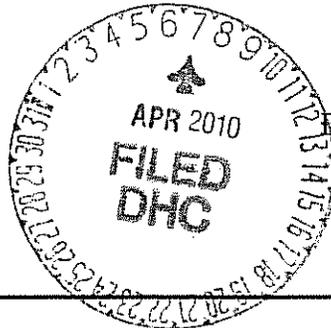


NORTH CAROLINA
WAKE COUNTY



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

THE NORTH CAROLINA STATE BAR,)
Plaintiff)
v.)
WILLIE D. GILBERT II, Attorney,)
Defendant)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
ORDER OF DISCIPLINE

This matter came before a hearing panel of the Disciplinary Hearing Commission composed of Tommy W. Jarrett, Chair; Donna R. Rascoe and Donald G. Willhoit on March 18-19, 2010. A. Root Edmonson represented the North Carolina State Bar. The Defendant, Willie D. Gilbert II was present and was represented by Eric C. Michaux. Based upon the record and the evidence presented at the hearing, and after considering the arguments of counsel, the panel finds the following facts were established by clear, cogent and convincing evidence:

FINDINGS OF FACT

1. The plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is a 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, Willie D. Gilbert II (hereinafter Mr. Gilbert), was admitted to the North Carolina State Bar on August 18, 1990 and he is, and was at all relevant times referred to, an Attorney at Law licensed to practice in North Carolina, and subject to the rules, regulations, and Rules of Professional Conduct of the North Carolina State Bar and the laws of North Carolina.

3. In all relevant times Mr. Gilbert maintained a trust account with Central Carolina Bank and an operating account with Centura Bank. The operating account was his regular firm checking account.

4. On or about March 4, 1997, Necole S. Maxwell (hereinafter Ms. Maxwell) was injured in an automobile accident. Ms. Maxwell retained Mr. Gilbert to represent her in the ensuing personal injury action.

5. On or before September 5, 1997, Mr. Gilbert received a \$4,500.00 check in settlement of Ms. Maxwell's claim.

6. On September 5, 1997, Ms. Maxwell signed a settlement statement prepared by Mr. Gilbert that authorized \$1,500.00 to be disbursed to Mr. Gilbert as his fee, \$1,500.00 to be disbursed to Dr. Spiro N. Comis (hereinafter Dr. Comis) to satisfy a doctor's lien held by Dr. Comis, and the balance of \$1,500.00 to be disbursed to Ms. Maxwell.

7. On or about September 8, 1997, Mr. Gilbert prepared three trust account checks to disburse from Ms. Maxwell's settlement proceeds according to the settlement statement. These checks were checks numbered 1034, 1035 and 1036, all dated September 8, 1997, drawn on his trust account.

8. Mr. Gilbert did not deliver check 1035 to Dr. Comis, and this check was never negotiated. Accordingly, at least \$1,500.00 should have remained in Mr. Gilbert's trust account until paid to Dr. Comis.

9. On or after April 17, 1998, in addition to Ms. Maxwell's \$1,500.00 still due to Dr. Comis, Mr. Gilbert's trust account also should have had \$973.43 due to Durham Rehabilitation for a client by the name of Pamela Hailey and \$2,200.00 due to Raleigh Rehabilitation for a client by the name of Larry Pyrtle. Both of these latter amounts were deposited into Mr. Gilbert's trust account and were required to satisfy the respective clients' doctor's liens. Accordingly, the balance of Mr. Gilbert's trust account should have been at least \$4,673.43 at all times on or after April 17, 1998 until the doctors liens for each of these clients were paid from the trust account.

10. On April 20, 1998, Mr. Gilbert wrote trust account check number 1078 in the amount of \$100.00 to his mother. At the time check number 1078 was written, Mr. Gilbert's mother had no funds in Mr. Gilbert's trust account and Mr. Gilbert had no funds in the account to which he was then entitled.

11. On April 22, 1998, Mr. Gilbert wrote trust account check number 1079 in the amount of \$100.00 to his then-fiancé, now current-wife, and then-office employee, Sheri Hall (hereinafter, Ms. Hall). At the time check number 1079 was written, Ms. Hall had no funds in Mr. Gilbert's trust account and Mr. Gilbert had no funds in the account to which he was then entitled.

12. On April 28, 1998, Mr. Gilbert wrote trust account check number 1081 in the amount of \$90.00 to Ms. Hall. At the time check number 1081 was written, Ms. Hall had no funds in Mr. Gilbert's trust account and Mr. Gilbert had no funds in the account to which he was then entitled.

13. At the time that Mr. Gilbert wrote checks numbered 1078, 1079, and 1081 from his trust account, Mr. Gilbert's operating account had insufficient funds on deposit for Mr. Gilbert to have been able to pay those personal obligations from his operating account.

14. As a result of Mr. Gilbert paying personal obligations from his trust account, the trust account balance dipped below the \$4,673.43 balance Mr. Gilbert should have maintained to cover Mr. Gilbert's obligations on behalf of Ms. Maxwell, Ms. Hailey and Mr. Pyrtle. After checks 1078, 1079, and 1081 cleared, the balance in Mr. Gilbert's trust account was \$4,379.10.

15. Mr. Gilbert appropriated his clients' funds to his own use.

16. Dr. Comis was later paid, on or about January 13, 1999, out of funds from Mr. Gilbert's operating account.

BASED UPON the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS OF LAW

1. All parties are properly before this panel of the Disciplinary Hearing Commission and the Disciplinary Hearing Commission and this panel have jurisdiction over Mr. Gilbert and the subject matter.

2. Mr. Gilbert's conduct, as set out above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(a) & (b)(2) in that Mr. Gilbert violated the Rules of Professional Conduct in effect at the time as follows:

- (a) By appropriating the funds used to pay checks numbered 1078, 1079, and 1081 from funds he held in a fiduciary capacity for Ms. Maxwell, Ms. Hailey and Mr. Pyrtle to his own use, Mr. Gilbert committed criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b); engaged in conduct involving dishonesty, fraud, and deceit in violation of Rule 8.4(c); and failed to maintain property received in a fiduciary capacity separately from his own property in violation of Rule 1.15-1(a) and (c).
- (b) By failing to promptly pay Dr. Comis as directed by Ms. Maxwell from the funds he retained for that purpose, Mr. Gilbert failed to promptly pay or deliver to a third person as directed by the client the funds he held for that purpose in violation of Rule 1.15-2(h).

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the evidence and arguments presented at the hearing concerning appropriate discipline, the hearing panel hereby finds by clear, cogent, and convincing evidence the following additional:

FINDINGS OF FACT REGARDING DISCIPLINE

- 1. The findings in phase one of this hearing are incorporated here by reference.

2. Mr. Gilbert was actively suspended for a substantial period of time as a result of an order of discipline in 2000 DHC 3.
3. Mr. Gilbert's conduct in this proceeding involved misappropriation and deceit; however, this conduct occurred before the conduct that resulted in the order of discipline imposed in 2000 DHC 3.
4. Mr. Gilbert put his own personal interest and the interests of others ahead of his clients' interests.
5. Mr. Gilbert's conduct had the potential to significantly and substantially damage his clients and could only have a negative impact on his clients and the public's perception of the legal profession.
6. The investigation of the allegations in this matter began in July 1999, but the Complaint in this matter was not filed until September 2003. The delay in filing the Complaint was not caused by Mr. Gilbert.

Based upon the Findings of Fact, Conclusions of Law, and Additional Findings Regarding Discipline, the hearing panel also enters the following:

CONCLUSIONS REGARDING 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), (2) and (3) of the Rules and Regulations of the North Carolina State Bar and finds the following factors are applicable in this matter:

General Factors from 27 N.C.A.C. 1B §.0114(w) (3):

- a. Mr. Gilbert had a prior disciplinary offense in this state;
- b. Mr. Gilbert had a dishonest or selfish motive;
- c. Mr. Gilbert exhibited a pattern of misconduct;
- d. Mr. Gilbert committed multiple offenses;
- e. There was a three-year delay in prosecution of this disciplinary offense through no fault of Mr. Gilbert;
- f. Mr. Gilbert refused to acknowledge the wrongful nature of his conduct; and

- g. At the time of the offenses in this matter, Mr. Gilbert was inexperienced in the practice of law.

Suspension and Disbarment Factors from 27 N.C.A.C. 1B §.0114(w) (1):

- a. Mr. Gilbert intended to cause the resulting harm or potential harm;
- b. The circumstances reflected Mr. Gilbert's lack of honesty;
- c. Mr. Gilbert elevated his own interest above the interests of his clients;
- d. Mr. Gilbert's conduct had a negative impact on his clients' and the public's perception of the legal profession; and
- e. Mr. Gilbert engaged in acts of dishonesty and deceit.

Disbarment Factors from 27 N.C.A.C. 1B §.0114(w) (2):

- a. Mr. Gilbert engaged in acts of dishonesty and deceit; and
 - b. Mr. Gilbert engaged in misappropriation of clients' funds.
2. The hearing panel considered alternatives other than suspension or disbarment and found that public censure, reprimand or admonition would not be sufficient discipline because of the gravity of the actual and potential harm to his clients, the public, the administration of justice and the legal profession and the significant potential harm Mr. Gilbert poses to the public.
 3. The hearing panel considered disbarment, but the majority of the hearing panel rejected that discipline because of the unique circumstances of this case. Those circumstances include that the conduct at issue occurred before the conduct that resulted in the prior order of discipline imposed in 2000 DHC 3, for which Mr. Gilbert has already served a substantial period of active suspension. Further, there was a three-year delay in the prosecution of the conduct at issue in this proceeding, through no fault of Mr. Gilbert. Suspension is appropriate in this case to address the rule violations and to provide some monitoring of Mr. Gilbert's practice to help ensure that he does not engage in further professional misconduct.

BASED UPON the foregoing Findings of Fact, Conclusions of Law, and Findings and Conclusions Regarding Discipline, the majority of the hearing panel, consisting of Donna R. Rascoe and Donald G. Willhoit, enters the following:

ORDER OF DISCIPLINE

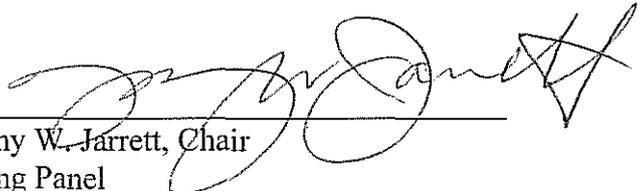
1. The license to practice law in the State of North Carolina of Willie D. Gilbert, II is hereby suspended for five (5) years from the date this Order of Discipline is served upon him.
2. The period of suspension is stayed for five (5) years as long as Mr. Gilbert complies and continues to comply with the following conditions:
 - a. Mr. Gilbert must respond to all letters of notice and other requests for information from the North Carolina State Bar by the deadline stated in the communication or request;
 - b. Mr. Gilbert must advise the North Carolina State Bar in writing of all address changes within ten (10) days of any change of address;
 - c. Mr. Gilbert must comply with all membership and continuing legal education requirements of the North Carolina State Bar and pay all fees and costs assessed by the applicable deadline;
 - d. Mr. Gilbert must not violate the laws of any state or of the United States;
 - e. Mr. Gilbert must not violate any of the Rules of Professional Conduct;
 - f. Mr. Gilbert must allow the North Carolina State Bar to examine all accounts over which he has signatory authority into which client or fiduciary funds have been deposited and must produce the required records within five (5) business days of a request for examination at his own expense;
 - g. Mr. Gilbert, at his own expense, must retain a certified public accountant (CPA) who shall provide semi-annual written reports to the Office of Counsel of the North Carolina State Bar confirming that Mr. Gilbert's handling of his trust account complies with all applicable provisions of the Rules of Professional Conduct. Mr. Gilbert's CPA's report must be delivered to the Office of Counsel within 10 days of the periods ending June 30 and December 31 throughout the period of the stayed suspension;
 - h. Mr. Gilbert must complete twenty (20) hours of continuing legal education in the area of law office management and trust account management. Mr. Gilbert shall provide written proof of successful completion of the CLE courses to the Office of Counsel within the (10) days of completing the courses; and

- i. Mr. Gilbert must pay the costs of this proceeding within thirty (30) days after service of the statement of costs upon him by the Secretary of the North Carolina State Bar.
3. If Mr. Gilbert fails to comply with any one or more of the conditions referenced in Paragraph 2, then the stay of the suspension of his law license may be lifted as provided in 27 N.C.A.C. 1B § .0114(x). The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to § .0114(x) throughout the period of the stayed suspension.

Dissent

Tommy W. Jarrett concurs in the Findings of Fact Regarding Discipline and the first two paragraphs of the Conclusions Regarding Discipline; however, he respectfully dissents from the discipline imposed by the majority of the hearing panel. Mr. Gilbert's conduct, taken in combination with the conduct found in 2000 DHC 3, leads Mr. Jarrett to the conclusion that Mr. Gilbert should be disbarred.

Signed by the undersigned Chair of the hearing panel with the knowledge and consent of the other members of the hearing panel this the 6th day of April, 2010.



Tommy W. Jarrett, Chair
Hearing Panel