent Jeffries respecting her personal injury claim. Atwater also undertook to assist Jeffries to apply for Social Security disability benefits.

29. Atwater failed to communicate adequately with Jeffries about her personal injury and Social Security disability claims.

30. Atwater failed to take adequate steps to pursue Jeffries's personal injury claim and her Social Security disability benefits claim.

31. On Sept. 12, 1991, the day before the statute of limitations ran on Jeffries' personal injury claim, Atwater filed a complaint on Jeffries' behalf. He took a voluntary dismissal of the suit on March 26, 1992, however, after being served with discovery by the opposing party.

32. On March 25, 1993, Atwater refiled the complaint on Jeffries' behalf.

33. Thereafter, opposing counsel served discovery requests upon Atwater. Atwater failed to respond to these requests in a timely fashion.

34. On Nov. 12, 1993, the court entered an order compelling Jeffries to respond to the discovery requests which had been filed and awarding \$478.25 in attorneys fees, based upon Atwater's failure to respond to discovery.

35. In 1996, Atwater withdrew as Jeffries' attorney in the personal injury case. Thereafter, Jeffries filed a grievance against Atwater with the N.C. State Bar.

36. On July 20, 1996, Atwater was served with a copy of the Substance of Grievance and Letter of Notice issued by the N.C. State Bar respecting a grievance filed against Atwater by Jeffries.

37. On Aug. 1, 1996, counsel for the N.C. State Bar wrote to Atwater, requesting additional information respecting Jeffries' grievance.

38. Atwater did not respond to bar counsel's Aug. 1, 1996 letter, nor to a follow up letter which was sent to him on Sept. 5, 1996.

39. On Sept. 26, 1996, the N.C. State Bar issued a subpoena to Atwater to appear at the N.C. State Bar's offices on Oct. 16, 1996 to testify about his representation of Jeffries and to bring all documents in his possession relating to her legal matters.

40. Atwater was personally served with the subpoena respecting Jeffries' grievance on Oct. 3, 1996.

41. Atwater did not appear in response to the State Bar's subpoena nor did he produce any documents as commanded by the subpoena.

42. On Oct. 24, 1996, the Grievance Committee of the N.C. State Bar admonished Atwater for neglecting a legal matter of a client named Sandra Brooks in State Bar grievance file no. 95G 1348. The Committee also ordered Atwater to pay \$50 in costs associated with the matter.

43. Atwater was personally served with the admonition by the Durham County Sheriff's Dept. on Dec. 4, 1996.

44. Atwater did not reject the admonition, and it therefore became final on or about Dec. 19, 1996.

45. Atwater did not pay the \$50 in costs imposed upon him by the admonition.

46. In March 1997, the N.C. State Bar opened a new grievance file against Atwater, based upon his failure to pay the costs assessed against him by the Grievance Committee in file no. 95G 1348 regarding Brooks. The new grievance file was assigned no. 97G 269.

47. On April 17, 1997, Atwater was personally served with the Letter of Notice and Substance of Grievance in file no. 97G 269, which alleged that he had failed to pay the costs assessed against him in file no. 95G 1348, the Brooks matter.

48. Atwater's response to the substance of grievance and letter of notice in file no. 97G 269 was due on or about May 2, 1997. Atwater did not file a timely response to the letter of notice.

49. On May 27, 1997, Atwater filed a response to the substance of grievance and letter of notice in file no. 97G 269, in which he admitted that he had not paid the \$50 in costs assessed against him in the admonition because he is "medically disabled and indigent."

50. Atwater indicated that he would "respond more fully and specifically to each and every allegation upon his return to the State of North Carolina" but failed to file any other response in file no. 97G 269.

51. Atwater has failed to pay the costs assessed in file no. 95G 1348 and has failed to demonstrate that he is indigent or otherwise unable to pay the costs.

52. Atwater undertook to represent Eugene Bell respecting a personal injury action in 1993.

53. Sometime prior to July 1995, Atwater or his paralegal, John Stokes, submitted a settlement package to N.C. Farm Bureau Ins. Co. on Bell's behalf. The package included a demand for \$69,000 in damages for Bell.

54. On July 18, 1995, Keith Lee, the adjuster handling Bell's claim for N.C. Farm Bureau, telephoned Stokes, who is a disbarred attorney, and offered to settle Bell's claim for a payment of \$15,000. Stokes purported to accept this offer on Bell's behalf.

55. Neither Stokes nor Atwater had discussed the settlement offer with Bell. Bell did not authorize either Stokes or Atwater to settle the case without first consulting with him.

56. In late September or early October 1995, Atwater spoke with Bell on the telephone and told him that he had settled Bell's claim for \$15,000. Bell told Atwater that he did not wish to settle the case for \$15,000 and that, if no better offer was forthcoming, that he desired to litigate the matter. Atwater refused to litigate the case and urged Bell to accept the offer.

57. On or about Sept. 25, 1995, Stokes telephoned Lee and told him that Bell would not accept the settlement check. Lee refused to reopen settlement negotiations, however, insisting that the case had been settled. Thereafter, Lee had a stop payment order placed upon the \$15,000 check.

58. In mid-October 1995, Bell met with Atwater at Atwater's office. During this meeting, Atwater's appearance was disheveled and he appeared to be under the influence of alcohol. During this meeting, Atwater continued to pressure Bell to accept the \$15,000 settlement.

59. In late December 1995, Atwater telephoned Bell and told him that he would not be practicing law any further owing to his ill-health. During this conversation Atwater again attempted to pressure Bell to accept the \$15,000 settlement. Bell refused to accept the settlement offer.

60. Atwater did not disclose to Bell that he had been suspended from the practice of law by the State Bar for three years as a result of a hearing on Nov. 10, 1995 before the Disciplinary Hearing Commission.

61. In April 1996, Bell retrieved his personal injury file from Atwater's office.

62. Bell filed a grievance against Atwater with the N.C. State Bar in July 1996.

63. On May 12, 1997, the Durham County Sheriff's Dept. served Atwater with a subpoena, commanding Atwater to appear in the State Bar's office on May 19, 1997 and to bring with him his representational file respecting Bell's case.

64. Atwater did not appear in compliance with the subpoena nor did he produce the file as commanded.

Based upon the foregoing Findings of Fact, the Hearing Committee hereby enters the following

CONCLUSIONS OF LAW

1. The Disciplinary Hearing Commission has jurisdiction over the subject matter of this complaint and over the person of the Defendant, Oliver E. Atwater.

2. By failing to communicate adequately with McNeil about his legal matter, by failing to keep McNeil adequately informed about the settlement negotiations concerning his personal injury case and by failing to explain to McNeil the significance of settlement of his case, Atwater failed to communicate with his client in violation of Rule 6(b)(1) and failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation in violation of Rule 6(b)(2) of the Rules of Professional Conduct.

3. By failing to file a workers' compensation claim on McNeil's behalf and by failing to contact McNeil's employer to confirm that McNeil had been injured, Atwater neglected a client's legal matter in violation of Rule 6(b)(3) of the Rules of Professional Conduct.

4. By settling McNeil's personal injury claim before McNeil had completed medical treatment and reached maximum medical improvement, Atwater prejudiced a client in violation of Rule 7.1(a)(3) of the Rules of Professional Conduct.

5. By failing to file a timely, full and fair response to the State Bar's letter of notice respecting McNeil's grievance, Atwater failed to respond to a lawful inquiry of a disciplinary authority in violation of Rule 1.1(b) of the Rules of Professional Conduct and by failing to respond to the subpoena issued to him respecting McNeil's grievance, Atwater engaged in conduct amounting to contempt of a committee of the N.C. State Bar, in violation of N.C. Gen. Stat. § 84-28(b)(3).

6. By failing to communicate adequately with Jeffries about her personal injury and Social Security disability cases, Atwater failed to communicate with his client in violation of Rule 6(b)(1) of the Rules of Professional Conduct.

7. By failing to pursue Jeffries' claim for Social Security disability and by failing to respond promptly to discovery filed in the personal injury case, Atwater neglected a client's legal matters in violation of Rule 6(b)(3) and prejudiced a client in violation of Rule 7.1(a)(3) of the Rules of Professional Conduct.

8. By failing to file a full and fair response to the State Bar's letter of notice and substance of grievance respecting Jeffries' grievance and by failing to file any response to the State Bar's follow up inquiries, Atwater failed to respond to a lawful inquiry of a disciplinary authority in violation of Rule 1.1(b) of the Rules of Professional Conduct and by failing to appear as commanded by the subpoena issued to him by the Grievance Committee in connection with Jeffries' grievance, Atwater engaged in conduct

amounting to contempt of a committee of the N.C. State Bar, in violation of N.C. Gen. Stat. § 84-28(b)(3).

9. By willfully failing to pay the \$50 in costs assessed against him by the Grievance Committee in connection with Grievance File No. 95G 1348, Atwater engaged in conduct amounting to contempt of a committee of the N.C. State Bar, in violation of N.C. Gen. Stat. § 84-28(b)(3).

10. By failing to file a timely, full and fair response to the Substance of Grievance and Letter of Notice issued to him by the Grievance Committee in Grievance File No. 97G 269, Atwater failed to respond to a lawful inquiry of a disciplinary authority in violation of Rule 1.1(b) of the Rules of Professional Conduct.

11. By failing to appear on May 19, 1997 and failing to produce his representational file respecting Bell's case in compliance with the State Bar's subpoena Atwater failed to respond to a lawful inquiry of a disciplinary authority in violation of Rule 1.1(b) of the Rules of Professional Conduct and engaged in conduct amounting to contempt of a committee of the N.C. State Bar, in violation of N.C. Gen. Stat. § 84-28(b)(3).

12. By permitting his paralegal, John Stokes, to settle Bell's personal injury claim without Bell's prior authorization, Atwater prejudiced a client in violation of Rule 7.1(a)(3), failed to take reasonable efforts to ensure that Stokes' conduct was compatible with Atwater's professional obligations in violation of Rule 3.3(b) and failed to abide by his client's decision concerning whether to accept an offer of settlement in violation of Rule 7.1(c)(1) of the Rules of Professional Conduct.

13. By attempting to pressure Bell into accepting a settlement offer in December 1995, after Bell had already refused to accept the settlement offer, and without revealing that his own law license had been suspended by the Disciplinary Hearing Commission, Atwater engaged in a conflict of interest in violation of Rule 5.1 of the Rules of Professional Conduct.

Based upon the foregoing Findings of Fact and Conclusions of Law and upon evidence and argument of the State Bar concerning the appropriate discipline, the hearing committee hereby makes the additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. Atwater failed to comply with an order dated June 16, 1998, entered by the Chair of the Hearing Committee, directing Atwater to respond to the State Bar's first interrogatories and first requests to produce documents by July 6, 1998.

2. Atwater has failed to submit himself for a 96 hour chemical dependency evaluation which was required as a condition precedent to reinstatement of his law

license by the Disciplinary Hearing Commission in N.C. State Bar v. Atwater, 95 DHC 16.

3. Atwater has failed to comply with the State Bar's mandatory continuing legal education requirements. The records of the N.C. State Bar indicate that Atwater only attended 1 hour of mandatory continuing legal education between 1994 and 1995, leaving him with a deficit of 23 hours of continuing legal education requirements for that period. Atwater was suspended from the practice of law by the Board of Continuing Legal Education in 1996. Atwater also owes the Board of Continuing Legal Education \$125 in late compliance penalties and would have to pay a \$250 reinstatement fee before seeking reinstatement of his law license.

4. Atwater's misconduct is aggravated by the following factors:

- a) Atwater has substantial experience in the practice of law.
- b) Atwater engaged in multiple violations of the Rules of Professional Conduct.
- c) Atwater engaged in a pattern of misconduct.
- d) Atwater was suspended from the practice of law by the DHC for three years in 1995 and was admonished by the State Bar in October 1996.
- e) Atwater has demonstrated his unwillingness to comply with his professional obligation to respond to inquiries of the N.C. State Bar and has exhibited contempt for the State Bar and its committees by failing to respond to the State Bar's letters of notice, failing to comply with the State Bar's subpoenas and failing to comply with the Hearing Committee Chair's June 16 discovery order.

Based upon the foregoing aggravating factors and the arguments of counsel for the State Bar, the hearing committee hereby enters the following:

ORDER OF DISCIPLINE

1. The Defendant, Oliver E. Atwater, is hereby disbarred from the practice of law beginning 30 days from service of this order upon Atwater.
2. The Defendant shall submit his license and membership card to the Secretary of the N.C. State Bar no later than 30 days following service of this order upon the Defendant.
3. The Defendant shall comply with all provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the N.C. State Bar Discipline & Disability Rules.
4. Prior to filing a petition for reinstatement, the Defendant shall demonstrate by clear, cogent and convincing evidence that:

a) he has submitted himself for a comprehensive 96 hour chemical dependency evaluation at a facility approved by the Executive Director of the PALS Program and that he has complied with the recommendations of the evaluation.

b) he has abstained from alcohol for a period of at least one year next preceding the date upon which he petitions for reinstatement to the practice of law. Defendant shall document his abstinence by submitting reports from a testing facility approved by the Executive Director of PALS showing that the Defendant has undergone random urine screens at least once a month during the one year period next preceding his petition for reinstatement and that each test has been negative for the presence of alcohol or any other mind altering and addictive substance other than those prescribed for Defendant by his treating physician. Failure to take a test or otherwise comply with the procedures of the testing company shall be grounds for denial of reinstatement. Defendant shall be responsible for the cost of all such tests and reports.

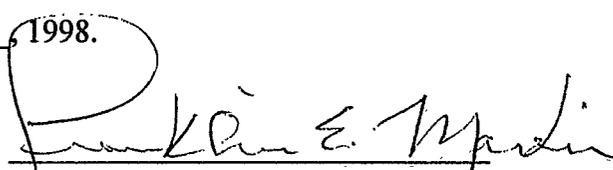
c) he has complied with all requirements of the Board of Continuing Legal Education, has paid all late fees and penalties due and owing at the time of his petition for reinstatement and is current with his mandatory continuing legal education requirements.

d) he has paid the costs of this proceeding and all costs assessed against him by the State Bar in any other disciplinary matter.

5. The requirements of paragraph 4 are in addition to the other requirements for reinstatement set out in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0125 of the State Bar Discipline & Disability Rules.

Signed by the Chair of the Hearing Committee with the consent of the other Committee members.

This the ³¹~~30~~ day of October, 1998.


Franklin E. Martin, Chair
Disciplinary Hearing Committee