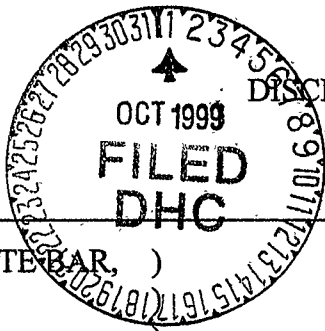


17967

NORTH CAROLINA

WAKE COUNTY



BEFORE THE DISCIPLINARY HEARING COMMISSION
NORTH CAROLINA STATE BAR
99 DHC 16

THE NORTH CAROLINA STATE BAR,)

Plaintiff)

v.)

DAVID R. DOWELL, Attorney)

Defendant)

CONSENT ORDER
OF DISCIPLINE

This matter was considered by a Hearing Committee of the Disciplinary Hearing Commission composed of Richard T. Gammon, Chair; Jean G. Hauser, and Franklin E. Martin, upon the proposed consent order of discipline submitted by the parties. The Plaintiff was represented by Larissa J. Erkman, The Defendant 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. Based on the consent of the parties, the Hearing Committee hereby enters 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, David R. Dowell (hereinafter, the "Defendant"), was admitted to the North Carolina State Bar in 1991 and is, and was at all times referred to herein, an attorney at law licensed to practice law 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 relevant periods referred to herein, the Defendant was engaged in the practice of law with the Dowell Law Offices in Jacksonville, North Carolina.

4. In February 1993, Mr. Almy J. O'Neal (hereafter, "Mr. O'Neal") was tried by general court-martial for offenses including the murder of his wife during his assignment in Korea. Mr. O'Neal pled guilty to involuntary manslaughter, among other charges, pursuant to the terms of a pretrial agreement. Mr. O'Neal was sentenced to a term of imprisonment.

5. Mr. O'Neal retained the Defendant to represent him in seeking post-conviction relief. Mr. O'Neal had authorized the Defendant to discuss his case with Mr. O'Neal's brother, Mr. Robert Lowery, with the understanding that Mr. Lowery would maintain contact with the Defendant throughout the appellate and post-conviction proceedings in order to facilitate communication between Mr. O'Neal, who was incarcerated, and the Defendant.

6. Mr. Lowery did maintain some contact with the Defendant during the appellate and post-conviction proceedings in Mr. O'Neal's case. At times, however, the Defendant was unable to reach Mr. Lowery when he attempted to contact him.

7. The Defendant filed a direct appeal and various petitions for post-conviction relief on behalf of Mr. O'Neal. The Defendant filed a petition for new trial in accordance with Article 73 of the Uniform Code of Military Justice ("UCMJ") in May 1996. In June 1996, the Chief of the Examinations and New Trials Division of the United States Army Judiciary returned the petition without action. On July 25, 1996, the Defendant resubmitted the petition with a cover letter in the nature of a memorandum of law. On July 30, 1996, the Chief of the Examinations and New Trials Division acknowledged receipt of the petition, which he described as "... implicating both Article 73 [new trial] and Article 74 [request for clemency], UCMJ [.]". The July 30th letter informed the Defendant that the Chief of the Examinations and New Trials Division had "forwarded the entirety of [the] petition to the Office of the Judge Advocate General."

8. Based on the July 30, 1996 letter from the Chief of the Examinations and New Trials Division, the Defendant concluded that the petition for new trial, which he resubmitted on behalf of Mr. O'Neal along with a memorandum of law, was being treated by the Chief of the Examinations and New Trials Division and the Office of the Judge Advocate General as a combined petition for new trial and a formal request for clemency. He therefore did not file a separate request for clemency.

9. In response to an inquiry made by Mr. O'Neal, the Office of the Judge Advocate General advised Mr. O'Neal by letter dated December 23, 1996 that all of his petitions for post-conviction relief had been denied, but that his attorney could still assist him in filing a request for clemency. Based on his mistaken belief that the petition for new trial and memorandum of law was being treated as a combined petition for new trial and request for clemency, the Defendant advised or otherwise led Mr. Lowery and/or Mr. O'Neal to believe that he had filed Mr. O'Neal's request for clemency and that he was simply waiting for a response from the Office of the Judge Advocate General.

10. The Defendant did not advise Mr. O'Neal or Mr. Lowery that he did not file a separate request for clemency on behalf of Mr. O'Neal. The Defendant did not make timely independent inquiry with the Office of the Judge Advocate General as to whether the petition for new trial and memorandum of law were in fact being treated as a combined request for clemency. Much later, the Defendant learned that it would be necessary for Mr. O'Neal to file a separate request for clemency under Article 74, UCMJ.

11. On or around October 29, 1996, the Defendant signed a letter prepared by his legal assistant addressed to Mr. O'Neal's brother, Mr. Robert Lowery, explaining that he intended to prepare and file on behalf of Mr. O'Neal a petition for extraordinary relief in the nature of a writ of error *coram nobis*. The Defendant did prepare a draft of the petition for writ of error *coram nobis*, but he never filed the petition. In researching and preparing the draft, the Defendant concluded that the grounds for the petition were frivolous, and, absent an adequate basis in law or fact, the petition ought not be filed.

12. The Defendant failed to advise either Mr. O'Neal or Mr. Lowery of his conclusion that a petition for writ of error *coram nobis* ought not be filed on behalf of Mr. O'Neal.

13. In January 1997, the Defendant moved his practice from his office to his home. Beginning in the spring of 1997, the Defendant's health conditions, including a diagnosed heart

condition, materially impaired his practice of law and his ability to represent clients, including Mr. O'Neal.

14. As a result of his health conditions, the Defendant decided to reduce his law practice by taking no new cases and transferring to other attorneys those cases that were either too time consuming or that he felt otherwise incapable of handling.

15. However, the Defendant believed he could timely and diligently handle Mr. O'Neal's case despite his health conditions. At the time the Defendant was transferring cases, he believed that Mr. O'Neal's case was merely awaiting response from the Office of the Judge Advocate General on the combined petition for new trial and request for clemency. The Defendant was mistaken.

16. The Defendant did not make any arrangements to have Mr. O'Neal's case transferred to another attorney. Nor did the Defendant seek to withdraw from representing Mr. O'Neal.

17. On or around July 1, 1997, Defendant moved his practice and home to Alabama. As of July 1, 1997, the Defendant had no office staff. By mid-July 1997, the Defendant was suffering from stress and subsequent depression. The Defendant did not advise Mr. O'Neal or Mr. Lowery where or how he could be reached after the Defendant moved his home and law practice to Alabama.

18. Since June or July 1997, neither Mr. O'Neal nor Mr. Lowery has had any communication with the Defendant, despite attempts to reach him. Defendant believes that he spoke with Mr. Lowery or Mr. O'Neal in the fall of 1997, but does not recall the substance of the conversation and does not have any notes.

19. Despite numerous requests from Mr. O'Neal and/or Mr. Lowery, the Defendant has failed to provide to Mr. O'Neal records relating to the legal representation, which documents, at all relevant times, have been in the Defendant's possession.

20. On December 9, 1997, Mr. O'Neal again wrote to the Office of the Judge Advocate General requesting the status of his request for clemency. On January 26, 1998, the Judge Advocate General's Office advised Mr. O'Neal that no request for clemency had been filed with any office affiliated with the United States Army Judiciary.

21. The Defendant did not retain any unearned fees collected from Mr. O'Neal. In fact, the Defendant's records show that Mr. O'Neal owes him at least \$796.72 in fees for legal services rendered up to and including the Defendant's research related to the proposed petition for writ of error *coram nobis*.

22. On December 22, 1995, the Defendant agreed to represent Donald C. Reed (hereafter, "Mr. Reed") in an action for damages against the U.S. Marine Corps.

23. The Defendant and Mr. Reed signed a written fee agreement, a true and accurate copy of which is attached to the Complaint filed in this action as Exhibit A. The fee agreement called for payment of attorney's fees to the Defendant in installments. Pursuant to the fee agreement, Mr. Reed has paid the Defendant a total of \$5,200.

24. From December 1995 to April 1997, Mr. Reed made repeated telephone calls and sent numerous letters to the Defendant requesting information on the status of his case against the U.S. Marine Corps. At all times during this period, the Defendant led Mr. Reed to believe that he was working on Mr. Reed's case and would shortly prepare a draft complaint for Mr. Reed's review. The Defendant furnished to Mr. Reed at least two drafts of the complaint bearing notations that the documents were drafts on which the Defendant was continuing to work.

25. On April 16, 1997, Mr. Reed sent the Defendant a letter demanding that the Defendant either give him assurances that the complaint would be drafted or return his file and the attorney's fee totaling \$5,200.

26. The Defendant responded to Mr. Reed by letter dated May 8, 1997, acknowledging receipt of \$5,200 from Mr. Reed in payment of attorney's fees and setting out specific dates for completion of the formal complaint against the U.S. Marine Corps.

27. Thereafter the Defendant completed a draft of the complaint and was working on a memorandum of law to accompany the complaint.

28. The Defendant did not advise Mr. Reed where or how he could be reached after the Defendant moved his practice and home to Alabama on or around July 1, 1997.

29. By letter dated October 18, 1997 and addressed to the Defendant at his Jacksonville, North Carolina address, Mr. Reed terminated the Defendant's legal services and requested that the Defendant forward the file materials to his new attorney. In November 1997, Mr. Reed located the Defendant and contacted him by telephone in Alabama, requesting that the Defendant refund the \$5,200 that Mr. Reed had paid for attorney's fees. Mr. Reed has not received his case file from the Defendant. Mr. Reed has not received a refund of the \$5,200 he paid the Defendant in attorney's fees.

30. On February 3, 1998, Mr. Reed filed a petition for fee arbitration with the North Carolina State Bar. On February 4, 1998, the North Carolina State Bar sent a Notification of Mandatory Fee Arbitration (hereafter "Fee Arbitration Notice") to the Defendant. The Defendant received the Fee Arbitration Notice on February 12, 1998. The Defendant was required to respond to the Fee Arbitration Notice within 15 days of receipt of that letter, or by February 27, 1998. The Defendant failed to respond to the Fee Arbitration Notice.

31. On March 10, 1998, the North Carolina State Bar sent a letter notifying the Defendant that he had failed to timely respond to the Fee Arbitration Notice. The Defendant received this second fee arbitration notice on March 12, 1998, and March 16, 1998, respectively. The Defendant was required to respond to the second fee arbitration notice letter within 10 days of receipt of that letter, or by March 26, 1998, at the latest. The Defendant failed to respond to this second fee arbitration notice.

32. The Defendant represented Samuel B. Thomas (hereafter, "Mr. Thomas") in administrative proceedings before the Department of Veterans Affairs (hereafter, the "Agency") to recover VA benefits. The Defendant obtained an award of full benefits for Mr. Thomas from the date of Mr. Thomas's initial claim. Mr. Thomas sought an award back to the date of his military discharge. The Defendant advised Mr. Thomas of his right of appeal from the agency decision awarding benefits from the claim date and that Mr. Thomas was not likely to prevail on appeal. Mr. Thomas nevertheless insisted on filing an appeal.

33. The Defendant filed an appeal of the Agency's decision at the request of Mr. Thomas. On appeal, the court entered a decision in effect overruling the Agency's decision, and allowing Mr. Thomas to continue with his proceedings to recover past-due benefits. The matter was set for hearing before the Agency on September 10, 1997. The hearing was continued until June 15, 1998. The Defendant did not appear at the June 15, 1998 hearing, so Mr. Thomas was forced to represent himself.

34. On May 8, 1998, the North Carolina State Bar sent Letters of Notice to the Defendant in Grievance Files 98G0447 and 98G0448, concerning the O'Neal case and the Reed case, respectively (hereafter, "the May 8 Letters of Notice"). The Defendant received the May 8 Letters of Notice on May 11, 1998. The Defendant requested and was granted by the North Carolina State Bar extensions of time, to and including June 22, 1998, within which to respond to the May 8 Letters of Notice. The State Bar did not receive a response from the Defendant at that time.

35. On July 2, 1998, the North Carolina State Bar issued subpoenas commanding the Defendant to appear before Deputy Counsel at the North Carolina State Bar office in Raleigh on August 6, 1998 to testify and produce documents in Grievance Files 98G0447 and 98G0448 (hereafter, "the July 2 Subpoenas"). The Defendant accepted service of the July 2 Subpoenas on July 9, 1998 and on July 17, 1998. By facsimile transmission dated July 22, 1998, the Defendant informed the State Bar that he could not appear in North Carolina for health reasons.

36. On July 21, 1998, the North Carolina State Bar sent a Letter of Notice to the Defendant in Grievance File 98G0839, concerning the Thomas case (hereafter, "the July 21 Letter of Notice"). The Defendant received the July 21 Letter of Notice on July 25, 1998. The Defendant was required to respond to the July 21 Letter of Notice on or before August 9, 1998. The Defendant did not timely respond to the July 21 Letter of Notice.

37. On August 28, 1998, the North Carolina State Bar sent a follow-up letter to the Defendant, advising that, as of that date, no response had been received in Grievance File 98G0839 and that the Defendant should respond in some fashion by September 8, 1998. The Defendant did not respond on or before September 8, 1998.

38. On December 8, 1998, the North Carolina State Bar issued subpoenas commanding the Defendant to appear before the Grievance Committee of the North Carolina State Bar in Raleigh on January 13, 1999 to testify and produce documents in Grievance Files 98G0447, 98G0448, and 98G0839 (hereafter, "the December 8 Subpoenas"). The Defendant accepted service of the December 8 Subpoenas on December 10, 1998 and December 14, 1998. By handwritten letter dated January 12, 1999, the Defendant notified the North Carolina State Bar that he was unable to appear as commanded on January 13, 1999, because he was recovering from reconstructive surgery on his foot. The North Carolina State Bar received no other correspondence from the Defendant.

Based upon the foregoing Findings of Fact and by consent of the parties, the Hearing Committee enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Committee and the Committee has jurisdiction over the Defendant, David R. Dowell, and the subject matter of this proceeding.

2. The Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:

- (a) By failing to act with reasonable diligence and promptness in making adequate inquiries to the Chief of the Examinations and New Trial Division or the Office of the Judge Advocate General, on behalf of Mr. O'Neal, concerning the status of what he believed to be Mr. O'Neal's combined petition for new trial and request for clemency, the Defendant violated Rule 1.3 of the Revised Rules of Professional Conduct.
- (b) By failing to keep Mr. O'Neal reasonably informed about the status of the post-conviction proceedings and by failing to promptly and accurately respond to all requests for information, the Defendant violated Rule 1.4 (a)(1) of the Revised Rules of Professional Conduct.
- (c) By failing to withdraw from representing Mr. O'Neal after he determined that his physical or mental condition materially impaired his practice of law and his ability to represent clients, including, but not limited to Mr. O'Neal, the Defendant violated Rule 1.16(a)(3) of the Revised Rules of Professional Conduct.
- (d) By failing to act with reasonable diligence and promptness in filing the complaint on behalf of Mr. Reed against the U.S. Marine Corps, the Defendant violated Rule 6(b)(3) of the Rules of Professional Conduct and/or Rule 1.3 of the Revised Rules of Professional Conduct.
- (e) By failing to refund the unearned portion of the \$5,200 fee and by failing to surrender papers and property to which Mr. Reed was entitled after Mr. Reed terminated the legal representation, the Defendant violated Rule 2.8(c)(3) of the Rules of Professional Conduct and/or Rule 1.16(d) of the Revised Rules of Professional Conduct.
- (f) By failing to participate in good faith in arbitration of the fee dispute with Mr. Reed, the Defendant violated Rule 1.5(f) of the Revised Rules of Professional Conduct.
- (g) By failing to act with reasonable diligence and promptness in pursuing Mr. Thomas' claims for past-due veteran's benefits, the Defendant violated Rule 6(b)(3) of the Rules of Professional Conduct and Rule 1.3 of the Revised Rules of Professional Conduct.
- (h) By failing to keep Mr. Thomas reasonably informed about the status of the legal representation and by failing to promptly and accurately respond to all requests for information, the Defendant violated Rule 6(b)(2) of the Rules of Professional Conduct and/or Rule 1.4 (a)(1) of the Revised Rules of Professional Conduct.
- (i) By knowingly failing to respond to formal inquiries and lawful demands for information issued by the North Carolina State Bar in Grievance Files 98G0447, 98G0448 and 98G0839, the Defendant violated N.C. Gen. Stat. § 84-28(b)(3) and Rule 8.1(b) of the Revised Rules of Professional Conduct.

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the consent of the parties to the discipline to be imposed, the Hearing Committee hereby makes additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. The Defendant's misconduct is aggravated by the following factors:
 - a) pattern of misconduct
 - b) multiple offenses
 - c) substantial experience in the practice of law
2. The Defendant's misconduct is mitigated by the following factors:
 - a) personal or emotional problems
 - b) absence of a dishonest or selfish motive
 - c) full and free disclosure to the DHC
 - d) physical or mental impairment
 - e) remorse
3. The aggravating factors do not outweigh the mitigating factors.

Based upon the foregoing aggravating and mitigating factors and the consent of the parties, the Hearing Committee hereby enters the following

ORDER OF DISCIPLINE

1. The license of the Defendant, David Dowell, is hereby suspended for three years upon the following terms and conditions:
 - a. The Defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days from service of this order upon him and shall comply with all provisions of 27 NC. Admin. Code Chapter 1, Subchapter B, § .0124 of the North Carolina State Bar Discipline & Disability Rules, respecting suspended attorneys.
 - b. The suspension will become effective 30 days from service of this order upon the Defendant and will continue for a period of not less than 36 consecutive months.
 - c. The Defendant shall provide to Mr. O'Neal all documents relating to his representation of Mr. O'Neal in the matters referred to herein, as required by Rule 1.16(d) of the Revised Rules of Professional Conduct, at Mr. O'Neal's last known address, as follows: Mr. Almy J. O'Neal, Jr., Reg. No. 04693-000, P.O. Box 1000, Leavenworth, KS 66048-1000, or at such other address as Mr. O'Neal may designate in writing in response to inquiry made by the Defendant.
 - d. The Defendant shall provide to Mr. Reed all documents relating to his representation of Mr. Reed in the matters referred to herein, as required by Rule 1.16(d) of the Revised Rules of Professional Conduct, at Mr. Reed's last known address, as follows: Mr. Donald C. Reed, 2210 Encanto Drive, NE, Phoenix AZ 85007, or at such other address as Mr. O'Neal may designate in writing in response to inquiry made by the Defendant.
 - e. The Defendant pay restitution to Mr. Reed in the amount of \$5,200.00 representing the unearned attorney's fee paid to the Defendant by Mr. Reed.

2. At any time after a period of 12 consecutive months, the Defendant may seek a stay of the remaining period of suspension and reinstatement of his license upon filing a written petition and demonstration of compliance with all provisions of 27 NC. Admin. Code Chapter 1, Subchapter B, § .0125(b) of the North Carolina State Bar Discipline & Disability Rules and the following conditions:

- a. The Defendant shall have complied with paragraph 1(c) – (e) above.
- b. The Defendant shall not have violated any state or federal laws during the period of active suspension.
- c. The Defendant shall not have violated any provisions of the North Carolina State Bar Discipline & Disability Rules or the Revised Rules of Professional Conduct during the period of active suspension.
- d. The Defendant shall have paid all costs incurred in this proceeding and taxed against the Defendant within ninety (90) days of service of this order upon him.
- e. The Defendant shall have voluntarily reported to the State Bar any instances of misconduct involving neglect of client matters occurring during the period from July 1996 to the date his license is hereby suspended, and the Defendant shall have executed a statement under oath verifying that no other instances of gross neglect exist (other than those for which he has been disciplined in this matter or those that he has voluntarily reported).
- f. At the time that he seeks a stay of the remaining period of suspension, the Defendant shall demonstrate by clear, cogent and convincing evidence that he is not suffering from any physical or emotion condition that would impair his professional judgment or ability to engage in the practice of law in a competent manner.

3. Upon entry of an order staying this suspension and granting the reinstatement of the Defendant's license to practice law, the order of stayed suspension shall continue in force for the balance of the term of suspension, provided that the Defendant complies with the following conditions:

- a. The Defendant shall violate no federal or state laws.
- b. The Defendant shall violate no provisions of the North Carolina State Bar Discipline & Disability Rules or the Revised Rules of Professional Conduct.
- c. The Defendant shall pay any costs incurred in connection with his reinstatement proceeding and assessed against him.

4. If during any period in which the three-year suspension is stayed the Defendant fails to comply with any one or more conditions stated in paragraph 3, 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 & Disability Rules.

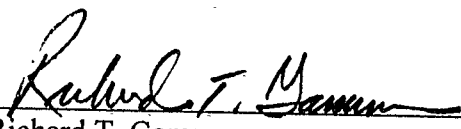
5. If any stay of the suspension of the Defendant's law license is lifted, as provided in the foregoing paragraph, the Disciplinary Hearing Commission may enter an order providing for such conditions as it deems necessary for obtaining a stay of the remaining period of suspension or for reinstatement of the Defendant's license at the end of the three-year suspension period.

6. To obtain reinstatement of his license at the end of the three-year suspension period, if no stay is sought or entered (or if a stay has been lifted, as provided above), the Defendant must demonstrate that he has fully complied with all provisions of 27 NC. Admin. Code Chapter 1, Subchapter B, § .0125(b) of the North Carolina State Bar Discipline & Disability Rules. The Defendant must also demonstrate by clear, cogent and convincing evidence that he has complied with the provisions of paragraphs 1 and 2 above, including, but not limited to, the requirement in paragraph 2(f) that the Defendant demonstrate by clear, cogent and convincing evidence that he is not suffering from any mental or physical condition that impairs his professional judgment or ability to engage in the practice of law in a competent manner.


7. 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 three-year suspension.

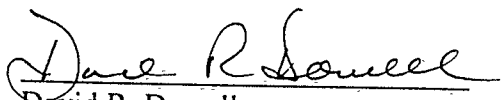
Signed by the undersigned Hearing Committee chair with the consent of the other Hearing Committee members.

This the 27th day of September 1999.


Richard T. Gammon
Hearing Committee Chair

CONSENTED AND AGREED TO:


Larissa J. Erkman
Attorney for Plaintiff
Date: 9/27/99


David R. Dowell
Defendant
Date: 10/4/99