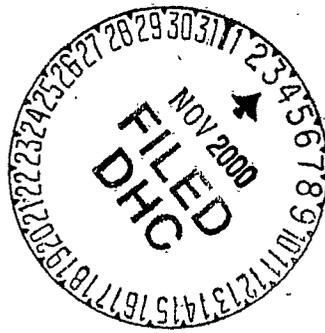


WAKE COUNTY  
NORTH CAROLINA



12448

BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
00 DHC 21

THE NORTH CAROLINA STATE BAR, )  
Plaintiff )  
v. )  
JON S. JOHNSON, ATTORNEY )  
Defendant )

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER OF DISCIPLINE

This matter was heard on November 3, 2000, before a hearing committee of the Disciplinary Hearing Commission composed of James R. Fox, Chairman, Joseph G. Maddrey, and Robert B. Frantz. Defendant, Jon S. Johnson, failed to appear in person or through an attorney. Douglas J. Brocker represented plaintiff. Based upon the pleadings and the evidence introduced at the hearing, the hearing committee hereby enters the following:

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar (hereafter "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. Defendant, Jon H. Johnson, (hereafter "Johnson"), was admitted to the North Carolina State Bar on August 18, 1984, 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 the times relevant to this complaint, Johnson actively engaged in the practice of law in the State of North Carolina and maintained a law office in the city of Matthews, Mecklenburg County, North Carolina.
4. During 1993 to 1998, Johnson's law office was a sole proprietorship operated by him.
5. During 1993 to 1998, Johnson had employees in his law office to whom he paid wages and salaries.
6. For each pay period, Johnson issued his employees a check for their net salary.
7. Johnson withheld from his employees paychecks the appropriate amounts for state and federal taxes and other deductions and held those funds in trust for payment to the state and federal government on behalf of his employees.
8. For tax years 1993 through 1998, Johnson provided employees with W-2 forms.
9. The W-2 forms Johnson provided to his employees included the total compensation paid, and separately listed the social security, Medicare, federal income, and state income taxes withheld from his employees.
10. Johnson provided the W-2 forms to his employees in January or February of the year immediately following the previous tax year. For example, Johnson provided the W-2 forms for 1993 in January or February 1994.
11. Johnson, therefore, knew the amounts he was supposed to be withholding for his employees and paying to the appropriate federal and state government agencies.
12. Johnson failed to file with the United States Internal Revenue Service ("IRS") in a timely fashion his federal quarterly and annual tax returns for employee withholding for all quarters and years from 1993 through 1998, inclusive.
13. Johnson failed to file with the North Carolina Department of Revenue ("NCDOR") in a timely fashion his state quarterly and annual returns for employee withholding taxes for all quarters and years from 1993 through 1998, inclusive.

14. Johnson failed to pay to the IRS in a timely fashion his federal employee withholding taxes for all quarters and years from 1993 through 1998, inclusive.
15. Johnson failed to pay to the NCDOR in a timely fashion his state employee withholding taxes for all quarters and years from 1993 through 1998, inclusive.
16. Johnson's unpaid and delinquent federal employee withholding taxes for 1993 through 1998 exceeded \$60,000, as of approximately August 1, 1999.
17. The penalties and interest on Johnson's unpaid and delinquent federal employee withholding taxes for 1995 through 1998 exceeded \$35,000, as of approximately August 1, 1999.
18. Johnson's unpaid and delinquent state employee withholding taxes for 1993 through 1998 exceeded \$13,000, as of approximately June 1, 1999.
19. The penalties and interest on Johnson's unpaid or delinquent state employee withholding taxes for 1993 through 1998 exceeded \$3,500, as of approximately June 1, 1999.
20. During 1993 through 1998, Johnson continued to receive income from his law office, paid his employees salaries, and paid other expenses necessary to run his law office.
21. In March 1996, an employee in Johnson's office prepared state and federal quarterly and annual tax returns for 1995 and provided them to Johnson.
22. The employee also provided Johnson with instructions on where the documents needed to be filed.
23. Johnson failed to file returns or pay taxes after receiving these 1995 returns from his employee.
24. Sometime during the first half of 1999, Johnson became aware that a former employee had or was going to report him to the IRS and NCDOR for failure to file returns and pay employee withholding taxes.
25. In June 1999, Johnson filed with the NCDOR his state employee withholding tax returns for 1995 through 1998.

26. In June 1999, Johnson paid to NCDOR his delinquent state employee withholding taxes for 1995 through 1998.
27. In August 1999, Johnson filed with the IRS his federal employee withholding tax returns for 1995 through 1998.
28. In August 1999, Johnson paid to the IRS his delinquent employee withholding taxes, interest, and penalties for 1995 through 1998.
29. On January 10, 2000, respondent received a letter of notice and substance of grievance from the North Carolina State Bar alleging that he had failed to file and pay employer withholding taxes for 1993 through 1998.
30. On approximately January 31, 2000, Johnson filed with the IRS and NCDOR his federal and state employee withholding tax returns for 1993 and 1994.
31. At the time he filed his returns, Johnson paid the federal and state employer withholding taxes due for 1993 and 1994.
32. Johnson has not paid the interest and penalties due for state and federal employee withholding taxes for 1993 and 1994.
33. Johnson conducted a real estate closing for Willie and Annette Simpson on approximately April 25, 1996. The Simpson closing involved a refinancing of the Simpson's existing property and the payoff of their previous mortgage holder, Principal Residential Mortgage (hereafter "Principal").
34. In 1998, the Simpsons experienced difficulties in attempting to refinance their property because Residential had not cancelled the previous deed of trust.
35. The Simpsons contacted Johnson during 1998 and 1999 and requested that Johnson ensure that Principal cancel the previous deed of trust.
36. The Simpson's eventually filed a grievance with the 26<sup>th</sup> Judicial District Grievance Committee.
37. The Chairman of the local Grievance Committee sent Johnson a copy of the Simpson's grievance on May 4, 1999, and instructed him to respond within 15 days.

38. Johnson failed to respond to the grievance within 15 days of his receipt of this letter.
39. On May 25, 1999, Johnson's office received a follow-up letter from the local investigating attorney notifying him that he had failed to respond, and instructing him to respond within 15 days.
40. Johnson again failed to respond to the grievance.
41. The defendant was properly served with process and the hearing was held with due notice to all parties.
42. The State Bar filed a complaint against Johnson in this matter on August 10, 2000.
43. Johnson was served with the summons and complaint in this matter by certified mail, return receipt requested, on August 14, 2000.
44. Johnson's answer, as set forth in the summons, was due no later than 20 days after service of the complaint – on or about September 5, 2000.
45. Johnson did not file an answer or other responsive pleading in this matter.
46. On September 13, 2000, upon motion of the office of counsel, the Secretary of the State Bar entered default against Johnson.
47. Johnson was served with the motion for entry of default, grounds for personal jurisdiction, and entry of default.
48. On September 20, 2000, the State Bar filed a motion for entry of order of discipline and notice of hearing for its motion.
49. The motion for entry of order of discipline and notice of hearing setting that motion for October 27, 2000, were served upon Johnson.
50. On October 23, 2000, attorney Harry H. Harkins, Jr. requested a continuance of the October 27, 2000 hearing date on behalf of defendant.
51. On October 24, 2000, the Hearing Committee entered an order continuing the October 27<sup>th</sup> hearing date in order to allow Mr. Harkins time to prepare to represent Johnson.
52. Attorney Harkins entered an appearance on behalf of Johnson and became counsel of record for him on October 24, 2000.

53. On October 27, 2000, the Hearing Committee entered an order rescheduling the hearing date in this matter for November 3, 2000.
54. On October 27, 2000, Attorney Harkins was provided a copy of the order rescheduling the hearing date for November 3, 2000.
55. Attorney Harkins subsequently communicated the November 3, 2000, rescheduled hearing date to Johnson.
56. On October 30, 2000, attorney Harkins moved to withdraw, asserting that he had been unable to get Johnson to communicate with him.
57. Thereafter, on October 30, 2000, Johnson personally received an order rescheduling the hearing date for November 3, 2000.
58. Later that same day, Johnson communicated with the State Bar acknowledging that he was aware of the rescheduled November 3, 2000 hearing date.
59. On November 1, 2000, the Hearing Committee entered an order allowing Mr. Harkins to withdraw and confirming the November 3, 2000 hearing date.
60. On November 1, 2000, Johnson received a copy of the order allowing Mr. Harkins to withdraw and confirming the November 3, 2000 hearing date.
61. Because a default has been entered against Johnson, the allegations in the State Bar's complaint are deemed admitted and the violations of the Rules of Professional Conduct set out in the complaint are deemed established as a matter of law.
62. Apart from the effect of the entry of default, the State Bar introduced evidence in support of the allegations in the complaint.
63. The Hearing Committee found that this evidence established each of the Rule violations alleged in the complaint by clear, cogent, and convincing evidence.
64. Johnson was not present at the hearing, nor was he represented by counsel, despite the Hearing Committee's efforts to allow him to be represented by counsel in providing a continuance of the original October 27<sup>th</sup> hearing date.

65. Johnson was afforded the opportunity object to evidence tendered by the Bar and to introduce evidence on his own behalf, but waived that right by failing to appear at the hearing in person or through counsel.
66. The State Bar requested in discovery in this action information and documentation regarding Johnson's filing and payment of his personal income taxes.
67. Johnson failed to respond to the discovery requests or the State Bar's subsequent Motion to Compel responses.
68. The Hearing Committee made no findings regarding Johnson's personal income taxes and did not consider this issue in any way in entering this order of discipline.

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

#### CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over Johnson and the subject matter.
2. Johnson's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) and (3) in that Johnson committed the following violations of the North Carolina Rules of Professional Conduct (hereafter "Rule") or Revised Rules of Professional Conduct (hereafter "Revised Rule"):
  - A. By willfully failing to collect or pay over a tax, in violation of 26 U.S.C. § 7202, and willfully failing to file returns, supply information, or pay tax in violation of 26 U.S.C. § 7203, Johnson committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in violation of Rule 1.2(b) and Revised Rule 8.4(b);
  - B. By failing to willfully collect or truthfully account for and pay over taxes and willfully failing to pay the tax, file the return, or supply the information in violation of N.C. Gen. Stat. § 105-236(8) & (9), Johnson committed criminal acts that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer in violation of Rule 1.2(b) and Revised Rule 8.4(b);

- C. Johnson's foregoing actions, set out in sub-paragraphs A and B above, constituted conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c) and Revised Rule 8.4(c).
- D. By failing to respond to a lawful demand for information from a disciplinary authority, Johnson violated Revised Rule 8.1(b) and NCGS § 84-28(b)(3).

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

#### FINDINGS OF FACT REGARDING DISCIPLINE

1. Johnson's misconduct is aggravated by the following factors:
  - A. A lengthy and significant prior disciplinary history:
    - (i) Johnson was reprimanded in November 1989 for repeatedly failing to respond to a client's grievance and for failing to zealously represent that client.
    - (ii) Johnson was reprimanded in November 1992 for failing to communicate with a client and for repeatedly failing to respond to that client's grievance.
    - (iii) In December 1999, Johnson was suspended for six months, stayed for two years, for repeatedly failing to respond and participate in a fee arbitration filed by one of his clients and for repeatedly failing to respond to the resulting grievance in violation of Revised Rules 1.5(f) and 8.1(b).
  - B. Dishonest or selfish motive,
  - C. A pattern of misconduct,
  - D. Multiple offenses over a period of numerous years, and
  - E. Substantial experience in the practice of law at the time of the offenses.
2. Johnson's misconduct is mitigated by the following factors:
  - A. Personal or emotional problems: Johnson suffered several deaths in his family, which in turn have contributed to his depression mentioned below,

B. Character or reputation, and

C. Mental disability or impairment: Johnson has been diagnosed with, and is currently being treated for, recurrent major depression.

3. The aggravating factors outweigh the mitigating factors.

Based upon the foregoing aggravating and mitigating factors and the arguments of the parties, the hearing committee hereby enters the following:

#### ORDER OF DISCIPLINE

1. Defendant, Jon S. Johnson, is hereby suspended from the practice of law for a period of five years, beginning 30 days from the service of this order upon him.
2. Johnson shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon him.
3. After no less than three years following the effective date of this order, Johnson may file a verified petition for a stay of the remaining period of the suspension in accordance with the requirements of N.C. Admin. Code Chapter 1, Subchapter B § .0125(b) of the North Carolina State Bar's Discipline and Disability Rules ("Discipline Rules"). Johnson's remaining suspension may be stayed if he establishes by clear, cogent, and convincing evidence the following conditions:
  - A. Prior to the filing of any petition for stay of suspension or reinstatement, Johnson shall meet all tax obligations for which he is currently in default, including but not limited to the filing of all past due federal and state tax returns, and the payment to the appropriate taxing authority of all taxes, withholdings, penalties, and interest due and owing on all state and federal tax returns.
  - B. Prior to the filing of any petition for stay of suspension or reinstatement, Johnson shall timely file all tax returns and other related filings which he is required to make by state or federal law, and shall timely pay all taxes or payments that are due and owing pursuant to those filings or by law.
  - C. With any petition for stay of suspension or reinstatement, Johnson shall provide to the North Carolina State Bar sufficient evidence that he has fulfilled the requirements of subparagraphs A and B above, including but not limited to personal income taxes, and shall execute authorizations and

releases requested by the North Carolina State Bar to enable it to verify with any appropriate taxing authority that Johnson has fulfilled the provisions of subparagraphs A and B above.

- D. With any petition for stay of suspension or reinstatement, Johnson shall submit a written certification from his treating psychiatrist that he has followed all recommendations for treatment for any diagnosed psychological or psychiatric condition(s), including depression, for the past six months. Johnson also must execute a release allowing the State Bar to obtain his medical records and attach that release to his petition for reinstatement.

If Johnson's treating physician is not recommended by the State Bar, the State Bar shall have the right to have Johnson evaluated by a psychiatrist, selected by it, prior to reinstatement.

- E. Prior to filing any petition for a stay of suspension, Johnson shall enter into a recovery contract and agree to participate in the North Carolina State Bar Lawyer's Assistant Program (hereafter "LAP") throughout the remainder of the suspension. Johnson shall include proof of compliance with this requirement with any petition for a stay of suspension.
- F. Johnson has complied with all the requirements of discipline Rule .0124.
- G. Johnson has complied with all the requirements of discipline Rule .0125(b).
- H. Johnson has paid all the costs assessed by the Secretary in connection with this proceeding, within 30 days of service of these costs by the Secretary.
- I. Johnson has not violated any federal or state laws.
4. Upon the entry of an order staying the remaining term of Johnson's suspension, such order of stayed suspension may continue in effect for the balance of the term of suspension only upon compliance with all the following conditions:
- A. Johnson shall not violate any federal or state law.
- B. Johnson shall not violate any provisions of the Revised Rules of Professional Conduct or subsequently enacted Rules of the North Carolina State Bar.

- C. Johnson shall timely file all tax returns or other related filings which he is required to make by state or federal law, and shall timely pay all taxes or payments that are due and owing pursuant to those filings or by law. Johnson shall forward copies of all filings and evidence of all payment to the North Carolina State Bar simultaneously with the filing of such documents.
- D. Johnson shall agree to be supervised by LAP and cooperate fully with that program. In connection therewith, Johnson shall :
- i. comply in all respects with the recovery contract entered into with LAP throughout the remaining period of the suspension,
  - ii. authorize his psychiatrist, psychologist, and any other physician or medical personnel who evaluates or treat him during the suspension, to release upon request, to the State Bar office of Counsel and LAP, information about his status as a patient,
  - iii. instruct his treating physician and psychologist to inform the Office of Counsel and LAP immediately in writing if, at any point, during the suspension he ceases to be a patient or otherwise fails to comply with the course of treatment prescribed by his psychiatrist and psychologist,
  - iv. be responsible for ensuring that his treating psychiatrist, Dr. G.H. Dornblazer, or another psychiatrist approved in advance by the State Bar, forward quarterly reports to LAP certifying that for the past quarter:
    - (a) He has followed all recommendations for treatment of any diagnosed psychological conditions, including depression; and
    - (b) In the psychiatrist's opinion, Johnson's psychiatric condition(s) will not prevent him from adequately performing his responsibilities as an attorney, or pose a threat to the public, if he is allowed to continue practicing law.

These reports shall be provided to LAP no later than January 1<sup>st</sup>, April 1<sup>st</sup>, July 1<sup>st</sup>, and October 1<sup>st</sup>, for each year during the remainder of the stayed suspension.

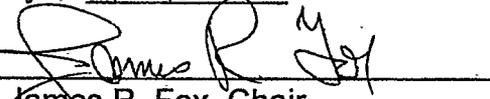
- v. be responsible for ensuring that his treating psychologist, Dr. Mark Worthen, or another psychologist approved in advance by the State Bar, forward quarterly reports to LAP certifying that for the past quarter:
  - (a) He has followed all recommendations for treatment of any diagnosed psychological conditions, including depression; and

(b) In the psychologist's opinion, Johnson's psychological condition(s) will not prevent him from adequately performing his responsibilities as an attorney, or pose a threat to the public, if he is allowed to continue practicing law.

These reports shall be provided to LAP no later than January 1<sup>st</sup>, April 1<sup>st</sup>, July 1<sup>st</sup>, and October 1<sup>st</sup>, for each year during the remainder of the stayed suspension.

- vi. be responsible for having LAP forward quarterly reports to the State Bar Office of Counsel no later than February 1<sup>st</sup>, May 1<sup>st</sup>, August 1<sup>st</sup>, and November 1<sup>st</sup> for each year during the remainder of the stayed suspension.
5. In the event that Johnson fails to petition for, or meet the requirements for any stay of the suspension, or in the event that any stay of the suspension is lifted, and the suspension is reactivated, as a condition of reinstatement following the suspension, Johnson must meet the requirements of subparagraphs A, B, C, D, F, G, and H of paragraph 3 above. This requirement is in addition to, and shall not deem to limit the provisions of Disciplinary Rule .0125

Signed by the chair with the full knowledge and consent of all other members of the hearing committee, this the 3rd day of November 2000.

  
James R. Fox, Chair