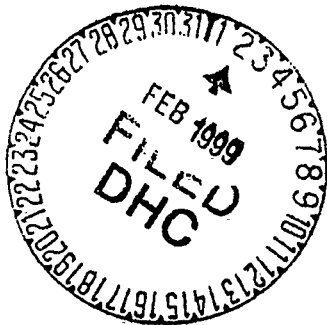


WAKE COUNTY
NORTH CAROLINA



4510

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
98 DHC 24

THE NORTH CAROLINA STATE BAR,

Plaintiff,

v.

JOHN C. WAINIO, Attorney,

Defendant.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
ORDER OF DISCIPLINE**

This matter came on for hearing pursuant to the summary judgment motion filed by the Defendant in this matter before a duly appointed committee of the Disciplinary Hearing Commission consisting of James R. Fox, Chair; Kenneth M. Smith, and Jean G. Hauser. The Plaintiff was represented by Clayton W. Davidson, III, Deputy Counsel. The Defendant was represented by Richard N. Watson.

Based on the pleadings, stipulations and affidavits submitted in this matter, the committee makes the following:

FINDINGS OF FACT

1. The Plaintiff, the North Carolina State Bar (the "State Bar") is a body duly organized under the laws of the State of North Carolina and is the proper body to bring this proceeding under the authority granted to it in Chapter 84 of the General Statutes of North Carolina and the rules and regulations of the State Bar promulgated pursuant thereto (the "State Bar Rules and Regulations").

2. The Defendant, John C. Wainio, (the "Defendant") was admitted to the State Bar in or about 1972 and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina subject to the State Bar Rules and Regulations and the Rules of Professional Conduct of North Carolina.

3. During all or a part of the relevant periods referred to herein, Defendant was engaged in the practice of law in the State of North Carolina and maintained a law office in Durham, North Carolina.

4. The Defendant is a partner in the firm of Spears, Barnes, Baker, Wainio & Whaley, L.L.P. (the "Limited Liability Partnership") and has been since 1983.

00652

5. In or about 1996, the Defendant received checks from three clients, Carolyn C. Myers, Teresa Newman and Mark Craven which were intended as fees for legal services (the "Client Checks").

6. The Client Checks were paid to and were the property of the Limited Liability Partnership.

7. The Defendant was not entitled to retain the Client Checks or use them for his own benefit.

8. The Defendant retained the client checks, which totaled approximately \$1,450.00 and appropriated them to his own use by endorsing them and cashing them without giving the Limited Liability Partnership, or the members thereof any notice or benefit of the funds received.

9. Robert O. Baker ("Baker"), a partner in the Limited Liability Partnership, learned that fees had been diverted in the Myers matter in March, 1997 when Myers called questioning the status of her bill, and Baker attempted to locate a ledger card, but was unsuccessful in doing so.

10. Baker approached the Defendant about the fact that no ledger card existed, and the Defendant readily admitted that he had deposited or cashed the check from Myers.

11. Baker later learned that the fees of another client, Newsome, had been diverted and approached the Defendant about that matter. At that time, the Defendant admitted to Baker the three occasions on which he had diverted fees.

12. The Defendant reported his actions to the North Carolina State Bar on October 3, 1997.

13. In 1996, prior to the diversion of fees being discovered, the Defendant had approached two members of the Limited Liability Partnership about his depression and the fact that he was undergoing severe financial problems because of a large tax liability to the Internal Revenue Service that resulted from his inability to pay income taxes for certain years.

14. The Defendant has paid back all amounts appropriated to his own use. At least one of the fee checks was paid back prior to the time that the members of the Limited Liability Partnership discovered the misappropriation.

Based on the foregoing findings of fact, the committee makes the following:

CONCLUSIONS OF LAW

1. The Defendant admitted in his answer, and the committee finds that there is no genuine issue of material fact as to the violations in this matter, and that the foregoing actions

constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that the Defendant violated Rule 1.2(c) of the North Carolina Rules of Professional Conduct¹.

THE PARTIES have stipulated that the hearing committee may consider the discipline to be imposed based on the record before the committee in this summary judgment proceeding. Based on the pleadings, stipulations, and affidavits, the hearing committee makes the following:

FINDINGS OF FACT CONCERNING DISCIPLINE

1. The Defendant's conduct is aggravated by the following factors:
 - (a) A selfish motive.
 - (b) Issuance of a letter of warning within the three years immediately preceding the filing of the complaint.
2. The Defendant's conduct is mitigated by the following factors:
 - (a) Absence of a prior disciplinary record.
 - (b) Personal or emotional problems.
 - (c) Timely good faith efforts to make restitution or to rectify the consequences of the Defendant's conduct.
 - (d) Full and free disclosure to the hearing committee and a cooperative attitude toward the proceedings.
 - (e) Good character and reputation.
 - (f) Mental impairment in that at the time of these instances, the Defendant has been diagnosed as suffering from major depression - severe and anxiety which impaired the judgment of the Defendant and contributed to the misconduct to the point that the Defendant's treating psychotherapist provided an affidavit stating that if the condition was treated she "feel[s] certain that [the Defendant] will never make such a mistake again."
 - (g) Substantial interim efforts at rehabilitation by the Defendant, in part through the efforts of the members of the Limited Liability Partnership. The members of the Limited Liability Partnership have filed affidavits in support of the Defendant indicating their belief that this conduct was an

¹ The conduct in this matter occurred prior to July 24, 1997, the effective date of the North Carolina Revised Rules of Professional Conduct, and this order is therefore based on the superseded North Carolina Rules of Professional Conduct and the comments and authorities under the superseded Rules. The committee makes no determination as to what the result in this matter would have been under the North Carolina Revised Rules of Professional Conduct.

aberration and will not be repeated, have asked the Defendant to remain in practice with them, have undertaken to assist the Defendant in obtaining psychiatric counseling, and prior to the entry of this order have taken appropriate actions to oversee the handling of Defendant's cases during the period when he is obtaining the counseling and assistance to ensure that the public is protected.

(h) Remorse.

3. The mitigating factors outweigh the aggravating factors in this case in such a way as to make this case distinguishable from the long line of cases that have held that misappropriation of funds presumptively subjects the Defendant to disbarment, the most severe level of discipline imposed by the Bar. This committee in this case is in full agreement with that line of cases and it is only in rare instances that this presumption can be overcome. This is such a rare case because of the Defendant's forthrightness in reporting himself, the evidence of severe major depression which impaired the Defendant's judgment and contributed to the misconduct, the isolated number of instances of misappropriation of law firm funds, the excellent reputation enjoyed by the Defendant prior to this incident, and because of the level of support shown for this Defendant by the members of his firm. The members of the Defendant's firm, have actively aided the Defendant in getting the psychiatric help that they believe that he needs, and have also undertaken to impose measures designed to protect the public while he is getting that help. The Defendant has been cooperative with all of those efforts. It is the combination of all factors in this case that the committee has determined to be sufficient to overcome the presumption of disbarment, and not any one factor alone. The committee expressly finds that the safeguards incorporated into the terms of this order are sufficient to protect the public, a necessary condition to overcoming the presumption of disbarment.

BASED UPON the foregoing Findings of Fact Concerning Discipline, the hearing committee makes the following:

ORDER OF DISCIPLINE

1. The Defendant is suspended from the practice of law for three years which suspension shall be stayed for three years on the following conditions:

- (a) Except as otherwise provided, the Defendant shall remain in practice with the law firm of Spears, Barnes, Baker, Wainio and Whaley (the "law firm") during the period of the stay, that another attorney in the law firm be assigned as an assisting attorney for each and every client matter that the Defendant undertakes, and that the assisting attorney shall:
 - (i) review and organize the files assigned;
 - (ii) meet with the Defendant and the paralegal for the Defendant at least once every thirty days;

- (iii) determine what has been done, what needs to be done;
 - (iv) enter the matter into the tickler system, including promised dates for any actions and providing that notice shall be given to the Defendant, the assisting attorney, and the paralegal of any action that needs to be taken;
 - (v) enter the dates for any action provided in subparagraph 1.a.iv above into the computer calendar for the Defendant, the paralegal, and the assisting attorney;
 - (vi) assign to the paralegal the aspects of the work that can be performed by the paralegal;
 - (vii) review all actions that have been taken to ensure that the client matter is being handled in an appropriate and timely manner, and to report any failure in that regard to the partners in the firm;
 - (viii) be available to take client phone calls or other calls relating to the matter in the event that the Defendant is not available to do so and the matter needs attention;
 - (ix) oversee the payment of fees and the handling of client funds in connection with the matter, and to report to the partners of the firm any action or failure which constitutes a violation of the North Carolina Revised Rules of Professional Conduct; and
 - (x) certify to the North Carolina State Bar biannually during the period of suspension that the Defendant is complying with the terms of this paragraph, and to further notify the North Carolina State Bar of any violations of the terms of this order or the North Carolina Revised Rules of Professional Conduct by the Defendant of which the assisting attorney is aware. The biannual certification shall be due at the times provided in subparagraph 1.e below.
- (b) The Defendant shall cooperate with the assisting attorney assigned pursuant to subparagraph 1.a and shall not undertake to handle any client matter without having an assisting attorney assigned. The Defendant shall submit to the North Carolina State Bar within thirty days of this order a statement signed by all attorneys who will be assisting attorneys in Defendant's cases, stating that they have read this order and agree to serve as an assisting attorney pursuant to this order. No person shall be assigned as an assisting attorney until and unless he or she has signed such a statement and it has been submitted to the Bar.

- (c) If the Defendant decides to leave the Limited Liability Partnership, the Defendant shall designate another attorney or group of attorneys to act as assisting attorneys and perform the functions listed in paragraph 1, which attorneys shall be approved by the Office of Counsel of the North Carolina State Bar and shall be subject to the requirements of subparagraph 1.b above.
- (d) The Defendant, at Defendant's expense, shall become a patient of a psychiatrist approved by the Office of Counsel of the North Carolina State Bar (the "Doctor"), shall remain a patient during the period of the suspension except as otherwise provided in subparagraph 1.e below, and shall comply with the course of treatment prescribed.
- (e) At any point during the period of suspension, the Defendant shall immediately inform the North Carolina State Bar in writing if he ever ceases to be a patient, or otherwise fails to comply with the course of treatment prescribed by the Doctor. The Defendant shall further instruct his Doctor to immediately inform the North Carolina State Bar if he ever ceases to be a patient, or otherwise fails to comply with course of treatment prescribed, shall authorize the Doctor to release to the North Carolina State Bar information about his status as a patient upon the request of the North Carolina State Bar, and shall further authorize the Doctor to release to the North Carolina State Bar any and all medical records, including but not limited to records detailing the course of treatment, any diagnosis, and the Defendant's prognosis. The Defendant shall submit written reports signed by his Doctor providing full details about his course of treatment, diagnosis and prognosis, and certifying that he remains a patient and is complying with the Doctor's prescribed treatment plan. The reports shall be filed at the same time that Defendant's biannual certifications are due under subparagraph 1.i below. If Defendant is discharged by the Doctor prior to the end of the suspension period, then the Defendant shall file a report signed by the Doctor indicating that no further treatment is required, and that in the opinion of the Doctor that the Defendant should be allowed to continue in the practice of law.
- (f) The Defendant shall violate no provisions of the Rules of Professional Conduct.
- (g) The Defendant shall violate no federal or state laws.
- (h) The Defendant shall pay all costs of this action within sixty (60) days from the date of this order.
- (i) The Defendant shall forward to the North Carolina State Bar biannual certifications on the second day of July, 1999 and January, 2000, and the


second day of July and January of each year thereafter. The certifications shall certify that he is currently in compliance with all of the terms and conditions of this order, and shall detail any instance of non-compliance that occurred after the date of this order, and that was not disclosed to the North Carolina State Bar by the Defendant in a previous biannual certification.

2. The Defendant has an interest in keeping confidential those records that are subject to physician-patient privilege, which interest overrides any interest of the public in obtaining disclosure of those records. That overriding interest cannot be protected by any measure short of sealing the records so produced. The North Carolina State Bar shall keep confidential all Doctor's reports, or other medical records obtained by the Bar pursuant to subparagraph 1.e above, and shall not disclose those records to any person other than employees of the North Carolina State Bar, except pursuant to an order of the Disciplinary Hearing Commission, or other court of competent jurisdiction.

3. Any violation of the conditions of this order shall be grounds for lifting the stay and activating the suspension as provided in this order. If, during the period of this stay, the North Carolina State Bar becomes aware of evidence that the Defendant has misappropriated the funds of any person, whether a client or otherwise, the North Carolina State Bar may apply to the Superior Court of Wake County for a Temporary Restraining Order and Preliminary Injunction pursuant to Rule 65 of the North Carolina Rules of Civil Procedure restraining or enjoining the Defendant from practicing law in North Carolina until such time as a proceeding to lift the stay, or any other disciplinary proceeding in which the misappropriation of funds is at issue can be heard by the Disciplinary Hearing Committee.

Signed by the undersigned chair with the full knowledge and consent of all other members of the hearing committee.

This the 29th day of January, 1999.



James R. Fox, Chair
Disciplinary Hearing Committee