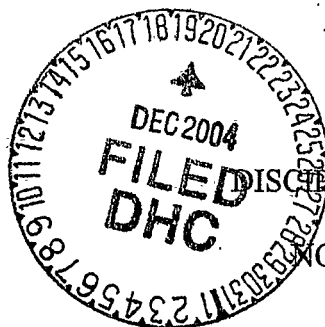


NORTH CAROLINA
WAKE COUNTY



25706

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
04 DHC 42

THE NORTH CAROLINA STATE BAR,)
Plaintiff,)
v.)
ARMINA SWITTENBERG,)
Defendant.)

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

This matter came on for hearing on November 23, 2004, before a duly appointed Hearing Committee of the Disciplinary Hearing Commission composed of Richard T. Gammon, Chair; W. Steven Allen, Sr., and Marguerite P. Watts. Thomas F. Moffitt and Carolin Bakewell represented the plaintiff (the "State Bar"). Eric C. Michaux is the attorney of record for the defendant, Armina Swittenberg ("Swittenberg" or the "Defendant"). Neither Michaux nor Swittenberg appeared at the hearing.

Based on the pleadings, exhibits to the pleadings, and other evidence presented during the hearing, the Hearing Committee finds by clear, cogent and convincing evidence, as follows:

FINDINGS OF JURISDICTIONAL FACTS AND CONCLUSIONS OF LAW

1. The State Bar is a body duly organized under the laws of North Carolina to regulate the practice of law and enforce the laws and administrative rules relating to attorney misconduct under the authority granted to it in Chapter 84 of the General Statutes of North Carolina, and pursuant to the Rules and Regulations of the North Carolina State Bar codified in Chapter 1 of Title 27 of the North Carolina Administrative Code, 27 NCAC 1 §§ .0201 et seq.). The State Bar is the proper party to bring this action predicated on attorney misconduct.

2. Swittenberg was admitted to the North Carolina State Bar in 1998, 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 Revised Rules of Professional Conduct.

3. During the times relevant to this Complaint, Swittenberg actively engaged in the practice of law in the State of North Carolina and practiced law in the city of Thomasville, Davidson County, North Carolina.

4. On August 19, 2004, the State Bar filed the complaint commencing this action alleging attorney misconduct by Swittenberg, and she accepted service of the summons and complaint that same day.

5. Swittenberg did not file an answer or other pleadings in response to the complaint. Instead, on October 26, 2004, she filed an affidavit in which she waived her right to a disciplinary hearing and attempted to surrender her law license.

6. The attempted surrender did not meet the requirements of Rule 27 NCAC 1B § .0117 (a) & (d) of the State Bar's Discipline and Disability Rules for two reasons: (A) Swittenberg failed to acknowledge in her affidavit that the material facts upon which the State Bar's complaint is predicated are true, and (B) Swittenberg failed to state that she was surrendering her license because she could not successfully defend against the charges against her. Both acknowledgments are required by Rule 27 NCAC 1B § .0117 (a) (3) & (4).

7. The State Bar moved for entry of default on October 27, 2004, and default was entered on October 28, 2004.

8. Swittenberg's attempt to surrender her law license did not deprive the Disciplinary Hearing Commission or this Hearing Committee of jurisdiction to adjudicate this case; nor did it moot this case.

9. Swittenberg was properly served with notice of the hearing herein.

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

11. The pleadings have closed, the facts are not at issue, and the matter is ready for disposition.

Based on the pleadings, exhibits to the pleadings, and other evidence presented to the Hearing Committee finds by clear, cogent and convincing evidence, as follows:

FINDINGS OF FACT

12. On August 12, 2002, Bank One ("Bank One") acquired ownership of property located at 4718 Andrew Link Street in Charlotte, North Carolina (the "Link Street property") through foreclosure of its own deed of trust, which was a first lien on the property. As a result, Bank One owned the Link Street property free of liens.

13. At some time between August 12, 2002 and October 18, 2002, Bank One entered into a contract to sell the Link Street property to Gregory E. Scales ("Scales"). The contract sales price for the property was \$475,000.

14. First Franklin Mortgage Company ("First Franklin") agreed to provide a loan to Scales in the amount of \$403,750 for the purchase of the Link Street property from Bank One.

15. Swittenberg was engaged as the closing attorney for the purchase by Scales of the Link Street property, including the closing of the First Franklin loan to Scales. The closing was scheduled for October 18, 2002. First Franklin sent \$403,750 in loan proceeds ("Link street loan proceeds") for the Scales loan to Swittenberg on or before that date and the funds were deposited into Swittenberg's attorney trust account no. 6895-0036666 at Wachovia Bank ("Wachovia trust account.").

16. After receiving the Link Street loan proceeds from First Franklin, Swittenberg held those funds in a fiduciary capacity and was required to maintain a balance of at least \$403,750 in her Wachovia trust account at all times for the benefit of the lender or the borrower pending completion of the transfer of the property in accordance with the lender's closing instructions or until she returned the money to First Franklin.

17. The transfer of the Link Street property did not actually take place and no deed or deed of trust was signed or recorded on or after October 18, 2002.

18. Despite the fact that no closing had occurred and in violation of the closing instructions, Swittenberg disbursed \$64,209.68 of the Link Street loan proceeds to Glynn P. Hubbard ("Hubbard"), an individual who was not authorized by First Franklin or Bank One to receive any of the proceeds of the loan or sale. The unauthorized disbursement is memorialized in a document, dated October 18, 2002 and signed by Hubbard and Swittenberg's non-lawyer assistant, Mavis Swittenberg.

19. Thereafter, Swittenberg misappropriated all of the remaining Link Street loan proceeds for the benefit of herself or third parties without the knowledge or consent of First Franklin or Bank One.

20. After discovering that the property transfer did not take place, First Franklin demanded that Swittenberg account for and return the Link Street loan proceeds. Swittenberg falsely told Steve Barnett ("Barnett"), a First Franklin representative, that she had approximately \$300,000 of the loan proceeds remaining in her trust account that she would return. Despite First Franklin's repeated demands, Swittenberg never returned any of the money.

21. Swittenberg prepared a HUD-1 closing statement, dated October 18, 2002, in which she falsely stated that \$323,000 of the closing proceeds had been disbursed to pay off a pre-existing mortgage to a lender (that was not identified on the HUD-1) even though Swittenberg knew or should have known that there was no pre-existing mortgage loan encumbering the property. The HUD-1 also failed to reflect that Swittenberg disbursed \$64,209.68 of the proceeds to Hubbard.

22. On January 22, 2004, a State Bar subpoena for cause audit was issued and served on Swittenberg, and on February 11, 2004, Superior Court Judge Donald W. Stephens entered a Consent Order of Preliminary Injunction freezing all bank accounts belonging to Swittenberg into which she may have deposited client or fiduciary funds. Examination of Swittenberg's attorney trust accounts showed a balance of \$3,904.23 in Swittenburg's attorney trust account no.

5212788564 at Branch Banking & Trust Co. and a negative balance in the Wachovia trust account at the time the preliminary injunction was entered.

Based upon the foregoing Findings of Fact, and any mixed findings of fact and conclusions of law howsoever designated, the Hearing Committee makes the following:

CONCLUSIONS OF LAW

1. Swittenberg's foregoing acts and omissions constitute grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Swittenberg violated the Revised Rules as follows:

(a) By failing to disburse the \$403,750 for the Link Street closing as required by the lender's closing instructions, Swittenberg failed to disburse and pay entrusted funds in violation of Rules 1.15-2 (a) and (m).

(b) By intentionally using the funds she received for the closing on the Link Street property and disbursing the money for purposes other than the closing:

(1) Swittenberg used entrusted funds either for her own benefit or for the benefit of someone other than the legal or beneficial owner of the funds in violation of Rule 1.15-2 (j);

(2) Swittenberg fraudulently or knowingly and willfully misapplied or converted money belonging to another person that was in her possession as a fiduciary to the use of herself or another, thereby committing criminal act(s) of embezzlement, N.C. Gen. Stat. § 14-90, that reflect adversely on her honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4 (b); and

(3) Swittenberg engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4 (c).

(c) By preparing a false HUD-1 closing statement that did not reflect how entrusted money was disbursed at closing and submitting the HUD-1 to First Franklin:

(1) Swittenberg knowingly made a false statement(s) of material fact to a third person in violation of Rule 4.1;

(2) Swittenberg knowingly made false statements to obtain a loan from a lending institution, thereby committing criminal act(s), 18 U.S.C. § 1010, that reflect adversely on her honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4 (b); and

(3) Swittenberg engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4 (c).

(d) By falsely telling Barnett that she had approximately \$300,000 of the loan proceeds remaining in her trust account that she would return, Swittenberg knowingly made a false statement(s) of material fact to a third person in violation of Rule 4.1.

Based upon the foregoing Findings of Fact and Conclusions of Law, and any mixed findings of fact and conclusions of law howsoever designated, the Hearing Committee makes the following:

FINDINGS OF FACT REGARDING DISCIPLINE

1. Swittenberg misappropriated funds that should have been held in a fiduciary capacity in her BB&T attorney trust account, including funds relating to the Turner/Lama closing, the Katie Harrison/Flick Mortgage closing, the Eric Evans/Flick Mortgage closing and the Penigraft closing.

2. Swittenberg misappropriated funds that should have been held in a fiduciary capacity in her Wachovia attorney trust account, including funds belonging to James Carter, funds relating to the closing of property at 2908 Triangle Lake Street and funds relating to the closing of property at 1312 Edgedale Street.

3. Swittenberg's conduct is aggravated by the following facts:

- a) She was motivated by a dishonest or selfish motive.
- b) She engaged in a pattern of misconduct.
- c) She failed to show remorse or acknowledge any wrongdoing.
- d) She engaged in bad faith obstruction of the disciplinary process by giving false information to the State Bar's investigator, Ed White.
- e) She failed to timely comply with the consent order of preliminary injunction entered in the Wake County Superior Court.
- f) She engaged in multiple violations of the Rules of Professional Conduct.
- g) She has failed to make restitution.

4. The Hearing Committee found no evidence of any mitigating factor.

5. Swittenberg's dishonest conduct has caused significant harm to her client, a third party lender and the administration of justice.

6. Swittenberg's misconduct has also harmed the standing of the legal profession by undermining trust and confidence in lawyers and the legal system.

7. Disbarment is the only sanction that can adequately protect the public for the following reasons:

- (a) An order of discipline less than disbarment would not sufficiently protect the public because Swittenberg committed misdeeds involving moral turpitude and violations of the

public trust. The dishonest and fraudulent conduct, material misrepresentations and misappropriation of money involved surreptitious theft of money belonging to others and which she had a fiduciary obligation to protect.

(b) Entry of an order imposing lesser discipline would fail to acknowledge the seriousness of the offenses that Swittenberg committed and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar in North Carolina.

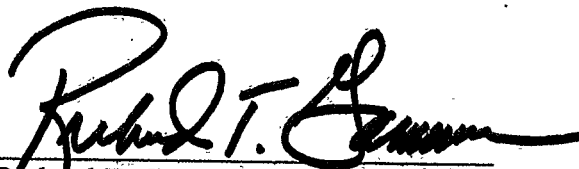
(c) The protection of the public requires that Swittenberg not be permitted to resume the practice of law unless and until she demonstrates that she has reformed, that she understands her obligations to her clients, the public, the courts and the legal profession, and that reinstatement would not injure the standing of the legal profession. Disbarred attorneys must show reformation among other things, before they may resume the practice of law, whereas no such showing of reformation is required of attorneys whose licenses are suspended for a term certain.

Based upon the foregoing Findings of Fact, Conclusions of Law and Findings of Fact Regarding Discipline, and any mixed findings of fact and conclusions of law howsoever designated, the Hearing Committee hereby enters the following:

ORDER OF DISCIPLINE

1. Armina Swittenberg is hereby DISBARRED from the practice of law.
2. Swittenberg shall surrender her law license and membership card to the Secretary of the State Bar no later than 30 days from service of this order upon Swittenberg.
3. Swittenberg shall pay the costs of this proceeding as assessed by the Secretary Bar no later than 30 days from service of this order upon Swittenberg.
4. Swittenberg shall comply with all provisions of 27 NCAC 1B § .0124 of the North Carolina State Bar Discipline & Disability Rules ("Discipline Rules").
5. Prior to seeking reinstatement of her law license, Swittenberg must present evidence to the Office of Counsel that she has made restitution of the \$403,750 misappropriated from the Link Street closing funds. She must also make restitution as required by 27 NCAC 1B § .0125 of the Discipline Rules.

Signed by the undersigned chairman with the full knowledge and consent of the other
Hearing Committee members, this the 30th day of November 2004.

A handwritten signature in black ink, appearing to read "Richard T. Gammon". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

Richard T. Gammon
Chairman, Hearing Committee