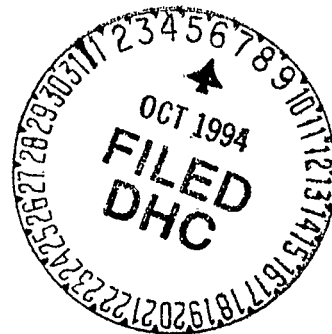


BEFORE THE DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR

93 DHC 26



6511  
THE NORTH CAROLINA STATE BAR, )

Plaintiff )

vs. )

MICHAEL R. BIRZON, ATTORNEY )

Defendant )

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

\*\*\*\*\*

This matter coming before the undersigned hearing committee of the Disciplinary Hearing Commission pursuant to Article IX, Section 14(H) of the Rules and Regulations of the North Carolina State Bar; and it appearing that the parties have agreed to waive a formal hearing in this matter; and it further appearing that the parties stipulate and agree to the following Findings of Fact and Conclusions of Law, the hearing committee therefore enters the following:

FINDINGS OF FACT

1. 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. Defendant, Michael R. Birzon, was admitted to the North Carolina State Bar on September 24, 1975 and was at all times relevant hereto 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 times relevant hereto, defendant was actively engaged in the practice of law in the City of Wilson, Wilson County, North Carolina.

4. On February 15, 1989, Mr. Norwood G. Cobb ("Cobb") was injured in an automobile accident on U.S. Highway 301 North in Nash County, N.C. when the car in which he was driving collided with a tractor-trailer truck driven by Ralph Davis Fisher, Jr. ("Fisher") and -owned by Intermodel Services, Inc. ("Intermodel"). Fisher and Intermodel denied liability and asserted a defense of contributory negligence.
5. On July 20, 1989, Cobb hired defendant to represent him in a claim against Fisher and Intermodel for injuries resulting from the February 15, 1989 accident. Pursuant to an employment agreement, Cobb agreed to pay defendant one-third of any amount recovered from Fisher and/or Intermodel as attorney's fees.
6. On or about April 3, 1992, Cobb agreed to settle his claim against Fisher and Intermodel for \$85,000. Pursuant to the employment contract, defendant was entitled to one-third of the settlement proceeds, or \$28,333.33.
7. Prior to settlement, Medicare had claimed a lien in the amount of \$19,645.13 for payments made on behalf of Cobb as a result of the February 15, 1989 accident. Cobb contested the amount owed under the Medicare lien. Respondent, on behalf of Cobb, examined Cobb's medical records and determined that some of the Medicare payments were not related to the February 15, 1989 accident. As a result of respondent's efforts, the Medicare lien amount was reduced to \$15,880.52.
8. In addition, pursuant to 42 CFR Sec. 411.37, Medicare was required to reduce its lien from \$15,880.52 to \$10,587.02. 42 CFR Sec. 411.37 requires Medicare to reduce its lien amount in all cases in which liability is contested and the subscriber is forced to incur costs, such as attorney's fees, to procure payment from a third party payor. These costs are termed "procurement costs." The purpose of the Medicare reduction is to help defray the subscriber's procurement costs.
9. Pursuant to 42 CFR Sec. 411.37, the Medicare lien amount is reduced by the ratio of the procurement costs (attorney's fees) to the settlement amount. In Cobb's case, respondent's attorney's fees were one-third of the settlement amount. Therefore, Medicare reduced its lien by one-third (\$5,293.50) leaving a balance owed of \$10,587.02 instead of \$15,880.52. Absent some

agreement to the contrary, the \$5,293.50 reduction amount should have been paid to Cobb to reduce his procurement costs (attorney's fees) from \$28,333.33 to \$23,039.83.

10. Birzon mistakenly believed that he was entitled to the reduction amount of \$5,293.50 for his time reviewing Cobb's medical records and securing a reduction in the Medicare lien from \$19,645.13 to \$15,880.52 and/or as a fee from Medicare for protecting its lien. Based upon his belief, Birzon, in addition to the \$28,333.33 fee he was entitled to from the \$85,000 settlement proceeds, paid himself an additional fee of \$5,293.50 instead of paying these funds to Cobb.
11. On August 10, 1992, after learning that Cobb was questioning Birzon's handling of the \$5,293.50, Birzon voluntarily sent Cobb a check for \$5,293.51.

Based upon the foregoing FINDINGS OF FACT, the Committee makes the following:

#### CONCLUSIONS OF LAW

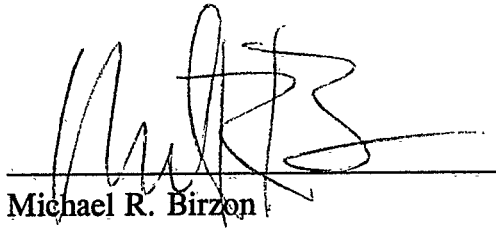
1. By taking the \$5,293.50 Medicare reduction amount which he believed he was entitled to but was not, Birzon violated Rule 2.6 of the Rules of Professional Conduct.
2. By depositing the \$5,293.51 belonging to Cobb into his office account, Birzon violated Rule 10.1(A) of the Rules of Professional Conduct.

This the 3rd day of October, 1994.

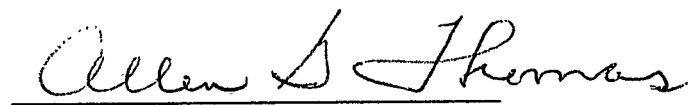
Signed by the Chair for the committee with the consent of all the committee members and the parties hereto.

  
Samuel Jerome Crow, Chair

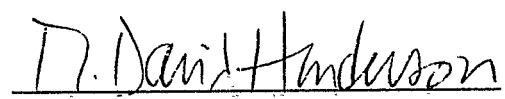
WE CONSENT:



Michael R. Birzon



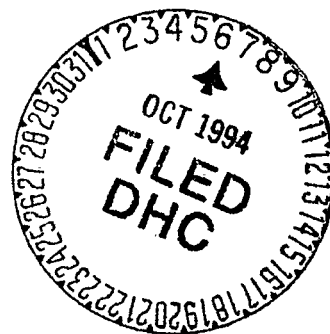
Allen G. Thomas  
Attorney for Defendant



R. David Henderson  
Attorney for Plaintiff

BEFORE THE DISCIPLINARY HEARING COMMISSION  
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THE NORTH CAROLINA STATE BAR, )  
Plaintiff )  
vs. )  
MICHAEL R. BIRZON, ATTORNEY )  
Defendant )

ORDER OF DISCIPLINE

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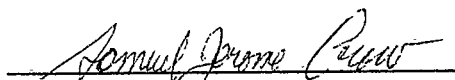
Based upon the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW,  
and with the consent of the parties hereto, the hearing committee enters the following:

ORDER

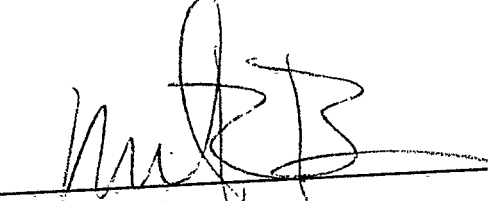
1. Birzon is hereby CENSURED.
2. Birzon shall pay the costs of this action as assessed by the Secretary of the North Carolina State Bar.


This the 3rd day of October, 1994.

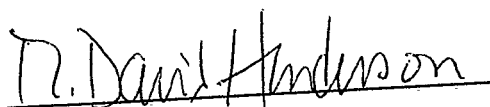
Signed by the Chair for the committee with the consent of a majority of the  
committee members and the parties hereto.

  
Samuel Jerome Crow, Chair

WE CONSENT:

  
Michael R. Birzon

  
Allen G. Thomas  
Attorney for Defendant

  
R. David Henderson  
Attorney for Plaintiff