

NORTH CAROLINA

WAKE COUNTY

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BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
91 DHC 19

THE NORTH CAROLINA STATE BAR,
Plaintiff

vs.

OTTWAY BURTON, ATTORNEY
Defendant

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter came on to be heard and was heard on January 10 and 11, 1992 before a hearing committee of the Disciplinary Hearing Commission composed of L.P. Hornthal, Jr., Chairman; Fred Folger, Jr., and Donald L. Osborne. The North Carolina State Bar was represented by Fern E. Gunn and the Defendant was represented by Robert S. Cahoon and James W. Clontz. 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, regulations, Code of Professional Responsibility (for attorney conduct occurring before October 7, 1985), 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. In 1982, Lucy Shields Wallace, Marie Shields Maness, Eula

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Shields Phillips, Beatrice Shields Hill, and Dorothy Shields Garner (the Shields sisters) hired the Defendant to represent their mother, Aggie Nancy M. Shields, in an action to set aside a deed in which she had given land to three of her eight children, excluding the five Shields sisters. The case was captioned Aggie Nancy M. Shields v. William Edgar Shields, et.al. (hereinafter the Shields case) and was filed in Chatham County Superior Court as 82 CVS 271.

5. The Shields sisters paid a total of \$1200 as the Defendant's attorney fee in handling the lawsuit.

6. Aggie Nancy M. Shields was unable to participate actively in the trial of the Shields case due to her failing health. Consequently, the Defendant found it necessary to communicate with the Shields sisters about the case.

7. On May 7, 1984, the Shields case was on the calendar for trial in Chatham County Superior Court. The Shields sisters attended court on that day.

8. Superior Court Judge James H. Pou Bailey dismissed the Shields case by order of May 7, 1984 because the Defendant failed to file a pretrial order as ordered on three occasions by Superior Court Judge Gordon Battle.

9. Defendant informed the Shields sisters that Judge Bailey dismissed their mother's lawsuit. However, Defendant did not tell the Shields sisters the reason for the dismissal of the lawsuit. Specifically, Defendant did not tell the Shields sisters that Judge Bailey dismissed the lawsuit because Defendant failed to comply with three earlier court orders to file a pretrial order in the action, nor did he inform them of his opinion that a successful appeal from Judge Bailey's discretionary order was unlikely.

10. Defendant's failure to file the pretrial order in the Shields case resulted in the action being dismissed with prejudice and the dismissal was affirmed on appeal by the North Carolina Court of Appeals.

11. The North Carolina State Bar failed to prove by clear, cogent, and convincing evidence that Defendant did not tell the Shields sisters that the paper they signed on July 5 and 10, 1984 was a confession of judgment for the Defendant's attorney fee in handling the appeal of Judge Bailey's order or that the paper was partly in blank when presented.

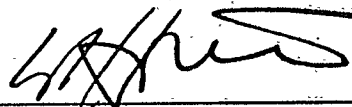
12. The North Carolina State Bar failed to prove by clear, cogent and convincing evidence that Defendant had Clyde and Betty Lovette sign a bank sheet of paper on September 17, 1981, which was to be typed as a confession of judgment; or that Defendant failed to tell Mr. and Mrs. Lovette that they were signing a confession of judgment on that occasion; or that Defendant told Mr. and Mrs. Lovette that he would have the Sheriff take their property when they refused to sign a deed of trust to secure his

attorney's fees.

Based upon the foregoing Findings of Fact, the hearing committee makes the following CONCLUSIONS OF LAW:

- a) By not filing the pretrial order in the Shields case as ordered by a superior court judge on three occasions and thus allowing the case to be dismissed with prejudice, the Defendant has neglected a legal matter entrusted to him in violation of DR6-101(A)(3) and engaged in conduct that is prejudicial to the administration of justice in violation of DR1-102(A)(5).
- b) By not informing the Shields sisters about the dismissal of the Shields case, in that the Defendant did not inform the Shields sisters of the reason for the dismissal or explain to them that the basis of the dismissal was due to his failure to comply with earlier orders of the court, the Defendant has neglected a legal matter entrusted to him in violation of DR6-101(A)(3) and engaged in professional conduct that is prejudicial to the administration of justice in violation of DR1-102(A)(5).

Signed by the undersigned chairman with the full knowledge and consent of the other members of the hearing committee, this the 28 day of January, 1992.



L. P. Hornthal, Jr., Chairman
Hearing Committee of the
Disciplinary Hearing Commission

NORTH CAROLINA

WAKE COUNTY

FEB 02 2 34 PM '92

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
91 DHC 19

THE NORTH CAROLINA STATE BAR,
Plaintiff

vs.

OTTWAY BURTON, ATTORNEY
Defendant

ORDER OF DISCIPLINE

This cause was heard on January 10 and 11, 1992 by a duly appointed hearing committee of the Disciplinary Hearing Commission consisting of L. P. Hornthal, Jr., Chairman; Fred Folger, Jr., 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 relative to aggravating and mitigating factors.

ADDITIONAL FINDINGS OF FACT

1. As aggravating factors, the hearing committee finds that:
 - a) the Defendant had a selfish motive in that he sought to collect a \$5,000 fee for the appeal of the Shields case in which the Defendant conceded that such appeal was without substantial merit and was based upon the Defendant's own violation of court orders to file a pretrial order.
 - b) The Defendant engaged in multiple disciplinary offenses.
 - c) The Defendant refused to acknowledge the wrongful nature of his conduct.
 - d) The alleged victims in these matters were vulnerable due to their lack of education and sophistication.
 - e) The Defendant has substantial experience in the practice of law, having practiced law since 1945.
 - f) The Defendant showed an indifference to making restitution to either Mr. and Mrs. Lovette or

the Shields sisters until the disciplinary hearing was virtually completed.

- g) The Defendant received a Public Censure in the case of the North Carolina State Bar v. Ottway Burton, 89 DHC 6 and the public censure was issued within three years preceding the filing of the complaint in this disciplinary action.
2. The hearing committee finds as mitigating factors that:
- a) In the times at issue in this disciplinary matter, the Defendant had personal and emotional problems of a severe nature.
 - b) The character and reputation of the Defendant in the community in which he practices is good.
 - c) There were physical and mental disabilities or impairments relating to the health of the Defendant during the times at issue.

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:


ORDER OF DISCIPLINE

- 1. The Defendant shall be censured for the aforementioned violations of the Code of Professional Responsibility.
- 2. The Defendant shall pay the costs of this proceeding.
- 3. With the consent of the Defendant, the hearing committee further orders that the Defendant satisfy the following conditions:
 - a) The Defendant shall cancel and satisfy the confessions of judgments against the Shields sisters and the Lovettes.
 - b) The Defendant shall dismiss with prejudice the case of Burton v. Lovette, 90 CVD 1401, such case pending in Randolph County District Court.
 - c) The Defendant shall notify the North Carolina Court of Appeals in the appeal of the Burton v. Lovette case of the cancellation and satisfaction of the confession of judgment against the Lovettes and the dismissal of the

action with prejudice.

- d) The Defendant will establish and maintain records of his accounts receivable in accordance with acceptable accounting practices, including but not limited to individual ledgers for each client's account and records of receipts, and accounting of payments and credits.
 - e) The Defendant shall commence the practice of periodic billings on all his accounts receivable.
 - f) The Defendant shall reimburse Marie Shields Maness in the amount of \$1,200 and the Defendant shall reimburse Dorothy Shields Garner in the amount of \$1,000. These amounts represent the attorney's fees paid by Ms. Maness and Ms. Garner and secured by the confession of judgment against them.
 - g) The Defendant agrees to comply with all of the above conditions by January 22, 1992.
4. The violation of any of the above conditions shall be deemed to be a violation of the disciplinary order of this hearing committee of the Disciplinary Hearing Commission.

Signed by the undersigned chairman with the full knowledge and consent of the other members of the hearing committee, this the 21 day of January, 1992.



L. P. Hornthal, Jr., Chairman
Hearing Committee of the
Disciplinary Hearing Commission

NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
91 DHC 19

IN THE MATTER OF

OTTWAY BURTON
ATTORNEY AT LAW

CENSURE

This Censure is delivered to you pursuant to Section 23A(3) of the Discipline and Disbarment Procedures 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 January 10 and 11, 1992. At that hearing, the hearing committee found that you had violated various provisions of the Code of Professional Responsibility of the North Carolina State Bar.

In 1982, Lucy Shields Wallace, Marie Shields Maness, Eula Shields Phillips, Beatrice Shields Hill, and Dorothy Shields Garner (hereinafter the Shields sisters) hired you to represent their mother, Aggie Nancy M. Shields, in an action to set aside a deed whereby Aggie Shields conveyed property to three of her eight children, to the exclusion of the five Shields sisters. You filed a complaint in the action in Chatham County Superior Court.

The Shields sisters paid you a total of \$1,200 as the attorney's fee. Aggie Shields was unable to participate actively in the trial of her case due to her failing health. Consequently, you found it necessary to communicate with the Shields sisters about the lawsuit.

On May 7, 1984, the case of Aggie Nancy M. Shields v. William Edger Shields et. al. (Shields case) was on the Chatham County Superior Court calendar for trial. All five Shields sisters attended court on that day.

Former Superior Court Judge James H. Pou Bailey dismissed the Shields case because you failed to file a pretrial order as ordered on three occasions by Superior Court Judge Gordon Battle. Judge Bailey entered an order to that affect on May 7, 1984.

You told the Shields sisters that Judge Bailey dismissed their mother's lawsuit. However, you did not tell them the reason for the dismissal of the lawsuit. You failed to inform the Shields sisters that Judge Bailey dismissed the lawsuit because you did not comply with three prior court orders to file a pretrial order in the Shields case.

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Your conduct violated several provisions of the Code of Professional Responsibility of the North Carolina State Bar which was in effect until October 7, 1985. By not filing a pretrial order in the Shields case as ordered by a superior court judge, you allowed the case to be dismissed and thus neglected a matter entrusted to you in violation of Disciplinary Rule 6-101(A)(3). Your failure to file the pretrial order was prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(A)(5). Furthermore, by not informing the Shields sisters of the basis for the dismissal of the lawsuit, in particular by not explaining that the reason for the dismissal was due to your non-compliance of court orders, you neglected a legal matter entrusted to you and engaged in professional conduct that is prejudicial to the administration of justice in violation of Disciplinary Rule 6-101(A)(3) and 1-102(A)(5), respectively.

The hearing committee was concerned about the way you handled the appeal of the Shields case to the North Carolina Court of Appeals. By your own admission, you sought to collect a \$5,000 attorney's fee for an appeal which lacked substantial merit and for the appeal of a matter was due to your own neglect and failure to comply with court orders. Furthermore, you admitted that a settlement was reached by the Shields sisters and their brothers with respect to two-thirds of the disputed property. Therefore, pursuing an appeal of the remaining disputed property was not advantageous to the Shields sisters, but would have resulted in a \$5,000 fee for you.

Although the hearing committee has chosen to impose a relatively moderate sanction of a censure, you should not assume that the Disciplinary Hearing Commission in any way feels that your conduct in this matter was excusable. The hearing committee trusts that you will consider this censure, recognize the errors that you have made, and 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.

Signed by the undersigned chairman with the full knowledge and consent of the other members of the hearing committee, this the 28 day of January, 1992.



L. P. Hornthal, Jr., Chairman
Hearing Committee
Disciplinary Hearing Commission