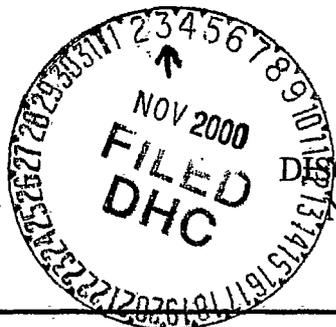


NORTH CAROLINA

WAKE COUNTY



13619

BEFORE THE
 DISCIPLINARY HEARING COMMISSION
 NORTH CAROLINA STATE BAR
 00 DHC 18

THE NORTH CAROLINA STATE BAR,)
 Plaintiff)
 v.)
 CAROLYN N. MIYASHITA, Attorney,)
 Defendant)

FINDINGS OF FACT
 AND
 CONCLUSIONS OF LAW

This matter came on to be heard on November 3, 2000 before a hearing committee of the Disciplinary Hearing Commission composed of James R. Fox, Chair; Joseph G. Maddrey, and Robert B. Frantz. Larissa J. Erkman represented the North Carolina State Bar and the defendant, Carolyn N. Miyashita appeared but was not represented by counsel. Based upon the allegations in the Complaint which were taken as true due to the default of the defendant, and the evidence presented at the hearing, 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, Carolyn N. Miyashita (hereinafter Miyashita), was admitted to the North Carolina State Bar on September 18, 1987 and is, and until January 16, 1999, was 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. As of January 16, 1999, Miyashita's license to practice in North Carolina was suspended, but Miyashita remained subject to the rules and regulations of the North Carolina State Bar and the laws of the State of North Carolina.

3. During the times relevant to this complaint, Miyashita actively engaged in the practice of law before the Immigration and Naturalization Service in the City of San Francisco, CA by virtue of her license to practice law in North Carolina.

4. On August 31, 2000, Miyashita was served with the Complaint in this matter by certified mail, return receipt requested, restricted delivery, as evidenced by the return receipt which she signed that is contained in the file.
5. Miyashita failed to file an answer or other responsive pleading in this matter.
6. Miyashita was served with the State Bar's Motion for Order of Discipline and a Notice of Hearing advising her of this hearing date.
7. Alexander Volobuev (hereinafter, Volobuev) was a foreign Principal Violinist present in the United States as a foreign exchange student on a J-1 visa.
8. In March 1998, Volobuev was hired by the Alabama Symphony Orchestra as a Principal Second Violinist.
9. As a result, Volobuev retained Miyashita to file an O-1 Alien of Extraordinary Ability Petition (hereinafter, O-1 visa petition) on his behalf with the Immigration and Naturalization Service (hereinafter, INS).
10. Volobuev paid Miyashita the \$500 retainer she requested in March 1998.
11. Volobuev's J-1 visa was to expire in the summer of 1998.
12. Miyashita agreed to apply for Volobuev's visa within two weeks, and complete the visa process within a month, to enable Volobuev to have the visa in time for him to travel to Greece to join the Athens Chamber Orchestra for its summer tour.
13. When Miyashita had not gotten Volobuev's O-1 visa by the end of April as promised, Volobuev applied for an extension of his J-1 visa.
14. The INS granted Volobuev an extension of his J-1 visa until January 1999.
15. Volobuev made repeated requests of Miyashita concerning the status of his O-1 visa petition.
16. Miyashita did not respond to Volobuev's requests for a status update.
17. In July 1998, Volobuev attempted to discharge Miyashita. However, when he finally reached her by telephone, Miyashita assured Volobuev that she was within a week of filing his petition. As a result, Volobuev did not discharge Miyashita.
18. In August 1998, Volobuev went to Greece as planned. While there, Volobuev was able to secure support letters from some of the top symphony conductors and performers in Europe to attach to his petition.

19. When he returned to the United States in September 1998, Volobuev learned that Miyashita had not yet filed his O-1 visa petition.

20. Volobuev sent the letters of support to Miyashita to be included with his O-1 visa petition.

21. Volobuev called Miyashita weekly upon his return to the United States. In October 1998, Volobuev finally was able to speak with Miyashita. Miyashita assured Volobuev that she would be sending a petition for him to sign within one week.

22. In November 1998, Miyashita told Volobuev that she had sent the O-1 visa petition to the American Federation of Musicians (hereinafter, AFM) for a consultation. Miyashita told Volobuev that she had signed his name to the copy she sent to AFM.

23. Knowing that a consultation with AFM should only take about a week, Volobuev soon began to make inquiries with Miyashita's office about the status of his matter.

24. Miyashita finally admitted to Volobuev that she had not sent anything to AFM. Miyashita contended that she had decided to handle the matter in a different way.

25. In January 1999, after his J-1 visa had expired, Volobuev's attempts to contact Miyashita were unsuccessful.

26. After not receiving any status updates from Miyashita after his repeated requests, Volobuev contacted a former employee of Miyashita's, Galina Fedorova (hereinafter, Fedorova).

27. Miyashita advised Fedorova that Volobuev's O-1 visa petition had been filed prior to the expiration of his J-1 visa.

28. By the beginning of February 1999, Volobuev learned that, if Miyashita had filed an O-1 visa on his behalf, the INS would have issued her a receipt notice.

29. Volobuev began to ask Miyashita's office to send him a copy of the receipt notice for his application.

30. Miyashita never responded to Volobuev's requests.

31. In March 1999, a friend of Volobuev's, Lev Rankov (hereinafter, Rankov), went to Miyashita's office on his behalf to inquire about the status of the O-1 visa petition.

32. Miyashita told Rankov that Volobuev's petition had been filed.

33. Miyashita never filed an O-1 visa petition for Volobuev.

34. In May 1999, Volobuev realized that nothing was being done on his behalf and discharged Miyashita. Volobuev asked Miyashita to refund his retainer.

35. Volobuev also asked Miyashita to return his file to him, particularly the valuable letters of support that Volobuev acquired while he was in Europe. These letters were very important to Volobuev's application and were not easily replaceable.

36. Although Miyashita had not performed any legal services for Volobuev, Miyashita never responded to Volobuev's requests for a refund.

37. Miyashita never returned Volobuev's file to him.

38. By allowing Volobuev's J-1 visa to expire without filing an O-1 petition on his behalf, Miyashita potentially prejudiced Volobuev's immigration status with INS.

39. By not returning Volobuev's letters of support to him, Miyashita potentially prejudiced Volobuev's chances to pursue his O-1 visa through other counsel.

40. On June 17, 1999, Volobuev sent a letter to the North Carolina State Bar complaining about Miyashita's conduct.

41. On June 21, 1999, a grievance file was established against Miyashita with Volobuev as the complaining party. This file was designated 99G0791.

42. On July 26, 1999, a Letter of Notice was issued to Miyashita pursuant to 27 NCAC 1B, §.0112.

43. On August 5, 1999, the Letter of Notice and a Substance of Grievance containing the substance of Volobuev's allegations was served upon Miyashita by a private process server leaving a copy with Miyashita's receptionist, Alba Rosales.

44. Pursuant to 27 NCAC 1B, §.0112(c), Miyashita was required to respond to the Letter of Notice with a full and fair disclosure of all of the facts and circumstances pertaining to the alleged misconduct within 15 days.

45. Miyashita failed to respond to the Letter of Notice.

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

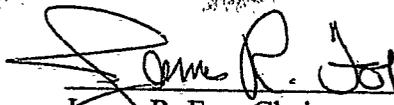
CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over Miyashita and the subject matter.

2. Miyashita's conduct, as set out above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:

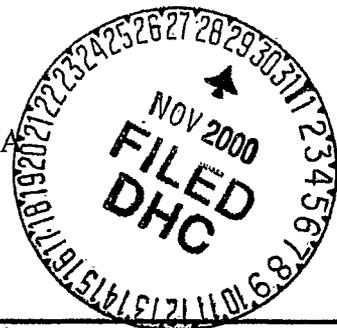
- (a) By failing to timely file an O-1 visa petition for Volobuev, Miyashita failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3.
- (b) By failing to respond to Volobuev's numerous requests for a status update on his O-1 visa petition, Miyashita failed to keep her client reasonably informed about the status of a matter and promptly comply with reasonable requests for information in violation of Rule 1.4.
- (c) By falsely telling Fedorova that she had filed Volobuev's O-1 visa petition prior to the expiration of his J-1 visa when no petition had been filed, Miyashita engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c).
- (d) By falsely telling Rankov that she had filed Volobuev's O-1 visa petition when none had been filed, Miyashita engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c).
- (e) By failing to refund the unearned portion of Volobuev's fee when asked to do so upon the termination of her representation, Miyashita failed to refund an advance payment of fee that had not been earned in violation of Rule 1.16(d).
- (f) By failing to return Volobuev's file to him when asked to do so upon the termination of her representation, Miyashita failed to surrender papers and property to which Volobuev was entitled in violation of Rule 1.16(d).
- (g) By failing to file an O-1 visa application on Volobuev's behalf prior to the expiration of his J-1 visa, and by failing to return the valuable letters of support Volobuev had been able to obtain while in Europe that would be essential to any subsequent counsel that Volobuev would retain, Miyashita intentionally prejudiced or damaged her client during the course of the professional relationship in violation of Rule 8.4(g).
- (h) By failing to respond to the Letter of Notice issued to her pursuant to 27 NCAC 1B §.0112, Miyashita failed to answer a formal inquiry issued by the North Carolina State Bar in a disciplinary matter in violation of NCGS §84-28(b)(3);
- (i) By failing to respond to the Letter of Notice issued to her pursuant to 27 NCAC 1B §.0112, Miyashita knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 1.1(b) of the Revised Rules of Professional Conduct.

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



James R. Fox, Chair
Hearing Committee

NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
NORTH CAROLINA STATE BAR
00 DHC 18

THE NORTH CAROLINA STATE BAR,
Plaintiff

v.

CAROLYN N. MIYASHITA, Attorney,
Defendant

ORDER OF DISCIPLINE

This matter came on to be heard on November 3, 2000 before a Hearing Committee of the Disciplinary Hearing Commission composed of James R. Fox, Chair; Joseph G. Maddrey, and Robert B. Frantz. Larissa J. Erkman represented the North Carolina State Bar and the defendant, Carolyn N. Miyashita, appeared, but was not represented by counsel. All parties are properly before the Hearing Committee. The Committee has jurisdiction over the Defendant Carolyn N. Miyashita, and the subject matter of this proceeding.

Based upon the pleadings on file, upon the evidence and arguments of the parties concerning the appropriate discipline, and upon the Findings of Fact and Conclusions of Law entered at the hearing due to the default of the Defendant, the Hearing Committee hereby makes the following additional findings of fact:

FINDINGS OF FACT REGARDING DISCIPLINE

1. On December 17, 1998, the defendant, Carolyn N. Miyashita ("Defendant"), was served with an order of discipline in a prior proceeding entitled The North Carolina State Bar v. Carolyn Miyashita, 97 DHC 33 ("the prior disciplinary proceeding"). The prior disciplinary proceeding was instituted against Defendant in 1997. The prior disciplinary proceeding was heard by a committee of the Disciplinary Hearing Commission on September 18, 1998. A disciplinary order was entered on December 8, 1998 ("the prior disciplinary order"). Defendant was served with a copy of the prior disciplinary order on December 17, 1998. The prior disciplinary order became effective on January 16, 1999.

2. The prior disciplinary order suspended Defendant's license to practice law in North Carolina for 5 years, effective January 16, 1999, for misconduct occurring in 1995 and 1996. The prior disciplinary order provides that, at any time after two years, the Defendant may apply for a stay of the suspension of her license if she meets certain

conditions. Defendant is therefore currently suspended from the practice of law and will not be eligible to seek a stay of the suspension of her license until January 16, 2001.

3. Defendant's misconduct, which is the subject of this proceeding, occurred during the period of March 1998 through May 1999. Her misconduct occurred contemporaneous with her defense of the prior disciplinary proceeding and continued following entry of the prior disciplinary order.

4. Pursuant to the prior disciplinary order, Defendant was required to wind down her practice of law pursuant to section .0124(b) of the N.C. State Bar Discipline & Disability Rules, 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124(b). In order to wind down her law practice, she was required to promptly notify all clients being represented in pending matters of her suspension from the practice of law by certified mail, return receipt requested, and to return client files.

5. Based on the Findings of Fact and Conclusions of Law entered in this proceeding, Defendant failed to comply with the wind down provisions of the prior disciplinary order in that she did not notify Mr. Volobuev of her suspension from the practice of law and she did not return to Mr. Volobuev file materials and property to which he was entitled.

6. The Defendant's misconduct, as described in the Findings of Fact and Conclusions of Law, is aggravated by the following factors:

- a) Defendant has a record of prior discipline.
- b) Defendant engaged in a pattern of misconduct similar to the misconduct for which she was disciplined in the prior disciplinary proceeding.
- c) Defendant engaged in multiple violations of the Revised Rules of Professional Conduct.
- d) Defendant has substantial experience in the practice law.
- e) The victim of Defendant's misconduct was vulnerable.

7. The Defendant's misconduct, as described in the Findings of Fact and Conclusions of Law, is mitigated by the following factors:

- a) Defendant experienced personal or emotional problems at the time of the misconduct.
- b) Defendant has shown some degree of remorse for her misconduct that is the subject of this proceeding.

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. The license of the Defendant, Carolyn Miyashita, is hereby suspended for three years. The suspension of Defendant's license shall be effective as of January 16, 2001, the date that she would be first eligible to seek a stay of the suspension of her license under the prior disciplinary order.

2. At any time after the expiration of the 3-year period of suspension, Defendant may file a petition pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0125(b) seeking the reinstatement of her license, except the petition should be filed with the Disciplinary Hearing Commission. Upon receipt of Defendant's petition for reinstatement of her license, the Disciplinary Hearing Commission shall conduct a hearing wherein Defendant must prove, by clear, cogent and convincing evidence that she has met the following conditions in order to obtain reinstatement of her license:

- (a) She has not violated any state or federal laws during the active suspension of her license to practice law.
- (b) She has not violated any provisions of the North Carolina State Bar Discipline & Disability Rules or the Revised Rules of Professional Conduct during the active suspension of her license to practice law.
- (c) She has complied with all requirements of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 following entry of this order suspending her license to practice law.
- (d) Within 30 days of the entry of this order, she has delivered to her former client, Mr. Volobuev, or his new counsel, Klari B. Tedrow, all papers and property in her possession to which Mr. Volobuev is entitled under the Revised Rules of Professional Conduct. Such papers include, but are not limited to, all papers delivered to Defendant by Mr. Volobuev or persons acting on his behalf; any original documents related to his immigration case; all correspondence received or generated by Defendant; and all other documents and things in Defendant's file related to her representation of Mr. Volobuev, with the exception of Defendant's personal notes and incomplete work product. The mailing address for Mr. Volobuev's new counsel is: Klari B. Tedrow, Attorney at Law, 4 Office Park Circle, #303, Birmingham, AL 35223. Ms. Tedrow's telephone number is (205) 871-8084.
- (e) She is not disabled within the meaning of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0103(18). To carry her burden of proof that she is

not disabled within the meaning of § .0103(18), Defendant must present the opinion testimony of at least one qualified, board-certified psychiatrist that she does not suffer from a mental or physical condition which significantly impairs her professional judgment, performance or competence. The medical opinion testimony must be based on a thorough medical examination of Defendant by the testifying psychiatrist, which takes into account the misconduct that was the subject of the prior disciplinary proceeding and this proceeding, as well as any other factors deemed relevant by the psychiatrist. Defendant must file with her petition for reinstatement a notice giving the name and address of the psychiatrist upon whose opinion she seeks to rely in support of her petition for reinstatement; a copy of all medical records regarding treatment and evaluation of Defendant prepared or maintained by the psychiatrist; a list of all health care professionals of any type or kind that have treated Defendant for any reason during the two-year period immediately preceding her petition for reinstatement; and an executed release, in the form of Exhibit A hereto, authorizing the State Bar to obtain Defendant's medical records from her treating psychiatrist and health care professionals. In addition, at the time she petitions for reinstatement, the hearing committee of the Disciplinary Hearing Commission assigned to hear Defendant's petition for reinstatement may require Defendant to undergo psychiatric, physical or other medical examination or testing by qualified medical experts selected by the hearing committee in order to obtain a second opinion concerning whether Defendant is disabled, within the meaning of § .0103(18). Defendant shall be responsible for all costs associated with presenting evidence in support of her petition for reinstatement.

- (f) Defendant has an interest in keeping confidential those records that are subject to the physician-patient privilege, which interest overrides any interest of the public in obtaining disclosure of those records. That overriding interest cannot be protected by any measure short of sealing the records so produced. Except pursuant to an order of the Disciplinary Hearing Commission, or other court of competent jurisdiction, the Office of Counsel of the North Carolina State Bar shall keep confidential all physician's reports or other medical records obtained pursuant to subparagraph (c) above, and shall not disclose those records to any person other than officers, councilors and employees of the North Carolina State Bar and members of the Disciplinary Hearing Commission.
- (g) Defendant shall pay all costs incurred in this proceeding and taxed against her by the Secretary of the North Carolina State Bar.

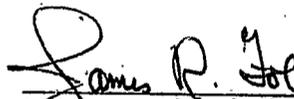
(h) The suspension of Defendant's license to practice law, pursuant to this order, is intended to run concurrently with the discipline imposed in the prior proceeding and to preclude Defendant from seeking a stay of the remaining term of suspension of her license under the terms of the prior disciplinary order. A copy of the prior disciplinary order is attached as Exhibit B hereto. To the extent that the prior disciplinary order imposes on Defendant conditions for reinstatement of her license, then Defendant must also prove by clear, cogent and convincing evidence that she has complied with the following conditions set out in the prior disciplinary order to obtain reinstatement of her license:

- (1) She has paid the \$500 fine assessed against her by the 9th Circuit Court of Appeals.
- (2) At least two years prior to her petition for reinstatement of her license, she began regular psychological counseling with a board-certified psychiatrist.
- (3) At her sole expense, she continued attending regular counseling sessions and otherwise complied with the treatment plan as recommended by a board-certified psychiatrist and any other mental health professionals to whom she may have been referred by the psychiatrist.
- (4) At least once every 6 months during which she underwent counseling, she submitted reports to the Office of Counsel of the North Carolina State Bar from her treating psychiatrist and mental health professionals, confirming that she complied with the treatment plan of the psychiatrist and mental health professionals.
- (5) Within 45 days of commencing treatment, she executed a written waiver, authorizing the Office of Counsel of the North Carolina State Bar to contact her treating psychiatrist and mental health professionals and to inquire respecting her compliance with the terms of this order. The written authorization should be in the form of Exhibit A hereto.
- (6) She paid \$500 in restitution to Yuriy Zhestkov.
- (7) She paid the costs of the prior disciplinary proceeding, 97 DHC 33, as assessed by the Secretary of the North Carolina State Bar. Such costs included all costs incurred by the N.C. State Bar in connection with the depositions of Arthur Hainsworth, Pat Hill and Yuriy Zhestkov.

3. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, §.0114(x) of the North Carolina State Bar Discipline & Disability Rules throughout the period of the suspension and up to an including entry of an order reinstating Defendant's license to practice law.

Signed by the undersigned Hearing Committee chair, with the consent of the other Hearing Committee members.

This the 27th day of November, 2000.



James R. Fox, Chair
Hearing Committee

EXHIBIT A
Disciplinary Order, 00 DHC 18

AUTHORIZATION TO RELEASE MEDICAL INFORMATION

TO: Carolyn N. Miyashita's treating physicians, psychiatrists, psychologists, counselors and other health care professionals:

YOU ARE HEREBY AUTHORIZED to furnish to:

The Office of Counsel
North Carolina State Bar

P.O. Box 25908,
Raleigh, NC 27611
[mailing address]

208 Fayetteville Street Mall,
Raleigh, NC 27601
[street address]

all information and records (including, but not limited to, test results, written evaluations, examination notes, nurses notes and all other memoranda or documentation of treatment of any kind) that are in your possession regarding the evaluation, examination, testing, counseling and/or medical treatment of **Carolyn N. Miyashita**.

This medical release also authorizes you to speak with the staff of the North Carolina State Bar concerning your evaluation and/or treatment of Ms Miyashita and concerning her compliance with your treatment recommendations.

THIS IS THE _____ DAY OF _____, 20__.

Carolyn N. Miyashita

Sworn and ascribed to before me,
this _____ day of _____, 20__.

Notary Public

My Commission Expires: _____