

WAKE COUNTY  
NORTH CAROLINA



17928

BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
06 DHC 15

THE NORTH CAROLINA STATE BAR  
Plaintiff

v.

MARK E. RANDOLPH, ATTORNEY  
Defendant

)  
)  
) FINDINGS OF FACT  
) CONCLUSIONS OF LAW  
) AND ORDER OF  
) DISCIPLINE BY CONSENT  
)  
)

THIS MATTER was considered by a hearing committee of the Disciplinary Hearing Commission composed of T. Richard Kane, Chair; Charles M. Davis and Michael J. Hauser. Dudley Witt represented the Defendant, Mark E. Randolph, and Carolin Bakewell represented the N.C. State Bar. Both parties stipulate and agree to the findings of fact and conclusions recited in this order and to the discipline imposed. Defendant waives all right to appeal the entry of this consent order of discipline. Based upon the stipulations of fact and the consent of the parties hereto, the hearing committee hereby finds by clear, cogent and convincing evidence the following:

#### FINDINGS OF FACT

1. The Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. The Defendant, Mark E. Randolph, ("Randolph"), was admitted to the North Carolina State Bar in March 1991 and is, and was at all times referred to herein, 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 all of the periods relevant hereto, Randolph was engaged in the practice of law in Winston-Salem, North Carolina.

4. Randolph was properly served with the State Bar's summons and complaint herein.

5. On June 8, 1999, Randolph closed the sale of property by Gregory and Gretchen Knuffke ("the Knuffkes") to Robin Brett Kerr ("Kerr").

6. Prior to the Knuffke-Kerr closing, Randolph received a total of \$131,969.58 relating to the Knuffke-Kerr closing, and the funds were deposited into Randolph's trust account at Branch Banking & Trust Co. ("BB&T trust account").

7. Pursuant to the closing instructions, Randolph was directed to disburse \$35,596.98 of the closing proceeds to the Knuffkes, to repay a bridge loan provided to the Knuffkes by Ohio Casualty.

8. On or after the date of closing, Randolph gave the Knuffkes his trust account check for \$35,596.98, which they forwarded to Ohio Casualty.

9. The \$35,596.98 trust account check was never cashed or negotiated and the check was either lost in transit or after it was received by Ohio Casualty.

10. In 2002, an attorney employed by Ohio Casualty notified the Knuffkes that Ohio Casualty had no record of receiving the \$35,596.98 check and was demanding payment.

11. In June 2002, Randolph was notified that the \$35,596.98 payoff check had not been negotiated and agreed to investigate the matter.

12. Randolph asked a staff member to review the appropriate records to determine what had happened to the \$35,596.98 pay off check. The staff member did not follow through on the matter and Randolph let the issue "slip through the cracks."

13. Randolph did not issue a replacement check or disburse any funds to the Knuffkes or Ohio Casualty.

14. In July 2002 Randolph was admonished by the N.C. State Bar for committing various technical violations of the Rules of Professional Conduct governing the maintenance of trust accounts, including failing to reconcile the BB&T trust account at least quarterly and failing to keep proper records.

15. After receiving notice of the complaint that led to imposition of the July 2002 admonition, Randolph retained the services of a certified public accountant. The CPA conducted a random review of 25 client files relating to the BB&T account. This review did not indicate any shortage in the account or other similar discrepancy. That fact, coupled with the state of the BB&T trust account

records and the volume of activity in the account made a complete audit impractical. Instead, it was decided that Randolph would permit the BB&T account to "wind down" and would begin using another trust account at Southern Community Bank ("SCB trust account").

16. The Knuffkes' matter was not among the 25 files that were randomly reviewed by Randolph's CPA and the CPA's review did not disclose the problem with the Knuffke disbursement.

17. By May 2005, the balance in the BB&T trust account had dropped below \$2,000. None of the funds in the BB&T trust account were paid to or on behalf of the Knuffkes although Randolph should have maintained at least \$35,596.98 in trust for them in the account at all times on and after June 18, 1999.

18. The funds that should have been held in trust for the Knuffkes in the BB&T account were disbursed to third parties other than the Knuffkes, without their knowledge and consent, as a result of accounting errors by Randolph and his staff.

19. Neither Randolph nor any member of his staff received any of the Knuffkes' money and there is no evidence that the temporary misuse of the Knuffkes' funds was the result of dishonesty.

20. In January 2005, a representative of Ohio Casualty again contacted the Knuffkes and advised them that no replacement funds had been received from Randolph on their behalf.

21. Between January 2005 and April 13, 2005, the Knuffkes contacted Randolph's office on at least eight occasions to ask him to replace the check to Ohio Casualty and communicate with them about the matter.

22. Randolph did not respond to the Knuffkes' inquiries and did not disburse any money to Ohio Casualty.

23. Randolph failed to reconcile his BB&T trust account at least quarterly between June 1999 and May 2005 and failed to provide annual written accountings to the Knuffkes regarding the funds that he was holding on their behalf.

24. On April 18, 2005, the Knuffkes filed a grievance against Randolph with the North Carolina State Bar.

25. On or about May 25, 2005, shortly after he received notice of the Knuffkes' complaint, Randolph issued a replacement check to the Knuffkes in the amount of \$35,596.98 ("replacement check") drawn on the SCB trust account.

26. At the time that he issued the replacement check to the Knuffkes, Randolph did not recall that their funds had never been deposited into the SCB trust account. He did not check the SCB trust records to ascertain that the replacement check had been drawn on the proper account.

27. Funds belonging to other clients of Randolph were used to fund the \$35,596.98 replacement check that Randolph issued to the Knuffkes in May 2005, without the knowledge or consent of those clients.

28. Randolph's conduct in failing to review the record relating to the SCB trust account was negligent and led to the temporary, unintentional misuse of funds in the SCB trust account.

Based upon the foregoing Findings of Fact, the Hearing Committee enters the following:

#### CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Committee and the Committee has jurisdiction over the defendant, Mark Randolph and the subject matter of this proceeding.

2. Randolph's conduct, as set out in the findings of fact above, constitutes ground for discipline pursuant to N. C. Gen. Stat. Section 84-28(b) (2) in that Randolph violated the Revised Rules of Professional Conduct as follows:

a) By disbursing all or a portion of the \$35,596.98 that should have been held intact for the Knuffkes to or for the benefit of third parties without the Knuffkes' knowledge or consent, Randolph failed to hold entrusted property intact in violation of Rule 1.15-2(a) and failed to deliver fiduciary funds as directed by the client in violation of Rule 1.15-2(m).

b) By using client funds that should have been held intact in the SCB trust account to repay the Knuffkes in May 2005 without the knowledge or consent of the owners of the funds, Randolph failed to hold in trust property intact in violation of Rule 1.15-2(a) and failed to deliver fiduciary funds as directed by the client in violation of Rule 1.15-2(m).

c) By failing to reconcile his BB&T trust account at least quarterly between June 1999 and May 2005, Randolph failed to comply with the minimum reconciliation requirement set out in Rule 1.15-3(c).

d) By failing to provide annual written accountings to the Knuffkes regarding the funds that he was holding on their behalf between June 8, 1999 and May 27, 2005, Randolph failed to comply with the minimum accounting requirements set out in Rule 1.15-3(d).

e) By failing to respond to the Knuffkes' inquiries between January and April 2005, Randolph failed to keep clients reasonably informed about the status of a matter in violation of Rule 1.4.

f) By failing to issue a replacement check to the Knuffkes within a reasonable period of time after he learned that the original \$35,596.98 check had been misplaced, Randolph failed to promptly deliver entrusted funds to a client as directed, in violation of Rule 1.15-2(m).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Committee enters the following:

#### FINDINGS REGARDING DISCIPLINE

1. Randolph's conduct is mitigated by the following factors:
  - a. Cooperative attitude toward the Bar proceedings.
  - b. Acknowledgement of the wrongful nature of his conduct.
  - c. Remorse.
  - d. Restitution.
  - e. Lack of a dishonest or selfish motive.
2. Randolph's conduct is aggravated by the following factors:
  - a. Entry of an admonition in 2002 and a censure in 2003.
  - b. Multiple rule violations.
3. The mitigating factors outweigh the aggravating factors.
4. The hearing committee has considered lesser alternatives and finds that a public censure or reprimand would not sufficiently protect the public and that a stayed suspension is necessary to permit implementation of conditions to ensure the protection of the public and Randolph's future clients. Because of the nature of Randolph's trust account violations, this Committee would have considered an active suspension of Randolph's law license, and perhaps even an order of disbarment, were it not for the fact that he did not act with a dishonest motive and the fact that a substantial period of time has passed since the trust

account violations occurred, with no further evidence of misuse of any fiduciary funds.

Based upon the foregoing Findings of Fact, Conclusions of Law and Findings Regarding Discipline, the Hearing Committee enters the following:

#### ORDER OF DISCIPLINE

1. The law license of the Defendant, Mark Randolph, is hereby suspended for two years, effective 30 days from service of this order. The suspension is stayed for a period of three years, so long as Randolph complies with the following conditions:
  - a. The Defendant will respond to all letters of notice and requests for information from the N.C. State Bar by the deadline stated in the communication.
  - b. The Defendant will advise the Bar in writing of all address changes within 10 days of the change.
  - c. The Defendant will timely comply with his State Bar continuing legal education requirements and will pay all fees and costs assessed by the applicable deadline.
  - d. The Defendant will not violate the laws of any state or of the United States. Notwithstanding the foregoing, a violation of state traffic and motor vehicle laws will not be deemed to violate the terms of this order.
  - e. The Defendant will permit the State Bar to conduct random audits of all accounts over which he has signatory authority and into which client or fiduciary funds have been deposited. The Defendant shall provide the State Bar with all documents identified by the State Bar within 10 business days of receiving a request for such documents and shall be solely responsible for the expense of complying with the random audit request.
  - f. The Defendant shall not violate any provision of the Revised Rules of Professional Conduct.
  - g. The Defendant, at his sole expense, shall retain a certified public accountant who shall provide semi-annual written reports to the N.C. State Bar, confirming that the Defendant's trust account(s) comply with all applicable provisions of the Revised Rules of Professional Conduct. The reports shall be received in the Office of Counsel each July 1 and Jan. 1 throughout the period of the stayed suspension.

2. The Defendant will pay the costs of this proceeding within 30 days of service of the statement of costs upon by the State Bar.

3. If the stay of the suspension is lifted at any time and the suspension of Randolph's law license is activated for any reason, before seeking reinstatement of his license to practice law, Randolph must demonstrate by clear, cogent and convincing evidence that he has complied with each of the following conditions:

a. Complied with all provisions of 27 NCAC 1B .0124 of the State Bar Discipline & Disability Rules on a timely basis.

b. Complied with ¶1(a) – (g), above.

c. Paid the costs of this proceeding.

Signed by the undersigned Chair with the knowledge and consent of the other Hearing Committee members.

This the 26<sup>th</sup> day of July, 2006.

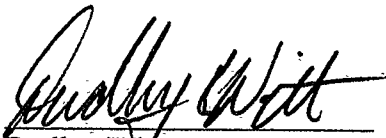


T. Richard Kane, Chair  
Disciplinary Hearing Committee

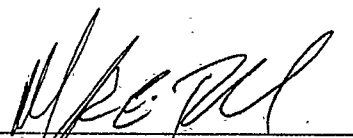
Seen and consented to:



Carolin Bakewell  
Plaintiff's Attorney



Dudley Wilt  
Defendant's Attorney



Mark E. Randolph  
Defendant