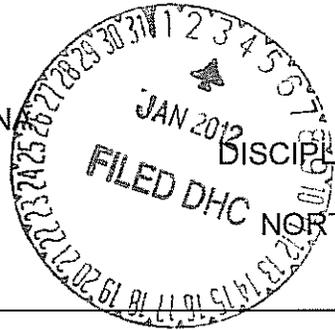


NORTH CAROLINA  
WAKE COUNTY



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

THE NORTH CAROLINA STATE BAR, )  
Plaintiff )  
v. )  
GARY B. KIVETT, Attorney, )  
Defendant )

ORDER OF  
DISCIPLINE

THIS MATTER was considered by a hearing panel of the Disciplinary Hearing Commission composed of Fred M. Morelock, Chair, Robert F. Siler, and Karen B. Ray pursuant to 27 N.C.A.C. 1B §.0114 of the North Carolina State Bar Discipline and Disability Rules. Defendant, Gary B. Kivett, was represented by Dudley A. Witt and David B. Freedman. Plaintiff was represented by Deputy Counsel Margaret Cloutier. Defendant has agreed to waive a formal hearing in this matter and both parties stipulate and consent to the findings of fact and conclusions of law recited in this order and to the discipline imposed. Defendant stipulates that he waives any right to appeal this consent order or challenge in any way the sufficiency of the findings by consenting to the entry of this order.

Based upon the pleadings and the admissions by consent of the parties, the hearing panel finds by clear, cogent and convincing evidence the following

#### FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar (hereinafter "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 Discipline and Disability Rules of the North Carolina State Bar promulgated thereunder.

2. Defendant, Gary B. Kivett (hereinafter "Kivett" or "Defendant"), was admitted to the North Carolina State Bar on February 28, 1989 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 the times relevant herein, Defendant actively engaged in the practice of law in the State of North Carolina and maintained a law office in Spruce Pine, Mitchell County, North Carolina.

4. In or about 2006 Defendant represented a female client with the initials S. S. J. in a criminal matter.

5. During Defendant's representation of Ms. J., Defendant made inappropriate comments and advances toward her, making it known to Ms. J. that Defendant wanted to have sex with her. Such comments and advances included:

a. telling Ms. J. she was beautiful and had a nice figure;

b. asking Ms. J. to have dinner with him at his home and that she would have fun;

c. trying to kiss Ms. J. and touching her waist in his attempts to kiss her.

6. In or about November 2005 Defendant represented a female client with the initials A. C. for a speeding ticket.

7. During his representation of Ms. C. Defendant had sexual relations with Ms. C.

8. In or about September 2005 Defendant represented a female client with the initials J. D. E. in a Department of Social Services matter.

9. During Defendant's representation of Ms. E., Defendant had sexual relations with Ms. E. at her home.

10. In or about March or April 2007 a woman with the initials M. D. V. consulted Defendant at his office concerning a divorce.

11. During Ms. V.'s consultation with Defendant, Defendant made inappropriate comments and advances toward her, making it known to Ms. V. that Defendant wanted to have sex with her. Such comments and advances included:

a. taking her hand and placing it over his genitals;

b. trying to convince her to perform oral sex on him;

c. kissing her.

12. In 2006 Defendant represented a male client with the initials S. R. in a Department of Social Services matter. During that representation, Mr. R. was arrested for failure to pay child support.

13. Mr. R.'s wife, J. R., met with Defendant regarding Mr. R.'s bond on the child support matter.

14. Defendant convinced Mrs. R. to travel to a tract of land owned by Defendant on which Mr. R. had agreed to clear trees. While there, Defendant made inappropriate comments and advances toward Mrs. R., making it known to her that Defendant wanted to have sex with her. Such comments and advances included:

- a. complimenting her on the appearance of her breasts and buttocks;
- b. touching her breast and trying to kiss her.

15. In or about late 2006 Mr. R. was charged with felony offenses. Mrs. R. consulted with Defendant regarding Mr. R.'s charges. Defendant was ultimately appointed to represent Mr. R. in December 2006.

16. In or about early 2007, Defendant repeatedly contacted Mrs. R. During those conversations and/or meetings, Defendant resumed his advances toward Mrs. R., asking her to go away with him for the night to Cherokee, trying to convince her to have sex with him, and masturbating in her presence at his residence.

Based upon the foregoing Findings of Fact, the hearing panel enters the following:

#### CONCLUSIONS OF LAW

1. All parties are properly before the Disciplinary Hearing Commission and the Disciplinary Hearing Commission has jurisdiction over Defendant, Gary B. Kivett, and the subject matter of this proceeding.

2. Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C.G.S. 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct in effect at the time of the conduct as follows:

a. By making inappropriate sexual comments and advances toward Ms. J. and Ms. V, touching and attempting to touch them in a sexual manner, and attempting to convince them to have sex with him, Defendant attempted to have sex with his client(s) which constitutes an attempted violation of Rule 1.19(a) in violation of Rule 8.4(a), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);

b. By making inappropriate sexual comments and advances toward Ms. J. and Ms. V., touching and attempting to touch them in a sexual manner, and attempting to convince them to have sex with him, and by having sexual relations with Ms. C. and Ms. E., Defendant demonstrated a personal interest that may have materially limited his representation of those clients in violation of Rule 1.7(a)(2);

c. By having sexual relations with Ms. C. and Ms. E. during his representation of them, Defendant had sexual relations with a current client in violation of Rule 1.19(a) and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d); and

d. By making inappropriate sexual comments and advances toward Mrs. R., touching and attempting to touch her in a sexual manner, and attempting to convince her to have sex with him at a time during which he represented Mr. R., Defendant demonstrated a personal interest that may have materially limited his representation of Mr. R. in violation of Rule 1.7(a)(2) and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

Based upon the pleadings and the admissions by consent of the parties, the hearing panel also finds by clear, cogent and convincing evidence the following

#### ADDITIONAL FINDINGS REGARDING DISCIPLINE

1. Defendant's victims were vulnerable not just in terms of their legal status but also with respect to their economic status. Defendant was appointed by the court to represent Ms. J., Ms. E., and Mr. R., who did not have the financial means to fire him and retain another attorney. Defendant's other clients also had similar financial constraints. Defendant's behavior left these clients with few options regarding representation.

2. Defendant's conduct toward his clients was purposeful and was of a nature that it would be obvious to Defendant that the conduct was exploitive of his clients' trust and reliance upon him and from which a conflict of interest would inherently arise.

3. Defendant's conduct demonstrated that he put his own personal interests and desires before the legal interests of his clients. Defendant's conduct manifests an inappropriate perception of women and an inappropriate perception of a proper relationship with female clients.

4. Clients are entitled to attorneys they can trust to act with commitment and dedication to their interests in their legal matters. Defendant violated the trust inherent in the attorney-client relationship by putting his sexual desires above the best interests of his clients. Defendant betrayed his clients' trust, leaving them with few options but to deal with an attorney whose attention was diverted by his personal interests in seeking a sexual relationship from them. Defendant's conduct reflects negatively on his trustworthiness and integrity.

5. Defendant's conduct also has the potential to cause significant harm to the standing of the legal profession in the eyes of the public because it shows disregard for his obligations as an attorney and officer of the court. Such erosion of public confidence in attorneys tends to sully the reputation of, and fosters disrespect for, the profession as a whole. Confidence in the legal profession is a building block for public trust in the entire legal system.

6. Defendant was disciplined by Admonition in 2006 for engaging in a conflict of interest for representing two clients with interests adverse to each other.

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 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 determines that the following factors are applicable in this matter:

- a. Defendant's prior disciplinary offense;
- b. Defendant's selfish motive;
- c. Defendant's pattern of misconduct;
- d. That Defendant committed multiple offenses;
- e. Defendant's cooperative attitude toward the proceedings;
- f. Defendant's remorse;

g. The vulnerability of the victims; and

h. Defendant's years of experience in the practice of law.

2. The hearing panel has also 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 determines that the following factors are applicable in this matter:

a. Defendant's intent to commit acts where the harm or potential harm was foreseeable;

b. The circumstances reflecting Defendant's lack of trustworthiness and integrity;

c. Defendant's elevation of his own interests above those of his clients; and

d. The negative impact of Defendant's actions on the public's perception of the profession.

3. The hearing panel has considered 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 determines that none of the factors are established by the evidence in this case.

4. The hearing panel has carefully considered all of the different forms of discipline available to it. An admonition, reprimand, or censure would not be sufficient discipline because of the gravity of the potential harm Defendant's conduct caused to the public, the administration of justice, and the legal profession.

5. The panel determines that discipline short of suspension would not adequately protect the public, the legal profession or the administration of justice for the following reasons:

a. The factors under Rule .0114(w)(1) that are established by the evidence in this case are of a nature that support imposition of a suspension as the appropriate discipline;

b. The protection of the public and the legal profession requires 1) that Defendant not be permitted to represent clients until he demonstrates that he has reformed and that he understands his obligations to his clients, the public and the legal profession, and 2) that permitting him to practice law will not be detrimental to the public, the integrity and standing of the legal profession, or the administration of justice; and

c. Entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to attorneys and to the public regarding the conduct expected of members of the Bar of this state.

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

#### ORDER OF DISCIPLINE

1. The license to practice law in the State of North Carolina of Defendant Gary B. Kivett is hereby suspended for four years effective thirty days from the date this Order of Discipline is served upon him.

2. Defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than thirty days following service of this Order on Defendant.

3. The costs and administrative fees of this action are taxed to Defendant. These costs include deposition costs as allowed by statute, which are found to be reasonable and necessary expenses in this case. Defendant shall pay the costs and administrative fees within 30 days of service of the statement of costs upon him.

4. Defendant shall comply with the wind down provisions contained in 27 N.C.A.C. 1B, §.0124. Defendant shall file an affidavit with the Secretary of the North Carolina State Bar within ten days of the effective date of this Order of Discipline certifying he has complied with the wind down rule.

5. Within fifteen days of the effective date of this Order, Defendant will provide the State Bar with a street address and mailing address at which clients seeking return of their files and records in Defendant's possession or control may obtain such files and records and at which the State Bar may serve any notices or other matters upon him.

6. After the completion of one year of active suspension of his license, Defendant may apply for a stay of the balance of the suspension upon filing a verified petition with the Secretary of the North Carolina State Bar at least thirty days before any proposed effective date of the stay as provided in 27 N.C.A.C. 1B, § .0125. The remaining term of Defendant's suspension may be stayed only if he establishes by clear, cogent and convincing evidence the following:

a. That Defendant has submitted to comprehensive psychiatric or psychological evaluations, at Defendant's sole expense, by two separate psychiatrists or psychologists who specialize in treating sexual offenders in the professions and who have been approved in advance by the Office of Counsel of the North Carolina State Bar;

b. That each of the psychiatrists/psychologists have certified under oath, based on their independent comprehensive evaluations of Defendant, that in their professional opinion Defendant does not suffer from any condition creating a predisposition for inappropriate sexual behavior and that Defendant does not suffer from any mental, psychological, or emotional condition that significantly impairs his professional judgment, performance, or competence in the representation of female clients;

c. That Defendant has attached to his reinstatement petition the sworn statements from the two evaluating psychiatrists/psychologists along with releases or authorizations signed by Defendant instructing the evaluating psychiatrists/psychologists to discuss their evaluations of Defendant with, and to release any corresponding records to, a representative of the Office of Counsel;

d. That Defendant has kept the North Carolina State Bar Membership Department advised of his current business and home addresses and notified the Bar of any change in address within ten days of such change;

e. That Defendant has responded to all communications from the North Carolina State Bar within thirty days of receipt or by the deadline stated in the communication, whichever is sooner, and has participated in good faith in the State Bar's fee dispute resolution process for any petition received after the effective date of this Order;

f. That Defendant has not violated the Rules of Professional Conduct or the laws of the United States or any state or local government during his suspension;

g. That Defendant has properly wound down his law practice and complied with the requirements of §.0124 of the North Carolina State Bar Discipline and Disability Rules; and

h. That Defendant has otherwise complied with the requirements of 27 N.C.A.C. 1B, §.0125(b).

7. If Defendant successfully seeks a stay of the suspension of his law license, such stay will continue in force only as long as he complies with the following conditions:

a. Defendant shall keep the North Carolina State Bar Membership Department advised of his current business and home addresses;

b. Defendant shall respond to all communications from the North Carolina State Bar within thirty days of receipt or by the deadline stated in the communication, whichever is sooner, and participate in good faith in the State Bar's fee dispute resolution process for any petition received during the stay;

c. Defendant shall not violate the Rules of Professional Conduct or the laws of the United States or any state or local government during his suspension;

d. Defendant shall timely comply with all State Bar membership and continuing legal education requirements and shall pay all fees and costs assessed by the applicable deadline;

e. Defendant shall comply with all treatment, if any, prescribed by any psychiatrist and/or psychologist. If any such treatment is recommended, Defendant shall ensure that the mental health professional provides written reports to the State Bar Office of Counsel concerning Defendant's compliance with the treatment plan each quarter during the stayed suspension. The reports shall be due each January 1, April 1, July 1 and October 1 throughout the stayed suspension. All expenses of such treatment and reports shall be borne by Defendant; and

f. Defendant shall execute written waivers and releases authorizing the Office of Counsel to confer with Defendant's psychiatrist/psychologist for the purpose of determining if Defendant has cooperated and complied with recommended treatment and shall not revoke such releases during the period of stayed suspension.

8. If Defendant fails to comply with any of the conditions of the stayed suspension provided in paragraph 7 above, the stay of the suspension may be lifted as provided in §.0114(x) of the North Carolina State Bar Discipline and Disability Rules.

9. If Defendant does not seek a stay of the active portion of the suspension or if some part of the suspension is stayed and thereafter the stay is

revoked, Defendant must comply with the conditions set out in paragraphs 6(a) through (h) above before seeking reinstatement of his license to practice law.

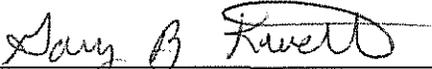
Signed by the undersigned Chair with the full knowledge and consent of the other members of the Hearing Committee, this 2nd day of ~~December, 2011.~~

January, 2012

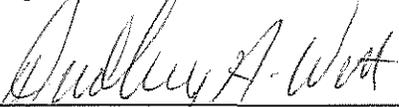


FRED M. MORELOCK, CHAIR  
HEARING PANEL

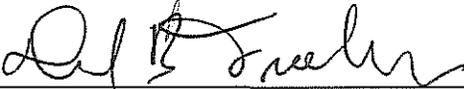
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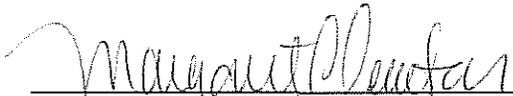
Gary B. Kivett, Defendant



Dudley A. Witt, Attorney for Defendant



David B. Freedman, Attorney for Defendant



Margaret Cloutier, Deputy Counsel  
Attorney for Plaintiff