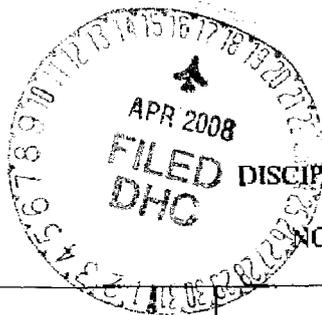


NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
07 DHC 21

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

D. BERNARD ALSTON, Attorney,

Defendant

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND CONSENT ORDER
OF DISCIPLINE

This matter was considered by a hearing committee of the Disciplinary Hearing Commission composed of F. Lane Williamson, Chair, and members Robert F. Siler and Donald G. Willhoit. Jennifer A. Porter and Brian P. D. Oten represented Plaintiff, the North Carolina State Bar. Defendant, D. Bernard Alston, represented himself. Both parties stipulate and agree to the findings of fact and conclusions of law recited in this consent order and to the discipline imposed. Defendant freely and voluntarily waives any and all right to appeal the entry of this consent order of discipline. Based upon the stipulations of fact and the consent of the parties, the hearing committee hereby finds by clear, cogent, and convincing evidence the following

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar ("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 (Chapter 1 of Title 27 of the North Carolina Administrative Code).
2. Defendant, D. Bernard Alston ("Alston" or "Defendant"), was admitted to the North Carolina State Bar in 1985, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Revised Rules of Professional Conduct.
3. During all or part of the relevant periods referred to herein, Alston was engaged in the practice of law in the State of North Carolina and maintained a law office in Henderson, Vance County, North Carolina.
4. Alston was properly served with process, a hearing in this matter was set, and the matter came before the hearing committee with due notice to all parties.

5. John Brown, Jr. ("Brown") retained Alston in about 2000 to represent him in a personal injury case arising from an accident with a driver from Ohio that occurred in West Virginia.

6. Alston filed a civil complaint to recover for damages from the other driver in the United States District Court for the Eastern District of North Carolina, Western Division, on or about October 26, 2001.

7. Alston failed to obtain service within 120 days of the filing of the complaint and the Court entered an order on or about April 11, 2002 dismissing the action without prejudice for failure to obtain service.

8. Alston did not notify Brown when Brown's 2001 action was dismissed on April 11, 2002.

9. Alston did not respond to Brown's request for information about the status of his case in October 2002. Alston's assistant responded to Brown but did not tell him his case had been dismissed.

10. At some point in time, Alston notified Brown that Alston needed to re-file the case for Brown. Alston provided Brown with a copy of the complaint when he re-filed the case in February 2003.

11. The opposing party in the case filed a motion to dismiss the case in March 2003 based upon several grounds, including lack of personal jurisdiction pursuant to Rule 12(b)(2).

12. The Court found the facts did not establish personal jurisdiction and granted the defendant's motion to dismiss on that ground on or about May 27, 2003.

13. Alston did not notify Brown when Brown's case was dismissed on May 27, 2003.

14. Alston did not notify Brown that he had failed to file Brown's case in a jurisdiction in which the court would have personal jurisdiction over Brown's case prior to the expiration of the applicable statute of limitations.

15. Although Alston met with Brown in February 2004 and provided Brown with the contact information for Alston's malpractice carrier, Alston did not notify Brown of the status of Brown's case or that he had failed to file Brown's case in a proper jurisdiction within the applicable statute of limitations.

16. The State Bar received a copy of an article published on or about May 13, 2005 in the Daily Dispatch of Henderson, North Carolina concerning Alston. The article discussed a lien filed by the federal government for unpaid federal income tax. The article also discussed a malpractice lawsuit that Brown had filed against Alston.

17. The State Bar opened grievance file 05G0630 and sent Alston a Letter of Notice concerning unpaid federal income taxes and the alleged neglect and failure to communicate in Brown's matter.

18. Subsequent to Alston's timely response to State Bar's Letter of Notice, the State Bar requested additional information and documents from Alston by letter dated August 1, 2005, including Alston's income tax returns from 1998 through 2005.

19. Alston responded to the State Bar's request for additional information by letter dated August 2, 2005 but did not provide the requested tax returns or responses to the questions about his taxes.

20. The State Bar sent Alston a letter dated August 8, 2005 again requested the tax returns and responses to the questions about his taxes.

21. Alston did not respond to the State Bar's August 8, 2005 letter.

22. On March 17, 2006, the State Bar served Alston with a subpoena pursuant to N.C. Gen. Stat. § 84-29 and 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0112(f) to appear at the State Bar building located at 208 Fayetteville Street Mall, Raleigh, North Carolina on March 31, 2006 and produce his state income tax returns and his employee withholding returns for 1998 through 2001.

23. Alston did not appear and did not produce his tax returns.

24. The subpoena was accompanied by a letter from the State Bar to Alston dated February 21, 2006 asking Alston to respond to the questions about the taxes and noting the enclosure of the subpoena.

25. Alston did not respond to the questions about his taxes as requested in the February 21, 2006 letter.

26. Willetta Teresa Lewis ("Lewis") hired Alston in 1999 to represent her and her two minor daughters on a contingency fee basis for injuries sustained in an automobile accident that occurred on or about December 22, 1998.

27. Lewis' statute of limitations expired on December 22, 2001.

28. Alston filed a complaint on behalf of Lewis and her daughters on December 27, 2001 and had a summons issued on December 27, 2001.

29. Alston did not obtain service of that summons and complaint.

30. Alston had an alias and pluries summons issued on January 25, 2002 but did not obtain subsequent alias and pluries summons.

31. Between 1999 and 2002 Lewis contacted Alston's office and attempted to speak with him by telephone about the status of her case. While Alston's paralegal assured Lewis that her case was progressing, Alston did not speak with Lewis.

32. Lewis made appointments to attempt to speak with Alston about her case, including but not limited to an appointment on or about May 23, 2002. Alston would cancel or not appear for the appointments.

33. Alston did not notify Lewis in 2001 or the beginning of 2002 that he had let the statute of limitations run on her personal injury claim or that he had failed to keep the chain of summonses alive in the case he filed on behalf of her and her children.

34. In or about June 2002 Lewis left a note for Alston stating that she was going to contact his malpractice carrier if he did not contact her with the status of her case. Alston subsequently met with Lewis and told her that he had let the statute of limitations expire in her case.

35. On or about June 27, 2005 Lewis submitted a grievance against Alston to the North Carolina State Bar.

36. On or about July 6, 2005 a Letter of Notice was sent by the State Bar to Alston.

37. On or about July 26, 2005 Alston responded to the Letter of Notice.

38. On or about August 1, 2005 the State Bar sent Alston a follow up letter asking for additional information and asking Alston to provide copies of all communications with Lewis, all pleadings regarding her case, and bank records showing receipt and disbursement of the funds from the insurance company on Lewis' behalf. Alston's response to this supplemental request for information was due on August 16, 2005.

39. Alston failed to respond to the State Bar's August 1, 2005 request for additional information and documents by August 16, 2005.

40. On or about February 9, 2006 the State Bar sent Alston another letter by certified mail asking for him to respond to the August 1, 2005 letter and enclosing another copy of that letter. Alston's response was due fifteen days from receipt of the letter. Alston received the letter by certified mail on February 25, 2006.

41. Alston did not respond within fifteen days of receipt of the February 9, 2006 letter. On or about March 16, 2006 Alston hand delivered to the State Bar a letter and a copy of his file on Lewis.

42. Alston failed to provide the requested bank records. Furthermore, the file that was delivered on or about March 16, 2006 did not contain any correspondence between Alston and Lewis.

43. Alston was retained in about 2000 to represent John O. Ricks (hereinafter "Ricks") in an employment matter against the Vance County Board of Education. Alston was also retained to represent the interests of Ricks' stepson (hereinafter "stepson"), a student in Vance County, concerning academic and disciplinary matters with the Vance County Board of Education.

44. Between 2000 and 2006, stepson's school would schedule meetings with to discuss stepson. Respondent was one of the requested participants at such meetings, and it was with such meetings that Ricks desired Respondent's assistance. Respondent failed to attend many of these meetings.

45. From 2000 to 2002 Ricks visited Alston's office several times a month to see if Alston needed any information from him, to coordinate dates and times for school meetings for stepson, and to deliver correspondence he had received from Vance County.

46. In February 2002, Ricks' employment with the Vance County Board of Education was terminated. Alston wrote a letter requesting reconsideration on Ricks' behalf in February 2002. Alston took no further action on Ricks' behalf concerning this termination of employment from February 2002 until he prepared and filed a complaint in the Superior Court of Vance County in 2004.

47. From 2002 to 2004 Ricks would attempt to contact Alston weekly to learn the status of the cases for him and stepson, by calling Alston and leaving messages. Alston did not return Ricks' calls.

48. Ricks made numerous appointments to see Alston between 2002 and 2004 in an attempt to learn the status of the cases. Alston failed to meet with Ricks at the appointed times.

49. On or about December 1, 2004 Alston filed a complaint in Vance County Superior Court, setting forth claims for relief for both Ricks and stepson.

50. On or about February 9, 2005, the defendant in Ricks' case filed a Motion to Dismiss. A hearing date of March 14, 2005 was set to hear the Motion.

51. On or about March 11, 2005 Alston filed a Notice of Voluntary Dismissal on behalf of Ricks without consulting Ricks.

52. Ricks discovered Alston dismissed the case on or about March 16, 2005. From March 2005 through March 2006, Ricks made calls and visits to Mr. Alston in an attempt to get the case re-filed but no progress was made on the case.

53. On or about March 10, 2006 Alston re-filed the complaint.

54. Alston did not properly maintain the chain of summons in the case and did not otherwise pursue relief for Ricks.

55. On or about April 11, 2006 Ricks filed a grievance with the North Carolina State Bar against Alston.

56. The State Bar sent a Letter of Notice and Substance of Grievance to Alston on or about April 16, 2006.

57. Alston responded to the Letter of Notice on or about May 15, 2006.

58. A follow up letter was sent to Alston on or about June 21, 2006 seeking additional information including any documentation of communications with Ricks or his stepson's mother.

59. Alston failed to respond to the State Bar's June 21, 2006 request for additional information.

60. On or about September 14, 2006 the State Bar subpoenaed Alston to appear on October 13, 2006 and produce documents from Ricks file. Alston complied with the subpoena.

61. David Best ("Best") retained Alston to represent him in a claim Best had against the Estate of Clara B. Jenkins ("Jenkins Estate").

62. In July 2003 Lori Renn, the public administrator of the Jenkins estate, responded to a letter Best had sent her about his claim and denied Best's claim.

63. Alston failed to pursue this claim on Best's behalf.

64. Alston failed to return calls and keep appointments made by Best concerning the matter.

65. On or about May 18, 2006 Best filed a grievance with the North Carolina State Bar against Alston.

66. On or about May 23, 2006 the State Bar sent Alston a Letter of Notice and Substance of Grievance.

67. Alston responded to the Letter of Notice on or about June 16, 2006.

68. On or about June 21, 2006 the State Bar sent Alston a follow up letter seeking additional information.

69. Alston failed to respond to the State Bar's June 21, 2006 request for additional information.

70. On or about September 14, 2006 Alston was subpoenaed to appear on October 13, 2006 and produce documents from Best's file. Alston complied with that subpoena.

71. On or about November 19, 2000, Nancy S. Leonard ("Leonard") hired Alston to represent her for injuries sustained in an automobile accident that occurred on or about December 19, 1997.

72. Alston filed a complaint in Vance County Superior Court on behalf of Leonard on or about December 18, 2000.

73. On or about July 12, 2001 the defendants in the lawsuit served Alston with their second set of interrogatories.

74. Alston did not respond to the defendants' second set of interrogatories.

75. On or about July 23, 2001 mediation took place in Leonard's case but no settlement was reached.

76. The court set a trial date of November 13, 2001.

77. Alston filed a Motion for Continuance on or about November 6, 2001, which was granted. Several continuances were granted due to both parties being unable to agree upon a trial date.

78. On or about November 8, 2002 the defendants filed a Motion to Compel Leonard to respond to the second set of interrogatories.

79. Alston did not notify Leonard of his failure to respond to discovery requests on her behalf or of the defendants' Motion to Compel.

80. On or about November 8, 2002 Alston filed a Notice of Voluntary Dismissal without Prejudice with Vance County Superior Court.

81. Alston did not consult with Leonard prior to filing the voluntary dismissal and Alston failed to inform Leonard that he had filed the voluntary dismissal.

82. Alston refiled the complaint on Leonard's behalf in June 2003 but failed to obtain proper service, failed to maintain the chain of summons, and failed to pursue Leonard's case in any other manner.

83. Throughout Alston's representation of her, Leonard would call his office and leave messages in an effort to learn information about the status of her case. Alston routinely failed to return her calls.

84. On or about September 6, 2006 Leonard filed a grievance with the North Carolina State Bar.

85. The State Bar sent a Letter of Notice and Substance of Grievance concerning the Leonard grievance to Alston by certified mail on or about September 25, 2006. Alston received the Letter of Notice on or about October 4, 2006.

86. Pursuant to Rule .0112(c) of the State Bar's Discipline and Disability Rules, 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0112(c), and the terms of the Letter of Notice, Alston's response to the Letter of Notice was due within fifteen (15) days of receipt. Alston did not respond to the Letter of Notice within the fifteen (15) day period as required.

87. On or about August 23, 2005 Alston closed a loan for Branch Banking and Trust Co. ("BB&T") in a residential real estate transaction in which Andre Baskett ("Baskett") purchased property from Wynn Construction, Inc.

88. Alston collected approximately \$156.26 at the closing for payment of the title insurance policy premium for a title insurance policy for BB&T and an owner's policy for Baskett.

89. Alston failed to complete the final opinion of title at the time of the closing, failed to send the final opinion and the check for the title insurance premium to the title insurance company for issuance of the title insurance policies at the time of the closing, and failed to ensure his office staff complied with any instructions given by him to accomplish these tasks.

90. Alston did not complete the final opinion of title and submit it to the title insurance company for issuance of the title insurance policies until on or after November 28, 2006.

91. In or about November 2005, Theodore Jones ("Jones") hired Alston to represent him in a child support case.

92. Jones paid Alston \$600.00 toward a \$900.00 fee.

93. Between November 2005 and June 2006, Alston did not appear for a scheduled meeting with Jones and was late to another scheduled meeting with Jones.

94. Between November 2005 and June 2006, Jones notified Alston's assistant that he wanted a refund. Alston's assistant said she would give Alston the message.

95. Alston did not respond to Jones' request for a refund or otherwise communicate with him about his case.

96. Jones saw Alston on a couple of occasions outside the office, and on such occasions Alston told Jones that Alston would call Jones. Alston did not call Jones as he said he would.

97. On or about June 16, 2006 Jones filed a Petition for Resolution of Disputed Fee ("fee dispute") with the North Carolina State Bar.

98. A Notification of Mandatory Fee Dispute Resolution was sent to Alston by certified mail on or about July 11, 2006. Alston received the notice on or about July

25, 2006. Alston's response to this notice was due within 15 days of his receipt of the notice.

99. Alston did not respond within 15 days of his receipt of the notice. Alston provided a brief response to the notice on or about August 28, 2006.

100. On or about October 4, 2006 the State Bar sent Alston a letter in the course of processing Jones' fee dispute, requesting Alston supply additional information showing services rendered and time expended in support of his fee. Alston was required to provide this information no later than October 19, 2006. Alston did not respond by October 19, 2006.

101. The State Bar then sent its letter dated October 4, 2006 requesting additional information in the fee dispute by certified mail to Alston on or about November 9, 2006. Alston's response to this letter was due within ten days of his receipt of the letter. Alston received this letter by certified mail on or about November 13, 2006. Alston did not respond to this letter requesting additional information for the fee dispute file within ten days of his receipt of the letter.

102. On or about December 12, 2006 the State Bar sent Jones and Alston a letter stating that Alston failed to participate in the Fee Dispute Resolution Program so the State Bar was closing the fee dispute file and referring it to the State Bar Grievance Committee.

103. A grievance file was opened in this matter subsequent to Alston's failure to participate in the Jones fee dispute. The State Bar sent a Letter of Notice and Substance of Grievance to Alston by certified mail on or about January 23, 2007. Alston received the Letter of Notice on or about January 26, 2007.

104. Pursuant to Rule .0112(c) of the State Bar's Discipline and Disability Rules, 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0112(c), and the terms of the Letter of Notice, Alston's response to the Letter of Notice was due within fifteen (15) days of receipt. Alston did not respond to the Letter of Notice within the fifteen (15) day period as required.

105. Alston was appointed Executor for the Estate of Fannie G. Alston (hereinafter "the Estate"), who died in December of 2004.

106. On December 30, 2005 Alston filed an annual account (hereinafter "the 2005 accounting") for the Estate, which Alice Faye Hunter, Clerk of Superior Court in Franklin County (hereinafter "the Clerk") approved on December 30, 2005.

107. Alston was required to file an annual or final account in December 2006. Alston did not do so.

108. The Clerk sent Alston a notice dated January 9, 2007 notifying Alston that the final account was due. Alston had thirty (30) days from the date of the notice to file the accounting. Alston did not file the final account within that thirty days.

109. The Clerk issued an order to Alston to file the final account on February 27, 2007. The Sheriff's Office served the order on Alston on February 23, 2007. Alston had twenty (20) days from service to file the final account. Alston did not file the final account within that twenty days.

110. On March 22, 2007, the Clerk issued an Order to Show Cause to Alston for failure to file the final account and for determination of whether Alston should be removed as executor. The Sheriff's Office served the Order to Show Cause on Alston on March 19, 2007. The show cause hearing was set for April 11, 2007.

111. Alston requested and was granted a continuance to allow him to file the required accounting.

112. On April 25, 2007, Alston provided the Clerk with a proposed annual accounting for 2006 (hereinafter "the 2006 accounting").

113. The 2006 accounting listed that on or about July 24, 2006, funds were distributed from the Estate Account in the amount of \$5,000.00 per person to the following beneficiaries: James O. Gailes, Christie Mitchell, William M. Gailes, Dorothy Johnson, Donna M. Howard, Eugene Gailes, and Edith Lynch.

114. On or about July 24, 2006, funds from the Estate Account were used to purchase 7 cashiers checks in the amount of \$5,000.00 made payable to the following beneficiaries: James O. Gailes, Christie Mitchell, William M. Gailes, Dorothy Johnson, Donna M. Howard, Eugene Gailes, and Edith Lynch.

115. These \$5,000.00 checks were not mailed or otherwise provided in July 2006 to the following four individuals: William M. Gailes, Dorothy Johnson, Donna M. Howard, and Eugene Gailes.

116. William M. Gailes, Dorothy Johnson, Donna M. Howard, and Eugene Gailes all received letters from the Clerk dated May 6, 2007 asking if they had received the distributions of \$5,000.00 each on July 24, 2006 and all reported back to the Clerk that they had not received those distributions at that time.

117. William M. Gailes, Dorothy Johnson, and Eugene Gailes notified the Clerk that they received bank checks for \$5,000.00 dated July 24, 2006 in May 2007.

118. The 2006 accounting also reflected distributions from the sale of real estate.

119. In about August 2006, real property of the Estate was sold and a proceeds check was issued to the four beneficiaries designated in Ms. Alston's will in the amount of \$114,008.81.

120. The \$114,008.81 was deposited and credited to the estate bank account for the Estate (hereinafter "Estate account") on or about September 13, 2006.

121. In accordance with Ms. Alston's will which provided these real estate proceeds be split equally among four beneficiaries listed in the will, Alston issued checks from the Estate account distributing the proceeds from the sale of the real property as follows and with the following subsequent results:

CHECK NUMBER	DATE CHECK CLEARED BANK	PAYEE	AMOUNT
1059	October 2, 2006	Eloise and Mark Branch ("Branch")	\$29,927.31
1060	September 28, 2006	Bonita Scarlett ("Scarlett")	\$29,927.31
1061	October 5, 2006	Jerry Gales ("J. Gales")	\$29,927.31
1062	Returned for insufficient funds	Aubrey L. Gales ("A. Gales")	\$29,927.31

122. Although \$114,008.81 was received and deposited by Alston as the proceeds from the sale of the real property, Alston signed checks totaling \$119,709.24 in distribution of said proceeds.

123. Alston over-disbursed funds when he sent out the four checks listed above.

124. Andre Roberts (hereinafter "Roberts"), an accountant Alston used to assist him with the Alston Estate, prepared the checks to A. Gales, Branch, Scarlett, and J. Gales for Alston's signature. Alston failed to sufficiently supervise the work of Roberts to avoid the over-disbursement of A. Gales' funds to Branch, Scarlett, and J. Gales.

125. Alston reported in the 2006 accounting that he had disbursed commissions from the estate account in the amount of \$5700.44 to himself for executor's commissions.

126. He also reported in the 2006 accounting he had disbursed fees in the amount of \$9,744.29 to Roberts.

127. Alston did not receive prior approval from the Clerk of Court to collect commissions at the time he collected them in 2006 as required by N.C. Gen. Stat. § 28A-23-3.

128. Pursuant to N.C. Gen. Stat. § 28A-23-3, the personal representative or executor/executrix of an estate is entitled to commissions to be fixed in the discretion of the Clerk of Superior Court and not to exceed five percent. The award of such commission and the amount to be paid is determined by the Clerk and may be adjusted or disallowed based upon the factors listed in the statute, including reduction of commission allowed by the amount of fees paid to professionals such as accountants. The statute does not permit an executor or executrix to determine the amount of commission he or she

should receive or to pay him or herself a commission without the Clerk's express approval.

129. Alston followed this same procedure in 2005, in which he disbursed commissions to himself during the year and then reported the commissions on the annual accounting. That 2005 annual accounting was accepted and approved by the Clerk.

130. The Clerk did not consider Alston's 2006 accounting acceptable and held the Show Cause hearing on April 25, 2007.

131. The Clerk found Alston had failed to carry out his fiduciary duties as Executor and ordered that the Letters Testamentary previously issued to Alston be revoked.

132. The Clerk found Alston had improperly made disbursements and distributions from the account and had collected commissions without the approval of the Clerk that exceeded the maximum commission allowed by statute. The Clerk ordered Alston to reimburse the Estate.

133. In about January 2002, Alice Harrison (hereinafter "Harrison") retained Alston to represent the estate of her husband, Odell Harrison, in a matter regarding circumstances surrounding her husband's death while in the custody of the North Carolina Department of Correction.

134. Harrison provided Alston with a chronology and a fact sheet reporting interviews conducted and facts found by the National Association for the Advancement of Colored People (NAACP) from approximately February 2002 through June 2002.

135. In about January or February 2004, Alston filed a claim for Harrison as administrator of husband's estate against the North Carolina Department of Correction under the Tort Claims Act with the North Carolina Industrial Commission (NCIC), which was assigned Docket Number TA-18325.

136. On May 7, 2004, the opposing party served Alston with interrogatories and a request for production of documents for response by Harrison. Harrison's responses to the discovery requests were due on or about June 6, 2004. Alston did not provide Harrison's responses to the discovery requests by that date.

137. Counsel for the opposing party sent Alston a letter dated June 14, 2004 that called Alston's attention to the overdue discovery and asked that Alston advise him when Alston would provide Harrison's responses to the discovery requests. Alston did not respond to opposing counsel's letter nor did Alston provide opposing counsel with Harrison's discovery responses.

138. Between about February 2004 and March 2006, Alston did not take any documented action on behalf of Harrison.

139. On March 8, 2006, Alston filed a motion asking that the case be placed on the active hearing docket for final disposition.

140. Alston had not provided opposing counsel with Harrison's discovery responses when he filed the motion to have the case placed on the active hearing docket for final disposition.

141. By order of the NCIC filed April 20, 2006, Harrison's case was placed on the active hearing docket. The case was set to be heard on July 20, 2006.

142. The opposing party filed a Motion to Compel on April 28, 2006 to compel Harrison's responses to the discovery requests served upon her through Alston on May 7, 2004.

143. A pre-trial hearing was held in Harrison's case on July 20, 2006.

144. Alston served the opposing party with discovery responses on July 20, 2006.

145. By order filed July 25, 2006, the NCIC ordered Harrison to name her expert witnesses by August 31, 2006, the opposing party to name its experts by November 30, 2006, discovery to be completed by January 31, 2007, mediation to be completed by February 28, 2007, and the matter set for hearing after March 1, 2007.

146. The NCIC held open the opposing party's motion to compel because Alston had provided some response to the discovery requests that day.

147. On August 8, 2006, the opposing party served its second set of interrogatories and requests for production of documents on Harrison through Alston, along with a request that she supplement her responses to the first set of discovery requests. Harrison's responses to the second set of discovery requests were due on or about September 7, 2006.

148. Alston did not name expert witnesses for Harrison by August 31, 2006 as ordered by the NCIC nor did he provide the names of expert witnesses in Harrison's July 20, 2006 response to the opposing party's first set of interrogatories, which contained an interrogatory requesting this information.

149. Alston did not provide Harrison's responses to the second set of discovery requests until December 8, 2006.

150. Alston did not provide any supplemental answer to the opposing party's interrogatory requesting the names of expert witnesses or any supplemented responses to the first set of discovery requests on behalf of Harrison.

151. Opposing counsel sent Alston a letter on January 25, 2007, asking Alston for available dates to depose Harrison's investigator. Alston did not respond to this inquiry.

152. On February 16, 2007, the NCIC set Harrison's case for hearing the week of March 12, 2007.

153. On February 19, 2007, opposing counsel sent Alston a letter asking him to supplement Harrison's discovery responses. Alston did not provide any supplemental responses.

154. Due to a scheduling conflict, Harrison's case was rescheduled to May 9 and 10, 2007.

155. The opposing party filed a Motion in Limine seeking to prevent Harrison from introducing any documents, statements, diagrams, or testimony that related to the discovery requests served upon Harrison through Alston to which Harrison had not fully responded. The Motion in Limine was first filed in March 2007 but was not ruled on because the hearing was continued. The Motion in Limine was updated and filed again on April 27, 2007.

156. Alston did not respond to this Motion in Limine on Harrison's behalf.

157. Opposing counsel attempted to reach Alston to coordinate on the pretrial order required in the matter in advance of the May hearing dates.

158. Although Alston had filed a draft pretrial order in advance of the March 2007 hearing date, he did not respond to opposing counsel's attempts to finalize a pretrial order in May 2007 nor did Alston file anything in response to opposing counsel's May 2007 unilateral pretrial order.

159. On May 3, 2007 Alston filed a motion to continue the trial.

160. On May 4, 2007, the NCIC considered the opposing party's Motion in Limine. The NCIC found Alston's client, Harrison, failed to comply with her discovery obligations for a period of three years and failed to provide and file a pretrial order as required by the rules. Given these failures, the NCIC dismissed Harrison's claim without prejudice. The NCIC further ruled that the motion for continuance filed by Alston was accordingly moot.

161. Alston did not notify Harrison that the NCIC dismissed her case.

162. Harrison filed a grievance with the State Bar concerning Alston's conduct. The State Bar opened Grievance Committee file number 07G0654 on June 14, 2007.

163. A letter of notice dated June 21, 2007 regarding the Harrison grievance was served on Alston in person by Steven Annis, a State Bar investigator, on August 23, 2007.

164. Alston was required to respond within fifteen days of receipt of the letter of notice. Alston failed to respond to the letter of notice.

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

CONCLUSIONS OF LAW

1. All the parties are properly before the Hearing Committee and the Committee has jurisdiction over Defendant, D. Bernard Alston, and the subject matter.
2. Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. §§ 84-28(b)(2) and (3) as follows:
 - (a) By failing to respond to Brown's request for information with accurate information about the status of Brown's case, failing to keep Brown informed about the status of his case, and failing to inform Brown of Alston's failure to file Brown's case in a proper jurisdiction prior to expiration of the statute of limitations, Alston failed to keep the client reasonably informed about the status of the matter in violation of Rule 1.4(a)(3), failed to promptly comply with reasonable requests for information in violation of Rule 1.4(a)(4), and failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of Rule 1.4(b);
 - (b) By failing to respond to the requests for additional information from the State Bar and failing to appear and produce the documents pursuant to the subpoena from the State Bar in grievance file 05G0630, Alston failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b) and N.C. Gen. Stat. § 84-28(b)(3);
 - (c) By failing to protect Lewis' ability to litigate claims for herself and her daughters through timely filing and service of the complaint and summons in the civil case and by failing to litigate those claims on Lewis' behalf, Alston failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3;
 - (d) By failing to respond to Lewis' telephone calls and letters, by failing to communicate the status of her case and her children's cases to Lewis, and by failing to timely notify her that he had allowed the statute of limitations to run in her personal injury case, Alston failed to keep his clients reasonably informed and failed to comply with reasonable requests for information in violation of Rule 1.4 (a)(3) and (4) and failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of Rule 1.4(b);

- (e) By failing to respond to the State Bar's letter dated August 1, 2005 in the Lewis grievance file by the deadline stated therein and failing to provide bank records requested in that file, Alston failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b) and N.C. Gen. Stat. § 84-28(b)(3);
- (f) By failing to act on behalf of Ricks in a timely manner and failing to attend meetings at stepson's school on behalf of stepson, Alston failed to act with reasonable diligence and promptness in representing clients in violation of Rule 1.3;
- (g) By failing to respond to Ricks' telephone calls, failing to meet with Ricks at scheduled appointments, failing to consult with Ricks prior to taking a voluntary dismissal in Ricks' case, and by failing to communicate the status of the case to Ricks, Alston failed to reasonably consult with the client about the means by which the client's objectives would be accomplished in violation of Rule 1.4(a)(2), failed to keep his client reasonably informed in violation of Rule 1.4(a)(3), and failed to comply with reasonable requests for information in violation of Rule 1.4(a)(4);
- (h) By failing to respond to the State Bar's letter dated June 21, 2006 requesting information regarding the Ricks grievance, Alston failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b) and N.C. Gen. Stat. § 84-28(b)(3);
- (i) By failing to pursue Best's claim against the Jenkins Estate, Alston failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3;
- (j) By failing to respond to Best's telephone calls and by failing to keep appointments with Best, Alston failed to keep his client reasonably informed and failed to comply with reasonable requests for information in violation of Rule 1.4(a)(3) and (4);
- (k) By failing to respond to the State Bar's letter dated June 21, 2006 requesting information regarding the Best grievance, Alston failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b) and N.C. Gen. Stat. § 84-28(b)(3);
- (l) By failing to respond to discovery requests on Leonard's behalf, by failing to litigate Leonard's claim on her behalf, by failing to protect Leonard's ability to litigate her claims through timely service of the complaint and summons when he re-filed her case and/or properly maintaining the chain of summonses until service could be obtained in the re-filed case, Alston failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3;

- (m) By failing to notify Leonard of his failure to respond to discovery requests on her behalf and of the opposing parties' motion to compel, and by taking a voluntary dismissal of Leonard's case without her knowledge or consent and without notifying her of this action, Alston failed to reasonably consult with the client about the means by which the client's objectives would be accomplished in violation of Rule 1.4(a)(2) and failed to keep his client reasonably informed in violation of Rule 1.4(a)(3);
- (n) By failing to respond to the Letter of Notice from the State Bar in the Leonard grievance file within the deadline established by applicable regulation, Alston failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b) and N.C. Gen. Stat. § 84-28(b)(3);
- (o) By failing to complete and provide the final opinion of title and title insurance premium to the title insurance company for issuance of the title insurance policies for BB&T and Baskett in a timely manner, Alston failed to act with reasonable diligence and promptness in representing clients in violation of Rule 1.3;
- (p) By failing to meet with Jones and by failing to respond to Jones' request for a refund, Alston failed to promptly comply with reasonable requests for information and keep the client reasonably informed about the status of the matter in violation of Rule 1.4(a)(3) and (4);
- (q) By failing to respond to the State Bar's request for additional information in the Jones fee dispute file, Alston failed to participate in good faith in the fee dispute resolution process in violation of Rule 1.5(f);
- (r) By failing to respond to the letter of notice in the Jones grievance file by the deadline established by applicable regulation, Alston failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b) and N.C. Gen. Stat. § 84-28(b)(3);
- (s) By failing to complete the final account in the Fannie G. Alston Estate in a timely manner, by failing to comply with the Clerk's notices and orders to file said account, and by mishandling distributions and/or disbursements from the Estate account to himself, Roberts, and beneficiaries of the Estate, Alston engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
- (t) By over-disbursing funds from the proceeds of the real estate sale, Alston failed to properly maintain and deliver entrusted funds in violation of Rule 1.15-2(a) and (m);
- (u) By failing to sufficiently supervise the work of the accountant he used to assist him with receipts and disbursements in the Estate, Alston failed to properly supervise a non-attorney assistant in violation of Rule 5.3(b);

- (v) By failing to respond fully or in a timely manner to discovery requests on behalf of Harrison, by failing to respond to opposing party's Motion in Limine on Harrison's behalf, by failing to act on behalf of Harrison in the pending litigation, and by failing to otherwise provide the legal services Harrison hired him to perform, Alston failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3, failed to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party in violation of Rule 3.4(d)(2), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
- (w) By failing to notify Harrison of the dismissal of her case by the NCIC, Alston failed to keep a client reasonably informed about the status of her case in violation of Rule 1.4(a)(3);
- (x) By failing to respond to the State Bar's letter of notice in the Harrison grievance, Alston failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b) of the Revised Rules of Professional Conduct and N.C. Gen. Stat. § 84-28(b)(3).

Based upon the stipulations of fact and the consent of the parties, the Hearing Committee hereby finds by clear, cogent, and convincing evidence the following additional

FINDINGS REGARDING DISCIPLINE

1. Alston's misconduct is aggravated by the following factors:
 - a. Prior disciplinary offenses, to wit: an admonition in 2002 for failing to communicate with Brown and on Brown's behalf in a different matter;
 - b. Pattern of misconduct;
 - c. Multiple offenses; and
 - d. Substantial experience in the practice of law.
2. Alston's misconduct is mitigated by the following factors:
 - a. Absence of a dishonest or selfish motive;
 - b. Personal or emotional problems, to wit: depression, diagnosed in 2007, which affected his conduct in at least some of the matters addressed in this disciplinary order;

- c. Timely good faith efforts to make restitution or to rectify consequences of misconduct, including payment of personal funds;
 - d. Full and free disclosure to the hearing committee or cooperative attitude toward proceedings; and
 - e. Remorse.
3. The aggravating factors outweigh the mitigating factors.
4. Alston has engaged in conduct that has caused significant harm to his clients, including in some instances extinguishing the client's ability to pursue legal claims.
5. Alston's failure to respond to the inquiries and demands from the State Bar resulted in potential significant harm to the profession, interfering with the State Bar's ability to regulate attorneys and undermining the privilege of lawyers in this State to remain self-regulating.
6. Alston's failure to ensure that the accountant assisting him with the Fannie G. Alston Estate completed the final account in the Fannie G. Alston Estate in a timely manner, complied with the Clerk's notices and orders to file said account, and properly handled distributions and/or disbursements from the Estate account to himself, Roberts, and beneficiaries of the Estate resulted in significant harm to the administration of justice in that matter.
7. Alston admits and takes responsibility for the conduct described herein. Alston acknowledges that poor office management and poor staff supervision have contributed to the conduct described herein. Alston has identified changes he has made in office procedures to better ensure he sees messages from clients and mail from the North Carolina State Bar.
8. Alston was diagnosed with depression in about May 2007, prior to the filing the complaint in this disciplinary matter. Alston is undergoing treatment for his depression. He has also entered into a contract with the Lawyer's Assistance Program for his depression.
9. This DHC Hearing Committee has considered lesser alternatives and finds that a public censure or reprimand would not be sufficient discipline because of the gravity of the harm caused by the Defendant to the profession, his clients, and to the administration of justice.
10. This DHC Hearing Committee finds Defendant's conduct caused significant harm and significant potential harm to clients and to the administration of justice, and to the profession as outlined above and that a more severe discipline is necessary to protect the public. For those reasons, this DHC Hearing Committee believes

and so finds that an Order calling for a discipline short of a suspension of Defendant's law license would not be appropriate.

Based upon the foregoing findings of fact, conclusions of law, findings of fact regarding discipline, and with the consent of the parties, the Hearing Committee hereby enters the following

ORDER OF DISCIPLINE

1. The license of Defendant, D. Bernard Alston, is hereby suspended for five years.
2. Alston shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 60 days following the service of this order upon Defendant.
3. Alston shall comply with the wind down provisions contained in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the North Carolina State Bar Discipline and Disability Rules. Defendant shall file an affidavit certifying he has complied with the wind down rule with the Secretary of the North Carolina State Bar within 60 days of the effective date of this order.
4. After serving eighteen (18) months of the active suspension of his license, Defendant may apply for a stay of the remaining period of suspension upon filing a petition with the Secretary of the North Carolina State Bar demonstrating by clear, cogent, and convincing evidence that, in addition to complying with the general provisions for reinstatement listed in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0125 of the North Carolina State Bar Discipline & Disability Rules, Alston has complied with the following conditions:
 - a. Paid the costs of this proceeding as assessed by the Secretary of the North Carolina State Bar within 30 days of notice of the costs being mailed to him at his address of record;
 - b. Kept his address of record with the North Carolina State Bar current, accepted all certified mail from the North Carolina State Bar, and responded to all letters of notice and requests for information from the North Carolina State Bar by the deadlines stated in the communication;
 - c. Participated fully and timely in the fee dispute program when notified of any petitions for resolution of disputed fees;
 - d. Completed a course in law office management approved in advance by the Office of Counsel of the North Carolina State Bar;

e. Established a plan for ensuring that appointments with clients will be made for dates and times when Alston is certain he will be physically present at his office and available to meet with the clients and provided that plan in writing with his application for reinstatement;

f. Entered into a contract with the Lawyer's Assistance Program to participate for the full period of time for which his suspension is stayed. Alston shall provide a copy of the contract and a written release authorizing the Office of Counsel of the North Carolina State Bar to speak with Lawyer's Assistance Program personnel and obtain information regarding Alston's compliance with the Program and any treatment recommendations. Alston shall not revoke this release;

g. Established ongoing treatment for his depression by a mental health provider and/or physician approved in advance by the Office of Counsel of the North Carolina State Bar. Defendant shall provide a written release to the North Carolina State Bar Office of Counsel, authorizing the counsel to speak with these providers and obtain copies of records relating to his compliance with the treatment recommendations. Defendant shall not revoke these releases; and

h. Arranged for an active member of the North Carolina State Bar in good standing who practices law in Vance County and who has been approved by the Office of Counsel of the North Carolina State Bar to serve as his law practice monitor. The selected monitor must agree to so serve and agree to meet with Alston monthly to review Alston's cases. The monitor will supervise all client matters and will ensure Alston handles all client matters in a timely fashion, that Alston responds promptly to his clients, and that Alston meets with clients as scheduled when clients make appointments. The monitor will submit written quarterly reports of this supervision to the Office of Counsel of the State Bar, such reports due on the following dates as they occur during the stay of this suspension: January 15, April 15, July 15, and October 15. This monitoring will occur for the duration of any stay of this suspension. Alston will pay the cost, if any, charged by the monitor for this supervision. Alston must have made the arrangements for this monitoring attorney and supplied the Office of Counsel of the State Bar with a letter from the monitoring attorney confirming his agreement to perform the duties listed above.

5. If Alston successfully seeks a stay of the suspension of his law license, such stay will continue in force only as long as he complies with the following conditions:

a. Respond to all letters of notice and requests for information from the State Bar by the deadline stated in the communication;

- b. Advise the State Bar in writing of all address changes within 10 days of the change;
- c. Participate fully and timely in the fee dispute program when notified that a petition for resolution of disputed fee has been received by the State Bar;
- d. Timely comply with his State Bar continuing legal education requirements and pay all fees and costs assessed by the applicable deadline;
- e. Attended a law office management course approved in advance by the Office of Counsel of the State Bar every year during the stayed suspension period; Alston will attend this course no later than December of each calendar year during the stayed suspension. Alston will provide written proof of successful completion of the course to the Office of Counsel within 10 days of completing the course;
- f. Meet once a month with his monitoring attorney, report the status of all current client matters to the monitor, cooperate with the monitoring attorney and provide any information the monitoring attorney deems reasonably necessary to ensure that Alston is handling all client matters in a timely fashion, is responding promptly to his clients, and is meeting with clients as scheduled when clients make appointments. Alston shall report all missed client appointments to the practice monitor, shall modify his plan for client appointments as needed, shall provide any such modified plan to the Office of Counsel within 10 days of modification, and shall comply with suggestions of the practice monitor regarding client appointments;
- g. Ensure the monitoring attorney sends a written report each quarter to the Office of Counsel of the State Bar as described above;
- h. Cooperate with the Office of Counsel and make appropriate arrangements for an alternate monitoring attorney if needed during any stay of this suspension;
- i. Comply with all treatment recommendations from the Lawyer's Assistance Program, his mental health provider, and/or his physician. Such treatments shall be solely at Alston's expense. Alston shall ensure that the Office of Counsel receives written reports from his mental health provider and/or physician confirming that he is complying with all treatment recommendations. The reports shall be received each January 15, April 15, July 15 and October 15 throughout the period of stayed suspension;
- j. Not violate the laws of any state or of the United States; and
- k. Not violate any provision of the Revised Rules of Professional Conduct.

6. If an order staying any period of this suspension is entered and Alston fails to comply with any one or more of the conditions referenced in Paragraph 5, then the stay of the suspension of his law license may be lifted as provided in § .0114(x) of the North Carolina State Bar Discipline and Disability Rules.

7. If Alston does not seek a stay of the active portion of the suspension of his law license or if some part of the suspension is stayed and thereafter the stay is revoked, Alston must provide in his application for reinstatement clear, cogent, and convincing evidence of the following:

- a. Compliance with the general provisions for reinstatement listed in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0125 of the North Carolina State Bar Discipline & Disability Rules;
- b. Compliance with the conditions set out in paragraph 4 (a) – (e) above; and
- c. That he is not then suffering from any disability that would impair his ability to practice law before seeking reinstatement of his license to practice law.

8. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(x) of the North Carolina State Bar Discipline and Disability Rules throughout the period of any stayed suspension.

Signed by the Chair with the consent of the other hearing committee members, this the 17th day of April, 2008.



F. Lane Williamson, Chair
Disciplinary Hearing Committee

CONSENTED TO BY:



Jennifer A. Porter
Deputy Counsel
North Carolina State Bar

Counsel for Plaintiff

D. Bernard Alston
Defendant

6. If an order staying any period of this suspension is entered and Alston fails to comply with any one or more of the conditions referenced in Paragraph 5, then the stay of the suspension of his law license may be lifted as provided in § .0114(x) of the North Carolina State Bar Discipline and Disability Rules.

7. If Alston does not seek a stay of the active portion of the suspension of his law license or if some part of the suspension is stayed and thereafter the stay is revoked, Alston must provide in his application for reinstatement clear, cogent, and convincing evidence of the following:

a. Compliance with the general provisions for reinstatement listed in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0125 of the North Carolina State Bar Discipline & Disability Rules;

b. Compliance with the conditions set out in paragraph 4 (a) - (e) above; and

c. That he is not then suffering from any disability that would impair his ability to practice law before seeking reinstatement of his license to practice law.

8. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(x) of the North Carolina State Bar Discipline and Disability Rules throughout the period of any stayed suspension.

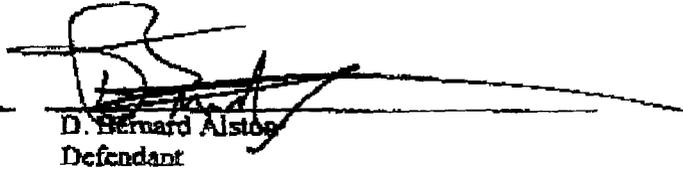
Signed by the Chair with the consent of the other hearing committee members, this the _____ day of _____, 2008.

F. Lane Williamson, Chair
Disciplinary Hearing Committee

CONSENTED TO BY:

Jennifer A. Porter
Deputy Counsel
North Carolina State Bar

Counsel for Plaintiff


D. Bernard Alston
Defendant