

WAKE COUNTY

31-103-55

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR

92 DHC 4

V.

SAMUEL S. POPKIN,
Defendant

CONSENT ORDER
OF
DISCIPLINE

This matter came on before the hearing committee of the Disciplinary Hearing Commission composed of W. Harold Mitchell, Chairman, Fred Folger, Jr., and Frank L. Boushee pursuant to Section 14(8) of Article IX of the Rules and Regulations of the North Carolina State Bar. On June 27, 1991, Clinton Pritchard filed a grievance against the Defendant with the North Carolina State bar, which was assigned file number 91G 553. On August 25, 1991, Charles F. Panos filed a grievance against the Defendant with the North Carolina State Bar, which was assigned file number 91G 726. All parties desire to resolve all issues raised in case number 92 DHC 4 as well as the Pritchard grievance, file number 91G 553, and the Panos grievance, file number 91G 726. The Defendant has agreed to waive a finding of probable cause by the Grievance Committee of the North Carolina State Bar and to waive the filing of a formal complaint and a formal hearing regarding the grievances filed by Pritchard and Panos, and he has agreed to waive a formal hearing in the instant case, 92 DHC 4. All parties stipulate that these matters may be resolved by the undersigned hearing committee, that Defendant does not contest the following Findings of Fact and Conclusions of Law recited in this Consent Order and the discipline imposed, and that Defendant further hereby waives his right to appeal this Consent Order or challenge in any way the sufficiency of the findings. The Hearing Committee therefore enters the following:

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.

00845

2. The Defendant, Samuel S. Popkin, was admitted to the North Carolina State Bar on February 3, 1978, 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, and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.
3. During all of the periods referred to herein, the Defendant was actively engaged in the practice of law and maintained a law office in Jacksonville, North Carolina.
4. The Defendant filed a medical malpractice lawsuit against Dr. Neil Worden on behalf of his client, Sharon Holden. The lawsuit was instituted on March 19, 1990.
5. At the time the Defendant filed Ms. Holden's action against Dr. Worden, Defendant had not received and reviewed medical records regarding the medical treatment set out in Holden's complaint. Furthermore, the Defendant had not received an opinion from a medical expert which would indicate that Dr. Worden rendered medical care to Ms. Holden that deviated from the standard of care applicable to Dr. Worden.
6. At the time the Defendant filed Ms. Holden's action against Dr. Worden, the statute of limitations had expired. Defendant did not conduct the necessary investigation to determine the applicable statute of limitations before filing Ms. Holden's lawsuit.
7. The Defendant was sanctioned by Superior Court Judge Ernest B. Fullwood in an order dated October 9, 1990 for violation of Rule 11 of the North Carolina Rules of Civil Procedure for his failure to make a reasonable inquiry as to whether Ms. Holden's claim against Dr. Worden was well grounded in fact and warranted in existing law.
8. The Defendant represented Kevin Richard Bennett in several drug charges in Onslow County Superior Court. Bennett was convicted of the sale and delivery of cocaine and possession of cocaine with intent to manufacture, sell and deliver. Bennett appealed the conviction to the North Carolina Court of Appeals and Defendant represented him on appeal.
9. The Defendant filed an Anders brief in Bennett's case and Defendant indicated to the Court of Appeals that he "has reviewed said trial transcript and could find no basis for arguing any reversible errors." Defendant further brought forth two assignments of error, but did not argue or cite any authority for them.

10. On February 7, 1991, the Court of Appeals issued an order that the record, transcript, and brief submitted by Defendant were "insufficient for appellate review and do not comply with the requirements of Anders v. California...". The Court ordered that Defendant file an addendum to the record to contain vital documents from the lower court. The Defendant was further ordered to serve upon the opposing counsel and Bennett copies of the addendum to the record and to serve upon Bennett a copy of the Court's February 7, 1991 order. The Defendant was ordered by the Court to provide proof of service on Bennett of the various documents with the Court.
11. Defendant failed to comply with the February 7, 1991 order mandating that he provide proof of service on Bennett of the various documents with the Court. The Court remanded Bennett's case to Onslow County Superior Court for a hearing to determine why the Defendant should not be removed as counsel on Bennett's appeal.
12. In a May 7, 1991 opinion, the Court sanctioned Defendant for his "gross disregard of the requirements of a fair representation of the issues to the Court in the initial filing of this appeal, and his failure to respond to an explicit directive of this Court to cure the defect".
13. James Houston Tucker hired the Defendant in 1987 to sue an insurance company for failure to advise Tucker of his uninsured/underinsured coverage under his policy.
14. Defendant filed a lawsuit against the insurance company in December 1988. Defendant did not inform Tucker that a lawsuit had been instituted.
15. On April 17, 1989, Defendant took a voluntary dismissal in the lawsuit and he did not inform Tucker of the dismissal of his action.
16. The Defendant refiled the complaint in the action (90 CVS 228) against the insurance company in March 1990.
17. On October 15, 1990, Tucker's action was discontinued pursuant to Rule 4(e) of the Rules of Civil Procedure because service of summons in the action had not been completed and the time for service was expired. Tucker was assessed the costs of court by order of the court.
18. Defendant did not inform Tucker of the court's October 15, 1990 order in 90 CVS 228.

19. In 1988 Tucker retained the Defendant to represent him in a legal malpractice action against Craig Willis.
20. Defendant filed a lawsuit (90 CVS 229) against Willis in Carteret County in March 1990.
21. District Court Judge Herbert Phillips discontinued the action against Willis on October 15, 1990 pursuant to Rule 4(e) of the Rules of Civil Procedure because the service of summons had not been completed and the time for service had expired. The court ordered Tucker be assessed with the costs of court.
22. Defendant did not inform Tucker of the court's October 15, 1990 order in 90 CVS 229.
23. Tucker also requested the Defendant handle personal injury and food poisoning cases. Defendant was to file lawsuits in the personal injury and food poisoning cases, but Defendant failed to do so.
24. In May of 1988, Defendant's law firm was retained to represent Clinton Pritchard in a claim for damages resulting from injuries Pritchard received on the job at Circus World Toys.
25. Pritchard represented himself in reaching an agreement with Liberty Mutual Insurance Company regarding payment of temporary total compensation. This agreement was filed with the North Carolina Industrial Commission.
26. By letter dated November 13, 1989, the Defendant informed the North Carolina Industrial Commission that he represented Pritchard. Defendant also asked that the "matter be reopened".
27. The North Carolina Industrial Commission reopened Pritchard's case upon Defendant's request.
28. Defendant did not take any further action in Pritchard's case before the North Carolina Industrial Commission.
29. Pritchard was advised by Rick Barton, senior claims adjuster with Liberty Mutual Insurance Company, in a letter dated November 6, 1989, that the statute of limitations had run on Pritchard's case as of October 16, 1989.
30. Defendant did not know that the statute of limitations had run on Pritchard's case at the time that he wrote the North Carolina Industrial Commission on November 13, 1989.

31. Defendant did not tell Pritchard that the statute of limitations had run on his case.
32. Charles F. Panos retained the Defendant for representation in a personal injury action involving Godfather's Pizza Restaurant.
33. The Defendant filed a lawsuit against Godfather's Pizza on November 6, 1987, several days before the statute of limitations ran. The Defendant filed the lawsuit against the wrong party and took a voluntary dismissal with prejudice in the action.
34. On July 25, 1989, Defendant filed a lawsuit on Panos's behalf against three different parties.
35. Panos's case was dismissed by a Superior Court Judge because the statute of limitations had run prior to the Defendant filing the second action. Panos was taxed with the cost of the action.
36. The Defendant did not tell Panos that the statute of limitations had run and that the case had been dismissed.

Based upon the foregoing Findings of Fact, the Committee enters the following:

CONCLUSIONS OF LAW

1. By not conducting a reasonable inquiry of claims alleged in a lawsuit against Dr. Worden to determine if the claims were well grounded in fact and warranted in existing law, Defendant has engaged in professional conduct that is prejudicial to the administration of justice in violation of Rule 1.2(D).
2. By not determining the applicable statute of limitation before filing Ms. Holden's action against Dr. Worden; Defendant has handled a legal matter without preparation adequate under the circumstances, in violation of Rule 6(A)(2); Defendant has engaged in professional conduct that is prejudicial to the administration of justice in violation of Rule 1.2(D).
3. By filing an appeal on behalf of Bennett which did not meet the requirements of Anders v. California and a line of North Carolina cases, Defendant has handled a legal matter which he knew or should have known that he was not competent to handle without associating with him a lawyer who was competent to handle it, in violation of Rule 6(A)(1); Defendant has handled a legal matter without preparation adequate under the circumstances, in violation of Rule 6(A)(2).

4. By not notifying Bennett of the steps taken in the appeal of his case to the N.C. Court of Appeals and by not providing Bennett with a copy of the record, transcript, and brief filed with the Court so that Bennett could conduct his own review of the case, Defendant has failed to keep his client reasonably informed about the status of a matter in violation of Rule 6(B)(1); Defendant has failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation in violation of Rule 6(B)(2); Defendant has failed to act with reasonable diligence and promptness in representing his client in violation of Rule 6(B)(3).
5. By failing to comply with the February 7, 1991 order of the N.C. Court of Appeals, Defendant has engaged in conduct that is prejudicial to the administration of justice in violation of Rule 1.2(D).
6. By failing to file a lawsuit against Tucker's insurance company for approximately one year, Defendant has failed to act with reasonable diligence and promptness in representing his client, in violation of Rule 6(B)(3).
7. By not informing Tucker that (1) a lawsuit was filed against the insurance company, (2) Defendant later took a voluntary dismissal in the action, and (3) the action was discontinued by the court, Defendant has failed to keep his client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, in violation of Rule 6(B)(1); Defendant has failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation in violation of Rule 6(B)(2).
8. By not taking steps to get the insurance company and Craig Willis served with summonses in the two separate cases, which resulted in the Court discontinuing the actions, Defendant has failed to act with reasonable diligence and promptness in representing his client, in violation of Rule 6(B)(3); Defendant has failed to seek the lawful objectives of his client through reasonably available means permitted by law and the Rules of Professional Conduct, in violation of Rule 7.1(A); Defendant has failed to carry out a contract of employment entered into with a client for professional services, in violation of Rule 7.1(A)(2); Defendant has prejudiced or damaged his client during the course of the professional relationship, in violation of Rule 7.1(A)(3); Defendant has engaged in conduct that is prejudicial to the administration of justice in violation of Rule 1.2(D).

9. By failing to inform Tucker that the Court had discontinued the action against Craig Willis, Defendant has failed to keep his client reasonably informed about the status of a matter, in violation of Rule 6(B)(1); Defendant failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation in violation of Rule 6(B)(2).
10. By failing to file lawsuits or take necessary action in Tucker's personal injury and food poisoning cases, Defendant has failed to act with reasonable diligence and promptness in violation of Rule 6(B)(3); Defendant has failed to seek the lawful objectives of his client through reasonably available means permitted by law and the Rules of Professional Conduct, in violation of Rule 7.1(A); Defendant has failed to carry out a contract of employment entered into with a client for professional services, in violation of Rule 7.1(A)(2); Defendant has prejudiced or damaged his client during the course of the professional relationship, in violation of Rule 7.1(A)(3); Defendant has engaged in conduct that is prejudicial to the administration of justice in violation of Rule 1.2(D).
11. By failing to take proper action prior to the expiration of the statutes of limitations in Panos and Pritchard's cases, the Defendant has failed to act with reasonable diligence and promptness in representing clients in violation of Rule 6(B)(3); Defendant has failed to seek the lawful objectives of his client through reasonably available means permitted by law and the Rules of Professional Conduct in violation of Rule 7.1(A)(1); Defendant has failed to carry out a contract of employment entered into with clients for professional services, in violation of Rule 7.1(A)(2); Defendant has prejudiced or damaged his client during the course of the professional relationship in violation of Rule 7.1(A)(3); and Defendant has engaged in conduct prejudicial to the administration of justice in violation of Rule 1.2(D).
12. By failing to advise Pritchard and Panos that the statutes of limitations had run in their cases, Defendant has failed to keep his clients reasonably informed about the status of a matter in violation of Rule 6(B)(1); and Defendant has failed to explain a matter to the extent reasonably necessary to permit his clients to make informed decisions regarding the representation in violation of Rule 6(B)(2).

Based upon the Stipulated Findings of Fact and Conclusions of Law entered in this matter of even date herewith, and further based upon the stipulations of aggravation and

mitigation contained herein and the consent of the parties to the discipline imposed, the Hearing Committee approves and enters the following:

FINDINGS IN AGGRAVATION

As aggravating factors, the Hearing Committee approves and enters the following: the Defendant (a) has a prior disciplinary record of two Letters of Admonition from the Grievance Committee in 1990, one Letter of Admonition in 1991, a public censure from the Grievance Committee in August 1991, and a one-year suspension, stayed for three years from the Disciplinary Hearing Commission in the case of N.C. State Bar v. Samuel S. Popkin, 90 DHC 23; (b) has demonstrated a pattern of misconduct; and (c) has engaged in multiple offenses.

FINDINGS IN MITIGATION

As mitigating factors, the Hearing Committee approves and enters the following: the Defendant (a) has been suffering personal and emotional problems which have contributed substantially to his mismanagement of cases; (b) has given full and free disclosure to the Hearing Committee, has acknowledged his wrongdoing and been cooperative with the North Carolina State Bar throughout this proceeding; (c) has sought interim rehabilitation through psychological counseling to help him emotionally and personally cope with his underlying depression; (d) has had other penalties and sanctions imposed as a result of the allegations contained in the Holden and Bennett matters; and (e) has expressed sincere remorse regarding his handling of these and other cases.

Based upon the stipulated Findings of Fact and Conclusions of Law, as well as the findings in mitigation and aggravation and further based upon the consent of the parties, the Hearing Committee approves and enters the following:

ORDER OF DISCIPLINE

The Defendant is suspended from the practice of law for a period of 3 years, effective as of the date of this order. As much as two years of the suspension may be stayed upon the following conditions:

(a) The Defendant shall apply for a stay by addressing a verified petition to the Secretary of the North Carolina State Bar which shall conform as closely as possible to the requirements of a petition for reinstatement after suspension of license pursuant to Section 25(B). In addition to the requirements of Section 25(B)(3), the Defendant's verified petition for the stay shall also include both a certification

that he has completed at least 12 hours of continuing legal education (CLE) in the subjects of ethics, law office management, or personal injury/tort law and a certification from his treating psychologist that the Defendant is able to emotionally cope with the responsibilities of practicing law. The Defendant is presently receiving psychological treatment because he is suffering from moderate depression.

(b) The Defendant's petition for the stay shall be handled by the Secretary, the Office of Counsel of the North Carolina State Bar and the Defendant as though it were a petition for reinstatement of a suspended attorney by conforming as closely as possible to the procedures set out in Section 25(B) of Article IX of the Rules and Regulations of the North Carolina State Bar.

(c) The Defendant shall complete at least 12 hours of CLE courses in ethics, law office management, or personal injury/tort law during the 1-year active suspension period. He shall certify completion of those CLE hours as set out in subparagraph (a) above. During the 2-year stay period, the Defendant shall comply with the CLE requirements as prescribed by the North Carolina State Bar Board of Continuing Legal Education and in addition shall complete 12 additional CLE hours in law office management and personal injury/tort law courses. The Defendant shall submit written proof of completion of the additional CLE courses required during the 2-year stay period to the Office of Counsel no later than one week prior to the expiration of the 2-year stay period.

(d) The Defendant shall select a member of the Onslow County Bar (or the county bar to which he belongs at the time), to be approved by the Office of Counsel, who will monitor and supervise his practice throughout the 2-year stay period. The Defendant shall meet the supervising attorney at least once each month to ensure that he handles client matters promptly, that his caseload remains of a manageable size and that he responds to requests for information from clients in a timely fashion. The supervising attorney shall submit a written report to the Office of Counsel at least once each quarter during the 2-year stay period verifying that these meetings have taken place, that Defendant is cooperating with the supervising attorney, that Defendant is handling his client matters in compliance with the Rules of Professional Conduct, that his caseload remains of a manageable size and that he responds to clients' requests for information in a timely fashion.

(e) The Defendant shall violate no provisions of the Rules of Professional Conduct during the active and stayed portions of the 3-year suspension period.

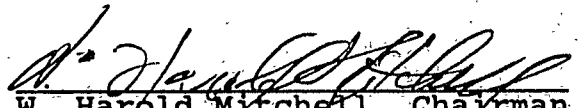
(f) The Defendant shall violate no state or federal laws during the active and stayed portions of the 3-year suspension period.

2. The Defendant shall turn in his law license to the Secretary of the N.C. State Bar no later than five days after the date of this order.

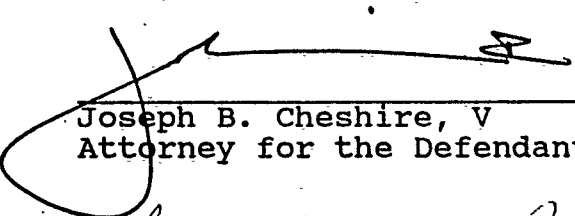
3. The Defendant shall comply with the provisions of Section 24 of Article IX of the Rules and Regulations of the North Carolina State Bar.


4. The Defendant shall pay the cost of this proceeding.

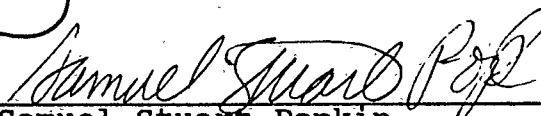
Signed by the undersigned Chairman with the full knowledge and consent of the other members of the Hearing Committee, this the 16th day of April, 1992.


W. Harold Mitchell, Chairman
Hearing Committee of the
Disciplinary Hearing
Commission

Seen and consented to:


Joseph B. Cheshire, V
Attorney for the Defendant


Fern E. Gunn
Attorney for the Plaintiff


Samuel Stuart Popkin
Defendant


Alan M. Schneider
Attorney for the Defendant