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NORTH CAROLINA

WAKE COUNTY

BEFORE THE
GRIEVANCE COMMITTEE
OF THE
NORTH CAROLINA STATE BAR
97G1674(III)

IN THE MATTER OF)

KENNETH M. JOHNSON,)
ATTORNEY AT LAW)

CENSURE

On October 15, 1998, the Grievance Committee of the North Carolina State Bar met and considered the grievance filed against you by Hyginus U. Aguzie.

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.

On approximately May 29, 1992, you agreed to represent Hyginus U. Aguzie on two potential lawsuits arising from the same incident. The incident occurred on May 9, 1992 when Mr. Aguzie was operating a machine manufactured by Gessner Napper Manufacturing Company while an employee of Guilford Mills Corporation. The machine malfunctioned while Mr. Aguzie was cleaning it and severed three complete fingers from Mr. Aguzie's right hand. Mr.

Aguzie retained you to represent him on a worker's compensation claim against his employer and a potential products liability action against the manufacturer.

With respect to the products liability claim, you filed suit against the manufacturer on May 8, 1995. The products liability suit was scheduled for a hearing on April 3, 1996. You failed to appear at that hearing. As a result, Senior Resident Superior Court Judge W. Douglas Albright entered an order of dismissal of Mr. Aguzie's products liability suit on April 10, 1996. Judge Albright, however, specifically provided in the order that the dismissal was without prejudice and that the action could be re-instituted within a year of the dismissal.

The Committee found the following with respect to your conduct after the dismissal of Mr. Aguzie's products liability suit. You received notice of the dismissal shortly after the hearing. You communicated by letter at least twice with Mr. Aguzie in the year following the dismissal of his claim. In these letters, you never informed Mr. Aguzie that his products liability suit had been dismissed, that it had been dismissed for your failure to appear at the April 3, 1996 hearing, or most importantly that he had until April 3, 1997 to re-file the lawsuit. Rather, you carefully worded your letters to Mr. Aguzie to mention other reasons you would not pursue his products liability claim while concealing the dismissal of the suit and the reasons for the dismissal. The Committee found that Mr. Aguzie was not aware of these important facts until receiving the information in the State Bar investigation in February 1998. Because Mr. Aguzie was not aware that his suit had been dismissed until well after April 3, 1997, he lost the opportunity to re-file his lawsuit.

The Committee found that you failed to return Mr. Aguzie's file until May 28, 1998, despite his repeated requests, your promise to do so as early as December 1996, and your acknowledgment in your March 18, 1998 response to the Grievance Committee that you had not returned the file despite his request. Given your other conduct after the dismissal of Mr. Aguzie's products liability suit, the Committee found that you failed to return the file in an effort to conceal from Mr. Aguzie the dismissal of his suit and the reasons for the dismissal.

The Committee also found that you made a false statement of material fact in response to the Grievance Committee regarding the reasons for the dismissal. In your initial response dated February 2, 1998, you stated that Mr. Aguzie's suit was dismissed under North Carolina's statute of repose - N.C.G.S. § 1-50(6). It was only after the Bar requested copies of the motions and order of dismissal that it learned that the suit was dismissed based on your failure to appear. Even in your subsequent responses to the Grievance Committee on March 18, 1998 and May 28, 1998, you continued to assert that the case was dismissed on statute of repose grounds, even though the order and other evidence demonstrate that it was not.

The Committee found that your above described conduct violated several Rules and Revised Rules of Professional Conduct. First, your failure to appear at the April 3, 1996 hearing, which caused Mr. Aguzie's products liability claim to be dismissed, violated Rule of Professional Conduct 6(b)(3). Second, your failure to inform Mr. Aguzie that his products liability suit had been dismissed, that it had been dismissed for your failure to appear at the April 3, 1996 hearing, and, most importantly, that he had until April 3, 1997 to re-file the lawsuit, violated Rule 6(b)(1) and (2). Third, your attempt to conceal the dismissal from your client by refusing or failing to return the file to Mr. Aguzie and by writing him several letters with


misleading explanations violated Rule 1.2(c) and 7.1(a)(3). Fourth, your false statements to the Grievance Committee regarding the reasons for the dismissal violated Revised Rules 8.1(a).

In deciding to issue a censure, the Committee considered the following aggravating and mitigating factors. In aggravation, the Committee considered the fact that you had been previously reprimanded in 1994 and that you engaged in a pattern of misconduct to cover up your previous neglect of Mr. Aguzie's products liability suit. In mitigation, the Committee considered that fact that you apparently were able to obtain some compensation for Mr. Aguzie's injuries in his workers compensation case.

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 16 day of November, 1998.


James K. Dorsett, III
Chair, Grievance Committee