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NORTH CAROLINA

WAKE COUNTY

BEFORE THE
GRIEVANCE COMMITTEE
OF THE
NORTH CAROLINA STATE BAR
95G0841(IV)R

IN THE MATTER OF)

THOMAS T. DOWNER,)
ATTORNEY AT LAW)

CENSURE

On October 22, 1997, the Grievance Committee of the North Carolina State Bar met and considered the grievance filed against you by EBS.

Pursuant to section .0113(a) of the Discipline and Disability Rules of the North Carolina State Bar, the Grievance Committee conducted a preliminary hearing. After considering the information available to it, including your response to the letter of notice, 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.

A Censure is a written form of discipline more serious than a Reprimand, issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or a member of the public, but the misconduct does not require suspension of the attorney's license.

The Grievance Committee believes that a hearing before the Disciplinary Hearing Commission is not required in this case and issues this Censure to you. As chairman of the Grievance Committee of the North Carolina State Bar, it is now my duty to issue this Censure. I am certain that you will understand fully the spirit in which this duty is performed.

You were the primary shareholder with the firm of Downer, Walters & Mitchener, PA (the "Downer Firm") and were involved in the handling of a personal injury case on behalf of the complainant who brought this grievance. On May 8, 1991, the complainant was injured when she tripped and fell over a flat of flowers at the Charlotte Farmers' Market. On June 10, 1991, the complainant retained the Downer Firm to handle the matter. The two potential defendants were the North Carolina Department of Agriculture (the "NCDOA"), which owned and operated

the Farmers' Market, and the individual who leased space from the NCDOA at the Farmers' Market (the "lessee"). An associate of the Downer Firm conducted the initial interview and made demand on the NCDOA for settlement. He made no demand on the lessee. The NCDOA wrote the Downer Firm return correspondence denying liability, identifying the lessee, and supplying his name and address, denying that the lessee was its employee, and identifying the lessee's status as a lessee of the booth. Other members of the Downer Firm filed an affidavit with the North Carolina Industrial Commission asserting a claim against the NCDOA under the North Carolina Tort Claims Act, alleging that the lessee was an employee of the department. On June 17, 1993, NCDOA filed answer denying that the lessee was an employee and asserting again that he was a lessee. Neither you nor the Downer Firm ever instituted an action against the lessee nor discussed this option with the complainant. The statute of limitations ran against the lessee on May 8, 1994. Although the claim had, in fact, been filed against the NCDOA on or about May 4, 1993, on May 20, 1994, you met with the complainant and, at that time, informed her that, as a result of the lack of evidentiary support, as well as contributory negligence problems, the firm did not feel that the complainant had a meritorious claim against the NCDOA. You further explained that the firm would, therefore, be taking a voluntary dismissal of the claim without prejudice and would be closing its file. You had the complainant sign a disengagement memo, acknowledging that she understood and agreed with your recommended course of action.

Even if it was the Downer Firm's opinion that the information provided by the complainant was insufficient to support a legal claim against the lessee, and that such a claim was not well grounded in law and fact, and even if that opinion was correct, you or other members of your firm should have nevertheless explained the matter to the complainant sufficiently in advance of the running of the statute of limitations to allow her to make an informed, timely, and independent decision about whether or not to proceed against the lessee. Your actions violated Rule 6(a)(2) of the Rules of Professional Conduct in that you did not exercise sufficient thoroughness and preparation reasonably necessary for the representation. Your actions violated Rule 6(b)(2) in that you did not explain the matter in a timely fashion to the client to the extent reasonably necessary to permit the client to make a timely, informed decision about whether or not to proceed against the lessee.


Furthermore, the Grievance Committee considered as an aggravating factor that your firm's manner and method of handling client files contributed to the neglect on the complainant's file. Individual attorneys in the firm played specific, defined, and limited roles in the claims handling process and no one attorney had primary responsibility for handling cases from start to finish. The firm had approximately 2,500 or more cases pending at any one time and opened or closed approximately 50 or more cases every week. Had one attorney been primarily responsible for reviewing individual files, that attorney would have, at the very least, provided the client with proper and timely information regarding his candid assessment of any and all potential parties, as well as any and all potential causes of action. Your firm's handling of such a large volume of client files without any one attorney being assigned primary responsibility for overseeing the case created the likelihood that, at some point, a client could be prejudiced or damaged during the course of the professional relationship in violation of the Rules of Professional Conduct. Had this aggravating factor not been present, the Committee may have chosen to issue a lesser form of discipline.

You are hereby censured by the North Carolina State Bar for your violation of the Rules of Professional Conduct. The Grievance Committee trusts that you will ponder this Censure,

recognize the error that you have made, and that you will never again allow yourself to depart from adherence to the high ethical standards of the legal profession. This Censure should serve as a strong reminder and inducement for you to weigh carefully in the future your responsibility to the public, your clients, your fellow attorneys and the courts, to the end that you demean yourself as a respected member of the legal profession whose conduct may be relied upon without question.

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 Censure by the Grievance Committee, the costs of this action in the amount of \$50.00 are hereby taxed to you.

Done and ordered, this 19 day of July, 1999.


James K. Dorsett, III
Chair, Grievance Committee