

NORTH CAROLINA

WAKE COUNTY

BEFORE THE
GRIEVANCE COMMITTEE
NORTH CAROLINA STATE BAR
98G0640

IN THE MATTER OF

Maynard A. Harrell, Jr.,
ATTORNEY AT LAW

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REPRIMAND

On October 18, 2000, the Grievance Committee of the North Carolina State Bar met and considered the grievance filed against you by a Complainant, Mr. Samuel Davenport.

Pursuant to Section .0113(a) of the Discipline & Disability Rules of the North Carolina State Bar, the Grievance Committee conducted a preliminary hearing. After considering the information available to it, including the grievance, your response to the letter of notice, your response to the Office of Counsel's request for additional information, and pleadings obtained from the Office of Administrative Hearings filed in Samuel Davenport v. NC Department of Corrections, 96 OSP 1973, 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, a reprimand, or a 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.

This reprimand is issued based on the following facts, as found by the Grievance Committee: At the direction of his employer, the NC Department of Corrections (hereafter, "NCDOC"), Mr. Davenport submitted to a drug test on June 26, 1996. On July 9, 1996, the

NCDOC reported that Mr. Davenport tested positive for marijuana based on a report that it had received from a laboratory. Mr. Davenport immediately retained you on July 11, 1996 to represent him in defending any agency action based on the positive drug test. On August 21, 1996, the NCDOC fired Mr. Davenport by issuing to him a formal Notice of Dismissal from Employment. The Notice of Dismissal advised that an internal appeal must be filed within 15 days. Mr. Davenport paid your retainer by August 30, 1996. On August 30, 1996, you filed a notice of Mr. Davenport's internal appeal of the termination of his employment with the NCDOC. On September 3, 1996, Mr. Davenport received a notice of the proposed 5-year suspension of his correctional officer certification with the North Carolina Criminal Justice Standards Commission. This notice of suspension stated in bold text that failure to appeal within 60 days would result in the immediate suspension of Mr. Davenport's correctional officer certification. The letter explained that "a person who has had his certification suspended may not remain employed or appointed as a criminal justice officer . . . during a period for which the person's certification is suspended." Mr. Davenport personally delivered the September 3, 1996 notice of suspension to you and had numerous telephone conversations with you concerning the suspension of his correctional officer certification. Mr. Davenport relied on you to request an administrative hearing of this separate agency action. Mr. Davenport's correctional officer certification was automatically suspended on November 4, 1996 because you failed to request on his behalf a formal administrative hearing within 60 days.

On October 31, 1996, notice was issued to Mr. Davenport that an Employee Relations Committee had convened on October 9, 1996 to hear his internal appeal of the termination of his employment and the Committee had unanimously agreed that personal misconduct had occurred based on the drug test results. On November 26, 1996, you filed a notice of appeal with the Office of Administrative Hearings from the Employee Relations Committee's decision. A scheduling order was served on you setting a hearing in Davenport v. NCDOC for the week beginning April 21, 1997. The scheduling order set April 7, 1997 as the deadline for completing discovery and required each party to file a prehearing statement by January 18, 1997. On January 17, 1997, you served a Prehearing Statement, stating the issues to be decided as whether Mr. Davenport's employment termination was wrongful, whether the method and manner of selection for testing as well as the frequency of testing was improper, and whether Mr. Davenport's rights were violated because he was not given an opportunity to have the test sample independently tested. On February 7, 1997, the NCDOC's attorney filed a motion for summary judgment, seeking a ruling in its favor that it had just cause to dismiss Mr. Davenport from his job because Mr. Davenport's certification as a correctional officer was suspended effective November 4, 1996 and could not be reinstated for a period of 5 years. The summary judgment motion explained that the suspension of Mr. Davenport's certification was a separate and independent agency action and that Mr. Davenport had failed to request a hearing. The NCDOC's motion for summary judgment was served on you by depositing a copy of the same in first-class mail on February 7, 1997. You filed no response to the NCDOC's motion for summary judgment.

On or around March 17, 1997, you were served with a notice of hearing, setting a hearing for Davenport v. NCDOC for the week beginning April 21, 1997. On April 3, 1997, the NCDOC's attorney filed a motion to continue the hearing, reciting as grounds for a continuance that "the Clerk to the Administrative Law Judge assigned to this matter has been attempting to

reach the attorney for Petitioner [you] in order to schedule a phone conference on [the NCDOC's] Motion for Summary Judgment, but she has so far been unsuccessful in her attempts to reach him." The motion to continue was served on you by depositing a copy of the same in first class mail. On April 4, 1997, the Administrative Law Judge (hereafter "ALJ") issued a Recommended Decision on the NCDOC's motion for summary judgment, noting a "lack of response from counsel for Petitioner [you]" and recommending that summary judgment be granted for the NCDOC. On or around April 4, 1997, a copy of the Recommended Decision and notice of opportunity to file exceptions to the Recommended Decision were served on you by first class mail.

On or around July 14, 1997, the Office of Administrative Hearings issued a memorandum to you and to the NCDOC's attorney, giving notice that Davenport v. NCDOC was scheduled to be heard by the State Personnel Commission at its meeting on August 14 - 15, 1997. The memorandum was served on you by certified mail. The memorandum specified that, if either party wished to make an oral presentation, a request must be made in writing within 15 days of the notice. The memorandum enclosed rules concerning briefs and legal memoranda to be presented, as well as rules concerning written exceptions and proposed alternative findings, conclusion and recommendations to the Recommended Decision. You did not request to be heard by the State Personnel Commission and did not file exceptions or proposed alternative findings to the Recommended Decision granting summary judgment in favor of the NCDOC.

You claim that Mr. Davenport terminated your services in February 1997; however, you did not file a motion to withdraw with the Office of Administrative Hearings or otherwise seek permission of the tribunal to withdraw as counsel for Mr. Davenport. The opposing counsel, the ALJ and the Office of Administrative Hearings continued to serve pleadings on you as counsel for Mr. Davenport in the proceedings up through and including July 14, 1997. You did nothing to advise the Office of Administrative Hearing or opposing counsel that you no longer represented Mr. Davenport. You did not forward a copy of the pleadings and notices that you received to Mr. Davenport, even though it should have been obvious to you that no other attorney had filed an appearance on Mr. Davenport's behalf and that Mr. Davenport was not otherwise receiving pleadings or information concerning what was happening in his case. You refunded to Mr. Davenport the unearned portion of Mr. Davenport's retainer in October or November 1997, but did not advise him of the adverse outcome of the proceedings, even though you had continued to receive notices and pleadings from the Office of Administrative Hearings and should have been aware of what happened in the proceedings.

Mr. Davenport retained a new attorney, William Little, in April 1998. Mr. Little obtained a copy of the pleadings in Davenport v. NCDOC from the Office of Administrative Hearings. Based on the pleadings and investigation conducted by Mr. Little, Mr. Davenport learned for the first time what happened in the case, including the fact that no formal appeal had been taken related to the agency action to suspend his correctional certification; the fact that a motion for summary judgment had been filed by the NCDOC and that you had not filed a response to the motion for summary judgment; the fact that the ALJ had reached an adverse Recommended Decision and no exceptions had been filed; and the fact that there had been a final hearing before the State Personnel Commission on or around August 14, 1997. At the request of Mr. Little, the hearing before the State Personnel Commission was rescheduled on the grounds that Mr.

Davenport did not receive timely notice of the hearing from you. On Mr. Davenport's behalf, Mr. Little also filed a motion with the Criminal Justice Standards Commission seeking to reopen the suspension of his correctional officer certification based on the fact that you did not appeal the suspension. This motion was denied. A final judgment was entered against Mr. Davenport on or around April 6, 1998. There is no legal basis for appeal.

Based on the foregoing facts, the Grievance Committee concluded that you violated Rule 6(b)(1) of the Rules of Professional Conduct by failing to keep Mr. Davenport reasonably informed about the status of the matter in that you did not properly and accurately advise Mr. Davenport about the status of the administrative proceedings. The Grievance Committee concluded that you violated Rule 6(b)(2) of the Rules of Professional Conduct in that you failed to explain the administrative proceedings to Mr. Davenport to the extent reasonably necessary to permit him to make informed decisions regarding the representation. The Grievance Committee concluded that you also violated Rule 6(b)(3) of the Rules of Professional Conduct by failing to act with reasonable diligence and promptness in representing Mr. Davenport in that you did not file an appeal from the separate administrative agency action suspending Mr. Davenport's correctional officer certificate and you did not respond to the motion for summary judgment. You also did not respond to telephone inquiries from the ALJ's clerk regarding the motion for summary judgment and you did not file exceptions to the Recommended Decision or otherwise protect Mr. Davenport's interests in proceeding to a trial on the merits.

To the extent that you claim that Mr. Davenport in fact terminated your services in February 1997,¹ the Grievance Committee concluded that you violated Rule 2.8 of the Rules of Professional Conduct. Upon termination of your services by Mr. Davenport, you were required by Rule 2.8(a)(1) to obtain permission of the tribunal to withdraw from employment as Mr. Davenport's attorney. You did not file a motion to withdraw or otherwise seek and obtain permission to withdraw. In fact, the opposing counsel and the Office of Administrative Hearings continued to send you pleadings and notices throughout the period of February 1997 to and including July 14, 1997. In any event, you were required by Rule 2.8(a)(2) to refrain from withdrawing as Mr. Davenport's attorney until you had taken reasonable steps to avoid foreseeable prejudice to Mr. Davenport's rights, including allowing time for Mr. Davenport to obtain new counsel, giving notice to Mr. Davenport of his immediate need to respond to the NCDOC's summary judgment motion, delivering to Mr. Davenport all papers and pleadings related to the proceedings, and complying with your obligation to formally withdraw as counsel of record so that the Office of Administrative Hearings and opposing counsel could notify Mr. Davenport or his substitute counsel of on-going proceedings in the matter. You failed to comply with your obligations under Rule 2.8(a)(1) and (a)(2), resulting in prejudice to Mr. Davenport's interests and claims.

¹ For the sake of making a determination on the written record before it, the Grievance Committee assumed as true your assertion that Mr. Davenport terminated your services in February 1997, but the Grievance Committee notes that Mr. Davenport denies that he terminated your services at that time. He admits that he received from you in October or November 1997 a partial refund of the retainer that he paid to you. Given that you did not file any motion to withdraw or give notice to the Office of Administrative Hearings that Mr. Davenport had terminated your services, even though you continued to receive pleadings and notices in the proceedings, your own conduct indicates that you continued to represent Mr. Davenport throughout the proceedings, in which case you violated Rule 6 of the Rules of Professional Conduct by failing to act diligently and by failing to keep Mr. Davenport reasonably informed in all phases of the administrative proceedings.

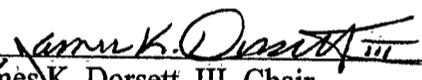
The Grievance Committee was seriously disturbed by the fact that you continued to receive pleadings from the Office of Administrative Hearings up through and including July 1997 and yet did not attempt to notify the Office of Administrative Hearings that you were no longer counsel for Mr. Davenport and you did not forward the pleadings to Mr. Davenport in an effort to protect his interests. You utterly failed to communicate with Mr. Davenport concerning the on-going proceedings, even though it should have been apparent to you that the tribunal and opposing counsel continued to believe that you were the attorney representing Mr. Davenport. Yet, you did nothing to correct the record on this point.

The Grievance Committee considered the fact that you have no prior disciplinary history with the North Carolina State Bar in mitigation of your conduct.

You are hereby reprimanded by the North Carolina State Bar for 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 the 10 day of November, 2000.


James K. Dorsett, III, Chair
Grievance Committee
The North Carolina State Bar