

NOTE: THIS LINK RELATES ONLY TO JERRY M. SMITH FORMERLY OF WINSTON-SALEM.

THIS LINK DOES **NOT** RELATE TO JERRY A. SMITH, JR. OF HENDERSONVILLE OR JERRY N. SMITH OF ATLANTA, GA. WHO HAVE HAD NO PROFESSIONAL ASSOCIATION WITH JERRY M. SMITH.

NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
10 DHC 26

THE NORTH CAROLINA STATE BAR,)
Plaintiff)
v.)
JERRY M. SMITH, Attorney,)
Defendant)

CONSENT ORDER
OF DISCIPLINE

THIS MATTER was considered by a Hearing Panel of the Disciplinary Hearing Commission composed of J. Michael Booe, Chair, Fred M. Morelock and Karen B. Ray pursuant to 27 N.C.A.C. 1B §.0114 of the Rules and Regulations of the North Carolina State Bar. Defendant, Jerry M. Smith was represented by Attorney Dudley A. Witt. 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 consent of the parties, the Hearing Panel hereby 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 Rules and Regulations of the North Carolina State Bar promulgated thereunder.
2. Defendant, Jerry M. Smith (hereinafter "Smith" or "Defendant"), was admitted to the North Carolina State Bar on August 9, 1988 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 Winston-Salem, Forsyth County, North Carolina.

4. Between February 1, 2002 and December 29, 2009 Defendant maintained a client trust account with SunTrust Bank, account number ending in the digits 2737 (hereinafter the "SunTrust trust account").

5. Defendant used the SunTrust trust account as a general trust account in which Defendant deposited and disbursed client funds.

6. On or about April 18, 2005 Defendant received funds on behalf of client Helen Robertson in settlement of Ms. Robertson's personal injury claim.

7. From the funds received on behalf of Ms. Robertson, Defendant retained in the SunTrust trust account approximately \$40,000.00 for payment of such sums as might be required by Medicare to reimburse it for funds paid by Medicare on Ms. Robertson's behalf.

8. On or about August 28, 2006 Medicare notified Defendant of the amount due Medicare on Ms. Robertson's behalf and requested immediate payment of that amount.

9. The funds held by Defendant in excess of the amount of the Medicare lien belonged to Ms. Robertson.

10. As of December 29, 2009 Defendant had not disbursed to Medicare any of the funds held on behalf of Ms. Robertson and had not disbursed to Ms. Robertson any remaining funds in excess of the Medicare lien.

11. Ms. Robertson and/or her son made numerous efforts to contact Defendant about the funds he held for Ms. Robertson but Defendant did not respond to their inquiries.

12. On or about August 10, 2006 Defendant received funds on behalf of client Charles Miller in settlement of Mr. Miller's personal injury claim.

13. From the funds received on behalf of Mr. Miller, Defendant retained in the SunTrust trust account approximately \$12,000.00 for payment of such sums as might be required by Medicare to reimburse it for funds paid by Medicare on Mr. Miller's behalf.

14. On or about November 18, 2006 Defendant requested Medicare to notify Defendant of the amount due Medicare on Mr. Miller's behalf. Defendant made no further efforts to determine the amount of the Medicare lien.

15. Some of the funds held by Defendant in excess of the amount of any Medicare lien belonged to Mr. Miller.

16. As of December 29, 2009 Defendant had not disbursed to Medicare any of the remaining funds held on behalf of Mr. Miller and had not disbursed to Mr. Miller any funds in excess of the Medicare lien.

17. Mr. Miller's subsequent attorney made several efforts to contact Defendant about the funds Defendant held for Mr. Miller but Defendant did not respond to those inquiries.

18. As of December 2007 Defendant stopped practicing law and did not deposit any more client funds into his SunTrust trust account.

19. As of December 29, 2009 Defendant held client funds in excess of \$62,000.00 in the SunTrust trust account, including the funds belonging to Ms. Robertson and Mr. Miller.

20. As of December 20, 2009 Defendant had not appropriately disbursed those funds held in trust on behalf of his clients.

21. Defendant did not prepare and keep client ledger cards reflecting funds held in trust for his clients.

22. Defendant did not reconcile the SunTrust trust account at least quarterly between February 1, 2002 and December 29, 2009.

Based upon the foregoing Findings of Fact, the Panel enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel and the Panel has jurisdiction over the Defendant, Jerry M. Smith, 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) as follows:

a. by failing to follow through in determining the amount of Mr. Miller's Medicare lien and failing to properly disburse trust funds belonging to clients or

third parties, Defendant did not act with reasonable diligence and promptness in representing a client in violation of Rule 1.3;

b. by failing to respond to the inquiries of Ms. Robertson, her son and Mr. Miller's attorney, Defendant failed to keep his clients reasonably informed about the status of their matters and did not promptly comply with reasonable requests for information in violation of Rule 1.4(a)(3) and (4);

c. by failing to timely disburse funds held on behalf of clients, Defendant did not promptly pay or deliver to the client entrusted property belonging to the client or to third parties and to which the client or third parties were currently entitled in violation of Rule 1.15-2(a) and (m);

d. by failing to properly disburse client funds remaining in his attorney trust account when he stopped practicing law, Defendant did not take steps reasonably necessary to protect the clients' interests in violation of Rule 1.16(d);

e. by failing prepare and maintain client ledger cards, Defendant failed to maintain a ledger containing a record of receipts and disbursements for each person from whom and for whom funds are received and showing the current balance of funds held in the trust account for each such person in violation of Rule 1.15-3(b)(5); and

f. by failing to reconcile his trust account at least quarterly, Defendant failed to total and reconcile the account with the current bank balance each quarter in violation of Rule 1.15-3(c).

Based upon the consent of the parties, the Hearing Panel also finds by clear, cogent and convincing evidence the following

ADDITIONAL FINDINGS REGARDING DISCIPLINE

1. There is no evidence that any of Defendant's actions relating to his trust account described in the Findings of Fact above were intentional misappropriations but rather were the result of gross inattention to the status of the account in general. However, such mismanagement in the handling of client funds puts the entrusted funds at risk and erodes the confidence clients place in attorneys who handle their affairs. As a result, such conduct harms the profession as a whole.

2. Ms. Robertson receives Social Security retirement benefits. Because of Defendant's delay in disbursing funds to Medicare for Ms. Robertson's benefit, the U.S. Treasury sought reimbursement by deducting funds from Ms. Robertson's monthly Social Security checks for a period of time. Defendant has

since fully reimbursed Medicare from the funds held in trust on behalf of Ms. Robertson, including interest accrued that Defendant paid from his own funds.

3. Ms. Robertson and Mr. Miller both relied on Defendant to handle their funds in a prompt and efficient manner. Defendant's lack of action and communication about the status of their funds delayed resolution of their financial matters and caused them anxiety over the uncertainty of the status of their funds.

3. Defendant's conduct reflects a pattern of misconduct in that the trust account mismanagement occurred over a period of years.

4. Defendant has never been disciplined by the State Bar.

5. In this proceeding before the Disciplinary Hearing Commission Defendant fully and freely disclosed the facts and circumstances surrounding the subject of this action and was cooperative in his participation.

6. Defendant has expressed remorse for his conduct.

7. Defendant did not act with a dishonest or selfish motive when he engaged in the conduct described in the Findings of Fact above relating to his trust account.

8. During the time of the actions described in the Findings of Fact, Defendant was suffering from undiagnosed depression that contributed to Defendant's inaction in handling entrusted funds. Since Defendant was initially contacted by the State Bar regarding his conduct, Defendant has been under the care of a psychologist and psychiatrist.

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) of the Rules and Regulations of the North Carolina State Bar and concludes the following factors warrant suspension of Defendant's license:

(a) Defendant's actions potentially had a negative impact on the public's perception of the legal profession; and

(b) Defendant's actions impaired his clients' ability to achieve the goals of the representation.

2. The Hearing Panel has also considered all of 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 concludes no factors are present in this instance that would warrant disbarment.

3. The Hearing Panel has also 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 concludes the following factors are applicable in this matter:

- (a) Defendant's lack of prior disciplinary offenses;
- (b) Absence of a dishonest or selfish motive;
- (c) Defendant engaged in multiple offenses;
- (d) Defendant engaged in a pattern of misconduct;
- (e) Defendant's psychological condition contributed to his inaction in properly distributing the funds in his trust account;
- (f) Defendant's full and free disclosure to the Hearing Panel and cooperative attitude toward the proceedings;
- (g) Defendant's remorse; and
- (h) The vulnerability of Defendant's clients.

4. The Hearing Panel has considered issuing an admonition, reprimand or censure but concludes that such discipline would not be sufficient discipline because of the gravity of the actual harm to his clients and the potential harm to client funds. The Panel further concludes that such discipline would fail to acknowledge the seriousness of the offenses committed by Defendant and send the wrong message to attorneys regarding the conduct expected of members of the Bar in this State.

5. For the nature and extent of Defendant's trust account violations and the protection of the public, this Panel would consider an active suspension of Defendant's license to practice law if it were not for the factors in Defendant's favor, Defendant's recognition of the impropriety of his conduct and his commitment to refrain from such conduct in the future. Given those circumstances, the Hearing Panel finds and concludes that the public will be adequately protected by suspension of Defendant's license, stayed for a period of time with conditions imposed upon Defendant designed to ensure protection of

the public and Defendant's continued compliance with the Rules of Professional Conduct.

6. Defendant has informed the hearing panel that he is not currently practicing law and intends to apply for inactive status with the North Carolina State Bar pursuant to 27 N.C.A.C. 1D § .0901. The intent of this Order of discipline is to protect the public while Defendant is in practice. Therefore, it would thwart the intended effect of the hearing panel's discipline if Defendant is able to avoid complying with the conditions of the stay of this suspension because he is not actively practicing law or is in inactive status. Furthermore, the hearing panel recognizes that Defendant's potential transfer to inactive status cannot occur until the January 2011 meeting of the North Carolina State Bar Council.

Based upon the foregoing Findings of Fact, Conclusions of Law, Additional Findings Regarding Discipline, and Conclusions Regarding Discipline, and upon consent of the parties, the Hearing Panel enters the following

ORDER OF DISCIPLINE

1. The license of Defendant, Jerry M. Smith, is hereby suspended for three years from the date this Order of Discipline is served upon him. The period of suspension is stayed for three years contingent upon Defendant's continued compliance with the following conditions:

a. Defendant shall demonstrate, to the satisfaction of the Office of Counsel of the North Carolina State Bar, that Defendant has properly disbursed the funds currently held in his trust account within thirty days of the service of this order upon him. Upon disbursement of the entrusted funds, Defendant shall provide to the State Bar an accounting of such disbursements within forty days of the service of this order;

b. During the period of stayed suspension Defendant shall retain the services of a Certified Public Accountant to review the status of any accounts into which client or fiduciary funds have been deposited. Defendant shall deliver to the Office of Counsel a report prepared and signed by the Certified Public Accountant certifying that Defendant has reconciled each account with the bank balance, that he has maintained client ledgers identifying all funds in each account, and that Defendant is otherwise meeting all requirements of Rule 1.15-3 of the Rules of Professional Conduct;

c. Defendant shall submit such reports by each January 15, April 15, July 15, and October 15 during the period of stay. Defendant shall provide to the certified public accountant the necessary information to satisfactorily prepare

such quarterly reports by their due dates. Defendant will be solely responsible for all costs associated with the monitoring of his trust account(s);

d. Defendant will complete an accounting course, either a continuing legal education course teaching trust accounting practices or other accounting course with an emphasis on trust accounts and/or fiduciary funds, approved in advance by the Office of Counsel. Defendant will complete the course within six months of the service of this order upon him and will provide the Office of Counsel proof of completion within ten days of completion of the course;

e. Defendant shall continue with all prescribed medical and/or psychiatric treatments as determined by his current treating psychiatrist or mental health professional. In the event Defendant determines it is necessary or appropriate to change mental health care providers at any time, Defendant first shall submit the name and credentials of his proposed treatment professional to the Office of Counsel for approval, which approval shall not be unreasonably withheld. Defendant will direct his treating mental health care professional to provide semi-annual reports to the Office of Counsel describing in detail Defendant's current treatment regimen, compliance, and prognosis or treatment plan for the next six months. Such reports will be provided by each January 15 and July 15 during the stay. Defendant may elect to have his treatment program supervised by the North Carolina State Bar Lawyer Assistance Program (LAP). If he does so elect, he will cooperate fully with LAP to develop an appropriate treatment plan under the supervision of LAP, and will comply with the requirements of such treatment plan. Within thirty days of service of this order upon him, Defendant will deliver to the State Bar Office of Counsel written waivers and releases authorizing the Office of Counsel to confer with Defendant's treating health care professional and/or LAP for the purpose of determining if Defendant has cooperated and complied with all requirements of the prescribed treatment plan. Defendant will not revoke such waivers and releases during the period of stay. All expenses of treatment and any reports provided to the Office of Counsel will be at Defendant's sole expense;

f. Defendant shall not violate any state or federal laws or any provisions of the Rules of Professional Conduct during the period of the stayed suspension;

g. Defendant shall respond to all State Bar requests for information by the earlier of the deadline stated in the communication or within thirty days, as required by Rule 8.1(b) of the Rules of Professional Conduct;

h. Defendant shall timely comply with all State Bar membership and Continuing Legal Education requirements; and

i. Defendant shall keep the North Carolina State Bar membership department advised of his current home and business street (not P.O. Box) addresses and telephone numbers.

2. This Order shall be effective on the date Defendant is served with this Order. However, because Defendant intends to apply for a transfer to inactive status as noted above, Defendant will not have to comply with conditions 1(b) – (e) prior to January 31, 2011. In the event Defendant successfully petitions for and is transferred to inactive status with the North Carolina State Bar pursuant to 27 N.C.A.C. 1D § .0901 by January 31, 2011, the suspension and the period of the stay of the suspension imposed by this Order shall be tolled until Defendant successfully petitions for and is transferred back to active status with the North Carolina State Bar pursuant to 27 N.C.A.C. 1D § .0902. If Defendant is not transferred to inactive status by January 31, 2011, the suspension and the period of the stay of the suspension shall remain in effect, and Defendant shall be subject to all accompanying conditions imposed by this Order until Defendant successfully transfers to inactive status, at which time any remaining period of the stayed suspension shall be tolled until Defendant's transfer back to active status. Once Defendant returns to active status, the suspension, the period of stayed suspension and all accompanying conditions imposed by this Order shall once again go into effect for three years minus the time previously served by Defendant prior to being transferred to inactive status. Nothing in this paragraph shall serve to toll the requirement to disburse funds in Defendant's account as provided in condition 1(a) above.

3. If Defendant fails to comply with any one or more of the provisions of Paragraph 1 above at any point during the period of time the stayed suspension is in effect, the stay of the suspension of his law license may be lifted or revoked as provided in §.0114(x) of the North Carolina State Bar Discipline and Disability Rules.

4. If the stay granted herein is lifted or revoked or the suspension of Defendant's license is activated for any reason, the DHC may enter an order providing for such conditions as it deems appropriate and/or necessary for reinstatement of Defendant's law license. Furthermore, before seeking reinstatement of his license to practice law, Defendant must show by clear, cogent and convincing evidence that he has complied with each of the following conditions:

a. Properly disbursed the funds held in his trust account within thirty days of the service of this order and provided to the State Bar an accounting of such disbursements within forty days of the service of this order;

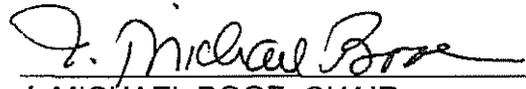
b. Submitted his license and membership card to the Secretary of the North Carolina State Bar within thirty days after the date of the revocation order suspending his law license;

c. Complied with all provisions of 27 N.C.A.C. 1B § .0124 of the State Bar Discipline and Disability Rules on a timely basis following the revocation order suspending his law license;

d. Paid all due and owing membership fees, Client Security Fund assessments and costs assessed by the DHC or the State Bar and complied with all continuing legal education requirements imposed by the State Bar.

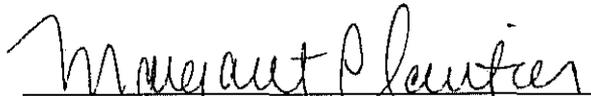
5. Defendant is taxed with the costs of this action as assessed by the Secretary which shall be paid within thirty days of service of the notice of costs upon the Defendant.

Signed by the Chair with the full knowledge and consent of the other members of the Hearing Panel, this 19th day of November, 2010.



J. MICHAEL BOOE, CHAIR
DISCIPLINARY HEARING PANEL

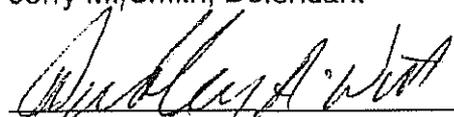
CONSENTED TO:



Margaret Cloutier, Deputy Counsel
Attorney for Plaintiff



Jerry M. Smith, Defendant



Dudley A. Witt, Attorney for Defendant