

NORTH CAROLINA  
WAKE COUNTY

BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
E. 84-28 DHC 10  
THE N.C. STATE BAR

THE NORTH CAROLINA STATE BAR, )  
Plaintiff )  
vs. )  
DONALD A. DAVIS, )  
Defendant )

PUBLIC CENSURE

This Public Censure is delivered to you pursuant to Section 23 of the Rules of Discipline and Disbarment of the North Carolina State Bar and pursuant to a Settlement Agreement and Consent Order entered in the above-captioned action by a Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar bearing date of January 2, 1985, which Consent Order incorporated Findings of Fact and Conclusions of Law agreed to by the parties on December 21, 1984 concerning certain violations of the Code of Professional Responsibility which are set forth below.

The fact that this Public Censure is not the most serious discipline provided for in North Carolina General Statute §84-28 should not be taken by you to indicate that the North Carolina State Bar in any way feels that your conduct in this matter was excusable or was considered by the members of the Hearing Committee to be less than a very serious and substantial violation of the Code of Professional Responsibility.

On or about December 29, 1982, David Battle Lee consulted with you for legal advice regarding his business and personal debts. As a result, you were employed and you advised Mr. Lee to file a Petition under Chapter 13 of the Bankruptcy Code, the "wage earner" provisions. You received \$60.00 from Mr. Lee for payment of the court filing fees.

You prepared the Chapter 13 Petition and signed it as attorney for Mr. Lee on December 30, 1982. You filed the Petition on or about January 3, 1983.

The Petition you prepared and filed proposed that Mr. Lee pay \$1,500.00 per month to the Trustee in Bankruptcy for payment of legal fees, court and trustee expenses for case administration, and the claims of various creditors. The Petition also stated that Mr. Lee had agreed to pay you \$1,500.00

in attorney's fees through the plan. The proposed period of the Plan was 24 months. On or about April 1, 1983, the Trustee in Bankruptcy for the Bankruptcy Court received \$1,200.00 on behalf of Mr. Lee pursuant to the Petition. These funds were paid to the Court in part from your trust account and in part from Mr. Lee.

No other payments were made to the Court under the Plan. On June 17, 1983, the Court denied confirmation of the Plan and dismissed the Petition because of nonpayment for "part of February, March, April, May and June."

On or about July 1, 1983, the Trustee in Bankruptcy issued a check made payable to Mr. Lee in the amount of \$1,200.00, representing a refund of the \$1,200.00 paid into the Court in April. The check was mailed to you as attorney for Mr. Lee.

You received the check on or about July 19, 1983, in a large batch of checks from the Trustee in Bankruptcy. As usual, most of these checks were payable to you for legal fees in Chapter 13 cases. You did not contact Mr. Lee to notify him of the check's receipt nor did you deposit the check in your trust account because, due to the check's inclusion in this batch, you assumed, erroneously, that the check was payable to you for legal fees to which you felt entitled. Instead, the check was stamped on the back in the location normally used for endorsements with your name and address and with a handwritten notation of "for deposit". The check was then deposited by you or by someone on your behalf in your firm or general bank account.

Mr. Lee subsequently became aware of the Petition's dismissal and contacted you relative to the check. You advised Mr. Lee that you had deposited the check in your general or firm account as payment of your legal fee. Mr. Lee asked you to refund a substantial portion of the \$1,200.00 as unearned. You refused to make any refund and did not deposit any of the money in your trust account after you became aware that Mr. Lee was disputing the amount of your fee.

On or about August 26, 1983, you wrote a letter to Mr. Lee offering to refund \$300.00 to Mr. Lee in settlement of the dispute. Mr. Lee refused the offer and no money was refunded or deposited in your trust account.

You have not returned any of the \$1,200.00 to Mr. Lee.

On January 4, 1984, you procured a default judgment against Mr. Lee in the amount of \$1,500.00, representing legal fees due and payable in the bankruptcy case.

Subsequent to the commencement of disciplinary proceedings, you delivered the sum of \$1,200.00 to your attorney of record to be held in trust pending the resolution of this matter. The

funds are still held by counsel pending settlement of the dispute concerning the amount of the fee earned.

On or about January 13, 1983, Robert and Naomi Patterson consulted with you concerning legal remedies available to them relative to their indebtedness. You agreed to represent them and advised that they file a Petition under Chapter 13 of the Bankruptcy Code.

You advised the Pattersons that they would be required to pay you \$60.00 to cover the filing fees for the Petition and \$200.00 as a deposit for attorney's fees in advance. The Pattersons paid the sums to you on January 14, 1983.

Also on January 14, 1983, you signed the Chapter 13 Petition you had prepared as the Patterson's attorney. The Petition proposed payment of \$1,750.00 per month to the Trustee in Bankruptcy for payment of legal fees, court and trustee expenses for case administration, and creditor claims.

You filed the Petition on January 25, 1983. The Pattersons agreed in the Petition to pay \$1,750.00 in attorney's fees through the Plan.

You received two separate payments from the Pattersons for transmittal to the Trustee under the Plan, one on February 1, 1983, and the other on March 8, 1983. The total amount of these two payments was equal to one month's payment under the Plan, \$1,750.00. You deposited the two checks in your trust account pending confirmation or dismissal of the Plan, as is customary in bankruptcy practice.

The Pattersons failed to make any other payments under the Plan. As a result, on May 31, 1983, the Court dismissed the Petition and denied confirmation of the Plan because of "nonpayment of Plan payments for February through June."

On May 31, 1983, you transferred the \$1,750.00 held in your trust account on behalf of the Pattersons to your general or firm account without informing the Pattersons of your intention and without affording them an opportunity to dispute the amount of the fee earned. You had, at the time you were employed and again shortly thereafter, informed the Pattersons that, in the event the Plan was not confirmed, money held in trust would be applied to fees owed.

You have asserted that the funds transferred were due you as payment of your fee.

Although the Pattersons subsequently requested a refund of a substantial portion of the \$1,750.00 fee as unearned, you have never returned any of the funds paid to you by the Pattersons or redeposited any portion of the money in your trust account to cover the disputed portion of the fee.

Subsequent to the commencement of these proceedings, you delivered the sum of \$1,750.00 to your attorney of record to be held in escrow pending the resolution of this matter. The funds are still held by counsel pending settlement of the dispute concerning the amount of the fee earned.

By failing to deposit any of the \$1,200.00 you appropriated for your fee in the Lee case in your attorney trust account after you became aware that your client disputed the amount of your fee, you failed to deposit and maintain funds of your client which were the subject of a fee dispute in an attorney trust account in violation of Disciplinary Rule 9-102(A)(2).

By transferring the Pattersons' funds to your general or firm account without their knowledge or consent at the time of the transfer, and by failing to redeposit in trust the disputed portion of the money you appropriated for your fee, you failed to notify your clients of the availability of their funds for general purposes in violation of Disciplinary Rule 9-102(B)(1), and you failed to maintain clients' funds which were subject to a fee dispute in your trust account in violation of Disciplinary Rule 9-102(A)(2).

In both cases you allowed your personal interest as a creditor to predominate.

The client is absolutely entitled to notice of the fact that his lawyer has received his money, which must then be placed in trust. If the lawyer is entitled to a fee and intends to pay himself, he should inform the client of his intention and give the client an opportunity to approve or disapprove the payment. If the client does not agree that the amount charged is fairly owed, the Code very clearly requires that the amount in question be retained by the lawyer in his trust account until the controversy is settled. By the same token, a lawyer who has paid himself from client funds without specific authority from his client has a duty to redeposit any disputed amount in his trust account after the disagreement surfaces.

In the Lee case, it appears that you made an honest mistake in endorsing and depositing the Trustee's check. Because of this mistake, you could not have been expected to notify Mr. Lee of the receipt of his money. You are, therefore, not being cited for misconduct in that regard. However, once you become aware of Mr. Lee's objection to the amount of your fee, you had a professional duty to deposit the disputed amount in trust.

In the Patterson case, you unjustifiably failed to notify your clients of the availability of their funds following the dismissal of their plan. They were thus effectively denied an opportunity to challenge your fee and to obtain the protection of Disciplinary Rule 9-102(A)(2). As in the Lee case, the situation was aggravated by your failure to redeposit the disputed sum in your trust account.

The Committee is not insensitive to the fact that you advised your clients at the commencement of the attorney-client relationship that, should their Petitions be dismissed, you would apply funds in your possession to your fee. This notice, however, was not adequate to fulfill your professional obligations. A lawyer should have his client's specific authority before paying his fee with money held in trust.

The Committee is of the opinion that your misconduct in this case was mitigated to some extent by your placing of the subject funds in escrow at the commencement of disciplinary proceedings. By so doing, you effectively protected the interests of all concerned.

The North Carolina State Bar is confident that this Public Censure will be heeded by you, that it will be remembered by you, and that it will be beneficial to you. We are confident that you will never again allow yourself to depart from strict adherence to the highest standards of the legal profession. Accordingly, we sincerely trust that this Public Censure, instead of being a burden, will actually serve as a profitable reminder to weigh carefully your responsibility to the public, your clients, your fellow attorneys, and the Court, with the result that you will be known as a respected member of our profession whose conduct may be relied upon without question.

Pursuant to Section 23 of the Rules of Disciplinary Procedure, it is ordered that a certified copy of this Public Censure be entered upon the judgment docket of the Superior Court of Wake County and also upon the minutes of the Supreme Court of North Carolina.

This the 24<sup>th</sup> day of JANUARY, 1985.



W. Osborne Lee, Jr., Acting Chairman  
The Disciplinary Hearing Commission  
and Hearing Committee Chairman