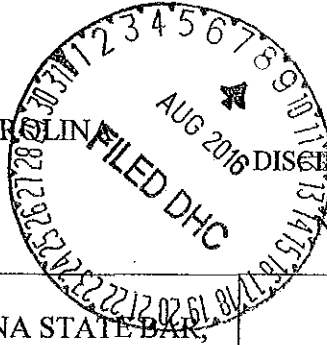


STATE OF NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
16 DHC 6

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

MICHAEL KYLE McENERY, Attorney,

Defendant

ORDER OF DISCIPLINE

THIS MATTER was heard on July 29, 2016 before a Hearing Panel of the Disciplinary Hearing Commission composed of Joshua W. Willey, Jr., Chair, and members R. Lee Farmer and Patti Head, pursuant to North Carolina Administrative Code, Title 27, Chapter 1, Subchapter B, § .0114(m) of the North Carolina State Bar Discipline and Disability Rules. Plaintiff, the North Carolina State Bar ("Plaintiff" or "State Bar") was represented by Barry S. McNeill, Deputy Counsel. Defendant, Michael Kyle McEnery ("Defendant" or "McEnery"), was represented by Alan M. Schneider, Cheshire, Parker, Schneider & Bryan, PLLC, Raleigh, North Carolina. Based upon the pleadings, the stipulated facts, and the testimony and evidence admitted at the hearing, the Hearing Panel hereby finds by clear, cogent, and convincing evidence the following

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar ("State Bar"), is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar (Chapter 1 of Title 27 of the North Carolina Administrative Code).
2. McEnery was admitted to the North Carolina State Bar on October 9, 2009, 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 Rules of Professional Conduct.
3. During all or part of the relevant periods referred to herein, McEnery was engaged in the practice of law in Raleigh, Wake County, North Carolina.
4. McEnery engaged in recreational drug usage during college and law school, but began abusing opiates, such as oxycodone prescription pain pills and eventually heroin, following surgery in 2008.
5. McEnery began abusing heroin more heavily as his tolerance to the drug increased.

6. On September 6, 2012, McEnery was arrested on charges of driving while impaired, felony possession of heroin, and possession of drug paraphernalia in *State v. Michael Kyle McEnery*, 12-CR-220337, -220338, -220339 (Wake County District Court).

7. McEnery began drug rehabilitation treatment at Bradford Health Services ("Bradford") in Warrior, Alabama on September 21, 2012.

8. McEnery remained in Bradford for approximately 12 weeks.

9. The therapists at Bradford recommended that McEnery spend six to eight months in a halfway house upon his discharge.

10. When McEnery was discharged from Bradford in December 2012, he went directly to a halfway house in Atlanta, Georgia called Safety Net Recovery ("Safety Net").

11. McEnery spent approximately seven months at Safety Net.

12. On December 18, 2012, McEnery pled guilty in Wake County District Court to the misdemeanor of driving while impaired in *State v. Michael Kyle McEnery*, 12-CR-220337 (Wake County District Court), and was placed on unsupervised probation for 12 months.

13. As a part of McEnery's plea, the Wake County prosecutor deferred prosecution on the possession of drug paraphernalia charge (Case No. 12-CR-220338), and voluntarily dismissed the felony possession of heroin charge (Case No. 12-CR-220339).

14. Notwithstanding the plea agreement entered into with the Wake County District Attorney, and despite the efforts of his family and supporters, McEnery relapsed into drug usage.

15. On July 18, 2014, McEnery broke into a friend's residence when the friend was not present and stole musical equipment belonging to two friends.

16. McEnery later sold the friends' stolen musical equipment to a pawnshop in order to obtain money to purchase illegal drugs.

17. On or about August 6, 2014, a Raleigh Police Officer arrested McEnery for the felonies of obtaining property by false pretenses, possession of stolen property, larceny, and breaking or entering in *State v. Michael Kyle McEnery*, No. 14-CR-217451 (Wake County District Court).

18. On August 12, 2014, McEnery was released from pre-trial custody under the condition that he enter and remain in substance abuse treatment at FIRST at Blue Ridge, Inc. ("FIRST"), Ridgecrest, North Carolina, until the charges pending against him were resolved.

19. McEnery enrolled in the one year long-term program at FIRST on August 13, 2014.

20. On April 16, 2015, McEnery pled guilty to one count of felonious possession of stolen goods/property in *State v. Michael Kyle McEnery*, No. 14-CR-217451 (Wake County District Court).

21. As a part of the plea agreement with the Wake County District Attorney's office, the State dismissed the remaining three charges against McEnery.

22. Upon his plea, McEnery received a sentence of 18 months of supervised probation and was ordered by the Wake County District Court to complete the long-term program at FIRST.

23. McEnery completed the long-term residential substance abuse treatment program at FIRST in August 2015.

24. McEnery has remained sober since his admission to FIRST in August 2014.

Based upon the stipulations of the parties, the testimony and evidence introduced at the hearing, 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 and the subject matter of this proceeding.

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

- (a) McEnery's conviction for the felonious possession of stolen goods shows professional unfitness and constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(1); and,
- (b) McEnery's commission of the crimes of breaking and entering his friends' residence and then stealing, possessing, and pawning the friends' stolen musical equipment constitutes criminal acts reflecting adversely on his honesty, trustworthiness and fitness as a lawyer in other respects in violation of Rule 8.4(b), and involved his engaging in conduct involving dishonesty, fraud, deceit and misrepresentation in violation of Rule 8.4(c).

Based upon the evidence, the Hearing Panel also enters the following:

FINDINGS OF FACT REGARDING DISCIPLINE

1. McEnery has no prior record of public discipline.

2. McEnery's aberrant criminal behavior and felony conviction resulted from and were caused by his drug addiction to opiates.

3. The crimes McEnery committed were property crimes which caused harm to the victims, his friends.

4. McEnery made restitution to the pawnshop.

5. McEnery's crimes did not involve mishandling or misappropriation of entrusted funds from clients.

6. McEnery entered recovery contracts with the State Bar's Lawyer Assistance Program ("LAP"), but he has not been compliant with the LAP contracts following his rehabilitation at Bradford and has not been engaged with LAP during or since his rehabilitation at FIRST.

7. Following his admission to FIRST, McEnery completed FIRST's thirty day short term drug treatment program and then transitioned to FIRST's long term program, including the 12-step program, relapse prevention, anger management, and required 12-step fellowship meetings in the community.

8. McEnery met all of FIRST's treatment recommendations and continues to engage with the recovery community at FIRST.

9. During his rehabilitation at FIRST, McEnery was given a job in the case management office and took on the responsibility of coordinating the court dates, housing, and finding employment for FIRST's clients.

10. McEnery was elected to serve as a Phase One Peer Leader, managing FIRST'S new clients during the first 30-days of their recovery; in May 2015, McEnery was elected to serve as the Senior Peer Leader.

11. In June 2015, McEnery was hired by FIRST as a Case Manager, and subsequently as its Case Manager Supervisor so as to take advantage of his leadership and organizational skills.

12. One of FIRST's clinical psychologists characterized McEnery as demonstrating a strong recovery and his overall performance as excellent.

13. While working at FIRST, McEnery currently resides in a transition house with other recovering addicts.

14. Fellow recovering addicts and colleagues at FIRST attested to McEnery's commitment to his recovery.

15. McEnery offered into evidence a letter from a local attorney in which she described his volunteer assistance with the Pisgah Legal Services and its expungement clinic, helping other volunteer lawyers in evaluating cases and preparing expungements for indigent clients.

16. Peers and colleagues at FIRST attest to McEnery's good character and reputation.

17. FIRST's executive director trusts McEnery as an employee on a daily basis.

18. McEnery's parents and sister insist his current commitment to recovery from drug addiction is real.

19. The Hearing Panel has carefully considered all of the different forms of discipline available to it, including admonition, reprimand, censure, suspension, and disbarment, in considering the appropriate discipline to impose in this case.

Based on the Findings of Fact and Conclusions of Law above and the additional Findings of Fact Regarding Discipline, the Hearing Panel makes the following:

CONCLUSIONS WITH RESPECT TO DISCIPLINE

1. The Hearing Panel has carefully 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 which warrant suspension of Defendant's license:

- (B) Intent of Defendant to commit acts where the harm or potential harm was foreseeable;
- (C) Circumstances reflecting Defendant's lack of honesty, trustworthiness, or integrity;
- (E) Defendant's actions potentially had a negative impact on the public's perception of the legal profession; and,
- (I) Defendant's acts of dishonesty, misrepresentation, deceit, or fabrication.

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 the following disbarment factors are present:

- (A) Defendant's acts of dishonesty, misrepresentation, deceit, or fabrication; and,
- (D) Defendant's commission of a felony.

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) Absence of prior disciplinary offenses in this state or other jurisdictions;
- (C) Absence of selfish motive;

- (D) Timely good faith efforts to make restitution or to rectify the consequences of Defendant's misconduct;
- (G) Multiple offenses;
- (H) Effect of any personal or emotional problems on the conduct in question;
- (I) Effect of any physical or mental disability or impairment on the conduct in question;
- (J) Interim rehabilitation;
- (K) Full and free disclosure to the hearing panel and cooperative attitude toward the proceedings;
- (P) Defendant's remorse;
- (Q) Defendant's character or reputation; and,
- (U) Imposition of other penalties or sanctions.

4. The Hearing Panel has considered issuing an admonition, reprimand or censure but concludes that such discipline would not be sufficient discipline because of the gravity of the misconduct at issue, the harm or potential harm Defendant's misconduct caused to the public, the administration of justice, and the legal profession, and because of the Hearing Panel's concern for the protection of the public.

5. McEnery's crimes and felony conviction caused significant harm to his friends and resulted in potential significant harm by breeding disrespect for the legal profession but the criminal conduct would not have been committed but for his drug addiction.

6. Given the aberrant nature of McEnery's crimes and felony conviction, his timely admission to drug treatment intervention, his initiative and leadership during rehabilitation, and his commitment to recovery and sobriety, the Hearing Panel deemed the factors found under 27 N.C.A.C. 1B §.0114(w)(2) insufficient to warrant disbarment.

7. For the following reasons, this Hearing Panel finds that an order imposing discipline short of suspension of Defendant's law license would not adequately protect the public, the legal profession, or the administration of justice for the following reasons:

- (a) While the Hearing Panel found two factors under 27 N.C.A.C. 1B §.0114(w)(2), these factors do not require disbarment when weighed with the factors found under 27 N.C.A.C. 1B §.0114(w)(1) and (w)(3);

- (b) The factors under 27 N.C.A.C. 1B §.0114(w)(1) and (w)(3) that are established by the evidence are of a nature that support imposition of suspension as the appropriate discipline;
- (c) Entry of less serious discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar in this State; and,
- (d) A stayed suspension with appropriate conditions, such as requiring McEnery to continue his recovery therapy and periodic reporting by the therapist and LAP to the State Bar, will assure Defendant's sobriety and compliance with treatment.

Based upon the foregoing findings of fact, conclusions of law, and the findings of fact and conclusions regarding discipline, the Hearing Panel enters the following:

ORDER OF DISCIPLINE

1. Defendant, Michael Kyle McEnery, is hereby suspended from the practice of law for five (5) years, effective 30 days from service of this order upon Defendant.
2. Defendant's five (5) year suspension is ordered stayed for the duration of the suspension as long as Defendant complies, and continues to comply during the period of the stay with each of the following conditions:
 - (a) Defendant shall not use or consume any mind or mood altering substances, including, but not limited to, alcohol or controlled substances, except to treat a legitimate medical need as prescribed by a licensed medical professional authorized to issue such a prescription. Prior to the use of any such prescribed drugs, Defendant will inform his physician of this Order and of his participation in the Lawyer Assistance Program ("LAP"), communicate the identity of his physician to the LAP Clinical Director, and have his physician consult with the LAP Clinical Director before any such medications are prescribed by his physician or used by Defendant;
 - (b) Defendant, at his own expense, continues counseling with his therapist, and/or any other board-certified psychiatrist, psychologist, or drug counselor (hereafter "Therapist") approved in advance by the State Bar's Office of Counsel, and follows and complies with the course of treatment prescribed by his Therapist. The Therapist shall provide quarterly reports, due in the Office of Counsel by the tenth day of each quarter (January 10, April 10, July 10, and October 10), to the State Bar and to the LAP Clinical Director (with a copy to Defendant) confirming Defendant is following the recommendations of the Therapist. The Therapist shall notify the State Bar and the LAP Clinical Director if

Defendant fails to follow the recommendations and treatment program of the Therapist. Defendant shall ensure these reports and notifications are timely made. Defendant will sign all necessary releases or documents to allow such reports and notifications, to allow the Therapist to provide documents from Defendant's treatment to the State Bar and the LAP Clinical Director, and to allow the Therapist to discuss Defendant's participation and treatment with the Office of Counsel of the State Bar and the LAP Clinical Director, and shall not revoke the releases during the period of the stayed suspension;

- (c) Defendant instructs his Therapist to notify the Office of Counsel and the LAP Clinical Director immediately in writing if, at any point during the stayed suspension, Defendant ceases to be a patient or otherwise fails to comply with the course of treatment prescribed by the Therapist;
- (d) During the entirety of the suspension, Defendant enters into and remains in a long term recovery contract with LAP and complies with all the terms of his contract and any treatment recommendations from LAP, at Defendant's expense. LAP shall notify the Office of Counsel if Defendant fails to participate in LAP, fails to comply with any of the terms of his long term recovery contract with LAP, or fails to comply with LAP's treatment recommendations. Defendant will sign all necessary releases or documents to allow such notification and to allow the LAP to discuss Defendant's participation and treatment in LAP with the Office of Counsel of the State Bar, and shall not revoke the release during the period of the stayed suspension;
- (e) Defendant shall, at his own expense, register for and comply with random drug and alcohol monitoring by FirstLab Professional Health Monitoring Program ("FirstLab") or other monitoring service agreed to by the parties. The monitoring agreement will require the monitoring service to report to the State Bar's Office of Counsel and to the LAP Clinical Director any failure of Defendant to take or pay for the test and any positive test result. Defendant will enter into the monitoring program within thirty days of the date of this order. Defendant will sign all necessary releases or documents to allow such reporting and shall not revoke the releases during the period of the stayed suspension;
- (f) Defendant shall, at his own expense, arrange for an attorney approved by the Office of Counsel to serve as Defendant's practice monitor. Defendant shall meet with the practice monitor at least monthly to review all of the Defendant's pending cases. The monitor will supervise all client matters and ensure that the Defendant handles all matters in a timely fashion and that the

Defendant communicates adequately with his clients. The Defendant will ensure that the practice monitor submits written quarterly reports to the Office of Counsel confirming that the meetings are occurring and that the Defendant is meeting deadlines and conferring with clients. The reports shall be received in the Office of Counsel each January 10, April 10, July 10, and October 10 throughout the period of the stayed suspension.

- (g) Defendant shall timely submit his annual Continuing Legal Education ("CLE") report form to the CLE Department of the North Carolina State Bar each year of the stay and contemporaneously send a copy of the CLE report form to the Office of Counsel of the State Bar to document compliance. "Timely" means by the date specified by the CLE department as the date by which members must submit their annual report forms to avoid assessment of a \$75.00 late filing penalty. Defendant must ensure the Office of Counsel receives a copy of his annual CLE report form no later than 15 days after it is due to the CLE department of the State Bar each year;
- (h) Defendant shall pay all Membership dues and Client Security Fund assessments and comply with all CLE requirements on a timely basis;
- (i) Defendant shall keep his address of record with the North Carolina State Bar current, accept all certified mail from the North Carolina State Bar, and respond to all letters of notice and requests for information from the North Carolina State Bar by the deadlines stated in the communication;
- (j) Defendant shall not violate any of the Rules of Professional Conduct in effect during the period of the stay;
- (k) Defendant shall not violate any laws of the State of North Carolina, of any other state, or of the United States during the period of the stay; and
- (l) Defendant shall pay all costs and administrative fees of this proceeding as assessed by the Secretary within thirty (30) days after service of the notice of costs on him.

3. If Defendant fails to comply with any one or more of the conditions of the stay of his suspension provided in paragraphs 2(a)-2(l) above, the stay of suspension may be lifted in accordance with 27 N.C.A.C. 1B § .0114(x).

4. Defendant's obligations under this Order end after the applicable period of the stay 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 27 N.C.A.C. 1B § .0114(x), 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 remaining portion of the 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.

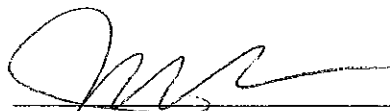
5. If the stay of the suspension is lifted and the remaining period of suspension is activated for any reason, the following conditions are placed upon Defendant's reinstatement to active status. With any petition Defendant files for reinstatement to active practice, Defendant must demonstrate by clear, cogent, and convincing evidence that he complied with each of the following conditions:

- (a) Complied with 2(a)-2(h) above;
- (b) Submitted his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days from the effective date of the order activating the suspension;
- (c) Complied with all provisions of 27 N.C.A.C. 1B § .0124 on a timely basis;
- (d) Complied with all provisions of 27 N.C.A.C. 1B § 0125(b);
- (e) Not have violated any of the Rules of Professional Conduct;
- (f) Not have violated any laws of the State of North Carolina, of any other state, or of the United States; and
- (g) Paid all costs of this proceeding as assessed by the Secretary within thirty (30) days of service of the notice of costs upon him.

6. Defendant is taxed with the administrative fees and costs of this action as assessed by the Secretary, which shall be paid within thirty (30) days of service of the notice of costs upon Defendant.

Signed by the undersigned Hearing Panel Chair with the consent of the other Hearing Panel members.

This the 5th day of August 2016.



Joshua W. Willey, Jr., Chair
Disciplinary Hearing Panel