

NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
NORTH CAROLINA STATE BAR
99 DHC 28

THE NORTH CAROLINA STATE BAR)
)
Plaintiff,)
)
v.)
)
W. KELLY ELDER, JR., Attorney,)
)
)
Defendant.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER OF DISCIPLINE

This matter was heard on the 11th day of February, 2000, before a hearing committee of the Disciplinary Hearing Commission composed of Richard T. Gammon, Chair; Kenneth M. Smith, and Anthony E. Foriest, Hearing Committee Members. The defendant, W. Kelly Elder, Jr. was represented by Doug Kingsbery. The plaintiff was represented by Larissa Erkman. Based upon the pleadings and stipulations of fact contained in the Stipulations on Prehearing Conference filed by the parties, the Hearing Committee hereby enters the following:

FINDINGS OF FACT

1. 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. Defendant W. Kelly Elder, Jr. (hereinafter, "Defendant"), was admitted to the North Carolina State Bar on August 21, 1977 and is, and was at all times referred to herein, an attorney at law licensed to practice law 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 the periods referred to herein, Defendant was engaged in the practice of law in North Carolina and maintained a primary law office in the City of Burlington, Alamance County, North Carolina.
4. The Defendant willfully failed to timely file federal individual income tax returns with the Internal Revenue Service for the calendar years 1991 through 1994.
5. During the calendar years 1991 through 1994, the Defendant received annual income higher than the minimum statutory amount requiring a taxpayer to file an individual tax return.
6. On or around February 27, 1996, the Defendant filed delinquent returns for each of the four calendar years, 1991, 1992, 1993 and 1994, after a criminal investigation had been initiated by the Criminal Investigation Division of the Internal Revenue Service.

7. On August 4, 1998, the Defendant was charged in the United States Court for the Middle District of North Carolina with four counts of willful failure to timely file federal income tax returns for the calendar years 1991, 1992, 1993, and 1994 in violation of 26 U.S.C. § 7203.

8. A certified copy of the Summons in a Criminal Case and the criminal information issued against the Defendant on August 5, 1998 in the United States District Court for the Middle District of North Carolina, case number 1:98CR215-1 is attached hereto and incorporated herein as Exhibit A.

9. On December 9, 1998, the Defendant pled guilty to one count of misdemeanor failure to timely file a federal income tax return for the calendar year 1991. The United States District Court for the Middle District of North Carolina entered a judgment of guilty and placed the Defendant on probation for three years subject to standard and special conditions of supervision, including the payment of criminal monetary penalties in the total amount of \$2,525.00.

10. The United States Court for the Middle District of North Carolina dismissed the remaining three counts of the information charging the Defendant with willful failure to timely file tax returns for the calendar years 1992, 1993 and 1994.

11. Defendant voluntarily reported the misconduct at issue herein to the North Carolina State Bar on August 4, 1998, prior to the issuance of a criminal summons and information.

Based upon the foregoing Findings of Fact and the stipulations contained in the Stipulations on Prehearing Conference filed by the parties, 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, W. Kelly Elder, Jr., and the subject matter.
2. The Defendant has been convicted of a criminal offense showing professional unfitness in violation of N.C. Gen. Stat. § 84-28(b)(1); and
3. By willfully failing to timely file federal individual income tax returns for the calendar years 1991 through 1994, the Defendant committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects, in violation of Rule 1.2(b) of the Rules of Professional Conduct.

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the evidence and arguments of the parties concerning the appropriate discipline, the Hearing Committee hereby makes additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. The Defendant's misconduct is aggravated by the following factors:
 - Defendant's conduct involved multiple offenses

2. The Defendant's misconduct is mitigated by the following factors:

- Absence of any prior disciplinary record
- Timely good faith efforts to make restitution or to rectify consequences of misconduct
- Full and free disclosure to the Grievance Committee and the DHC and a cooperative attitude toward the proceedings
- Good character or reputation
- Physical or mental disability or impairment
- Interim rehabilitation
- Imposition of other penalties or sanctions
- Remorse

3. The mitigating factors outweigh the aggravating factors.

Based upon the foregoing aggravating and mitigating factors and the arguments of the parties, the Hearing Committee hereby enters the following

ORDER OF DISCIPLINE

1. The license of the defendant, W. Kelly Elder, Jr., is hereby suspended for a period of two years, and the two-year suspension is stayed for a period of three years on the following conditions:

a. The Defendant shall not violate any local, state or federal laws during the period of stayed suspension.

b. The Defendant shall not violate any provisions of the Revised Rules of Professional Conduct during the period of stayed suspension.

c. The Defendant shall comply with all standard and special conditions of his federal probation imposed in the United States District Court for the Middle District of North Carolina, case number 1:98CR215-1.

d. The Defendant shall report to the Office of the Secretary of the North Carolina State Bar any finding by a federal district court judge or magistrate judge of a violation of his probation, regardless of the punishment imposed by that judge.

e. Throughout the period of the stayed suspension, the Defendant shall timely pay the legally required estimated income taxes, if any, due and payable to the North Carolina Department of Revenue and the Internal Revenue Service on April 15, June 15, September 15 and January 15 of each tax year (or at such other intervals or times required by law) so as to remain current with his obligations to pay state and federal income taxes, and if Defendant is not legally required to pay estimated income taxes, he shall pay annual income taxes due and payable of each tax year during the period of the stayed suspension.

f. During the stayed suspension, the Defendant shall file all state and federal tax returns in a timely manner.

g. The Defendant shall provide to the Office of the Secretary of the North Carolina State Bar written verification that he has filed all required tax returns with the North Carolina

Department of Revenue and the Internal Revenue Service during the stayed suspension. This written verification shall be sent on or before April 15th each year of the stayed suspension period. If an extension for filing income tax returns is sought, then written verification shall be provided to the Office of the Secretary of the North Carolina State Bar within one week of the filing date of that return.

h. The Defendant shall pay all costs incurred in this proceeding and taxed against the Defendant within ninety (90) days of service of this order upon the Defendant.

2. If during the stay of the two-year suspension, the Defendant fails to comply with any one or more conditions stated in paragraphs 1 (a) – (h), then the stay of the suspension of his law license may be lifted as provided in §.0114(x) of the North Carolina State Bar Discipline & Disability Rules.

3. If any stay of the suspension of the Defendant's law license is lifted, as provided in the foregoing paragraph, the Disciplinary Hearing Commission may enter an order providing for such conditions as it deems necessary for obtaining a stay of the remaining period of suspension or for reinstatement of the Defendant's license at the end of the two-year suspension.

4. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, §.0114(x) of the North Carolina State Bar Discipline & Disability Rules throughout the period of the stayed suspension.

Signed by the undersigned Hearing Committee chair with the consent of the other Hearing Committee members.

This the ~~17th~~ day of ~~March~~ 2000. *(RTG)*

This the 16th of May 2000

Richard T. Gammon
Richard T. Gammon, Chairman
Hearing Committee