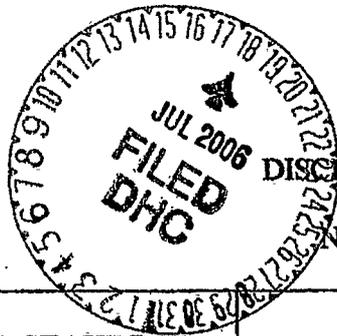


NORTH CAROLINA  
WAKE COUNTY



16516

BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
06 DHC 26

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

ALAN T. SMITH, Attorney,

Defendant

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

This matter was considered by a duly appointed hearing committee of the Disciplinary Hearing Commission. Jennifer A. Porter represented the Plaintiff, the North Carolina State Bar. The Defendant, Alan T. Smith, represented himself. Both parties stipulate and agree to the findings of fact and conclusions of law recited in this consent order and to the discipline imposed. Defendant freely and voluntarily waives any and all right to appeal the entry of this consent order of discipline. Based upon the stipulations of fact and the consent of the parties, the hearing committee hereby finds by clear, cogent, and convincing evidence the following:

#### FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar ("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 (Chapter 1 of Title 27 of the North Carolina Administrative Code).
2. Defendant, Alan T. Smith ("Defendant"), was admitted to the North Carolina State Bar in 1989, and was until October 23, 1998 an active member of the North Carolina State Bar authorized to practice law in North Carolina, and was at all times referred to herein subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Revised Rules of Professional Conduct.
3. Defendant was administratively suspended on October 16, 1998 for failure to pay State Bar membership dues for 1998 and the associated late payment fee.
4. During all or part of the relevant periods referred to herein, Defendant was engaged in the practice of law in the State of North Carolina and maintained a law office in Fayetteville, Cumberland County, North Carolina.

5. On April 1, 1998, Defendant left the private practice of law and began work with the Public Defender's Office in Cumberland County, North Carolina. As an assistant public defender, Defendant was prohibited under N.C. Gen. Stat. § 84-2 from engaging in the private practice of law.

6. John O. King ("King") retained Defendant in May 1996 to represent him in seeking a reduction in the amount of child support King was obligated to pay. King paid Defendant the fee quoted for this representation, in the amount of \$350.00.

7. Defendant filed a Motion for Child Support Modification on behalf of King with the Cumberland County District Court.

8. A hearing on the motion was set in October 1996. Defendant and King both attended the hearing. The hearing was continued by the court with a request that the parties try to come to an agreement. No agreement was reached.

9. Between October 1996 and March 1998, King repeatedly contacted Defendant and provided information about his employment status. Defendant did not provide any information about the status of the case during that period, however.

10. King received a notice from the Child Enforcement Agency of North Carolina stating that he was in arrears on his child support payments.

11. In March 1998, King went to Defendant's office in person in an attempt to determine the status of his case. King discussed both his desire for an order modifying his child support payments and the Child Enforcement Agency notice with Defendant. Defendant assured King he would take care of the matter.

12. Defendant did not obtain a court order modifying King's child support obligation nor did he assist King with the Child Enforcement Agency matter.

13. At the time Defendant left private practice and entered employment with the Cumberland County Public Defender's Office in April 1998, King's legal matter had not been concluded.

14. Defendant did not notify King that he had left private practice to join the Public Defender's Office.

15. Defendant did not return any unearned fee to King, did not withdraw from King's case before the court, and did not otherwise take reasonable steps to protect King's interests.

16. King filed a grievance with the State Bar, and a letter of notice from the Grievance Committee of the State Bar was served on Defendant by certified mail on April 21, 1999. Defendant was required to respond to the State Bar within 15 days of receipt of the letter of notice. Defendant failed to do so. Despite a reminder letter sent by the State Bar to Defendant in May 1999, Defendant did not provide any response to the King letter of notice until July 19, 1999.

17. In about February 1997, Patricia Zucosky ("Zucosky") hired Defendant to represent her in an equitable distribution matter. Zucosky paid Defendant the fee he quoted for this representation, in the amount of \$500.00.

18. At that time, Zucosky had already obtained a divorce from bed and board. She did not wish to proceed with absolute divorce when she hired Defendant, but merely wanted to resolve equitable distribution matters.

19. Despite her communication to Defendant that she did not want to pursue absolute divorce and only wanted his assistance with the equitable distribution matter, Defendant prepared paperwork reflecting that the representation was for divorce.

20. Zucosky notified Defendant's assistant of the error upon receipt of the paperwork. The assistant told her to sign the paper and return it and they would prepare a corrected version. Zucosky never received corrected paperwork or a copy of what she had signed.

21. Defendant subsequently appeared in court on Zucosky's behalf. At that time, Defendant stated she would need to pay him \$55.00 to re-open the equitable distribution matter. He also indicated that it would be best to resolve the equitable distribution matter before proceeding with the divorce.

22. Zucosky paid Defendant \$55.00 at that time.

23. Zucosky did not hear from Defendant for a period of time. The next correspondence she received from Defendant was when Defendant sent her divorce papers to sign and return.

24. Zucosky called to complain that this is not what she hired Defendant to do. She left a message for Defendant. Defendant did not return her call.

25. Zucosky did not hear from Defendant again until February 1998, when she received a copy of a motion to withdraw that Defendant had filed in her case. The motion recited that she had not been in contact with him.

26. Zucosky called Defendant's office to seek clarification. Zucosky left a message for Defendant. Defendant did not return her call.

27. Zucosky wrote Defendant a letter. Defendant responded by letter asking her to contact the office. Zucosky did so and left a message. Defendant did not return her call.

28. After about a month passed with no contact from Defendant, Zucosky called Defendant again. At this time, Zucosky learned that Defendant was no longer with the firm.

29. At the time Defendant began employment with the Cumberland County Public Defender's Office on April 1, 1998, Zucosky's legal matter was still outstanding.

30. Defendant did not discuss with Zucosky his plan to leave private practice to join the Public Defender's Office.

31. Defendant did not allow Zucosky time to retain other counsel before he ceased representing her and did not otherwise take reasonable steps to protect Zucosky's interests.

32. Defendant did not refund any unearned fee to Zucosky.

33. Zucosky sent a letter to the State Bar on November 2, 2001 and a grievance file was opened. It was determined that Defendant was on a long term trip in Russia at that time.

34. Donald Jones, chief investigator with the State Bar, obtained an e-mail address and a fax address for Defendant in Russia. Jones sent Defendant the letter of notice from the Grievance Committee in the Zucosky grievance by e-mail and fax in early February 2002.

35. Defendant responded by e-mail on February 22, 2002 and acknowledged receipt of Jones' e-mail. He indicated he would not be able to respond to the letter of notice until he was back in the United States and had access to the client file. He indicated he would be back in the United States in May 2002 and indicated he could respond then.

36. Jones e-mailed a message back to Defendant granting an extension of time for Defendant to respond until June 2002.

37. Defendant did not respond to the Zucosky grievance.

38. In early February 1998, Mr. and Mrs. Samuel Reyes ("the Reyes") contacted the office of the Bell and Smith Law Firm ("Bell & Smith") for legal advice on filing bankruptcy.

39. At the time, Defendant was a partner in the firm of Bell & Smith and Defendant was the partner who provided representation for clients with bankruptcy matters.

40. On or about February 6, 1998, the Reyes received a letter from Bell & Smith signed by Defendant explaining the bankruptcy procedure and providing the fee schedule for filing a Chapter 13 bankruptcy petition.

41. On or about February 11, 1998, the Reyes returned to the offices of Bell & Smith, paid the required Chapter 13 bankruptcy retainer fee of \$300.00, and received the appropriate bankruptcy forms for completion.

42. On or about February 23, 1998, the Reyes returned to the offices of Bell & Smith and submitted the completed bankruptcy forms.

43. On or about March 3, 1998, Mr. Reyes paid the requisite Chapter 13 bankruptcy filing fee at the Bell and Smith office.

44. After paying the required fees for filing the Chapter 13 bankruptcy petition by or about March 3, 1998, the Reyes heard nothing from Defendant for a period of time and began trying to contact Defendant during the latter part of March 1998. The Reyes left repeated messages for Defendant to call, but Defendant did not return those calls.

45. In early April 1998, the Reyes called Bell & Smith and learned that Defendant had left the firm to join the Cumberland County Public Defender's Office.

46. After threatening to call the State Bar, the Reyes received a telephone call from Defendant that same day.

47. Mrs. Reyes explained to Defendant her concern that it was now April 1998, the bankruptcy petition was still not filed, and that Defendant had not contacted the Reyes about their case.

48. Defendant promised to work on the case and to call the Reyes.

49. Defendant met with the Reyes in early May 1998. At that meeting, Defendant agreed to review the bankruptcy packet, add the Reyes' medical bills to the schedules, and contact the Reyes to sign revised forms before filing.

50. The Reyes did not hear from Defendant for the rest of the month of May 1998.

51. Defendant filed a Chapter 13 petition for the Reyes on or about May 29, 1998. Defendant did not file the requisite schedules.

52. Defendant did not notify the Reyes that he had filed the petition, nor did he notify them that he had not filed the schedules.

53. Defendant did not request additional information from the Reyes for the schedules or otherwise indicate to the Reyes why he had not filed the schedules.

54. On or about June 5, 1998, the Reyes received a Notice to Debtor from the bankruptcy court dated June 2, 1998, stating that a voluntary Chapter 13 petition had been filed on their behalf on May 29, 1998. The notice further indicated that the Reyes were required to make monthly payments of \$500 to the bankruptcy court beginning June 1, 1998.

55. Although Defendant had mentioned the figure of \$500.00 as a possible monthly payment, he had not discussed or confirmed this with the Reyes as a final number before or at the time of the filing of the petition.

56. Also on or about June 5, 1998, the Reyes received a Notice of Possible Dismissal from the bankruptcy court stating that they had 15 days to file the required schedules following the filing of the bankruptcy petition or the petition would be subject to dismissal. The fifteenth day after the filing of the petition was June 13, 1998.

57. After receiving the notices from the bankruptcy court on or about June 5, 1998, the Reyes attempted to contact Defendant, but he did not respond to the Reyes.

58. Defendant's former partner, Robert A. Bell ("Bell"), attempted to assist the Reyes by securing an extension of time on Defendant's behalf until July 15, 1998 to file the schedules with the Bankruptcy Court.

59. Bell informed Defendant of the new deadline. Defendant assured Bell he would file the schedules by the deadline.

60. Defendant did not file the schedules for the Reyes.

61. Defendant did not notify the Reyes or Bell that he failed to file the schedules.

62. On or about July 25, 1998, the Reyes received an order from the bankruptcy court dated July 24, 1998 dismissing the petition for failure to file the required schedules.

63. The Reyes, on their own, obtained an extension of time from the Clerk and thereafter again contacted Defendant. Defendant assured the Reyes that he would take care of the matter.

64. Defendant did not file the required schedules in a timely manner but did eventually file the schedules.

65. On or about September 3, 1998, the Reyes received a notice that a creditors meeting would be held on October 16, 1998.

66. Mrs. Reyes promptly contacted the Defendant and notified him of the creditors meeting. He indicated he would attend the meeting on the Reyes' behalf.

67. Mrs. Reyes told Defendant she was concerned because she had not been making the monthly payments to the Bankruptcy Court. Mrs. Reyes' understanding was that she could not make the payments until her case was reopened after the schedules were filed. As of September 3, 1998, her case had not yet been reopened. Mrs. Reyes also told Defendant that they were having trouble financially even without making those monthly payments and not paying any amount toward credit card debt. She asked for information about Chapter 7 bankruptcy.

68. Defendant did not provide the information or advice about Chapter 7 that Mrs. Reyes sought. Instead, he summarily declared that Chapter 7 would be best if they were having trouble making ends meet and the paperwork would be easier.

69. Defendant agreed to meet with the Reyes to go over their existing paperwork and discuss their options. He indicated he would schedule a meeting with them so that he could have their paperwork in front of him when they talked.

70. Defendant did not schedule a meeting with the Reyes or otherwise contact them about their bankruptcy matter.

71. Mrs. Reyes contacted Defendant a couple of weeks prior to the scheduled creditors meeting. Defendant agreed to meet with them at Bell's office.

72. Defendant met with the Reyes but did not have their paperwork and seemed unfamiliar with the details of their case. He promised they would meet the following week.

73. Defendant did not contact the Reyes or otherwise arrange for them to meet that following week.

74. Mrs. Reyes attempted to contact Defendant during that week without success. She finally was able to talk with Defendant the night before the creditors meeting. At that time Defendant informed her he would not be able to attend the meeting with them and would send a friend instead.

75. The Reyes were not comfortable with this and asked Defendant to obtain a continuance and he agreed to do so.

76. Defendant informed Mrs. Reyes that he would be busy for the remainder of October 1998, but that he would call her the first week in November 1998.

77. The Reyes never heard from Defendant again.

78. Defendant did not refund any amount of unearned fees to the Reyes.

79. On or about December 15, 1998, the Reyes received a notice from the bankruptcy trustee that requested that the court enter an order denying confirmation of and dismissing the petition for failure to pay the required monthly payments into the court and failure to appear at the creditors meeting.

80. On or about December 30, 1998, the Reyes filed a grievance against Defendant with the State Bar.

81. The State Bar sent the Reyes' grievance to the Twelfth Judicial District Bar for local investigation.

82. The Chair of the Twelfth Judicial District Grievance Committee notified Defendant of the grievance by letter dated March 3, 1999. Defendant's response to the notice was due within fifteen days of his receipt of that letter. Defendant did not respond in that time period.

83. Ruby Bullard, the Twelfth Judicial District Grievance Committee member to whom the Reyes' grievance was assigned for investigation sent Defendant a letter dated April 1, 1999. The letter noted that the time for Defendant to respond had passed but that if he responded by the middle of the following week, the local committee would consider his response. Defendant did not respond to this letter.

84. On July 27, 1999, Defendant was served by certified mail with a letter from the State Bar. The letter primarily pertained to King's case, but also noted that Defendant had failed to respond to the local committee's inquiry regarding the grievance filed by the Reyes. The State Bar asked that Defendant respond as soon as possible. Defendant did not respond.

85. On October 16, 1998, Defendant was suspended from the practice of law by the North Carolina State Bar for non-payment of membership fees for 1998 and the associated late payment fee.

86. The Order of Suspension was delivered to Defendant's last address of record with the North Carolina State Bar by certified mail shortly after October 23, 1998. Defendant received the Order of Suspension shortly thereafter, during the week of October 26, 1998.

87. The Order of Suspension stated that if Defendant sought reinstatement within 30 days of service of the Order, his license would be reinstated upon payment of the outstanding membership and late fee. Additional requirements applied if Defendant sought reinstatement after expiration of the 30 days.

88. Defendant did not apply for reinstatement within 30 days of service of the Order.

89. Defendant did not advise anyone in the Public Defender's Office that his license had been suspended.

90. From October 16, 1998 to July 6, 1999, Defendant continued to represent defendants in court pursuant to employment with the Cumberland County Public Defender's Office without an active license even though he was aware that his license had been suspended by the North Carolina State Bar.

91. On July 6, 1999, the Cumberland County Public Defender learned that Defendant's law license had been suspended and terminated Defendant's employment at that time.

92. Defendant applied for reinstatement by application dated July 14, 1999.

93. Pursuant to N.C. Gen. Stat. § 84-4, it is unlawful for any person except an active member of the Bar of the State of North Carolina admitted and licensed to practice as attorney-at-law to engage in the practice of law on behalf of another person, firm, or corporation. The practice of law includes appearing as attorney in any action or proceeding before any judicial body, holding oneself out as competent or qualified to

give legal advice or counsel, providing legal advice, and providing legal services. A violation of N.C. Gen. Stat. § 84-4 is a Class 1 misdemeanor under N.C. Gen. Stat. § 84-8.

#### CONCLUSIONS OF LAW

1. All the parties are properly before the hearing committee and the committee has jurisdiction over the Defendant, Alan T. Smith, and the subject matter.

2. Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline as follows:

a. By failing to keep clients King, Zucosky, and the Reyes reasonably informed about the status of their cases, Defendant violated Rules 6(b)(1) and (2) of the Superseded Rules of Professional Conduct of the North Carolina State Bar ("Superseded Rules")<sup>1</sup> and Rule 1.4(a) of the North Carolina State Bar Revised Rules of Professional Conduct ("Revised Rules")<sup>2</sup>;

b. By failing to notify clients King and Zucosky that he had left private practice, by failing to properly withdraw from representation of these clients, by failing to return any unearned fee to King, Zucosky, and the Reyes, and by failing to take reasonable steps to protect these clients' interests after leaving private practice, Defendant violated Rules 1.5, 1.16(c), and Rule 1.16(d) of the Revised Rules;

c. By failing to take any appropriate action to resolve or conclude the legal matter for which he was retained by clients King, Zucosky, and the Reyes, Defendant violated Rules 6(b)(3) and 7(a)(1) and (2) of the Superseded Rules and Rule 1.3 of the Revised Rules;

d. By failing to respond to the letter of notice issued by the Chair of the Grievance Committee as directed therein pertaining to his representation of clients King, Zucosky, and the Reyes and to the inquiry of the Twelfth Judicial District Grievance Committee made concerning his representation of the Reyes, Defendant violated Rule 8.1(b) of the Revised Rules and N.C. Gen. Stat. § 84-28(b)(3); and

e. By representing defendants in court pursuant to employment with the Cumberland County Public Defender's Office and by holding himself out to his employer, the court, and to the criminal defendants he was assigned to represent by the Public Defender's Office as able to engage in the practice of law in North Carolina while his license to practice law was suspended and he was not an active member of the North Carolina State Bar, Defendant engaged in the

<sup>1</sup> The Rules of Professional Conduct as adopted and in force before July 24, 1997

<sup>2</sup> The Rules of Professional Conduct as adopted and in force on and after July 24, 1997

unauthorized practice of law in violation of Rule 5.5 and committed criminal conduct that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b).

Based upon the stipulations of fact and the consent of the parties, the hearing committee hereby finds by clear, cogent, and convincing evidence the following additional

#### FINDINGS OF FACT REGARDING DISCIPLINE

1. Defendant's misconduct is aggravated by the following factors:
  - a. Multiple offenses; and
  - b. Substantial experience in the practice of law.
2. Defendant's misconduct is mitigated by the following factors:
  - a. Absence of a prior disciplinary record;
  - b. Absence of a dishonest or selfish motive;
  - c. Personal problems for which he sought psychiatric help in 1998;
  - d. Remorse; and
  - e. Full and free disclosure to the hearing committee and a cooperative attitude toward the proceedings.
3. The mitigating factors outweigh the aggravating factors.
4. Defendant's failure to inform the Public Defender of his administrative suspension was a result of Defendant's sense of denial over the matter and his desire to avoid the situation. Defendant did not deny the administrative suspension when his employer became aware of it and terminated his employment.
5. Defendant's neglect of and failure to communicate with his clients when he left private practice and entered employment with the Public Defender's Office caused significant harm and created the risk of potential significant harm to his clients.
6. Defendant's failure to respond to the Letters of Notice from the State Bar and the local grievance committee interfered with the State Bar's ability to regulate attorneys and undermined the privilege of lawyers in this State to remain self-regulating.
7. This DHC Committee has considered lesser alternatives and finds that a public censure or reprimand would not be sufficient discipline because of the gravity of

the harm caused by the conduct of the Defendant to the public and to the administration of justice.

8. This DHC Committee finds Defendant's conduct caused significant harm and significant potential harm to clients and to the administration of justice, to the profession, and to members of the public, and that a more severe discipline is necessary to protect the public.

9. For those reasons, this DHC Committee believes and so finds that an Order calling for a discipline short of a suspension of the Defendant's law license would not be appropriate.

Based upon the foregoing factors and with the consent of the parties, the hearing committee hereby enters the following

#### ORDER OF DISCIPLINE

1. The license of the Defendant, Alan T. Smith, is hereby suspended for five years. The effective date of this order and of this suspension is the date on which this order is filed. Defendant does not maintain a mailing address in the United States but does maintain an e-mail address; therefore, this order shall be served upon Defendant by e-mailing an electronic version of it to Defendant's e-mail address of elalsmith@email.net.

2. Defendant 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 Defendant by e-mail as described above.

3. Defendant shall comply with the wind down provisions contained in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the North Carolina State Bar Discipline & Disability Rules.

4. After serving three years of the active suspension of his license, Defendant may apply for reinstatement upon filing a petition with the Secretary of the North Carolina State Bar demonstrating the following by clear, cogent, and convincing evidence:

a. That he paid the costs of this proceeding within 30 days of service of the statement of costs upon him, such service to be accomplished by e-mail as described above;

b. That he has notified the North Carolina State Bar Membership Department of his current mailing address no later than ten (10) days following service of this order on him by e-mail, and that he has notified the State Bar of any change in his mailing address within ten (10) days of such change;

c. That he responded to all communications from the North Carolina State Bar within 30 days of receipt or by the deadline stated in the communication, whichever is sooner;

d. That he has not violated the Revised Rules of Professional Conduct or the laws of the United States or any state;

e. That he has submitted clear, cogent and convincing evidence that he is not suffering from any mental or physical condition that significantly impairs his professional judgment, performance or competence; and

f. That he properly wound down his law practice and complied with the terms of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the State Bar Discipline & Disability Rules.

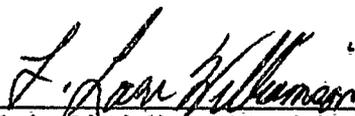
5. If Defendant successfully seeks a stay of the suspension of his law license, such stay will continue in force only as long as he complies with the conditions set out in paragraph 4 (b), (c), and (d) above.

6. If an order staying any period of this suspension is entered and the Defendant fails to comply with any one or more of the conditions referenced in Paragraph 5, then the stay of the suspension of his law license may be lifted as provided in § .0114(x) of the North Carolina State Bar Discipline and Disability Rules.

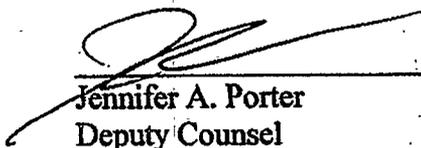
7. If Defendant does not seek a stay of the active portion of the suspension of his law license or if some part of the suspension is stayed and thereafter the stay is revoked, Defendant must comply with the conditions set out in paragraph 4 above before seeking reinstatement of his license to practice law.

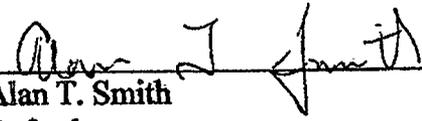
8. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(x) of the North Carolina State Bar Discipline and Disability Rules throughout the period of any stay of the suspension.

Signed by the Chair with the consent of the other hearing committee members,  
this the 17<sup>th</sup> day of July, 2006.

  
\_\_\_\_\_  
Chair, Disciplinary Hearing Committee

CONSENTED TO BY:

  
\_\_\_\_\_  
Jennifer A. Porter  
Deputy Counsel  
Attorney for Plaintiff

  
\_\_\_\_\_  
Alan T. Smith  
Defendant