

NORTH CAROLINA :
WAKE COUNTY :

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
89 DHC 6

THE NORTH CAROLINA STATE BAR,
Plaintiff
v.
OTTWAY BURTON,
Defendant

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came on to be heard and was heard on November 3, 1989 before a Hearing Committee of the Disciplinary Hearing Commission composed of John B. McMillan, Chairman, Robert C. Bryan, and Donald L. Osborne. The North Carolina State Bar was represented by Fern E. Gunn and the defendant was represented by J. W. Clontz and Robert S. Cahoon. Based upon the stipulations of the parties and the evidence admitted at the hearing, the Committee finds the following facts 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, Ottway Burton, was admitted to the North Carolina State Bar on December 3, 1945, and is, and was at all times referred to herein, an Attorney at Law licensed to practice in North Carolina, subject to the rules and regulations, Code of professional

Responsibility and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. Since December 3, 1945 Defendant has been actively engaged in the practice of law in North Carolina and maintained a law office in Asheboro in Randolph County except the Defendant did not actively practice from July 1, 1961 through and including October 1, 1961, from October 1, 1984 through May 15, 1985, from May 22, 1989 through September 20, 1989 and for short periods during the winter months all due to illnesses.

4. On October 21, 1980, Lois Thompson Keaton ("Keaton") retained the Defendant to represent her in a workers compensation action regarding two separate hernias Keaton suffered on the job on two different occasions - February 4, 1980 and July 14, 1980. Keaton entered into a contract with the Defendant wherein she agreed to pay attorney's fees equal to thirty-three and one-third percent of whatever sum was recovered.

5. Keaton made a \$500.00 down payment which was to be credited to fees earned by Defendant.

6. On October 21, 1980 Defendant received the \$500.00 check and placed that sum in his firm account.

7. Defendant received the \$500.00 check from Keaton without the approval of the North Carolina Industrial Commission.

8. Keaton's cases were heard on November 8, 1983 by former Deputy Commissioner Brenda B. Becton of the North Carolina Industrial Commission. Defendant was present at the hearing and performed valuable legal services on Mrs. Keaton's behalf.

9. In an order filed on or about May 15, 1984 Deputy Commissioner Becton awarded payment for Keaton's temporary total disability in the two separate injuries as follows:

- a) \$116.56 per week compensation for the period of disablement from March 9, 1980 through April 20, 1980;
- b) \$115.47 per week compensation for the period of disablement from August 13, 1980 through October 14, 1980.

10. Deputy Commissioner Becton's Order also provided that "An attorney's fee in the amount of 25% of the total compensation due Plaintiff is hereby approved for Plaintiff's counsel and that amount shall be deducted from the compensation due Plaintiff and paid directly to her attorney."

11. The defendants in Keaton's cases were ordered by Deputy Commissioner Becton to "pay all medical expenses incurred by Plaintiff as a result of the injury by accident giving rise hereto when bills for the same have been submitted to the Industrial Commission, through the carrier, and approved by the Commission."

12. On May 24, 1984, the insurance carrier for Keaton's employer, Liberty Mutual Insurance Company (Liberty Mutual), sent to Defendant two checks totalling \$1,316.43 payable to Keaton for her temporary total disabilities. On May 24, 1984, Liberty Mutual sent to Defendant two checks totalling \$438.81 payable to the Defendant as his attorney's fees in Keaton's cases. The grand total of these four checks was \$1,755.24. All these checks were void if not negotiated before November 24, 1984 and so stated on the face of the checks.

13. Although the total of the two checks payable to Keaton was in accordance with the order of Deputy Commissioner Becton, one of the checks was in an amount higher than had been awarded and the other

check was in an amount lower than had been ordered. Although the two checks payable to the Defendant when combined were in the correct amount ordered by the Becton order, one of said checks was in an amount higher than that ordered and the other check was in an amount lower than that ordered.

14. Upon receipt of the four checks, Defendant placed them in his file and did not negotiate them nor deliver the Keaton checks to Mrs. Keaton.

15. Following receipt of the checks, Defendant informed Mrs. Keaton that he would not give them to her because the amounts were not correct and the 25% attorney fee award was not right.

16. Between May 24, 1984 and June 8, 1988, Defendant took no action with regard to collecting Keaton's disability award.

17. Between May 24, 1984 and June 8, 1988, on numerous occasions Keaton requested that Defendant obtain her money for her. Defendant told Keaton that he did not think the twenty-five per cent awarded as attorney's fees was right.

18. Sid Porter of Liberty Mutual sent the Defendant a letter dated April 15, 1985 requesting information about the four outstanding checks in Keaton's cases and Defendant did not respond to Porter's letter.

19. On numerous occasions between May 24, 1984 and June 8, 1988, Keaton requested that Defendant obtain payment of her hospital and medical bills.

20. During the period from May 15, 1984 until June 8, 1988, Defendant took no action to seek reimbursement for Keaton's out of

pocket medical expenses which were ordered paid by the order of Deputy Commissioner Becton.

21. On June 24, 1987 Keaton wrote the North Carolina Industrial Commission and requested assistance in obtaining payment of her award.

22. On June 8, 1988, Defendant filed a request for a hearing with the North Carolina Industrial Commission wherein he requested that the Keaton matter be assigned for hearing because of the "failure of insured to pay all medical expenses/treatments and to enter an order for adequate attorney fees for employee."

23. On November 29, 1988, Deputy Commissioner Lawrence B. Shuping, Jr. convened a hearing regarding the Keaton cases and ruled that the Defendant was not due any additional attorney fee. Deputy Commissioner Shuping also ruled that Defendant had already received \$61.19 more than he was awarded under the original order because of the \$500.00 retainer Defendant had charged and received from Keaton without the Industrial Commission's prior approval. Defendant was ordered to pay Keaton \$61.19.

24. Defendant appealed Deputy Commissioner Shuping's order to the full North Carolina Industrial Commission which affirmed that order by opinion dated September 20, 1989.

Based upon the foregoing Findings of Fact, the Hearing Committee makes the following:

CONCLUSIONS OF LAW

1. By telling his client, Keaton, she had not received her full compensation due under the Industrial Commission's award in 1984 and by failing to pay Keaton promptly such compensation, the Defendant neglected a legal matter entrusted to him in violation of

DR6-101(A)(3), has failed to seek the lawful objectives of his client through reasonably available means permitted by law and by disciplinary rules in violation of DR7-101(A)(1); has failed to carry out a contract of employment entered into with the client for professional services in violation of DR7-101(A)(2); and has prejudiced or damaged his client during the course of the professional relationship in violation of DR7-101(A)(3).

2. By failing to keep Keaton informed about the status of her worker's compensation case for approximately four years, the Defendant has neglected a legal matter entrusted to him in violation of DR6-101(A)(3); has failed to keep his client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; has failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation, all in violation of Rule 6(B)(1) and (2), respectively.

3. By failing to respond to Sid Porter's letter of April 15, 1985 requesting information about the four outstanding checks issued to Keaton and the Defendant, and the Defendant has neglected a legal matter entrusted to him in violation of DR6-101(A)(3) and Rule 6(B)(3); has failed to seek the lawful objectives of his client through reasonably available means permitted by law in violation of DR7-101(A)(1) and Rule 7.1(A)(1); has failed to carry out a contract of employment entered into with a client for professional services, in violation of DR7-101(A)(2) and Rule 7.1(A)(1); and has prejudiced or damaged his client during the course of the professional relationship in violation of DR7-101(A)(2) and Rule 7.1(A)(3).

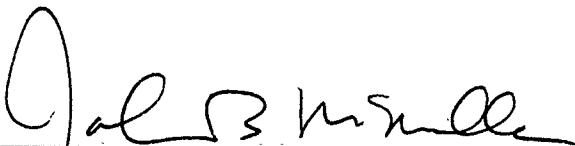
4. By not submitting Keaton's medical bills to Liberty Mutual or investigating the failure of Liberty Mutual to pay any of those bills during the period of May 15, 1984 to June 8, 1988, the Defendant neglected a legal matter entrusted to him in violation of DR6-101(A)(3) and Rule 6(B)(3); has failed to seek the lawful objectives of his client through reasonably available means permitted by law in violation of DR7-101(A)(1) and Rule 7.1(A)(1); has failed to carry out a contract of employment entered into with a client for professional services in violation of DR7-101(A)(2) and Rule 7.1(A)(2) and has prejudiced or damaged his client during the course of the professional relationship in violation of DR7-101(a)(3) and Rule 7.1(A)(3).

5. By charging a contingent fee and receiving up front a \$500.00 fee from Keaton without the Industrial Commission's prior approval, such conduct violating N.C. Gen. stat. Sec. 97-90, the Defendant has engaged in professional conduct that is prejudicial to the administration of justice, in violation of DR1-102(A)(5) and has entered into an agreement for, charged and collected an illegal fee in violation of DR2-105(A).

6. By failing to request a hearing before the North Carolina Industrial Commission for approximately four years to inquire about Keaton's unpaid medical expenses, the Defendant has neglected a legal matter entrusted to him in violation of DR6-101(A)(3) and Rule 6(B)(3); has failed to seek the lawful objectives of his client through reasonably available means permitted by law in violation of DR7-101(A)(1) and Rule 7.1(A)(1); has failed to carry out a contract of employment entered into with a client for professional services, in

violation of DR7-101(A)(2) and Rule 7.1(a)(1); has prejudiced or damaged his client during the course of the professional relationship in violation of DR7-101(A)(2) and Rule 7.1(A)(3).

Signed by the undersigned Chairman with the full knowledge and consent of the other members of the Hearing Committee, this 21st day of November, 1989.



John B. McMillan, Chairman

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THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

OTTWAY BURTON,

Defendant

ORDER OF DISCIPLINE

This cause was heard on November 3, 1989 by a duly appointed Hearing Committee of the Disciplinary Hearing Commission consisting of John B. McMillan, Chairman, Robert C. Bryan, and Donald L. Osborne. In addition to the Findings of Fact and Conclusions of Law made following the evidentiary hearing, the Hearing Committee makes additional findings of fact in mitigation as follows:

ADDITIONAL FINDINGS OF FACT:

1. Defendant has actively practiced law in North Carolina for over forty years and has no prior disciplinary record.

2. In agreeing to represent Mrs. Keaton, Defendant undertook a difficult cause with little hope of adequate compensation. Up to and including the entry of the order awarding compensation to Mrs. Keaton, Defendant performed valuable services for his client.

3. There was an absence of any dishonest or selfish motive in the conduct of the Defendant.

4. Defendant made full disclosure to the Grievance Committee of the North Carolina State Bar and maintained a cooperative attitude

toward its proceedings and the proceedings of the Disciplinary Hearing Commission.

5. Defendant has a good general reputation in the community and a reputation within the legal community as being an exceedingly conscientious and diligent lawyer in representing his clients.

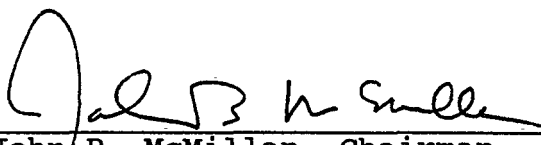
6. During a portion of the period of Defendant's neglect of Mr. Keaton's matter, Defendant experienced personal health problems and his son experienced significant health problems which required the Defendant's time and attention.

Based upon the Findings of Fact and Conclusions of Law entered in this case and the further Findings of Fact set forth above, the Hearing Committee enters the following

ORDER OF DISCIPLINE:

1. The Defendant shall be publicly censured for his misconduct.
2. 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 21st day of November, 1989.



John B. McMillan, Chairman

NORTH CAROLINA :
WAKE COUNTY :

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
89 DHC 6

IN THE MATTER OF

OTTWAY BURTON,
ATTORNEY AT LAW

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) PUBLIC CENSURE
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This public censure is delivered to you pursuant to Section 23 of Article IX of the Rules and Regulations of the North Carolina State Bar as ordered by a Hearing Committee of the Disciplinary Hearing Commission following a hearing in the above-captioned proceeding on November 3, 1989. At that hearing, the Hearing Committee found that you had violated various provisions of the Code of Professional Responsibility and Rules of Professional Conduct of the North Carolina State Bar.

On October 21, 1980, Lois Thompson Keaton had an appointment with you in your office and on that date you met with her and agreed to represent her in a worker's compensation action regarding two separate hernias she had suffered on the job on two different occasions - February 4, 1980 and July 14, 1980. You agreed to represent her despite the fact that she had already given a statement to the adjuster for the worker's compensation carrier and may have prejudiced her case during that interview. You recognized that it would be a difficult case, but you accepted employment and entered into a written contract of employment with Mrs. Keaton which provided in part that your compensation for attorney's fees would be thirty-three and one-third per cent of whatever sum was recovered from the claim.

Although N. C. Gen. Stat. 97-90 prohibited you from receiving any fee unless such fee was approved by the North Carolina Industrial Commission, you accepted a \$500.00 down payment to be credited to fees earned. Your contract of employment provided that if you were unable to recover on the claim of Mrs. Keaton, there would be "no further fee due". You did not place the \$500.00 "down payment" in your trust account, but received it in your firm account.

Although you apparently failed to answer some interrogatories submitted to Mrs. Keaton and her case was dismissed, you were able to have that dismissal reversed by appealing to the full Commission and the matter was returned for hearing by a hearing officer. The North Carolina State Bar did not allege any misconduct in failing to answer the interrogatories and the Hearing Committee did not place any weight on this apparent failure. This does explain to some degree why a claim filed in October of 1980 was not heard for over three years by the Deputy Commissioner of the Industrial Commission.

On November 8, 1983 the claims of Mrs. Keaton were heard before Brenda B. Becton, Deputy Commissioner of the North Carolina Industrial Commission and you appeared at that hearing, rendered valuable services to Mrs. Keaton and obtained a temporary total disability award for both of her injuries. The total amount of compensation awarded to Mrs. Keaton under the opinion and award of Deputy Commissioner Becton was \$1,755.24 out of which sum you were awarded attorney's fees equal to one-fourth of that award or \$438.81.

The opinion and award entered by Brenda B. Becton was filed on or about May 15, 1984 and no appeal was taken from that decision within the time allowed by law. On or about May 24, 1984 Liberty Mutual

Insurance Company, the worker's compensation carrier, sent four checks to you, two payable to Mrs. Keaton for her temporary total disabilities and two checks payable to you representing the attorney's fees allowed by Deputy Commissioner Becton. All four of the checks were for amounts different from that awarded by Deputy Commissioner Becton, but the total of the four checks represented the correct total of the award and the two checks payable to Mrs. Keaton represented the correct total awarded to her. The two checks payable to you represented one-fourth of the total award to Mrs. Keaton in accordance with Deputy Commissioner Becton's order. Upon receipt of the checks, you notified Mrs. Keaton that you had received them but told her she could not have the checks because the amounts were incorrect and that you and she had agreed to a thirty-three and one-third per cent fee.

By failing to negotiate the checks within six months, the checks became void on their face and you took no further action on behalf of Mrs. Keaton for over four years when on June 8, 1988, you requested that the matter be assigned for hearing before the North Carolina Industrial Commission.

During this four year period of time, you received many communications from Mrs. Keaton inquiring about her case, but you took no action whatsoever. During this period of time you had inquiries from Liberty Mutual Insurance Company, but you took no action. During this period of time Mrs. Keaton complained to you that her hospital bill and other medical bills had not been paid as ordered by Deputy Commissioner Becton's order and that her credit was suffering as a result, but you took no action. You had already received more in attorney fees than had been awarded by Deputy Commissioner Becton and

you in fact owed a refund to Mrs. Keaton. Your inaction has the effect of preventing Mrs. Keaton from receiving the award you had worked so hard to establish. In addition, her credit rating was damaged because you took no action to see that her hospital bill was paid. Finally, you held a sum of money which had been originally collected from her as an illegal fee.

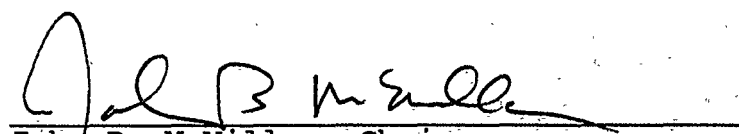
Your conduct violated numerous provisions of the Code of Professional Responsibility of the North Carolina State Bar which was in effect until October 7, 1985. Your misconduct also violated several provisions of the North Carolina Rules of Professional Conduct because your misconduct continued beyond the date those rules became effective on October 7, 1985. You neglected a legal matter entrusted to you in violation of DR6-101(A)(3). You failed to seek the lawful objectives of your client through reasonably available means permitted by law and by disciplinary rules in violation of DR7-101(A)(1). You failed to carry out a contract of employment entered into with your client for professional services in violation of DR7-101(A)(2) and you prejudiced and damaged your client during the course of the professional relationship in violation of DR7-101(A)(3). Your neglect was in violation of Rule 6(B)(3), Rules 7.1(A)(1) and (3) of the Rules of Professional Conduct. Your \$500.00 fee described as a "down payment" which was charged and collected without the Industrial Commission's prior approval was an illegal fee in violation of N. C. Gen. Stat. 97-90 and DR1-102(A)(5) and DR2-105(A).

The Hearing Committee was ultimately persuaded that your misconduct in this case was generally the product of negligence and inattention to this particular client's matters. Although there was

precedent for and counsel for the North Carolina State Bar sought an active suspension of your license, the Hearing Committee determined that because of the mitigating factors set out in its order, suspension would not be appropriate in this your first offense. The fact that the Hearing Committee has chosen to impose the relatively moderate sanction of public censure should not be taken by you to indicate that the Disciplinary Hearing Commission in any way feels that your conduct in this matter was excusable.

You have a reputation for being a competitive and aggressive advocate for your clients. In this instance, during the contest with the insurance carrier, you lived up to that reputation. Unfortunately, it appears that once the legal fight was over and had in fact been won, the challenge ended and you failed to complete the task for your client. The Hearing Committee determined that your inattention to this case was an isolated incident and that this public censure will be heeded by you. The Hearing Committee is satisfied that you will never again allow yourself to depart from the strict adherence to the highest standards of the legal profession.

Signed by the undersigned Chairman with the full knowledge and consent of the other members of the Hearing Committee, this 21st day of November, 1989.


John B. McMillan, Chairman