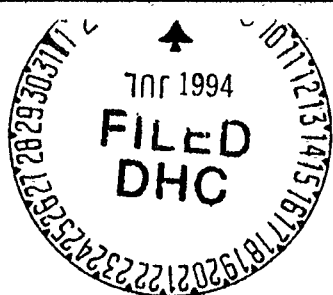


NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
93 DHC 10

8424

THE NORTH CAROLINA STATE BAR,)
)
Plaintiff)
)
v.)
)
MICHAEL R. MITWOL,)
Attorney)
Defendant)

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

This cause came on to be heard and was heard on June 24, 1994 before a hearing committee composed of Samuel Jerome Crow, chairman; Paul L. Jones, and James Lee Burney. Fern E. Gunn represented the North Carolina State Bar. The defendant, Michael R. Mitwol, was not present at the hearing and was unrepresented by counsel. Based upon the evidence presented at the hearing, the hearing committee finds the following to be supported by clear, cogent, and convincing evidence:

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, Michael R. Mitwol, was admitted to the North Carolina State Bar on August 30, 1978 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 all of the periods referred to herein, the Defendant was actively engaged in the practice of law in the State of North Carolina and maintained a law office in New Hanover County, Wilmington, North Carolina.

4. The Defendant had notice of this disciplinary hearing as he acknowledged receiving a notice of this hearing when he was in the State Bar's office on May 31, 1994.

5. Ann F. Jordan retained the Defendant to represent her in a lawsuit filed by Don R. and Kirby Lee Whittemore in 1990. The Whittemores were represented by Gary Shipman of Wilmington.

6. Jordan paid the Defendant \$1500.00. He did not give her

a receipt.

7. Defendant did not file an answer in the lawsuit and an entry of default was entered against Jordan on September 18, 1990.

8. Shortly after the entry of default was entered, Jordan was informed of it and contacted Defendant. Defendant stated that he would take care of the matter.

9. In late 1990 and in 1991, Jordan repeatedly contacted Defendant about the status of her case. Defendant stated that nothing was happening in her case and she should wait until she heard from him. Defendant continued to claim that he would take care of the matter.

10. On September 18, 1991, Defendant filed a motion to set aside the entry of default, as well as a notice scheduling the hearing on the motion for November 18, 1991.

11. By letter dated November 4, 1991, Defendant advised Jordan that her case was scheduled for trial on February 3, 1992.

12. Defendant did not notify Jordan of the November 18, 1991 court date to hear the motion to set aside the entry of default which was filed by the Defendant on September 18, 1991.

13. By letter dated November 18, 1991, the Defendant notified Superior Court Judge Gary E. Trawick that the defendant would not be able to appear in court on November 18, 1991 to argue the motion to set aside the entry of default. The Defendant informed Judge Trawick that there was no opposition to the motion to set aside the entry of default and that the Defendant and Jennifer Umbaugh of Gary Shipman's law firm had agreed to try Jordan's case on the merits during the week of February 3, 1992.

14. Jennifer Umbaugh stated by affidavit that she never agreed to a consent order setting aside the entry of default and she never had discussions with the Defendant about trying the case on the merits during the week of February 3, 1992. Gary Shipman stated by affidavit that there was no agreement not to oppose the motion to set aside the entry of default. Shipman further stated that he opposed the motion and he had not agreed to try the case on the merits during the week of February 3, 1992.

15. On November 18, 1991, neither Jordan nor the Defendant were present in court. Judge Gary E. Trawick denied the motion to set aside the entry of default. Judge Trawick later filed the order on February 7, 1992, nunc pro tunc for November 18, 1991.

16. Defendant did not inform Jordan that the motion to set aside the entry of default had been denied and he did not give her a copy of Judge Trawick's order.

17. On January 24, 1992, the Whittemores filed a motion for entry of default judgment and a notice scheduling the hearing for the motion for February 3, 1992. A certificate of service to Defendant was attached to the motion and notice.

18. On February 3, 1992, Defendant filed a response on Jordan's behalf to the motion for entry of default judgment.

19. The motion for entry of default judgment was not heard on February 3, 1992 and the Whittemores filed a notice scheduling the hearing on the motion for February 17, 1992, with a certificate of service to Defendant.

20. Defendant did not inform Jordan of the February 17, 1992 court date.

21. The motion for entry of default judgment was not heard on February 17, 1992 and the Whittemores filed a notice scheduling the hearing on the motion for March 16, 1992, with a certificate of service to Defendant.

22. Defendant did not inform Jordan of the March 16, 1992 court date.

23. Neither Jordan nor the Defendant were present in court at the March 16, 1992 hearing. Judge James D. Llewellyn entered a default judgment against Jordan whereby the Whittemores were awarded \$100,000.00, plus interest and costs.

24. Defendant did not inform Jordan of the default judgment entered by Judge Llewellyn.

25. Jordan learned that Defendant had scheduled a meeting on March 26, 1992 with the Whittemores and their lawyer, Gary Shipman, to discuss the default judgment.

26. On March 20, 1992, Jordan contacted Defendant and obtained an appointment with him to discuss the default judgment on March 23, 1992. The Defendant cancelled that appointment and three subsequent meetings.

27. On March 26, 1992, Jordan learned that the meeting between Defendant, the Whittemores, and Shipman, was scheduled for that afternoon. Jordan went to Defendant's office and was informed by Defendant that the meeting with the Whittemores and Shipman had been cancelled. Prior to March 26, 1992, Defendant had never informed Jordan of the scheduled meeting with the Whittemores and Shipman. Jordan scheduled a meeting with Defendant for March 27, 1992.

28. On March 27, 1992, Jordan learned that Defendant had attended a meeting with the Whittemores and Shipman on March 26, 1992. She went to Defendant's office on March 27, 1992 for her appointment. Defendant gave her a copy of the default judgment and apologized for not properly representing her. He offered to refund \$1500.00 to Jordan. Jordan also asked that Defendant return her file. Defendant has not refunded the entire \$1500.00 to Jordan or returned her file.

29. On February 11, 1992, David Walton Graves, Sr. retained Defendant to collect a \$2,000.00 fee which Graves was due as a result of tracking and returning a fugitive to Sampson County, North Carolina.

30. Per Defendant's request, Graves paid him a \$300.00 retainer. Defendant and Graves agreed that the balance of Defendant's fee would be paid on a contingent fee arrangement.

31. From February 11, 1992 to July 3, 1992, Defendant scheduled eleven appointments with Graves. Defendant cancelled or delayed eight of the eleven appointments with Graves. Of the remaining three meetings held between Defendant and Graves, Defendant spent very little time discussing Graves' case.

32. Defendant never collected the \$2,000.00 for Graves.

33. Graves asked the Defendant to return Graves' file. Defendant failed to comply with Graves' request.

34. Defendant did not earn the retainer that Graves paid him. Defendant also failed to return the unearned part of the fee paid to him.

35. Jimmy Miller, Ann F. Jordan, and David Walton Graves, Sr. filed grievances against Defendant with the N.C. State Bar. These grievances were referred to the 5th Judicial District Grievance Committee (hereinafter "local grievance committee") for investigation as provided by Article IX, Section 2(B) of the Discipline and Disbarment Procedures of the N.C. State Bar.

36. Representatives of the local grievance committee wrote Defendant and requested that he respond to the grievances. Defendant did not respond to the grievances.

37. The State Bar dismissed its First Claim for Relief regarding Jimmy Miller because he did not appear at the hearing. The State Bar subpoenaed Miller to testify at the hearing.

BASED UPON the foregoing Findings of fact, the hearing committee makes the following:

CONCLUSIONS OF LAW

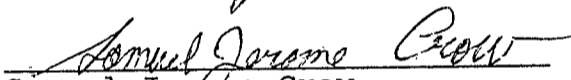
The conduct of the Defendant, as set out above, constituted grounds for discipline pursuant to N.C. Gen. Stat. Sec. 84-28(b)(2) in that Defendant's conduct violates the North Carolina Rules of Professional Conduct as follows:

- (a) By failing to prepare and file an answer to the complaint filed against Jordan, Defendant has failed to act with reasonable diligence and promptness in representing his client in violation of Rule 6(B)(3); failed to seek the lawful objectives of his client through reasonably available means permitted by law and the Rules of Professional Conduct in violation of Rule 7.1(A)(1); failed to carry out a contract of employment entered into with a client for professional services, in violation of Rule 7.1(A)(2); prejudiced or damaged his client during the course of the professional relationship in violation of Rule 7.1(A)(3); engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(D).

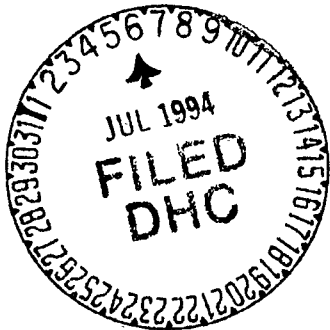
- (b) By waiting a year before he took any action to attempt to cure the entry of default, Defendant has failed to act with reasonable diligence and promptness in representing his client in violation of Rule 6(B)(3); failed to seek the lawful objectives of his client through reasonably available means permitted by law and the Rules of Professional Conduct in violation of Rule 7.1(A)(1); failed to carry out a contract of employment entered into with a client for professional services, in violation of Rule 7.1(A)(2); prejudiced or damaged his client during the course of the professional relationship in violation of Rule 7.1(A)(3); engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(D).
- (c) By failing to keep Jordan advised about various court dates and developments in her case, Defendant has failed to keep his client reasonably informed about the status of a matter and promptly comply with reasonable requests for information in violation of Rule 6(B)(1) and failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of Rule 6(B)(2).
- (d) By lying to Jordan and the court about the status of her case and by lying to Jordan about the March 26, 1992 meeting with the Whittemores and Shipman, Defendant has engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1.2(C).
- (e) By failing to appear on Jordan's behalf at the various court hearings, Defendant has failed to act with reasonable diligence and promptness in representing his client in violation of Rule 6(B)(3); failed to seek the lawful objectives of his client through reasonably available means permitted by law and the Rules of Professional Conduct in violation of Rule 7.1(A)(1); failed to carry out a contract of employment entered into with a client for professional services, in violation of Rule 7.1(A)(2); prejudiced or damaged his client during the course of the professional relationship in violation of Rule 7.1(A)(3); engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(D).
- (f) By not returning Jordan's file, Defendant has failed to deliver to his client all papers and property to which his client is entitled in violation of Rule 2.8(A)(2).
- (g) By failing to refund the unearned part of the fee Jordan paid to him, Defendant has failed to refund promptly any part of a fee paid in advance that has not been earned in violation of Rule 2.8(A)(3).

- (h) By failing to handle Graves' case and obtain his money, Defendant has failed to act with reasonable diligence and promptness in representing his client in violation of Rule 6(B)(3); failed to seek the lawful objectives of his client through reasonably available means permitted by law and the Rules of Professional Conduct in violation of Rule 7.1(A)(1); failed to carry out a contract of employment entered into with a client for professional services, in violation of Rule 7.1(A)(2); prejudiced or damaged his client during the course of the professional relationship in violation of Rule 7.1(A)(3).
- (i) By failing to return Graves' file to him, Defendant has failed to deliver to his client all papers and property to which the client is entitled, in violation of Rule 2.8(A)(2).
- (j) By not refunding the unearned part of the fee Graves paid him, Defendant has failed to refund promptly any part of a fee paid in advance that has not been earned in violation of Rule 2.8(A)(3).
- (k) By failing to respond to the N.C. State Bar regarding grievances, Defendant has knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 1.1(B).
- (l) The violations alleged in the First Claim for Relief in the State Bar's complaint were not proven by clear, cogent and convincing evidence since the State Bar took a voluntary dismissal of the claim.

Signed by the undersigned chairman with the full knowledge and consent of the other members of the hearing committee this the 1st day of July, 1994.


Samuel Jerome Crow
Chairman
Hearing Committee

NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
93 DHC 10

THE NORTH CAROLINA STATE BAR,)

Plaintiff)

v.)

MICHAEL R. MITWOL,)
Attorney)

Defendant)

ORDER OF DISCIPLINE

BASED UPON the Findings of Fact and Conclusions of Law entered in this case, and further based upon the evidence and arguments presented at the hearing, including a letter from the defendant which he asked that counsel for the State Bar submit to the hearing committee, the hearing committee composed of Samuel Jerome Crow, chairman; Paul L. Jones, and James Lee Burney, makes the following additional findings:

AGGRAVATING FACTORS

1. Prior disciplinary record;
2. Substantial experience in the practice of law;
3. Pattern of misconduct;
4. Multiple offenses;
5. Dishonest or selfish motive when he lied to Ann Jordan and the court about the status of her case and;
6. Indifference to making restitution to Ann Jordan and David W. Graves Sr.

MITIGATING FACTORS

1. Personal or emotional problems; and
2. Apparent remorse for his actions.


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BASED UPON all the Findings of Fact, the Conclusions of Law, and the aggravating and mitigating factors listed above, the hearing committee enters the following:

ORDER OF DISCIPLINE

1. The Defendant, Michael R. Mitwol, is hereby DISBARRED from the practice of law in North Carolina.
2. The Defendant shall immediately submit his law license and membership card to the Secretary of the North Carolina State Bar.
3. The Defendant shall reimburse the North Carolina State Bar for the cost (\$462.50) incurred for the psychiatric examination conducted by Dr. John Parkinson and for the fees (\$43.16) incurred by his appointed counsel, Helen Hinn, in his disability case.
4. The Defendant shall violate no provisions of the Rules of Professional Conduct of the North Carolina State Bar during his disbarment.
5. The Defendant shall violate no state or federal laws during his disbarment.
6. The Defendant shall fully comply with the provisions of Rule 24 of Article IX of the Discipline and Disbarment Procedures of the North Carolina State Bar regarding the wind down of his practice.
7. The Defendant shall pay the costs of this proceeding.

Signed by the undersigned chairman with the full knowledge and consent of the other members of the hearing committee, this the 1st day of July, 1994.



Samuel Jerome Crow
Chairman
Hearing Committee