

NORTH CAROLINA
WAKE COUNTY



10212

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
98 DHC 25

THE NORTH CAROLINA STATE BAR, Plaintiff

v.

JOHN T. ORCUTT, Defendant

CONSENT ORDER
OF DISCIPLINE

This matter came before a Hearing Committee of the Disciplinary Hearing Commission composed of Joseph G. Maddrey, Esq., Chair; Vernon Russell, Esq.; and Mr. B. Stephen Huntley, pursuant to Section .0114 of the Discipline and Disability Rules of the North Carolina State Bar (hereinafter "Bar Rules"). The defendant, John T. Orcutt, was represented by Alan M. Schneider and Hugh Stevens. The plaintiff was represented by Douglas J. Brocker. Both parties stipulate and agree to the findings of fact and conclusions of law recited in this consent order and to the discipline imposed. Based upon the consent of the parties the hearing committee hereby enters the following:

FINDINGS OF FACT

1. 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. Defendant, John T. Orcutt, ("Defendant"), was admitted to the North Carolina State Bar on April 22, 1982 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 the times relevant to this complaint, Defendant actively engaged in the practice of law in the State of North Carolina and maintained a law office in the cities of Raleigh, Durham, and Fayetteville and the Counties of Wake, Durham, and Cumberland in North Carolina.
4. Defendant was properly served with process and defendant waived his right to a formal hearing.
5. In 1996, Karen and Abbas Arash Semnani were having difficulty meeting their financial obligations. In response to one of Defendant's advertisements, the Semnanis called and scheduled an initial appointment and consultation with Defendant's office for approximately September 17, 1996.

6. At this initial conference, the Semnanis filled out some documentation, which primarily concerned their financial situation.

7. Thereafter, the Semnanis met with Al Orcutt, Defendant's brother and an employee in Defendant's office. Al Orcutt is not an attorney.

8. At this initial meeting, Al Orcutt reviewed the financial information the Semnanis provided on a "client questionnaire," and obtained additional information about their specific financial situation.

9. After reviewing the Semnanis' financial information, Al Orcutt advised them of their potential options under the bankruptcy laws.

10. Al Orcutt then advised the Semnanis that they should file a chapter 7 bankruptcy petition.

11. Al Orcutt told the Semnanis that Defendant's office would charge a fee of \$800, plus a \$175 filing fee, to represent them in a chapter 7 bankruptcy proceeding.

12. The Semnanis subsequently made another appointment with Defendant's office for approximately November 12, 1996.

13. At the subsequent appointment, the Semnanis again met with Al Orcutt.

14. The Semnanis told Al Orcutt that they could not afford the fee he quoted them for filing a chapter 7 bankruptcy petition.

15. Al Orcutt advised the Semnanis to file a chapter 13 bankruptcy petition and then convert the petition to a chapter 7 proceeding once they had paid Defendant's attorney's fees pursuant to their chapter 13 payment plan.

16. Defendant's office filed the Semnanis' chapter 13 bankruptcy petition on November 15, 1996 in the United States Bankruptcy Court for the Middle District of North Carolina.

17. The Semnanis never met with or spoke to Defendant or any other attorney in Defendant's office before Defendant's office filed their chapter 13 bankruptcy petition.

18. Al Orcutt did not consult with Defendant or any other attorney in Defendant's office about the Semnanis' particular situation before: (a) initially advising them to file a chapter 7 bankruptcy petition, or (b) subsequently advising them to file a chapter 13 bankruptcy petition and convert the petition to a chapter 7 proceeding once they had paid the attorney's fees pursuant to their chapter 13 payment plan.

19. Approximately one year later, in November 1997, the Semnanis had paid most or all of the attorney's fees to Defendant's office under their chapter 13 payment plan.

20. Based on the advice given to them by Al Orcutt previously, the Semnanis contacted Defendant's office about converting their chapter 13 bankruptcy petition to a chapter 7 proceeding.

21. Defendant's office filed a motion to convert their chapter 13 bankruptcy petition to a chapter 7 proceeding on approximately November 11, 1997. Prior to the filing of the conversion motion, Defendant personally conferred with the Semnanis, advised them to convert their case from a chapter 13 proceeding to a chapter 7 proceeding, and prepared the conversion documents.

22. It was Defendant's regular practice in 1996 and 1997 to allow Al Orcutt and other non-lawyers in his office to obtain financial and other information from clients and advise clients about whether to file for bankruptcy or under which bankruptcy chapter to file. Although Defendant contends that no case is actually filed with the bankruptcy court until it has been thoroughly reviewed and approved by a licensed attorney, such "after the fact" review is insufficient to absolve the Defendant of his responsibility for the paralegal's having previously provided legal advice about whether to file bankruptcy or under which bankruptcy chapter to file.

23. Defendant is sole owner of the law offices of John T. Orcutt. Defendant has direct supervisory authority over Al Orcutt and the other non-lawyers in his office.

24. The Grievance Committee of the State Bar reprimanded Defendant twice previously in May 1995 for allowing Al Orcutt to meet with clients, review their financial information and advise his clients that they should file chapter 7 bankruptcy, in violation of Rules 3.1(a) and 3.3(a). Thereafter Defendant put into place some remedial measures and safeguards, including but not limited to attending seminars concerning the proper supervision of paralegals and providing clients with a document explaining the paralegal's role. These remedial measures, however, were insufficient to ensure compliance with the rules.

25. On April 15, 1994, the Council of the State Bar adopted RPC 161. This opinion of the Ethics Committee of the State Bar interpreted Rules of Professional Conduct 2.1, 2.2 and 2.4 in the context of a specific television advertisement placed by the Defendant.

26. Although Defendant's television advertisement at issue in RPC 161 advertised his legal services in chapter 7 and chapter 13 bankruptcy matters by inviting viewers to listen to a recorded telephone message, the television advertisement did not include the word "bankruptcy."

27. In RPC 161, the Ethics Committee stated that Defendant's failure to use the word "bankruptcy" as the form of relief being described was an omission that made defendant's advertisement materially misleading.

28. Defendant was given notice as early as June 1993 of the Ethics Committee's consideration of his advertisement in RPC 161.

29. Defendant and his attorneys submitted materials to the Ethics Committee at its meeting concerning the adoption of RPC 161.

30. Defendant had notice of the State Bar Council's adoption of the Ethics Committee's opinion RPC 161.

31. After receiving notice of the State Bar Council's adoption of RPC 161, Defendant discontinued use of the specific advertisement addressed by RPC 161 and replaced it with a similar advertisement from which Defendant eliminated specific language held to be objectionable in RPC 161. Defendant also revised the recorded telephone message that viewers of the television

advertisement were invited to hear. Defendant continued to place advertisements in various mediums offering his services to potential debtors in bankruptcy.

32. The revised television advertisement, and some of the advertisements in other mediums placed by Defendant subsequent to RPC 161, did not include the word "bankruptcy" to refer to the form of legal relief described.

33. For example, Defendant placed an advertisement in the Attorneys section of the December 1996 edition of the GTE yellow pages telephone directory in Durham, North Carolina that included the statements, "Consolidate Bills!" "Under Federal Law!" The statements "Consolidate Bills!" "Under Federal Law!" referred to filing a chapter 13 bankruptcy petition.

34. Defendant intentionally did not include the term "bankruptcy" in the 1996 Durham GTE ad because he believed that the use of that term might prevent, inhibit or dissuade debtors and potential clients from accessing his recorded message and ultimately from contacting Defendant's office.

35. Defendant also placed an advertisement in the Attorneys section of the March 1997 edition of the Sprint yellow pages telephone directory in Henderson, North Carolina that included a statement, "DEBT PROBLEMS?" Under this "DEBT PROBLEMS?" statement, Defendant included two separate sets of descriptive statements. The first set of descriptive statements under the "DEBT PROBLEMS?" statement was entitled "BANKRUPTCY" (hereafter "BANKRUPTCY section"). The second set of descriptive statements under the "DEBT PROBLEMS?" statement was entitled "BILL CONSOLIDATIONS" (hereafter "BILL CONSOLIDATIONS section"). The BILL CONSOLIDATIONS section referred to filing a chapter 13 bankruptcy petition.

36. Defendant intentionally did not include the term "bankruptcy" in the BILL CONSOLIDATIONS section of the 1997 Henderson Sprint ad because he believed that the use of that term might prevent, inhibit or dissuade debtors and potential clients from accessing his recorded message and ultimately from contacting Defendant's office.

37. Defendant intentionally did not include the term "bankruptcy" in the television ad that he revised in response to RPC 161 because he believed that the use of that term might prevent, inhibit or dissuade debtors and potential clients from accessing his recorded message or otherwise responding to the advertisement, and because he believed that the other modifications that he had made to the advertisement rendered it not misleading.

Based upon the consent of the parties and the foregoing Findings of Fact, the hearing committee enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over Defendant and the subject matter of this proceeding.

2. Giving a client or prospective client opinion or advice about whether or not to file a bankruptcy petition or under what chapter to file, given their particular circumstances, constitutes the giving of advice about the legal rights of that person (hereafter "legal advice").

3. Giving legal advice constitutes practicing law pursuant to N.C. Gen. Stat. § 84-2.1.
4. It is unlawful for any person, except active members of the North Carolina State Bar, to practice law, including giving legal advice, pursuant to N.C. Gen. Stat. § 84-4.
5. Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to NC. Gen. Stat. § 84-28(b)(2) and the Rules of Professional Conduct as follows:
 - a. By permitting non-lawyers in his office to give his clients legal advice, Defendant:
 - (i) aided persons not licensed to practice law in North Carolina in the unauthorized practice of law in violation of Rule 3.1(a); and
 - (ii) failed to supervise the non-lawyers in his office adequately or have in effect measures giving reasonable assurance that the conduct of the non-lawyers in his office was compatible with his professional obligations in violation of Rule 3.3(a) and (b).
 - b. By omitting the term "bankruptcy" in the advertisements described in paragraphs 34 through 38 of the Findings of Fact, which term was necessary to make those advertisements not materially misleading when considered as a whole, Defendant made misleading communications about his services in violation of Rule 2.1(a).

Based upon the consent of the parties, the hearing committee also enters the following:

FINDINGS OF FACT REGARDING DISCIPLINE

1. Defendant's misconduct is aggravated by the following factors:
 - (a) prior disciplinary offenses;
 - (b) a pattern of misconduct;
 - (c) multiple offenses; and
 - (d) substantial experience in the practice of law
2. Defendant's misconduct is mitigated by the following factors:
 - (a) absence of dishonest motive;
 - (b) full and free disclosure to the hearing committee and a cooperative attitude toward the proceedings;
 - (c) timely efforts to rectify the consequences of the conduct in question;

- (d) good character and reputation.

Based upon the foregoing findings of fact, conclusions of law and the findings regarding discipline and based upon the consent of the parties, the hearing committee enters the following:

ORDER OF DISCIPLINE

1. Defendant, John T. Orcutt, is hereby suspended from the practice of law for one year, effective 30 days from service of this order upon Defendant. The suspension is STAYED for a period of three years, upon compliance with the following terms and conditions during all three years of the stayed suspension:

- (a) Defendant shall not violate any Revised Rule of Professional Conduct;
- (b) Defendant shall not violate any state or federal criminal laws;
- (c) Defendant shall not permit the non-lawyers employed by or in his office to provide clients with an opinion or advice about whether to file a bankruptcy petition or under what chapter to file given the clients' particular circumstances. To ensure compliance with this provision, Defendant shall have every client for whom he files bankruptcy sign a notarized client certification. The client must sign the client certification prior to the bankruptcy petition being filed. Defendant, or another attorney in his office also shall sign the attorney certification for each client. The form to be used for the client and attorney certification is attached as exhibit A to this consent order.

Defendant shall keep, on an on-going basis throughout the period of the stayed suspension, all such certifications along with a corresponding list of clients for whom his office has filed bankruptcy. The State Bar may request these documents from Defendant at any time throughout the stayed suspension. Defendant must provide the State Bar with his list of clients and the corresponding certification documents within 15 days of all such State Bar requests.

- (d) Defendant shall not prospectively place any advertisement or make any communications about his services in representing clients under any chapter of the bankruptcy laws without specifying in the advertisement or communication itself that the form of relief described is bankruptcy.
- (e) During the period of Stayed Suspension Defendant shall provide any proposed advertisement or communication for legal services (hereafter "communication") to the North Carolina State Bar for review. Defendant shall not use any communication unless approved by the State Bar prior to its use. Defendant also shall keep a copy or recording of any communication submitted to the State Bar for review, along with any a written record of the State Bar's response for each communication submitted and provide these records to the State Bar upon request.

- (f) The defendant shall pay the costs of this proceeding as assessed by the Secretary within 30 days of service of this order on him.

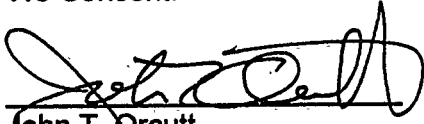
2. If, upon motion by the State Bar, the Committee finds that the Defendant has violated any of the conditions in paragraph I(a)-(e) of this Order, the suspension shall be activated. If Defendant's suspension is activated, the defendant shall comply with all provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0125(b) of the N.C. State Bar Discipline & Disability Rules, prior to seeking reinstatement of his license.

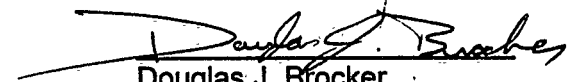
Signed by the undersigned hearing committee chair with the consent of the other hearing committee members.


This the 12th day of January 1999.

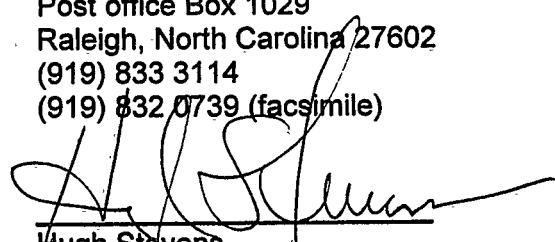

Joseph G. Maderrey, Chair
Hearing Committee

We Consent:


John T. Orcutt


Douglas J. Bocker
Deputy Counsel
North Carolina State Bar


Alan M. Schneider
Cheshire, Parker, Schneider, Wells & Bryan
Attorney for Defendant
133 Fayetteville Street Mall
Post office Box 1029
Raleigh, North Carolina 27602
(919) 833 3114
(919) 832 0739 (facsimile)


Hugh Stevens
Everett, Gaskins, Hancock & Stevens, L.L.P.
Attorneys for Defendant
127 West Hargett Street, Suite 600
Post Office Box 911
Raleigh, North Carolina 27602
(919) 755 0025
(919) 755 0009 (facsimile)

CLIENT CERTIFICATION

I, _____, have consulted with the Law Offices of John T. Orcutt, P.C.

I personally met with, spoke to, or received written communication directly from _____ (John T. Orcutt or another attorney in his office), who advised me: (1) Whether or not it is in my best interest to file bankruptcy (or if married, whether or not it is in the best interest of my spouse and/or I to file bankruptcy) and (2) If advisable to file, under which Chapter of the Federal Bankruptcy Code to file.

This advice was received from the above-mentioned attorney prior to the filing of my (our) bankruptcy case.

Client (Who received the advice)

Spouse (If also present for the advice)

Sworn and subscribed before
me this _____ day of _____, 19____.

Notary Public

My commission expires: _____

ATTORNEY CERTIFICATION

I, _____ (John T. Orcutt or another attorney in his office), affirmatively state that I have reviewed all necessary financial and other information provided by the above client(s) and have personally met with, spoken to or written to _____ (Name(s) of client(s) given advice) prior to filing the client(s)' petition for bankruptcy, and advised said client(s): (1) Whether or not it is in the best interest of the client(s) to file bankruptcy, and (2) If advisable, under which Chapter to file.

Dated: _____

Signature of Attorney

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