NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
07 DHC 29

FILED DHC JUL 2008

THE NORTH CAROLINA STATE BAR, Plaintiff	)	
	)	CORRECTED
v.	)	ORDER OF
	)	DISCIPLINE
MICHELLE V. MALLARD, Attorney, Defendant	)	

This matter was heard on June 12 and 13, 2008 by a Hearing Committee of the Disciplinary Hearing Commission composed of F. Lane Williamson, Chair, John B. Regan, and H. Dale Almond. Margaret Cloutier and Leanor Bailey Hodge represented Plaintiff. Curtis C. Osborne represented Defendant. After signing the initial Order in this matter, it came to the attention of the Chair that the computer misprinted certain paragraphs by transposing language from one paragraph into another necessitating this Corrected Order. Based upon the record and the evidence introduced at the hearing, the Hearing Committee by clear, cogent and convincing evidence hereby makes 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 (Chapter 1 of Title 27 of the North Carolina Administrative Code ("NCAC").

2. Defendant Michelle V. Mallard was admitted to the North Carolina State Bar on August 26, 2004, 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. At the time of the hearing, Defendant's license had been administratively suspended.

3. During the times relevant herein, Mallard actively engaged in the practice of law in the State of North Carolina and maintained a law office in Charlotte, Mecklenburg County, North Carolina.

4. Defendant was properly served with process and received due notice of the hearing in this matter.

5. Between December 2004 and December 2006 (hereafter referred to as "the relevant period"), Defendant's practice consisted primarily of residential real estate transactions.

6. During the relevant period Defendant maintained a client trust account with Wachovia Bank, account number ending in the digits 702 (hereinafter the "trust account").

7. Defendant used that Wachovia account as a general trust account in which Defendant deposited and disbursed closing funds for residential real estate transactions for which she was the closing attorney.

8. Defendant did not reconcile the trust account identified above at least quarterly during the relevant period.

9. During the relevant period Defendant maintained a business bank account at Wachovia Bank, account number ending in the digits 906 in the name of The Mallard Law Firm PLLC (hereinafter the "operating account").

10. Funds in the operating account were generally available for the use and benefit of Defendant and were actually used for Defendant's benefit for both business and personal purposes.

11. During the relevant period Defendant made electronic transfers of funds from her trust account to her operating account that were not earned fees or reimbursement for expenses paid on behalf of clients, and that were client funds to which she was not entitled.

12. Many of the transfers of trust account funds to which Defendant was not entitled were made to Defendant's operating account at a time when Defendant had insufficient funds in her operating account to meet upcoming financial obligations.

13. The following are examples of those electronic transfers of trust account funds to which Defendant was not entitled:

(a) transfer in the amount of $1,000.00 on April 21, 2006. Immediately prior to this transfer, the balance in Defendant's operating account was $279.12. Defendant made payments from her operating account to Verizon Wireless for $263.35, to Junior League for $190.00, both on April 24, 2006, and to Time Warner Cable for $147.59 on April 25, 2006. Defendant had insufficient funds to make the enumerated payments without the $1,000.00 transfer;

(b) transfer in the amount of $3,780.00 on May 12, 2006. Immediately prior to this transfer, the balance in Defendant's operating account was $254.82. Defendant made payments from her operating account in the amount of $2,593.74 to meet her mortgage obligation on May 15, 2006 and $800.00 to meet a payroll obligation to an employee on May 16, 2006. Defendant had insufficient funds to make the enumerated payments without the $3,780.00 transfer;

(c) transfer in the amount of $1,000.00 on June 16, 2006. Immediately prior to this transfer, the balance in Defendant's operating account was $15.41. Defendant made a payment from her operating account in the amount of $800.00 to meet a payroll obligation to an employee on June 19, 2006. Defendant had insufficient funds to make the enumerated payment without the $1,000.00 transfer;

(d) transfer in the amount of $5,500.00 on June 17, 2006. Immediately prior to this transfer, the balance in Defendant's operating account was $1,156.85. Defendant made payments from her operating account in the amount of $2,723.43 to meet her mortgage obligation and $800.00 to meet a payroll obligation to an employee both on July 17, 2006 and $214.14 to Duke Power on July 20, 2006. Defendant had insufficient funds to make all of the enumerated payments without the $5,500.00 transfer;

(e) transfer in the amount of $2,600.00 on August 14, 2006, $725.00 of which she was entitled to receive as a fee on a client matter and the remaining $1,875.00 to which she was not entitled. Immediately prior to this transfer, the balance in Defendant's operating account was $79.88. Defendant made a payment from her operating account in the amount of $2,593.74 to meet her mortgage obligation on August 14, 2006. Defendant had insufficient funds to make the enumerated payment without the $1,875.00 portion of the transfer; and

(f) transfer in the amount of $2,500.00 on October 17, 2006. Immediately prior to this transfer, the balance in Defendant's operating account was $446.45. Defendant made a payment from her operating account in the amount of $800.00 to meet a payroll obligation to an employee on October 18, 2006. Defendant had insufficient funds to make the enumerated payment without the $2,500.00 transfer.

14. Defendant wrote and signed check number 1735 in the amount of $750.00 drawn on her trust account and dated October 19, 2006. The check cleared the bank on October 20, 2006. Check number 1735 was made payable to Complete Copier Service and bore the words "Business Copier" on the memo line. These funds were used for the payment of Defendant's obligation on her office copy machine, were not earned fees or reimbursement for expenses paid on behalf of clients, and were client funds to which Defendant was not entitled.

15. Defendant caused a wire transfer of funds in the amount of $513.00 to be made from her trust account to National City Bank on October 19, 2006. These funds were used for the benefit of J&F Land Management, a business owned and/or operated by Defendant's mother. The wire notation on Defendant's bank statement references property at 12306 Mt. Overlook Road. This property is located in Cleveland, Ohio and at the time of the wire transfer the property was owned by Defendant's ex-husband. The funds used for this purpose were not earned fees or reimbursement for expenses paid on behalf of clients, and were client funds to which Defendant was not entitled.

16. Defendant caused a wire transfer of funds in the amount of $2,000.00 to be made from her trust account to National City Bank on November 14, 2006. These funds were used for the benefit of J&F Land Management, a business owned and/or operated by Defendant's mother. The wire notation on Defendant's bank statement references property on East 126th Street and East 142nd Street. These properties are located in Cleveland, Ohio, they were owned by Defendant ten months prior to the wire transfer, and at the time of the wire transfer were owned by Defendant's mother. The funds used for this purpose were not earned fees or reimbursement for expenses paid on behalf of clients, and were client funds to which Defendant was not entitled.

17. Defendant caused a wire transfer of funds in the amount of $850.00 to be made from her trust account to First Charter Bank on November 22, 2006. These funds were used for the benefit of Louwanna Ball, an employee of Defendant. The wire notation on Defendant's bank statement references "Ball closing for the property address." No funds were ever deposited into Defendant's trust account for the benefit of Louwanna Ball. Defendant had previously written checks made payable to Louwanna Ball from Defendant's operating account in the amounts of $400.00 on October 11, 2006, $800.00 on October 18, 2006 and $800.00 on November 2, 2006, all of which checks were labeled as "payroll." The funds wired from Defendant's trust account to the benefit of Louwanna Ball were not earned fees or reimbursement for expenses paid on behalf of clients, and were client funds to which Defendant was not entitled.

18. During the relevant period Defendant disbursed from her trust account funds for numerous clients in excess of the amount of funds deposited for the benefit of those clients into the trust account.

19. The following are examples of instances where Defendant disbursed from her trust account funds in excess of the amount of funds deposited for the benefit of those clients:

(a) Defendant closed a residential real estate transaction for client T. Baird. The settlement statement and disbursement summary/balance sheet for the Baird transaction reflected cash to be paid by the buyer of $28,352.13 and cash to be paid by the seller of $3,762.81. The actual cash deposited into the trust account on behalf of the buyer was $28,141.13, a deficiency of $211.00, and no cash was deposited into Defendant's trust account on behalf of the seller. Defendant disbursed funds consistent with the items listed on the settlement statement and disbursement summary/balance sheet as if the cash deposits had been made. As a result, Defendant disbursed $3,973.81 more for this transaction than she deposited.

(b) Defendant closed a residential real estate transaction for client V. Bradley. The settlement statement and disbursement summary/balance sheet for the Bradley transaction reflected cash to be paid by the buyer of $188.75. No cash was deposited into Defendant's trust account on behalf of the buyer. Defendant disbursed funds consistent with the items listed on the settlement statement and disbursement summary/balance sheet as if the cash deposit had been made. As a result, Defendant disbursed $188.75 more for this transaction than she deposited.

(c) Defendant closed a residential real estate transaction for client A. Branson. The settlement statement and disbursement summary/balance sheet for the Branson transaction reflected payment to be paid from the transaction funds to Litton Loan Servicing in the amount of $130,833.99 to pay off the existing note and deed of trust encumbering the property. Defendant disbursed $131,022.81 to Litton Loan Servicing. As a result, Defendant disbursed $188.82 more for this transaction than she deposited.

20. By disbursing from her trust account funds for clients in excess of the amount of funds deposited into the trust account for said clients, Defendant misappropriated entrusted funds held in a fiduciary capacity for other clients.

21. Defendant closed a residential real estate transaction for client Sylvia Hendley on or about November 15, 2006. In accordance with the settlement statement for the Hendley transaction, Defendant deposited $267,409.03 into her trust account, an amount sufficient to meet all of the disbursement obligations contained on the settlement statement. Defendant was obligated to remit $217,433.74 to Countrywide Home Loans on or near the closing date to satisfy the existing note and deed of trust encumbering the property in the name of the sellers, Horace and Stephanie Moore.

22. Defendant delayed making the $217,433.74 payment to Countrywide Home Loans until November 28, 2006. On that date, the actual balance of client funds in Defendant's trust account was insufficient to meet Defendant's obligation to pay off the existing note and deed of trust. On November 28, 2006 Defendant remitted $117,433.74 by wire transfer to Bank of America for the benefit of Countrywide Home Loans. Countrywide Home Loans rejected the tender of payment because it did not pay the loan in full and the funds were wired back into Defendant's trust account on December 5, 2006.

23. As of December 29, 2006, Defendant's trust account should have had a balance of $243,180.86 belonging to clients on whose behalf entrusted funds had been deposited into Defendant's trust account.

24. As of December 29, 2006, Defendant's trust account had an actual balance of $159,970.02 as a result of the activities described above.

Based on the foregoing Findings of Fact, the 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. Defendant's use of client funds to which she was not entitled for her personal benefit by writing checks, making wire transfers, and making electronic transfers from her trust account to her operating account satisfies the elements of the crime of embezzlement.

3. Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C.G.S. §84-28(b)(2) in that Defendant violated one or more of the Revised Rules of Professional Conduct in effect at the time of the conduct as follows:

(a) by disbursing funds for clients in excess of the amount of funds deposited for those clients in the trust account, Defendant used or pledged entrusted property for the benefit of someone other than the legal or beneficial owner of that property in violation of Rule 1.15.-2(a), (j), and (m);

(b) by misappropriating entrusted funds to her own use and benefit, Defendant committed a criminal act that reflects adversely on her honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b), engaged in conduct involving dishonesty fraud, deceit or misrepresentation in violation of Rule 8.4(c), and used or pledged entrusted property for her personal benefit or for the benefit of someone other than the legal or beneficial owner of that property in violation of Rule 1.15.-2(j);

(c) by failing to reconcile her trust account at least quarterly, Defendant failed to total and reconcile client balances with the current bank balance each quarter in violation of Rule 1.15-3(c) in effect at the time of the conduct [now Rule 1.15-3(d)(1)].

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Committee also enters the following

FINDINGS REGARDING DISCIPLINE

1. As a result of the Defendant's misappropriation of client funds there were insufficient funds to pay off the seller's original mortgage that encumbered the property purchased by Defendant's client Ms. Hendley.

2. As a result of Defendant's failure to pay off the mortgage with the funds entrusted to her by Ms. Hendley and the Moores, the Moores were forced to continue to make monthly mortgage payments on the property purchased by Ms. Hendley – a property the Moores no longer owned.

3. When the Moores could no longer afford to continue making mortgage payments on the mortgage the Defendant failed to pay off in connection with the closing, Ms. Hendley began receiving foreclosure notices and a foreclosure action was instituted naming Ms. Hendley and the Moores as parties. A foreclosure sale was scheduled and rescheduled several times before the matter was resolved.

4. The Moores had to retain an attorney to represent them in connection with their efforts to get the matter with the mortgage company resolved.

5. As a result of the fact that the Defendant failed to pay off the Moores' original mortgage on the property purchased by Ms. Hendley, the Moores' credit record has been negatively impacted. The negative impact to the Moores' credit continues today.

6. Defendant's misconduct is aggravated by the following factors:

(a) dishonest or selfish motive;

(b) a pattern of misconduct;

(c) multiple offenses; and

(d) vulnerability of the victims.

7. Defendant's conduct is mitigated by the following factors:

(a) absence of a prior disciplinary record;

(b) personal or emotional problems regarding the illness of her father; and

(c) inexperience in the practice of law.

8. The aggravating factors outweigh the mitigating factors.

9. The Hearing Committee finds and concludes that Defendant's conduct caused significant harm to members of the public, the Moores, and potential significant harm to her client, Ms. Hendley.

10. Defendant's conduct caused significant harm or potential significant harm to the profession and to the public in that such conduct erodes the confidence of the public in the trustworthiness of all lawyers. Ms. Hendley and Ms. Moore expressed a sense of distrust of the legal profession in general due to Defendant's conduct.

11. Defendant engaged in multiple violations of the Rules of Professional Conduct over a substantial period of time. Her actions were not a result of mistake nor appear to be an aberration, and it therefore appears that her misconduct is the product of a character flaw that is not readily changeable.

12. The protection of the public requires that Defendant be disbarred and that she not resume the practice of law until she demonstrates that she understands the Rules of Professional Conduct and that she has reformed.

13. The Committee finds that entry of an order imposing a sanction less than disbarment would fail to acknowledge the seriousness of the offense committed by Defendant, would be inadequate to protect the public, and would send the wrong message to attorneys regarding the conduct expected of members of the Bar in this State.

14. Depositions of two witnesses and the Defendant were taken by Plaintiff and the expenses incurred by the Plaintiff for those depositions were reasonable and necessary in the litigation of this case. The expense of the depositions should be taxed to the Defendant.

Based upon the foregoing Findings of Fact, Conclusions of Law, and Findings Regarding Discipline, all found by clear, cogent and convincing evidence, the Hearing Committee enters the following:

ORDER OF DISCIPLINE

1. The Defendant, Michelle V. Mallard, is hereby DISBARRED from the practice of law in this state, effective 30 days from the date of service of this order upon her.

2. Defendant shall surrender her law license and bar membership card within 30 days after service of this order upon her.

3. Defendant shall comply with all provisions of 27 N.C.A.C. 1B §.0124 of the North Carolina State Bar Discipline and Disability Rules as applicable.

4. Defendant is taxed with the costs of this action as assessed by the Secretary, which costs shall include the cost of the depositions taken of the witnesses and Defendant, and shall be paid within thirty (30) days of service of the notice of costs upon the Defendant.

Signed by the undersigned Chair with the full knowledge and consent of the other members of the Hearing Committee, this 10th day of July, 2008.

F. Lane Williamson

F. LANE WILLIAMSON, CHAIR
HEARING COMMITTEE