

NORTH CAROLINA

WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
16 DHC 30A

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

DAVID H. HARRIS, Jr., Attorney,

Defendants

CONSENT ORDER
OF DISCIPLINE

This matter was considered by a Hearing Panel of the Disciplinary Hearing Commission composed of R. Lee Farmer, Chair, and members Richard V. Bennett and Michael S. Edwards pursuant to 27 N.C. Admin. Code § 1B.0114 of the Rules and Regulations of the North Carolina State Bar. G. Patrick Murphy represented Plaintiff, the North Carolina State Bar. Defendant, David H. Harris, Jr., was represented by Dhamian Blue. 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 Panel hereby finds by clear, cogent, and convincing evidence 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, David H. Harris, Jr. (hereinafter "Defendant" or "Harris"), was admitted to the North Carolina State Bar on August 22, 1981, 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 Rules of Professional Conduct.

3. Marquis D. Street (hereinafter "Street"), was admitted to the North Carolina State Bar on August 12, 1972, 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 Rules of Professional Conduct. Street died November 27, 2016.

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

5. During all or part of the relevant periods referred to herein, Street was engaged in the practice of law in the State of North Carolina and maintained a law office in Greensboro, Guilford County, North Carolina.

6. Harris and Street represented Mildred Cotton Council (hereinafter "Council" or "client") in a lawsuit captioned *Mildred Council v. Governors Club Development Corporation, et al.*, 09 CVS 1327 (Chatham County). The lawsuit was filed on December 31, 2009. Council signed a sworn verification of the complaint prior to its filing.

7. The claims of the lawsuit involved approximately 9 acres of property (hereinafter "Property" or "subject property") located in Chatham County.

8. The subject property had been acquired by Sinie Jones in 1882 and Plaintiff, as an heir of Jones, was owner of the subject property as a tenant in common with other Jones' heirs.

9. In 1990, the subject property was purportedly conveyed to Governors Club Development Corporation ("Governors Club") by a group of individuals named as defendants in the Complaint ("Grantors"). The Complaint alleged that the transfer was through a false and fictitious deed without Council's knowledge or consent.

10. Council was more than 80 years-old at the time she engaged Defendant and Street to pursue her legal rights related to the Property; however, during the relevant periods referred to herein Council was of good and sound mind. Council trusted and relied upon Defendant and Street to determine the proper individuals and entities to commence a legal action against and to be fully aware of the proper legal claims to pursue.

11. The Complaint alleged that Council was entitled to quiet title, punitive damages, attorney's fees and other relief from the named defendants.

12. Wade Barber, Esq. ("Barber") was a named defendant in the lawsuit.

13. The claims asserted against Barber included: a claim to quiet title, slander of title, violation of the Marketable Title Act, conspiracy, unfair and deceptive trade practices, fraudulent acts by an attorney, violation of N.C.G.S. § 84-13, and negligence by an attorney.

14. The Complaint alleged that Barber was the settlement agent for the 1990 transfer of the Property from the Grantors to Governors Club and that Barber's conduct related to the 1990 transfer of the Property was fraudulent, willful and wanton, and that he acted with malice.

15. Neither Defendant nor Street contacted Barber prior to filing the lawsuit.

16. Barber was represented in the lawsuit by Walter E. Brock, Jr. ("Brock").

17. After Barber was served with the lawsuit, and before answering, on March 10, 2010, Brock met with Defendant and Street. At the meeting, Brock provided factual information regarding the transactions alleged in the lawsuit, including facts of record that Brock cited seeking to demonstrate the absence of any basis in fact or law for the claims against Barber.

18. On March 11, 2010, Brock sent a letter to Defendant and Street in which he encouraged them to contact him should they have any other questions or require any additional information.

19. Brock's March 11, 2010 letter further stated that he looked forward to a favorable response to his request that Barber be dismissed from the lawsuit. Brock concluded his letter by stating that if Barber was required to litigate the claims he would be left no choice but to pursue any and all remedies available as a result of the filing and prosecution of the lawsuit.

20. Defendant and Street did not dismiss the action against Barber in response to Brock's March 11, 2010 letter and continued pursuing the lawsuit claims.

21. On March 23, 2010, Barber filed his Answer to the Complaint. In so doing, he did not notice for hearing any motion to dismiss or motion for sanctions at that time.

22. Barber's Answer stated that contemporaneous with the 1990 deed from the Grantors "a survey plat was recorded with specific notes referencing the tract of land that is the subject of this action. The deed and plat are written documents that speak for themselves, and had the effect of conveying such title and interest as may have been in the grantors."

23. Barber's Answer further stated that he "caused to be recorded in the Chatham County Registry a deed and a plat noting that any purported conveyance of the subject property may be subject to adverse claims of the heirs of Sinie Jones."

24. Barber asserted the applicable statutes of limitations pursuant to N.C. Gen. Stat. §§ 1-15(c), 1-52, and 75-16.2.

25. Barber's Fourth Defense in his Answer stated that he had affirmatively caused to be recorded on the public records of Chatham County notice that the heirs of Sinie Jones may have an interest in the subject property.

26. Barber's Fourth Defense further stated that "[b]ecause of the public record, and what a minimal investigation of the circumstances and law prior to suit would have established with respect to Wade Barber, the claims against Wade Barber set forth in the Complaint were made under circumstances indicating that the plaintiffs and their counsel knew, or should have known, that the claims against him were false and malicious when made, and that as to certain claims there was a complete absence of a justiciable issue of law or fact as to him."

27. Barber's Fourth Defense also asserted that he was entitled to his attorney's fees and costs pursuant to N.C. Gen. Stat. §§ 75-16.1, 1D-45, 6-21.5, 1A-1, Rule 11, and otherwise as allowed by law.

28. On April 22, 2010, Defendant and Street filed a Reply to Barber's Answer which denied the allegations of Barber's Fourth Defense.

29. On July 6, 2010, Defendant and Street deposed Grantors Joan Council Spencer ("Spencer") and Mildred Council ("Grantor Council").

30. Spencer and Grantor Council both confirmed that they were represented by their own attorneys in the transaction with Governors Club and they had no recollection of any representation made by Barber in relation to that transaction, and were therefore unaware of any purported statement by Barber that was not true.

31. On July 23, 2010, Brock wrote Defendant and Street a letter in which Brock reviewed some of the evidence in the case, including the depositions of Spencer and Grantor Council, and noted that there was no basis in law or fact for the claims against Barber. Brock also offered to answer any questions and to provide additional information as to Barber's actions related to the subject property.

32. Brock concluded his July 23, 2010 letter by informing Defendant and Street that Brock was authorized to waive any claim for costs including attorney's fees if Barber was dismissed from the lawsuit within ten (10) days. If Barber was not dismissed from the lawsuit, Brock stated that his letter and the evidence that had been provided would be used to demonstrate Defendant and Street were continuing to pursue unfounded claims against Barber in a Rule 11 motion.

33. Facts and evidence presented to Defendant and Street by Brock included, but was not limited to, the following: 1) Barber represented Governors Club in the 1990 real estate transaction to acquire all rights, title and interest in certain property in Chatham County previously owned by the heirs of Ethel Council; 2) the Council heirs had a survey prepared that was certified and notarized by a surveying firm in 1985 and the survey reflected that the Ethel Council Estate owned the subject property; 3) Barber caused the plat of survey of the Ethel Council Estate to be revised prior to it being filed with the Chatham County Register of Deeds on March 1, 1990, Plat 90 Slide 67, to indicate that Tract 26-D, the subject property, may be subject to adverse claims and noted the Sinie Jones deed at DB.FW PG384.

34. Defendant and Street did not dismiss Barber from the lawsuit within the time limit of Brock's July 23, 2010 letter.

35. On August 5, 2010, Brock filed a motion to dismiss on behalf of Barber with a calendar request for August 16, 2010.

36. On August 16, 2010, Defendant and Street filed a notice of voluntary dismissal without prejudice pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure with respect to Barber.

37. Defendant and Street deposed Barber on September 9, 2010. At the conclusion of Defendant's and Street's questioning of Barber, Brock stated to Defendant and Street that "in the original complaint in this action, there were very serious allegations of fraud and misrepresentation" asserted against Barber.

38. At Barber's deposition Brock also advised Defendant and Street that Barber intended to pursue Rule 11 sanctions and that Barber was present to answer any questions, not protected by the attorney-client privilege, which Defendant and Street had related to alleged false representations or deceptive conduct on Barber's part related to the subject property. The deposition had already taken nearly eight hours.

39. On October 19, 2010, Defendant and Street, with leave of the court, filed an amended Complaint naming Aqua North Carolina, Inc., (hereinafter "Aqua"), the sole remaining defendant.

40. At court-ordered mediation in December 2010, Council, represented by Defendant and Street, settled her lawsuit with Aqua.

41. Defendant and Street drafted a Consent Judgment to be approved by the superior court setting forth the terms of Council's agreement with Aqua.

42. On January 21, 2011, Street wrote a letter to Council in which he discussed the Consent Judgment. Street advised Council that Defendant and Street intended to ask the superior court to approve reimbursement to Council of \$72,275.40 which was advanced to litigate the case and payment of the outstanding balances of attorney's fees owed. Street further stated that "after the case is settled and you are reimbursed all of your money" Defendant and Street would discuss with Council putting the Property up for sale.

43. On April 1, 2011, Brock served Defendants with a notice of hearing on Barber's Verified Motion for Attorney's Fees and Costs.

44. On April 10, 2011, Defendant recorded a charge of \$525.00 on his billing records with the activity for the charge indicated as: "researched fee issue."

45. On April 12, 2011, Defendant recorded a charge of \$700.00 on his billing records with the activity for the charge indicated as: "researched fee issue - - prepared for meeting with Walter Brock and Wade Barber."

46. On April 13, 2011, Defendant recorded a charge of \$175.00 on his billing records with the activity for the charge indicated as: "additional research and prepared for meeting with Walter Brock and Wade Barber."

47. On April 13, 2011, Defendant and Street met with Brock and negotiated a settlement with Barber that called for the payment of \$17,500 to Barber in exchange for the release of Council from claims related to Barber's attorney's fees and costs. Neither Defendant nor Street advised Council to consult with a third party attorney with respect to the settlement of Barber's claim for attorney's fees and costs.

48. Defendant and Street each charged Council \$300.00 (total of \$600.00) for meeting with Brock on April 13, 2011.

49. Barber was never Council's attorney in the transactions that were the subject of Council's lawsuit.

50. Barber never claimed an interest in the subject property.

51. Billing statements of Defendant and Street that were later provided to Council do not show that Council was consulted about Barber's motion for attorney's fees and costs prior to their meeting with Brock, although not all conversations were detailed.

52. On or about April 14, 2011, Defendant and Street received a proposed Mutual Release and Settlement Agreement (the "Release") from Brock related to Barber's claim for attorney's fees and costs. Council ultimately reviewed and executed the Release.

53. On May 2, 2011, Council's lawsuit with Aqua was resolved by a Release and Settlement Agreement (the "Settlement") that was approved and executed by Council and approved and executed by the court in a Consent Judgment.

54. One of the terms of the settlement required Aqua to pay \$95,000.00 to be deposited to Street's trust account and distributed as set out in paragraph 3 of the terms section of the settlement. Additionally, Council received title to 6 of the 9 acres of land that was the subject of the Council lawsuit.

55. Paragraph 3 of the terms of the Settlement does not specifically reference the payment to Barber for the release.

56. Defendant and Street were obligated to comply with the terms of the settlement.

57. On May 3, 2011, Street issued a check in the amount of \$17,500.00 on his trust account to Brock's law firm to pay Barber's attorney's fees and costs.

58. Street signed an affidavit on June 8, 2011 setting forth the amount of attorney's fees that Defendant and Street billed to Council and expenses she paid.

59. At the time Street signed his June 8, 2011 affidavit, he had already made disbursements to pay all of Defendant's and Street's attorneys' fees from the Aqua settlement funds.

60. Street controlled all funds coming in and out of his trust account.

61. Council did not give her informed consent to Defendant and Street to charge the \$17,500.00 to her in the final accounting of disbursements.

CONCLUSIONS OF LAW

1. The parties are properly before the Hearing Panel and the Hearing Panel has jurisdiction over Defendant, David H. Harris, Jr., and the subject matter.

2. Defendant's conduct, as set out in the stipulated Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Defendant violated Chapter 84 of the General Statutes and the North Carolina the Rules of Professional Conduct in effect at the time of the conduct as follows:

- (a) By filing a lawsuit against Barber alleging his conduct was fraudulent, willful, wanton and that he acted with malice, Defendant asserted claims that were not meritorious in violation of Rule 3.1;
- (b) By failing to adequately research the allegations Defendant made in the lawsuit against Barber, Defendant failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3;
- (c) By negotiating the Release without explaining to Council her right to acquire third-party council to explain the basis for her having to pay \$17,500.00 from her part of the settlement with Aqua, Defendant violated of Rule 1.4(b);
- (d) By representing Council in Barber's claim for attorney's fees and costs, and negotiating the Release to settle Barber's claim from Council's settlement funds, Defendant engaged in a conflict of interest in violation of Rule 1.7(a)(2);
- (e) By charging attorney's fees and expenses to Council for Defendant's activity related to researching and negotiating Barber's claim for attorney's fees and costs when the research and negotiation were necessary solely as a result of Defendant's failure to act as he should have on behalf of Council and were for Defendant's benefit, Defendant charged and collected a clearly excessive fee in violation of Rule 1.5(a); and
- (f) By paying Barber's attorney's fees and costs from Council's settlement with Aqua, when such expense was incurred solely as a result of Defendant's failure to act as he should have on Council's behalf, Defendant charged a clearly excessive amount for an expense to Council in violation of Rule 1.5(a).

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

ADDITIONAL FINDINGS REGARDING DISCIPLINE

1. Defendant has no prior discipline.
2. Defendant, who was admitted to the North Carolina State Bar in 1981, has substantial experience in the practice of law. More than half of Defendant's time in the practice of law has involved cases and matters in which he collected no fee from clients. Defendant continues to handle complex, high-impact cases with little hope of remuneration.
3. Defendant has been cooperative in this disciplinary process. He has timely responded to inquiries of the State Bar. Defendant has acknowledged his conduct, stipulated to the violations of the Rules of Professional Conduct, and consented to this imposition of discipline.
4. Defendant has agreed to repay his client \$17,500.00 for the expenses charged to her for Barber's attorney's fees and costs.

Based upon the Findings of Fact, Conclusions of Law, and Additional Findings Regarding Discipline, and the consent of the parties, the Hearing Panel also enters the following

CONCLUSIONS REGARDING DISCIPLINE

1. The Hearing Panel has carefully considered all of the different forms of discipline available to it, including admonition, reprimand, censure and suspension.
2. In addition, the Hearing Panel has considered all of the factors enumerated in 27 N.C. Admin. Code § 1B.0114(w)(3) of the Rules and Regulations of the North Carolina State Bar and determines the following factors are applicable:
 - a. The absence of prior disciplinary offenses;
 - b. Full and free disclosure to the Hearing Panel and a cooperative attitude toward the proceedings;
 - c. Absence of dishonest motive;
 - d. Defendant's willingness, as evidenced by this Consent Order, to make restitution to his client;
 - e. Defendant's experience in the practice of law; and
 - f. Defendant's character and reputation.
3. The Hearing Panel has considered all of the factors enumerated in 27 N.C. Admin. Code § 1B.0114(w)(2) and concludes no factors are present that would warrant disbarment.

4. The Hearing Panel has carefully considered all of the factors enumerated in 27 N.C. Admin. Code § 1B.0114(w)(1) of the Rules and Regulations of the North Carolina State Bar and determines the following factors warrant suspension:

- a. Elevation of Defendant's own interest above that of the client;
- b. Negative impact of Defendant's actions on the client's or public's perception of the profession; and
- c. Impairment of the client's goals to achieve the goals of the representation.

5. The Hearing Panel has considered lesser alternatives and finds that a censure, reprimand or admonition would be insufficient discipline because of the significant potential harm to the legal profession caused by Defendant's conduct.

6. Although Defendant's conduct is serious enough to warrant more than a censure it does not warrant an active suspension of his license.

7. A stayed suspension of Defendant's law license is warranted because entry of an order imposing less severe discipline would fail to acknowledge the seriousness of the conduct and would send the wrong message to attorneys and the public about the conduct expected of members of the Bar of this State.

Based upon the foregoing Findings of Fact, Conclusions of Law, and Findings and Conclusions Regarding Discipline, and based upon the consent of the parties, the Hearing Panel enters the following

ORDER OF DISCIPLINE

1. The license of Defendant, David H. Harris, Jr., is hereby suspended for two years. The suspension under this order shall be stayed for two years as long as Defendant complies and continues to comply with the following conditions:

- a. Defendant shall repay his client, Mildred Council, the sum of \$17,500.00, half of this amount (\$8,750.00) shall be paid within 90 days of the date this Order is filed with the Clerk, and the remainder shall be paid within one year of the date this order is filed with the Clerk;
- b. Defendant shall provide the Clerk and the State Bar's Office of Counsel written confirmation of the repayment ordered in paragraph a. above within 7 days of the repayment(s);
- c. Defendant shall complete two (2) hours of CLE in the area of ethics each of the two years of the stayed suspension and shall provide written proof of the successful completion of those courses to the Office of Counsel within 10 days of completing each course. These CLE hours are in addition to the annual CLE requirements set out in 27 N.C.A.C. 1D § .1518;

- d. Defendant shall keep the North Carolina State Bar Membership Department advised of his current contact information, including his current business and home addresses (not a P.O. Box) as well as his current telephone number(s), and shall notify the Bar of any change in address or telephone number within 10 days of such change;
 - e. Defendant shall respond to all communications from the North Carolina State Bar, including communications from the Attorney Client Assistance Program, within 15 days of receipt or by the deadline stated in the communication, whichever is sooner, and shall participate in good faith in the State Bar's fee dispute resolution process for any petition of which he receives notice after the effective date of this Order;
 - f. Defendant shall promptly accept service of all certified mail sent to him by the State Bar;
 - g. Defendant shall not violate any laws of the State of North Carolina, of any state within the United States, or of the United States;
 - h. Defendant shall not violate any provision of the Rules of Professional Conduct;
 - i. Defendant shall timely pay the costs and administrative fees of this proceeding taxed to him as set out below; and
 - j. Defendant shall pay all Membership dues and Client Security Fund assessments and comply with all Continuing Legal Education requirements on a timely basis.
2. Defendant is taxed with the administrative fees and costs of this action, including deposition costs, as assessed by the Secretary, which Defendant shall pay within sixty days of service of the notice of costs upon Defendant.
3. Unless Defendant's obligations under this order are modified by further order of the DHC, Defendant's obligations under this order end two years from the date the suspension under this order goes into effect, provided there are no motions or show cause proceedings pending alleging lack of compliance with the conditions of the stay of the suspension. Pursuant to § .0114(x) of the North Carolina Discipline and Disability Rules, the DHC retains jurisdiction until all conditions of the stay of the suspension have been met. If a motion or show cause proceeding alleging lack of compliance with the conditions for the stay of the suspension is pending when the period of the stay of the suspension would otherwise have terminated, the DHC retains the jurisdiction and ability to lift the stay of the suspension and activate the two year suspension in whole or in part if it finds that any of the conditions of the stay have not been met. The stay of the suspension and Defendant's obligation to comply with the conditions for the stay will continue until resolution of any such pending motion or show cause proceeding.

4. If during the stay of the two year suspension Defendant fails to comply with any one or more of the conditions stated in Paragraph 1(a) through 1(j) above, 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.

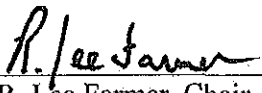
5. If the stay of the suspension is lifted and the suspension is activated for any reason, Defendant must show by clear, cogent, and convincing evidence that he complied with each of the following conditions before seeking reinstatement:

- a. Defendant repaid his client, Mildred Council, \$17,500;
- b. Defendant submitted his license and membership card to the Secretary of the North Carolina State Bar within thirty days after the entry of the order lifting the stay and/or activating the suspension of his law license;
- c. Defendant complied with all provisions of 27 N.C. Admin. Code § 1B.0124 of the State Bar Discipline and Disability Rules following the order lifting the stay and/or activating the suspension of his law license;
- d. Defendant kept the North Carolina State Bar Membership Department advised of his current business and home addresses, as well as his current telephone number, and notified the Bar of any change in address or telephone number within 10 days of such change;
- e. Defendant responded to all communications from the North Carolina State Bar, including communications from the Attorney Client Assistance Program, within 15 days of receipt or by the deadline stated in the communication, whichever is sooner, and has participated in good faith in the State Bar's fee dispute resolution process for any petition of which he receives notice after the effective date of this Order;
- f. Defendant promptly accepted all certified mail sent to him by the State Bar;
- g. That at the time of his petition for reinstatement, Defendant is current in payment of all Membership dues, fees and costs, including all Client Security Fund assessments and other charges or surcharges the State Bar is authorized to collect from him, and including all judicial district dues, fees and assessments;
- h. That at the time of his petition for reinstatement, there is no deficit in Defendant's completion of mandatory Continuing Legal Education (CLE) hours, in reporting of such hours or in payment of any fees associated with attendance at CLE programs;
- i. Defendant has not violated the Rules of Professional Conduct or the laws of the United States or of any state or local government during his suspension, including Defendant's timely filing and payment of federal and state tax obligations;

- j. Defendant has paid the administrative fees and costs of this proceeding as reflected on the statement of costs served upon him by the Secretary of the State Bar; and
- k. Defendant has complied with any other conditions deemed necessary for reinstatement imposed by the Hearing Panel pursuant to the order lifting the stay of the suspension of Defendant's law license.

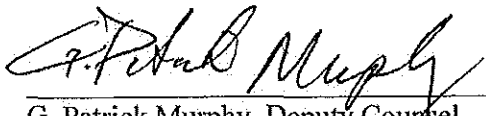
6. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(x) of the North Carolina State Bar Discipline and Disability Rules throughout the period of the stayed suspension.

Signed by the Chair with the consent of the other Hearing Panel members, this the 16th day of May, 2017.

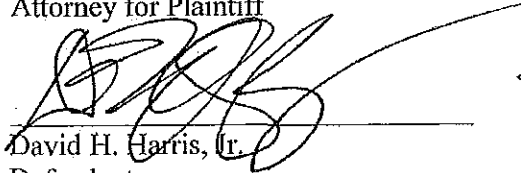


R. Lee Farmer, Chair
Disciplinary Hearing Panel

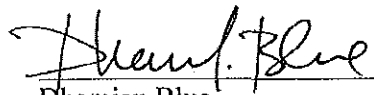
CONSENTED TO BY:



G. Patrick Murphy, Deputy Counsel
Attorney for Plaintiff



David H. Harris, Jr.
Defendant



Dhamian Blue
Attorney for Defendant