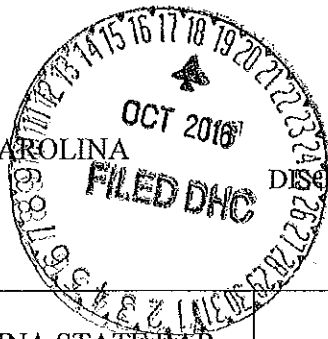


STATE OF NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
16 DHC 3

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

R. KELLY CALLOWAY, JR., Attorney,

Defendant

CONSENT ORDER OF
DISCIPLINE

This matter was considered by a Hearing Panel of the Disciplinary Hearing Commission composed of Joshua W. Willey, Jr., Chair, and members Shirley L. Fulton and Bradley Lail, pursuant to North Carolina Administrative Code, Title 27, Chapter 1, Subchapter B, § .0114(h) 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, R. Kelly Calloway, Jr. ("Defendant" or "Calloway"), 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 has freely and voluntarily stipulated to the foregoing findings of fact and consents to the conclusions of law and entry of the order of discipline. 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 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, R. Kelly Calloway, Jr. ("Calloway" or "Defendant"), was admitted to the North Carolina State Bar on August 20, 1993, 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, Calloway was engaged in the practice of law in Hendersonville, Henderson County, North Carolina, doing legal business as Calloway & Associates Law Firm, P.C. ("firm").

4. In addition to Calloway himself, the firm paid wages to one or more employees between the first quarter of 2006 through the first quarter of 2012 ("the relevant time period").

5. Calloway had signature authority on all bank accounts maintained by his firm at SunTrust Bank in Hendersonville, North Carolina.

6. Calloway signed the checks with which the firm paid bi-weekly wages to its employees.

7. During the relevant time period, Calloway controlled the funds in all bank accounts maintained by the firm and made decisions regarding how and when such funds in those accounts would be deposited and/or disbursed.

8. When the firm paid its employees during the relevant time period, Calloway would withhold the appropriate funds from the employees' paychecks to pay federal income, Social Security and Medicare taxes to the Internal Revenue Service ("IRS") and state income taxes to the North Carolina Department of Revenue, and would pay his employee(s) and himself the net amounts due.

9. During the relevant time period, the withheld funds remained in the firm's operating account and were not paid by Calloway to the IRS.

10. Calloway understood that from the time the funds were withheld from employees' paychecks until the funds were ultimately to be paid to the IRS, he and the firm had a fiduciary obligation to hold the funds in trust for the benefit of the IRS.

11. For tax years 2006 through 2012, Calloway provided the firm's employees with W-2 forms.

12. The W-2 forms Calloway provided to his employees included the total compensation paid, and separately listed the social security, Medicare, federal income taxes, and state income taxes withheld from his employees' paychecks.

13. Calloway provided the W-2 forms to his employees in January or February of the year immediately following the previous tax year (i.e., Calloway provided the W-2 forms for 2006 in January or February of 2007), and therefore Calloway knew the amounts he was supposed to be withholding for his employees and paying to the appropriate federal and state government agencies.

14. During the relevant time period, Calloway used the federal withholding funds in his operating account to continue to pay income to himself, his employees' wages, and the firm's other expenses, including his membership at the Hendersonville

Country Club (\$2,643.02 in 2008; \$3,163.05 in 2009; \$1,997.18 in 2010; and, \$3,670.19 in 2011).

15. Calloway's income, as reported on his W-2's to the IRS during the relevant time period, were as follows: \$18,461.60 in 2006; \$24,230.85 in 2007; \$30,000.10 in 2008; \$31,153.95 in 2009; \$31,153.95 in 2010; \$28,846.25 in 2011; and, \$10,769.22 in 2012.

16. Calloway and his firm failed to timely file Federal Quarterly Tax Returns and annual federal tax returns for the firm for all quarters from 2006 to the third quarter of 2011.

17. Beginning in February 2012, Calloway voluntarily filed the past due 941 Quarterly Tax Reports for the firm.

18. According to the 941 Quarterly Tax Reports, the total amount of taxes Calloway failed to pay for all quarters of 2006 to the third quarter of 2011 was \$70,896.68.

19. After adding penalties and interest, the IRS filed Federal Tax Lien Notices ("liens") in 2012 against Calloway and his firm indicating that the firm owed the IRS approximately \$123,476.12 in employee payroll withholding taxes, interest, and penalties for the relevant time period.

20. Since the time of filing the 941 Quarterly Tax Reports, Calloway and/or his firm has made payments toward the taxes, penalties and interest totaling \$77,481.15 set out as follows:

- a) On September 17, 2012, a certified check in the amount of \$10,431.90;
- b) On October 31, 2012, a certified check in the amount of \$3,632.47;
- c) On January 15, 2013, a levy on the firm's operating account of \$6,199.70;
- d) On May 13, 2013, a levy on the firm's operating account of \$9,685.55;
- e) On August 1, 2013, a levy on the firm's operating account of \$1,279.27;
- f) Monthly payments from October 20, 2013 to August 20, 2015 for a total amount of \$35,273.26;
- g) 2013 Individual income tax refund applied of \$4,596.00 as part of Installment Agreement; and,
- h) 2014 Individual income tax refund applied of \$6,383.00 as part of Installment Agreement.

21. The liens also showed Calloway and his firm owed the IRS approximately \$6,453.91 in annual federal unemployment taxes ("FUTA") for the tax years of 2006, 2007, 2008 and 2009 while returns for those years showed a total of \$509.73 in FUTA taxes owed.

22. Calloway, through his firm, paid \$612.73 toward FUTA taxes owed on March 14, 2012.

23. Calloway failed to file state quarterly returns and pay state withholding taxes to the North Carolina Department of Revenue ("Department of Revenue") for the first, second, and third quarters of 2007, totaling approximately \$2,700.00.

24. On May 20, 2008, the Department of Revenue levied Calloway's bank account for \$2,983.44.

25. Calloway is current with Department of Revenue.

26. In a letter dated September 30, 2013 from Calloway to the State Bar, Calloway self-reported his failure to file Federal Quarterly Tax Returns from 2006 to 2011.

27. The State Bar served Calloway with a Letter of Notice in Grievance File No. 13G0917 on October 24, 2013.

28. Calloway's response to the Letter of Notice was due on Friday, November 8, 2013.

29. Calloway requested and was granted an extension of time until November 18, 2013 to respond.

30. Calloway neither responded by the deadline nor requested a further extension.

31. On December 6, 2013, the State Bar sent Calloway a letter encouraging him to respond no later than December 16, 2013.

32. Calloway again did not respond or request a further extension of time.

33. On or about January 3, 2014, staff counsel contacted Calloway and he indicated that he had not been able to respond because of his work load and the holidays, but that he would send his response by the next week.

34. The State Bar did not receive Calloway's response until February 10, 2014.

Based upon the consent of the parties and the foregoing stipulated 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 stipulated Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:

- a) By using the fiduciary funds to pay the firm's business expenses, Defendant committed criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b), and Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);
- b) By willfully failing to pay over the federal taxes owed to the IRS in violation of 26 U.S.C. § 7202, and by willfully failing to file returns, supply information, or pay the owed taxes in violation of 26 U.S.C. § 7203, Defendant committed felonious criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b), and Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);
- c) By willfully failing to pay over taxes owed to the North Carolina Department of Revenue for the first, second, and third quarters of 2007, and by willfully failing to file the necessary returns or supply information to the North Carolina Department of Revenue for the first, second, and third quarters of 2007 in violation of N.C. Gen. Stat. § 105-236(8) & (9), Defendant committed misdemeanor criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b), and Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); and
- d) By failing to timely respond to the State Bar's Letter of Notice, even after extensions of time to do so, Defendant knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b) and N.C. Gen. Stat. § 84-28(b)(3).

Upon the consent of the parties, the Hearing Panel also enters the following:

FINDINGS OF FACT REGARDING DISCIPLINE

1. The State Bar issued Defendant a reprimand in November 1998 for failing to timely respond to grievances.

2. The State Bar issued Defendant a reprimand in May 2016 for failing to respond in a fee dispute with a client and failing to timely respond to the grievance in the same matter.

3. In February 2012, on his own initiative, Defendant began taking corrective action and filed the federal tax returns he failed to file during the relevant time period.

4. Defendant's yearly income during the relevant time period ranged from a low of \$10,769.22 in 2012 to a high of \$31,153.95 in 2009 and 2010, and there is no evidence that he used the fiduciary withholding funds to maintain a lavish lifestyle.

5. From January 2012 to October 2012, Defendant made payments to the IRS of over \$14,000 towards the liens owed.

6. Between December 2012 and August 2013, the IRS garnished more than \$17,000 from Defendant's bank account toward satisfying its liens.

7. In August 2013, Defendant reached agreement with IRS to pay \$1,533.62 per month starting October 21, 2013 until the amount owed (\$93,945.20 at that time) was satisfied.

8. On October 30, 2013, the IRS issued a Certificate of Release of Federal Tax Lien in the amount of \$21,409.70; on July 2, 2014, the IRS issued another Certificate of Release of Federal Tax Lien in the amount of \$16,910.91.

9. From October 2013 to August 2015, Defendant made monthly payments to the IRS totaling \$35,273.26, leaving a balance owed to the IRS of \$56,743.94 (approximately 37 months at the agreed upon \$1,533.62 per month).

10. In September 2015, Defendant ceased making the monthly payments to the IRS due to lack of adequate revenue.

11. After initially failing to submit timely responses during the grievance process, Defendant thereafter cooperated with the State Bar's investigation and has been responsive to subsequent State Bar's inquiries.

12. Defendant was diagnosed with hyperglycemia in 2006, which contributed to his feelings of being overwhelmed in his personal and professional lives.

13. Defendant received notices about his firm's delinquent taxes, but often did not open such notices and ignored them.

14. Defendant experienced marital difficulties and separated from his wife in November of 2013 during the time period his response was due to the State Bar's Letter of Notice in Grievance File No. 13G0917, and such circumstances contributed to his inattention to submit a timely response.

15. Defendant has expressed remorse for his inattention to his federal and state tax obligations and his failure to timely respond to the State Bar's Letter of Notice in Grievance File No. 13G0917.

16. 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 different forms of discipline available to it. In addition, 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 warrant suspension of Defendant's license:

- (C) Circumstances reflecting the Defendant's lack of honesty, trustworthiness, or integrity; and,
- (E) Defendant's actions potentially had a negative impact on the public's perception of the legal profession.

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 the following factors are present, but did not warrant disbarment in light of the totality of the evidence in this case:

- (A) Acts of misrepresentation;
- (C) Defendant's conversion of assets to which he was not entitled; and,
- (D) 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) Defendant's recent prior disciplinary offense;
- (D) Defendant eventually made good faith efforts to rectify consequences of misconduct;
- (G) Defendant engaged in multiple offenses;
- (H) Effect of any personal or emotional problems on the conduct in question;
- (K) Defendant's full and free disclosure to the hearing panel and cooperative attitude toward the proceedings;
- (P) Defendant's remorse and efforts to repay all sums unpaid to State and Federal authorities; and,
- (S) Defendant's degree of experience in the practice of law

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 and the harm or potential harm Defendant's misconduct caused to the public, the administration of justice, and the legal profession.

5. For these 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) 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; and,
- b) Entry of less serious discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to prosecutors, attorneys, and the public regarding the conduct expected of members of the Bar in this State.

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

ORDER OF DISCIPLINE

1. Defendant, R. Kelly Calloway, Jr., is hereby suspended from the practice of law for four years, effective 30 days from service of this order upon Defendant.

2. Defendant shall comply with the wind down provisions of 27 N.C.A.C. 1B § .0124 of the State Bar Rules.

3. Within 15 days of the effective date of this Order, Defendant shall provide the State Bar's 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.

4. After one year of active suspension, Defendant may apply for a stay of the remaining period of suspension by filing a verified motion in this DHC proceeding demonstrating by clear, cogent and convincing evidence that Defendant has met all requirements for reinstatement set out in 27 N.C.A.C. 1B § .0125(b), and has complied with each of the following conditions:

- a) 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 with the above conditions of the stay. "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;

- b) In addition to his annual requirement of 12 hours of CLE and within the next 12 months following the effective date of his suspension, Defendant shall complete an additional three (3) hours of CLE, approved in advance by the Office of Counsel, related to law office management;
- c) For the next 48 months following the effective date of his suspension, Defendant shall make good faith efforts to maintain an installment agreement with the IRS to continue paying the outstanding balance of the taxes and penalties owed by his firm. If the existing installment agreement with the IRS is modified or satisfied, Defendant shall notify the Office of Counsel within ten (10) days of such change in status, and shall thereafter notify the Office of Counsel of any further changes in the status of the firm's installment agreement with the IRS within ten (10) days;
- d) Defendant shall make good faith efforts to make repayments to the IRS of those amounts remaining owed by his firm as a result of penalties and interest.
- e) For the next 48 months following the effective date of his suspension, Defendant shall ensure that his firm properly reports and timely pays any applicable federal and state withholding taxes and unemployment insurance for its employees. Thirty days prior to end of his suspension, Defendant shall submit a report to the Office of Counsel certifying his compliance with this requirement as of the date of the report;
- f) Defendant shall pay all Membership dues and Client Security Fund assessments and comply with all CLE requirements on a timely basis;
- g) 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;
- h) Defendant shall not violate any of the Rules of Professional Conduct in effect during the period of the stay;
- i) Defendant shall not violate any laws of the State of North Carolina or of the United States during the period of the stay; and
- j) 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.

5. If Defendant successfully petitions for a stay of his suspension, the suspension of Defendant's law license shall be stayed as long as Defendant complies and continues to comply with the conditions set out in paragraphs 4a-4j above.

6. If Defendant fails to comply with any one or more of the conditions of the stay of his suspension provided in paragraphs 4a-4j above, the stay of suspension may be lifted in accordance with 27 N.C.A.C. 1B § .0114(x).

7. If Defendant successfully petitions for a stay of his suspension, Defendant's obligations governing the stay 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.

8. If no stay is sought by Defendant, or if the stay of the suspension is lifted and the 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:

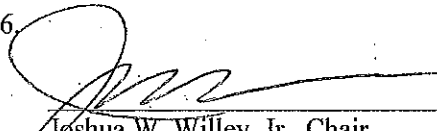
- a) Made good faith efforts to repay to the IRS the outstanding balance resulting from interest and penalties owed by his firm;
- b) Submitted his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days from the effective date of the order activating his suspension;
- 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 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.

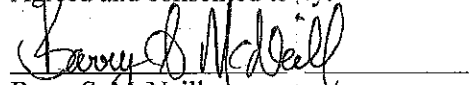
7. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C.A.C. 1B § .0114(x) throughout the period of the suspension or any period of the stayed suspension, until all conditions set forth in paragraphs 4a-4j are satisfied.

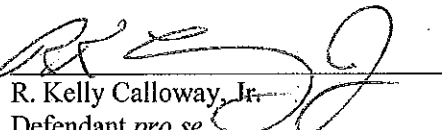
Signed by the undersigned Hearing Panel Chair with the consent of the other Hearing Panel members.

This the 18th day of October, 2016.


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

Agreed and consented to by:


Barry S. McNeill
Attorney for Plaintiff


R. Kelly Calloway, Jr.
Defendant *pro se*