

STATE OF NORTH CAROLINA

WAKE COUNTY



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

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

CLARKE K. WITTSTRUCK, Attorney,

Defendant

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

This matter was considered by a Hearing Panel of the Disciplinary Hearing Commission composed of Joshua W. Willey, Chair, and members William O. King and Michael S. Edwards, pursuant to North Carolina Administrative Code, Title 27, Chapter 1, Subchapter B, § .0114(h). Plaintiff was represented by G. Patrick Murphy. Defendant appeared *pro se*. Both Plaintiff and Defendant 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 pleadings in this matter, the parties' stipulations of fact, and with the consent of the parties, the Hearing Panel hereby enters 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 was admitted to the North Carolina State Bar on August 23, 1986, and is, and was at all times referred to herein, an attorney 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. During all or part of the relevant periods referred to herein, Defendant was engaged in the practice of law in the State of North Carolina and maintained a law practice in Asheville, Buncombe County, North Carolina.

4. Defendant was properly served with process and the matter came before the Hearing Panel with due notice to the parties.

FIRST CLAIM FOR RELIEF

5. On April 22, 2015, the Disciplinary Hearing Commission of the North Carolina State Bar ("DHC") entered an Order of Discipline in *The North Carolina State Bar v. Clarke Wittstruck*, 14 DHC 29 and 14 DHC 33, suspending Defendant from the practice of law in North Carolina for 5 years with the opportunity to petition for a stay of the suspension after 3 years.

6. The Order of Discipline was served on Defendant on April 29, 2015 and the suspension was effective on June 13, 2015.

7. On June 19, 2015, Defendant sent R. Silvers a proposed separation agreement that he drafted on behalf of Defendant's client, C. Silvers.

8. At the time Defendant sent the draft separation agreement to R. Silvers, he offered to discuss with her any changes to the draft agreement that she might request.

9. Defendant did not tell R. Silvers that his license to practice law was suspended at the time he sent her the draft separation agreement and offered to discuss changes with her.

10. On July 10, 2015, Defendant was served with a Letter on Notice ("LON") by The North Carolina State Bar in State Bar file 15G0628 making a formal inquiry into Defendant's communication with R. Silvers about a proposed separation agreement after his suspension became effective.

11. Defendant did not respond to the State Bar's LON nor did he request an extension of time to submit a response within the time provided by 27 N.C.A.C., Chapter 1, Subchapter B, Rule .0112(c).

12. In the Order of Discipline in 14 DHC 29 and 14 DHC 33, the DHC found that Defendant had failed to respond to letters of notice from The North Carolina State Bar in six grievances.

SECOND CLAIM FOR RELIEF

13. D. Mathis ("Mathis") on March 17, 2014 paid Defendant \$415 to represent him in an uncontested divorce.

14. Mathis sent Defendant all the documents Defendant requested but Defendant did not complete the case.

15. Mathis asked Defendant to return his fee and Defendant told Mathis he would do so but did not timely return the fee to Mathis.

16. Mathis filed a fee dispute petition on September 26, 2014 with the State Bar's Fee Dispute Resolution Program ("FDRP").

17. Defendant was served with notice of the fee dispute on October 2, 2014. The notice required Defendant to provide a written response to the fee dispute within 15 days. Defendant did not timely respond to the fee dispute. In response to a follow-up communication from the FDRP, Defendant told the FDRP he would email a response by October 24, 2014 but he did not do so.

18. In the Order of Discipline in 14 DHC 29 and 14 DHC 33, the DHC found that Defendant had failed to respond to six notices of fee dispute petitions from the FDRP.

19. Defendant ultimately reimbursed the legal fee to Mathis on or about April 23, 2015.

THIRD CLAIM FOR RELIEF

20. On June 28, 2012, Defendant qualified as the Executor of the Estate of George Rekucha in Buncombe County Estate file, 12E867 ("the Estate").

21. As Executor of the Estate, Defendant provided professional fiduciary services and received an executor's commission for his services.

22. On or about July 17, 2012, Defendant opened an estate account at Capital Bank.

23. After qualifying as Executor, Defendant contacted A.R. Miller and K.R. Glenn, daughters of Rekucha, in 2012 and advised them that he was Executor of the Estate. Defendant also told them that he was in possession of personal items belonging to Rekucha which he would send to Miller.

24. Defendant was required to file an inventory of the Estate within 3 months of qualifying as Executor.

25. On October 15, 2012, the Clerk of Buncombe County ("Clerk") sent Defendant a notice to file an inventory in the Estate.

26. On February 7, 2013, the Clerk issued an order to Defendant to file an inventory within 20 days from the date of the order.

27. On or about February 19, 2013, Miller and Defendant exchanged emails and Defendant told Miller that he would get Rekucha's personal effects ready to ship to Miller the coming weekend. Defendant did not do so.

28. On July 1, 2013, the Clerk issued to Defendant an order to show cause why Defendant should not be removed as fiduciary and held in contempt for his failure to file an inventory in the Estate. Defendant was served with the order to show cause on July 10, 2013.

29. On September 20, 2013, Defendant filed an inventory of the Estate and an annual accounting. The annual accounting covered the period May 7, 2012 through May 6, 2013. In

the annual accounting, Defendant stated that the Estate would be ready to close as of November 16, 2013.

30. On July 25, 2014, the Clerk sent Defendant a notice to file a final accounting in the Estate.

31. Defendant did not respond to the Clerk's July 25, 2014 notice.

32. On April 17, 2015, Glenn wrote to the Clerk of Superior Court complaining about Defendant's handling of the Estate, including his failure to deliver her father's personal belongings to Miller as he had indicated he would and Defendant's failure to file a final accounting.

33. On April 22, 2015, the Clerk issued an order to Defendant to appear and show cause why Defendant should not be held in civil contempt or removed as fiduciary for his failure to file an accounting in the Estate. Defendant was served with the order to show cause on April 23, 2015.

34. On May 28, 2015, Defendant filed an annual accounting covering the period May 7, 2013 through May 6, 2014. This annual accounting was a year late.

35. The Clerk called Defendant on July 13, 2015 and August 7, 2015 requesting that he file a final accounting. On August 7, 2015, Defendant told the Clerk he would have the final accounting filed by August 11, 2015.

36. On September 1, 2015, the Clerk called Defendant and left a message that the final accounting needed to be filed.

37. On or about October 9, 2015, Defendant told the Clerk he would file the final accounting on October 12, 2015.

38. Defendant filed a purported final accounting with the Clerk on or about November 13, 2015, however, the Clerk did not approve it due to deficiencies.

39. Even though Defendant opened an Estate account at Capital Bank, Estate funds from the sale of the decedent's residence were deposited into Defendant's attorney trust account with SunTrust Bank.

40. The State Bar requested that Defendant provide account ledgers for transactions related to the Estate. Defendant provided financial records for transactions related to the Estate but did not produce any ledgers related to his Sun Trust Bank attorney trust account.

Based upon the foregoing Findings of Fact, with the consent of the parties 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 and the subject matter of this proceeding.

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 the Rules of Professional Conduct in effect at the time of the conduct, as follows:

- a. By sending a proposed separation agreement to R. Silvers after the effective date of the suspension of his license to practice law, Defendant engaged in the unauthorized practice of law in violation of Rule 5.5(a);
- b. By failing to respond in writing to the letter of notice served on Defendant on July 10, 2015 within the time allowed by 27 N.C.A.C., Chapter 1, Subchapter B, Rule .0112(c), Defendant violated Rule 8.1(b);
- c. By failing to inform R. Silvers that he was prohibited by the Order of Discipline in 14 DHC 29 and 14 DHC 33 from practicing law in North Carolina and by offering to discuss with R. Silvers changes she requested in the separation agreement when he knew it was unlawful for him to do so, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
- d. By failing take timely action in Mathis' case, Defendant failed to act with reasonable diligence and promptness in representing Mathis in violation of Rule 1.3;
- e. By failing to communicate with Mathis regarding the status of his case, and failing to timely return Mathis' money after telling Mathis that he would do so, Defendant failed to keep Mathis reasonably informed about the status of his case in violation of Rule 1.4(a)(3), charged and collected a clearly excessive fee in violation of Rule 1.5(a), and failed to take reasonable steps to protect Mathis' interests by timely refunding a fee that was not earned in violation of Rule 1.16(d);
- f. By failing to respond to the notice of fee dispute related to Mathis within the time allowed by 27 N.C.A.C., Chapter 1, Subchapter D, Rule .0708(c), Defendant failed to participate in good faith in the fee dispute resolution process in violation of Rule 1.5(f)(2);
- g. By failing to deliver the decedent's personal effects to Miller for over two years after stating he would do so, and by failing to timely file an inventory and accountings of his receipt and disbursement of Estate funds and property, Defendant failed to file an accounting of fiduciary funds received by him with a judicial official as required by law in violation of Rule 1.15-3(f), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d); and
- h. By failing to maintain a ledger of the Estate funds in his SunTrust account, Defendant failed to maintain a ledger containing a record of receipts and

disbursements for the Estate funds in his trust account in violation of Rule 1.15-3(b)(5).

3. Defendant's conduct, as set out in the stipulated Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. § 84-28(b)(3), as follows:

- a. For failing to respond in writing to the LON served on Defendant on July 10, 2015 within the time allowed by 27 N.C.A.C., Chapter 1; Subchapter B, Rule .0112(c).

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

ADDITIONAL FINDINGS OF FACT REGARDING DISCIPLINE

1. Defendant's conduct resulted in multiple violations of the Rules of Professional Conduct.

2. Defendant's conduct includes failing to timely respond in writing to a notice from the FDRP and to a letter of notice sent to Defendant by the State Bar, conduct which repeats violations found in prior discipline Defendant has received.

3. Defendant's conduct in the Estate matter impacted the timely and orderly process of the Estate proceeding and required court officials to issue notices, orders and show cause proceedings for his failure to timely file an inventory and an annual accounting.

4. Defendant was licensed to practice law in North Carolina in 1986 and has substantial experience in the practice of law.

5. Defendant's misconduct had a negative impact on a client's and the public's perception of the legal profession. Mathis' case was not timely processed nor was his legal fee timely refunded. A beneficiary of the Estate had to seek the assistance of the clerk's office to obtain the initiation of legal process to get the Estate closed.

6. Defendant had open heart surgery in December 2011, believes he has suffered at times from a compromised memory, and was attending to serious family issues during some or all of the period covered by this conduct.

7. Defendant acknowledges and agrees that he has had an opportunity to consult with counsel but has freely and voluntarily elected to proceed *pro se* and agree to the terms of this Consent Order of Discipline. Defendant acknowledges and agrees that, as a condition of this Consent Order of Discipline, Defendant freely and voluntarily waives his right to petition for a stay of the suspension imposed by the Order of Discipline in 14 DHC 29 and 14 DHC 33, and acknowledges and agrees that his license to practice law in North Carolina will remain suspended for the entire five year period of suspension imposed therein. Defendant also acknowledges and agrees and freely and voluntarily consents that the additional suspension

imposed in this Consent Order of Discipline will not begin to run until the expiration of the full five year period of suspension imposed by the Order of Discipline in 14 DHC 29 and 14 DHC 33.

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

CONCLUSIONS REGARDING DISCIPLINE

1. The Hearing Panel has considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(1) of the Rules and Regulations of the North Carolina State Bar and concludes the following factors are present:

- a. Intent of Defendant to commit acts where the harm or potential harm is foreseeable;
- b. Elevation of the Defendant's own interest above that of his client;
- c. Negative impact of Defendant's actions on client's or public's perception of the profession;
- d. Negative impact of the Defendant's actions on the administration of justice;
- e. Impairment of the client's ability to achieve the goals of the representation; and
- f. Multiple instances of failure to participate in the legal profession's self-regulation process.

2. The Hearing Panel has considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(2) of the Rules and Regulations of the North Carolina State Bar and concludes that none of those factors are present.

3. The Hearing Panel has considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(3) of the Rules and Regulations of the North Carolina State Bar and concludes the following factors are applicable in this matter:

- a. Prior disciplinary offenses in this State;
- b. Selfish motive;
- c. A pattern of misconduct;
- d. Multiple offenses;
- e. Effect of personal or emotional problems on the conduct in question;

- f. Effect of physical or mental disability or impairment on the conduct in question;
- g. Vulnerability of victims; and
- h. Defendant's experience in the practice of law.

4. Defendant's conduct in this proceeding and his prior discipline is remarkable for neglect of client's cases and Defendant's repeated failure to participate in the self-regulatory processes of the profession.

5. The Hearing Panel has carefully considered all of the different forms of discipline available, including admonition, reprimand, censure, suspension, and disbarment, in considering the appropriate discipline to impose in this case. The Hearing Panel concludes that any discipline less than suspension would fail to acknowledge the seriousness of the violations committed by Defendant and send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar in this State.

6. The Hearing Panel has considered all alternatives and concludes that a suspension is necessary to adequately protect the public. The Hearing Panel finds that an order imposing discipline short of suspension would not be appropriate.

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

ORDER OF DISCIPLINE

1. Defendant's license to practice law in the State of North Carolina is hereby suspended for two (2) years, effective at the expiration of the five (5) year suspension imposed by the Order of Discipline in 14 DHC 29 and 14 DHC 33.

2. It is the intent of this Order that the two year suspension of Defendant's license to practice law in the State of North Carolina is a second, independent order of suspension to run consecutively to the five year suspension imposed by the Order of Discipline in 14 DHC 29 and 14 DHC 33 such that Defendant is ineligible to petition for reinstatement for seven years from the effective date of Defendant's suspension by the Order of Discipline in 14 DHC 29 and 14 DHC 33.

3. Defendant shall submit his license and membership card to the Secretary of the State Bar within 10 days of the effective date of this order if he has not already done so.

4. Defendant shall comply with the provisions of 27 N.C.A.C. 1B § .0124 of the State Bar Discipline and Disability Rules.

5. If he has not already done so, within 15 days of the effective date of this Order, Defendant shall provide the State Bar Office of Counsel with an address and telephone number at which clients seeking return of files can communicate with Defendant and obtain such files, and Defendant shall promptly provide client files to all clients who request return of their files.

6. Defendant is taxed with the costs and administrative fees of this action, including deposition costs, as assessed by the Secretary. Defendant shall pay the amount assessed within 30 days of service of the statement of costs and fees upon him.

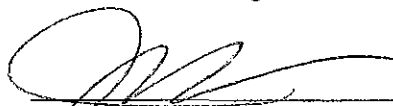
7. Defendant shall keep the North Carolina State Bar Membership Department advised of his current physical home address.

8. Defendant shall respond to all letters of notice and requests for information from the North Carolina State Bar by the deadline stated in the communication.

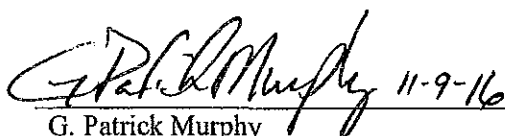
9. Defendant shall not violate the Rules of Professional Conduct or the laws of the United States or any state.

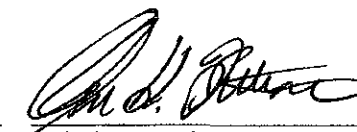
10. To be reinstated at the end of the term of suspension imposed by this Consent Order of Discipline, Defendant must demonstrate by clear, cogent and convincing evidence that Defendant has met all requirements for reinstatement set out in 27 N.C.A.C 1B § .0125 and that the Defendant has reformed and presently possesses the moral qualifications for admission to practice law and that permitting the Defendant to resume the practice of law will not be detrimental to the integrity and standing of the Bar, the administration of justice, or the public interest.

10/16 Signed by the Chair with the consent of the other Hearing Panel members, this the day of November 2016.


Joshua W. Willey, Chair
Disciplinary Hearing Panel

CONSENTED TO BY:

 11-9-16
G. Patrick Murphy
Deputy Counsel
North Carolina State Bar
Counsel for Plaintiff


Clarke K. Wittstruck
Defendant