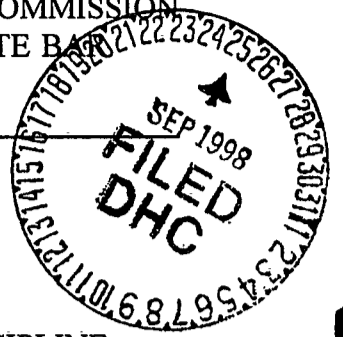


15494

NORTH CAROLINA
WAKE COUNTY

BEFORE THE DISCIPLINARY HEARING COMMISSION
OF THE NORTH CAROLINA STATE BAR
98 DHC 8



THE NORTH CAROLINA STATE BAR,)
)
Plaintiff,)
)
vs.)
)
G. PHILLIP DAVID, ATTORNEY)
)
Defendant.)

CONSENT ORDER OF DISCIPLINE

This matter was heard before a hearing committee of the Disciplinary Hearing Commission composed of Henry C. Babb Jr., Chair, Michael L. Bonfoey and B. Stephen Huntley, pursuant to Section .0114(h) of the Discipline and Disability Rules of the North Carolina State Bar. The Plaintiff was represented by Fern Gunn Simeon. The Defendant was represented by Joseph B. Cheshire V. and Alan M. Schneider. Both parties have agreed to waive a formal hearing in this matter and both parties stipulate and agree to the following findings of fact and conclusions of law recited in this consent order and to the discipline imposed. Based upon 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, G. Phillip David was admitted to the North Carolina State Bar in 1988, 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.
3. During all of the relevant periods referred to herein, defendant was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the city of Wilmington, North Carolina.

4. In late 1994 or early 1995, the defendant agreed to represent Nellie Ballard (hereafter Ballard) in a wrongful death action concerning the death of Ballard's nephew, Jessie Junior Darden (hereafter Darden) arising from an automobile accident which occurred on July 26, 1994 in Brunswick County.

5. Although Darden had resided with Ballard and had been raised by her since infancy, the defendant was aware that Darden's natural mother was alive and that Ballard, although Darden's aunt, was not his natural mother.

6. Also, there was a minor child who survived Darden but defendant was unaware of the child's existence and did not take the necessary steps to determine the child's existence.

7. The defendant pursued a wrongful death claim against Ballard's uninsured motorist carrier, Seibels Bruce.

8. On February 1, 1995, a check in the amount of \$1,000.00 was issued from Seibels Bruce to Ballard, as the executrix of the estate of Darden, and to the Defendant. This check represented payment of a medical payment claim in the Darden wrongful death action.

9. At the time the \$1,000.00 medical payment claims check was issued to Ballard, she was not the executrix of Darden's estate.

10. On February 20, 1995, defendant sent the \$1,000.00 medical payments claim to Ballard.

11. The defendant did not give the \$1,000.00 medical payment to Darden's lawful heir.

12. In April 1995, the defendant settled the wrongful death claim for \$25,000.00.

13. On April 6, 1995, a check in the amount of \$25,000.00 from Seibels Bruce was issued to Ballard, as the executrix of the estate of Darden, and to the defendant.

14. At the time the \$25,000 check was issued to Ballard, she was not the executrix of Darden's estate.

15. Some time after receiving the \$25,000.00 check from Seibels Bruce, the defendant deposited the check in his trust account.

16. The defendant issued two checks to Ballard from the \$25,000.00 proceeds of the wrongful death claim. On April 20, 1995, the defendant issued check number 1246 in the amount of \$11,316.58 to Nellie Ballard. The defendant also issued check number 1255 to Atlantic Health Clinic or Nellie Ballard in the amount of \$2,868 which was payment of a personal obligation of Ballard.

17. The defendant did not pay the wrongful death proceeds to Darden's lawful heir pursuant to N.C.G.S. Section 28A-18-2.

18. The defendant did not have the clerk of superior court approve the disbursements made from the wrongful death claim as required by N.C.G.S. Section 28A-18-2.

19. Although the Defendant mistakenly believed that Ballard had been appointed as the personal representative of Darden's estate, through adequate preparation and investigation, the defendant should have known that Ballard had not been appointed as personal representative of Darden's estate at the time the two checks from Seibels Bruce were issued to Ballard.

20. The conduct in question did not involve any intentional wrongdoing or any fraudulent conduct on the part of the defendant, but was the result of the defendant's lack of familiarity and knowledge regarding the proper procedures involved in handling a wrongful death case.

21. Since the filing of the grievance with the North Carolina State Bar, a compromise settlement of all claims arising out of the defendant's erroneous distribution of proceeds (received pursuant to a wrongful death claim) has been negotiated. As a result, the parties have reached a mutually satisfactory resolution of the underlying civil claim whereby the defendant has paid the sum of \$22,517.08 in satisfaction. This settlement amount represents \$25,000 received from the uninsured motorist provisions of Ballard's personal automobile policy plus \$1,000 med pay, less the cost of a funeral (\$3,482.92). Additionally, the defendant as part of the negotiated settlement, paid the sum of \$7,505.69 to defray the minor's attorney's fees and costs incurred in pursuing and obtaining a compromise settlement of the malpractice action.

22. The Petition For Appointment of Guardian Ad Litem, the Order appointing Guardian Ad Litem, the Judgment and Release, the Petition For Court Approval, and the Court Order approving Judgment found that the minor child had a claim for relief against the defendant G. Phillip David and David & Associates, P.L.L.C. for negligent disbursement of funds received pursuant to a wrongful death claim which arose from the death of said minor child's father, Jessie Junior Darden, in an automobile accident which occurred on July 26, 1994 in Brunswick County.

23. On December 19, 1995, the defendant agreed to represent Lula Wright (hereafter Wright) in a personal injury case. Wright and the defendant entered into a contract for legal services on December 1995.

24. Paragraph 6 of the contract for legal services signed by Wright and the defendant provided that if Wright "discontinue[d] her cause and/or dismise[d]" the defendant after an offer of settlement was made, Wright must pay the defendant the "contracted percentage amount of the most recent offer of settlement..."

25. The defendant adopted this clause approximately 9 years ago from another local law firm's Fee Agreement. Although the defendant has had occasions over the years where he was discharged by the client, he has never pursued any compensation whatsoever from a client upon

discharge. In addition, immediately upon learning that the language in the fee agreement was problematic, he revised his fee agreements to eliminate the provision in question.

Based upon the consent of the parties and 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 the defendant 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.G.S. Sec. 84-28(b) as follows:

a. By failing to determine the existence of Darden's lawful heirs and by disbursing the wrongful death claim proceeds and medical payment check to Nellie Ballard and not to Darden's lawful heir, the defendant handled a legal matter without adequate preparation under the circumstances in violation of Rule 6(a)(2); handled a legal matter which defendant knew or should have known he was not competent to handle without associating a lawyer who was competent to handle a wrongful death case in violation of Rule 6(a)(1); and engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(d).

b. By requiring in his December 19, 1995 contract for legal services that his client pay the contractual contingent fee instead of a quantum meruit amount if his client discharged him before there was a final settlement in the case, the defendant entered into a fee agreement in violation of Rule 2.6.

Based upon the consent of the parties, the hearing committee also enters the following:

FINDINGS OF FACT REGARDING DISCIPLINE

1. The Defendant's conduct is mitigated by the following factors:

- a. Full and free disclosure to the Committee and cooperative attitude toward the proceedings;
- b. absence of dishonesty;
- c. good character and reputation;

- d. The Defendant has been subjected to a civil malpractice claim regarding this matter which proceeding has been resolved to the satisfaction of all parties, with full restitution being made; and
 - e. The Defendant has exhibited sincere remorse regarding his mishandling of this matter.
2. The Defendant's conduct is aggravated by the following factors:
 - a. Prior discipline involving advertising.
 3. The mitigating factors outweigh the aggravating factors.

Based upon the foregoing findings of fact and conclusions of law and the findings regarding discipline and based upon the consent of the parties, the hearing committee enters the following:

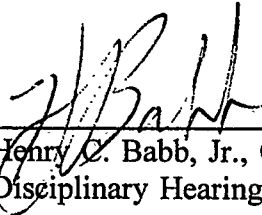
ORDER OF DISCIPLINE

The defendant is hereby suspended from the practice of law for six months. This suspension shall be stayed for one year based on the following conditions:

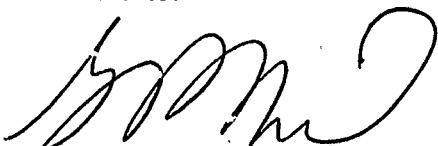
- (a) Defendant shall successfully complete an extra 12 hours of CLE prior to the end of the stay;
- (b) Defendant shall violate no provisions of the Rules of Professional Conduct during the one year stay period;
- (c) Defendant shall violate no laws of the state of North Carolina during the one year stay period;
- (d) Defendant shall pay the costs of this proceeding as determined by the Secretary of the North Carolina State Bar.


Signed by the hearing committee chair with the consent of the other members of the hearing committee.

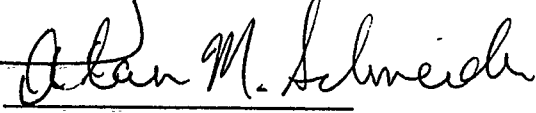
This the 21 day of ^{September} ~~August~~, 1998.

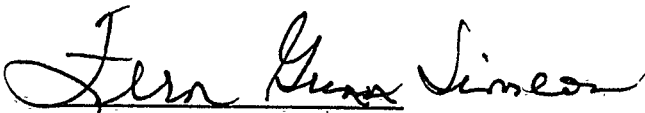

Henry C. Babb, Jr., Chair
Disciplinary Hearing Committee

consented to:


G. Phillip David, Defendant


Joseph B. Cheshire V.
Attorney for Defendant


Alan M. Schneider
Attorney for Defendant


Fern Gunn Simeon
Attorney for Plaintiff