

STATE OF NORTH CAROLINA

WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
17 DHC 28

THE NORTH CAROLINA STATE BAR,
Plaintiff

v.

BRYON M. SMITH, Attorney,
Defendant

CONSENT ORDER
OF
DISCIPLINE

This matter was considered by a hearing panel of the Disciplinary Hearing Commission composed of Fred M. Morelock, Chair, Richard V. Bennett, and Tyler B. Morris. Leonor Bailey Hodge represented Plaintiff, the North Carolina State Bar. Defendant, Bryon M. Smith, was represented by Douglas J. Brocker. Defendant waives a formal hearing in the above referenced matter. The parties stipulate and agree to the findings of fact and conclusions of law recited in this consent order. The parties consent to the discipline imposed by this order. By consenting to this order, Defendant knowingly, freely, and voluntarily waives his right to appeal this consent order or to challenge in any way the sufficiency of the findings.

Based on the foregoing and on the consent of the parties, the Hearing Panel hereby makes by clear, cogent, and convincing evidence the following:

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar (hereafter "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, Bryon M. Smith (hereafter "Defendant" or "Smith"), was admitted to the North Carolina State Bar on 28 February 1989 and is an attorney at law licensed to practice in North Carolina, subject to the rules, regulations and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During the relevant period referred to herein, Smith actively engaged in the practice of law in the State of North Carolina and maintained a law office in Jacksonville, Onslow County, North Carolina.

4. During the relevant period referred to herein, Smith maintained a general attorney trust account at First Bank, account number ending 0600 (hereinafter "trust account").

5. Smith used the trust account as a general account into which all entrusted client funds were deposited and disbursed.

6. On or about 9 June 2016, Smith's trust account was the subject of a random procedural audit by the State Bar.

7. Smith's trust account had previously been subject to random procedural audits in December 2001 and November 2010.

8. Smith was cited in the December 2001 procedural audit for the following deficiencies in his trust account management:

- a. Failure to maintain client ledgers;
- b. Failure to perform quarterly reconciliations of his trust account;
- c. Failure to identify the client and source of funds on deposit slips;
- d. Failure to maintain personal funds on deposit for payment of bank charges; and
- e. Failure to escheat unidentified/abandoned funds as required by N.C. Gen. Stat. § 116B-53.

9. Smith was cited in the November 2010 procedural audit for the following deficiencies in his trust account management:

- a. Failure to maintain client ledgers;
- b. Failure to perform quarterly reconciliations of his trust account;
- c. Failure to identify the client and source of funds on deposit slips;
- d. Failure to maintain personal funds on deposit for payment of bank charges; and
- e. Failure to always deposit mixed funds into the trust account.

10. From 1992 through 2013, Smith retained B. Rhoades, a certified public accountant, to assist him with management of his trust account.

11. Upon Rhoades' retirement, Smith retained a new certified public accountant to assist him with management of the trust account, but Smith failed to educate this accountant about Smith's professional obligations relating to trust account management as set forth in the Rules of Professional Conduct and to properly supervise him.

12. The June 2016 procedural audit revealed the following deficiencies in Smith's trust account management:

- a. Failure to conduct monthly and quarterly reconciliations;
- b. Disbursing funds from the trust account on behalf of clients for whom Smith did not maintain in the trust account sufficient funds for such disbursements resulting in negative client balances;

- c. Date of the deposit as listed on the client ledger did not reconcile with the bank date of deposit; and
- d. Failure to escheat unidentified/abandoned funds as required by N.C. Gen. Stat. § 116B-53.

13. After the June 2016 procedural audit, an investigative audit of the trust account was conducted for the time period 1 January 2015 through 31 May 2016.

14. The investigative audit confirmed the findings of the random procedural audit, that Smith:

- a. Failed to conduct monthly and quarterly reconciliations;
- b. Disbursed funds from the trust account on behalf of clients for whom Smith did not maintain in the trust account sufficient funds for such disbursements resulting in negative client balances (“excess disbursement”);
- c. Failed to ensure that the date of the deposit as listed on the client ledger reconciled with the bank date of deposit; and
- d. Failed to escheat unidentified/abandoned funds as required by N.C. Gen. Stat. § 116B-53.

15. The investigative audit also revealed that Smith failed in several instances to (i) promptly disburse his legal fee and (ii) promptly disburse funds to clients.

16. The investigative audit showed that certain excess disbursements were caused by bookkeeping errors that went undetected due to Smith’s failure to reconcile the trust account.

17. Most of the instances of excess disbursement, however, were caused by Smith’s non-lawyer assistants’ failure to deposit cash payments from clients into the trust account.

18. Smith employed three non-lawyer assistants who assisted him with the management of his trust account.

19. Two of the non-lawyer assistants were primarily responsible for accepting from clients payments of all types, including cash.

20. When a client provided payment in cash, a non-lawyer assistant provided the client with a receipt for the payment, a copy of which was maintained in the office receipt book.

21. A third non-lawyer assistant was responsible for taking to the bank the deposits with deposit slips completed by the two other non-lawyer assistants.

22. All of the cash deposits collected from clients were not always deposited into the trust account by Smith’s non-lawyer assistant.

23. Smith did not reconcile the bank deposits with his receipt book or otherwise supervise his non-lawyer assistants' handling of entrusted funds.

24. Since the procedural audit Smith has changed the amount of trust account management assistance his non-lawyer assistants provide. However, Smith still employs the same three non-lawyer assistants.

Based upon the consent of the parties and the foregoing Findings of Fact, the Hearing Panel enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel and the panel has jurisdiction over Defendant, Bryon Smith, and over the subject matter.

2. Smith's conduct, as set forth in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct as follows:

- (a) By failing to educate the certified public accountant about Smith's professional obligations relating to trust account management as set forth in the Rules of Professional Conduct and to properly supervise him, Smith failed to make reasonable efforts to ensure that a non-lawyer's conduct was compatible with Smith's professional obligations as a lawyer in violation of Rule 5.3(b);
- (b) By failing to reconcile the trust account, Smith failed to perform monthly and quarterly reconciliations of his trust account in violation of Rule 1.15-3(d);
- (c) By failing to ensure that the date of the deposit as listed on the client ledger reconciled with the bank date of deposit, Smith failed to maintain accurate client ledgers in violation of Rule 1.15-3(b)(5);
- (d) By failing to ensure the deposit into the trust account of entrusted funds collected in cash, Smith failed to properly maintain entrusted funds in violation of Rule 1.15-2(a) and failed deposit trust funds into either a general or dedicated trust account in violation of Rule 1.15-2(b);
- (e) By failing to establish adequate supervisory measures for his non-lawyer assistants, Smith failed to make reasonable efforts to ensure that the non-lawyer's conduct was compatible with Smith's professional obligations as a lawyer in violation of Rule 5.3(b);
- (f) By disbursing funds from the trust account on behalf of clients for whom Smith did not maintain in the trust account sufficient funds for such disbursements resulting in negative client balances, Smith failed to properly maintain entrusted funds in violation of Rule 1.15-2(a) and used entrusted property for the personal benefit of persons other than the legal or beneficial owners of that property in violation of Rule 1.15-2(j);

- (g) By failing to escheat unidentified/abandoned funds, Smith failed to escheat unclaimed property in accord with N.C. Gen. Stat. §116-B53 in violation of Rule 1.15-2(q);
- (h) By failing to promptly disburse entrusted funds on behalf of clients, Smith failed to promptly pay to clients entrusted property belonging to the client in violation of Rule 1.15-2(m); and
- (i) By failing to promptly disburse his legal fee, Smith failed to properly maintain entrusted funds in violation of Rule 1.15-2(a) and maintained funds belonging to the lawyer in the trust account in violation of Rule 1.15-2(f).

Based upon the foregoing Findings of Fact and Conclusions of Law and the consent of the parties, the Hearing Panel hereby makes by clear, cogent, and convincing evidence the following:

ADDITIONAL FINDINGS OF FACT REGARDING DISCIPLINE

1. Smith has no prior discipline.
2. In preparation for the random audit, Smith discovered that certain funds had not been deposited into the trust account. Smith informed the auditor of this fact upon her arrival.
3. Although Smith failed to discover until the random audit that the balance of his trust account was below the amount he was required to maintain in trust for his clients, Smith promptly replenished the trust account upon his discovery of this shortfall.
4. Smith has made significant changes to the management and supervision of his trust account to ensure that entrusted funds are properly safeguarded going forward and to ensure his compliance with the Rules of Professional Conduct.
5. Smith's failure to properly maintain, manage, and handle entrusted funds betrays a vital trust clients and the public place in attorneys and the legal profession. Clients are entitled to have their funds handled with the utmost care.
6. Smith's failure to properly maintain a trust account placed entrusted client funds at risk and has the potential to cause significant harm to the standing of the profession in the eyes of the public because it shows his disregard for certain of his duties as an attorney. This tends to erode the public's confidence in attorneys. Confidence in the legal profession is a building block for public trust in the entire legal system.
7. Smith's failure to always perform quarterly reconciliations of his trust account after having been twice previously cited for failure to perform quarterly reconciliations of his trust account demonstrates his intent to commit acts where the potential harm is foreseeable.

Based on the foregoing Findings of Fact, Conclusions of Law, and Additional Findings of Fact Regarding Discipline, and with the consent of the parties, the Hearing Panel makes the following:

CONCLUSIONS REGARDING DISCIPLINE

1. The Hearing Panel has considered all of the factors contained in 27 N.C. Admin. Code 1B.0116(f)(1) and concludes that the following factors that warrant suspension or disbarment are present:

- (a) Intent of the defendant to commit acts where the harm or potential harm is foreseeable; and
- (b) Negative impact of defendant's actions on client's or public's perception of the profession.

2. The Hearing Panel has considered all of the factors contained in 27 N.C. Admin. Code 1B .0116(f)(2) and concludes that no factors that warrant disbarment are present.

3. The Hearing Panel has considered all of the factors contained in 27 N.C. Admin. Code 1B.0116(f)(3) and concludes that the following are applicable in this matter:

- (a) Absence of prior disciplinary offenses;
- (b) Timely good faith efforts to rectify consequences of misconduct;
- (c) Multiple offenses;
- (d) Full and free disclosure to the hearing panel and cooperative attitude toward the proceedings;
- (e) Good character and reputation; and
- (f) Defendant has been licensed to practice law for approximately twenty-eight years.

4. Defendant caused harm to his clients by using their entrusted funds to pay the obligations of other clients.

5. Defendant caused potential significant harm to his clients by failing to properly manage their entrusted funds.

6. Defendant's conduct placed entrusted funds at risk and has the potential to cause significant harm to the standing of the profession in the eyes of the public because it shows his disregard for certain of his duties as an attorney. Such erosion of public confidence in attorneys tends to sully the reputation of, and fosters disrespect for, the profession as a whole. Confidence in the legal profession is a building block for public trust in the entire legal system.

7. The Hearing Panel has considered all lesser sanctions including: censure, reprimand, and admonition, and finds that discipline less than suspension would not adequately protect the public from Defendant's future misconduct because (i) of the gravity of potential

significant harm to clients, and (ii) a period of reporting pursuant to a stayed suspension is necessary to ensure Defendant's proper handling of entrusted funds.

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

ORDER OF DISCIPLINE

1. Defendant, Bryon M. Smith, is hereby suspended from the practice of law for two years effective 30 days from service of this order upon Smith. This suspension is stayed immediately as set forth herein and subject to the terms of paragraph 3 below.

2. Defendant shall pay, within 30 days of service of the statement of fees and costs upon him by the Secretary of the State Bar, the administrative fees and costs of this proceeding.

3. The two-year suspension is stayed for a period of two years as long as Defendant complies with all of the following conditions:

- (a) Defendant shall pay the administrative fees and costs of this proceeding as assessed by the Secretary of the State Bar within 30 days of service of the statement of fees and costs upon him;
- (b) Each month Defendant shall provide the Office of Counsel of the State Bar with the three-way reconciliation described in the State Bar Lawyer's Trust Account Handbook, using the Trust Account Reconciliation sheet available on the State Bar's website, for all trust accounts he maintains. Defendant shall provide (i) the three-way reconciliation report, (ii) client ledgers for all clients with funds in the trust account(s) during that month as may be requested by the Office of Counsel, (iii) ledger for any personal funds maintained in the trust account(s) for bank or credit card fees, (iv) trust account general ledger, (v) multiple balance ledger report (report listing balance of funds maintained in trust for each client during reporting period), (vi) the bank statements, (vii) cancelled checks, and (viii) as may be requested by the Office of Counsel, deposit slips for each month. These documents are due on the 15th day of the following month – for example, the three-way reconciliation for the month of January is due on February 15;
- (c) Each quarter, Defendant shall have a CPA, or other accounting professional approved by the Office of Counsel of the State Bar, audit all trust accounts maintained by Defendant. This audit shall assess whether Defendant has in his trust account the client funds he is required to maintain for his clients at that time, as well as Defendant's compliance with all requirements of Rule 1.15-2 and Rule 1.15-3. The audit shall include addressing the items on the CPA Report Template which will be provided by the State Bar to Defendant. The quarterly audit reports from the CPA or accountant are due no later than 30 days after the end of the quarter – for example, the audit for the first quarter of the calendar year (January,

February, and March) is due on or before April 30. It is Defendant's sole responsibility to ensure that the CPA or accountant completes and submits the reports required herein. Defendant shall bear the cost of preparation and submission of these reports;

- (d) If either the monthly three-way reconciliation report or the audit reveals any deviation from Defendant's obligations under Rule 1.15-2 or Rule 1.15-3, Defendant shall take remedial action within 10 days of the date of the three-way reconciliation report or the CPA or accountant audit and shall provide documentation showing the remedial action to the State Bar within 2 days of the date of the remedial action;
- (e) Defendant shall provide any other records requested by the Office of Counsel within ten days of the request;
- (f) By the deadline stated in the request, Defendant shall comply with any requests from the Office of Counsel to provide any information regarding his trust account(s) or to sign and provide any release or authorization to allow the Office of Counsel to obtain information directly from any bank in which Defendant maintains a trust account;
- (g) Within six months of the effective date of this order, Defendant shall complete two hours of continuing legal education (CLE) in the area of trust account management approved by the Office of Counsel of the State Bar. This CLE requirement is in addition to the CLE requirements set out in 27 N.C. Admin. Code 1D.1518;
- (h) Defendant shall keep the State Bar Membership Department advised of his current business address, office telephone number, and office e-mail address. Defendant shall notify the State Bar of any change of address within ten (10) days of such change. His current business address must be a street address, not a post office box or drawer;
- (i) Defendant shall accept all certified mail from the State Bar sent to the address on record with the Membership Department of the State Bar;
- (j) Defendant shall respond to all communications from the State Bar, including communications from the Attorney Client Assistance Program, within thirty (30) days of receipt of such communication or by the deadline stated in the communication, whichever is sooner;
- (k) Defendant shall participate in good faith in the State Bar's fee dispute resolution process for any petition that is pending at the time of entry of this order or of which he receives notice after the effective date of this order;

- (l) Defendant shall timely comply with all State Bar continuing legal education requirements and will pay all fees and costs assessed therefor by the applicable deadline;
- (m) Defendant will pay all State Bar and judicial district membership dues, Client Security Fund assessments, and any other related dues, fees, assessments and/or costs by the applicable deadline; and
- (n) Defendant shall not violate the Rules of Professional Conduct or the laws of the United States or of any state or local government.

4. 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 effective date of the Order provided there are no pending motions or show cause proceedings alleging lack of compliance with the conditions of the stay of the suspension. Pursuant to 27 N.C. Admin. Code 1B .0118, 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.

5. If Defendant fails to comply with any one or more of the conditions set out above in this Order of Discipline, then the stay of the suspension may be lifted in accordance with 27 N.C. Admin. Code 1B.0118.

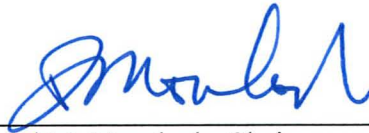
6. If the stay of the suspension is lifted and the suspension is activated for any reason, the Disciplinary Hearing Commission may enter an order imposing such conditions as it deems proper for the reinstatement of Defendant's license at the end of the suspension. Additionally, Defendant must establish the following by clear, cogent and convincing evidence prior to being reinstated to the practice of law after any period of active suspension:

- (a) Defendant submitted his law license and membership card to the Secretary of the State Bar within thirty (30) days of the date of the order lifting the stay and/or activating the suspension of his law license;
- (b) Defendant complied with the provisions of 27 N.C. Admin. Code 1B.0128 following entry of the order lifting the stay and/or activating the suspension of his law license;
- (c) Defendant timely paid all administrative fees and costs assessed against him in this proceeding as reflected on the statement of costs served upon him by the Secretary of the State Bar;

- (d) That within fifteen (15) days of the effective date of the order activating the suspension Defendant provided the State Bar with an address and telephone number at which clients seeking return of files could communicate with Defendant and obtain such files;
- (e) That Defendant provided within ten days client files to all clients who made a request for return of their files;
- (f) Defendant kept the State Bar Membership Department advised of his current business street address (not post office box or drawer addresses) and notified the State Bar of any change in address within ten days of such change;
- (g) Defendant responded to all communications from the State Bar, including communications from the Attorney Client Assistance Program, within thirty (30) days of receipt or by the deadline stated in the communication, whichever is sooner;
- (h) 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 assessments, charges or surcharges the State Bar is authorized to collect from him, including all judicial district dues and assessments;
- (i) At the time of his petition for reinstatement, there is no deficit in Defendant's completion of mandatory CLE hours in reporting of such hours or in payment of any fees associated with attendance at CLE programs;
- (j) At the time of his petition for reinstatement, Defendant has completed within the six months that immediately preceded his petition for reinstatement two hours of continuing legal education (CLE) in the area of trust account management approved by the Office of Counsel of the State Bar;
- (k) Defendant did not violate the Rules of Professional Conduct or the laws of the United States, or the laws of any state or local government during his suspension; and
- (l) Defendant participated in good faith in the State Bar's fee dispute resolution process for any petition that was pending at the time of entry of this order or of which he received notice after the effective date of this order.

7. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code 1B.0118 until all conditions of the stay of suspension are satisfied.

Signed by the Chair with the consent of the other Hearing Panel members this
the 22ND day of January, 2017. 2018.



Fred M. Morelock, Chair
Disciplinary Hearing Panel

WE CONSENT:



Bryon M. Smith
Defendant



Douglas Brecker
Attorney for Defendant



Leann Bailey Hodge, Deputy Counsel
Attorney for Plaintiff