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7-8-93
MAR 10 1993

BEFORE THE DISCIPLINARY HEARING COMMISSION
OF THE NORTH CAROLINA STATE BAR

92 DHC 19

THE NORTH CAROLINA STATE BAR,)	
Plaintiff)	
)	FINDINGS OF FACT
vs.)	AND
)	CONCLUSIONS OF LAW
BENJAMIN S. MARKS, ATTORNEY)	
Defendant)	

This matter cause was heard by a hearing committee of the Disciplinary Hearing Commission consisting of Samuel Jerome Crowe, Chairman; Paul L. Jones; and William H. White; on Friday, March 5, 1993. R. David Henderson represented the North Carolina State Bar and the defendant was represented by Robert S. Cahoon. Based upon the pleadings, the Pretrial Stipulations, and the evidence presented at the hearing, the hearing committee, by clear, cogent and convincing evidence, makes 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 in the General Statutes of North Carolina and the rules and regulations of the North Carolina State Bar promulgated thereunder.
2. Defendant, Benjamin S. Marks, Jr., was admitted to the North Carolina State Bar on August 8, 1958 and is, and was at all times relevant 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 all times relevant herein, defendant was actively engaged in the practice of law in the State of North Carolina and maintained a law office in Greensboro, Guilford County, North Carolina.
4. Sometime prior to January of 1985, defendant opened an interest bearing checking account assigned account number 701-85-02-762 at First Union National Bank. This account was designated as defendant's trust account ("the Trust Account"). From January of 1985 and continuing at least through April of 1988, defendant deposited funds belonging to clients into the Trust Account ("the Client Funds").

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5. From January of 1985 through April of 1988, defendant removed from the Trust Account interest earned on the Trust Account for Client Funds as follows:

1985 --	\$ 5,523.85
1986 --	\$ 5,713.48
1987 --	\$ 1,785.06
1988 --	\$ <u>546.00</u>

Total = \$13,568.39

6. The above interest accumulated primarily on real estate closing funds remaining in the Trust Account as a "float." That is, even though Trust Account checks were disbursed at closing, the Trust Account was not debited until sometime thereafter. Thus, there was a period of time when the Client Funds remained in the Trust Account and accrued interest.
7. Defendant was required, pursuant to DR 9-102(A)(3) and DR 9-102(C)(1) of the Code of Professional Responsibility (as amended by the NC Supreme Court on June 23, 1983) and Rule 10.1(D) and Rule 10.3 of the Rules of Professional Conduct, to either hold the interest earned on the Client Funds for his clients or remit the interest generated to the North Carolina State Bar pursuant to the Interest on Lawyer's Trust Account ("IOLTA") program.
8. When defendant was admitted to the practice of law in North Carolina in 1958, and when defendant completed his service with the U.S. Air Force and returned to his real estate law practice in 1961, there was no rule or requirement that interest on clients' trust funds be held for the clients or remitted to the IOLTA program.
9. From January of 1985 to April 1988, defendant failed to remit the interest earned on the Client Funds to IOLTA or the clients on whose funds the interest had accumulated. Defendant used the interest earned on the "float" described above for his own use or for the use of persons other than his clients.
10. On or about April 20, 1988, defendant was randomly selected pursuant to Section 28(2) of the Rules of Discipline and Disbarment for a procedural audit of his trust account.
11. On or about May 6, 1988, Bruno E. DeMolli, North Carolina State Bar Auditor, reviewed defendant's trust account and determined that defendant had paid the interest earned on the trust account to himself. Defendant cooperated completely with Mr. DeMolli, making available all of his trust account records. On that same day, defendant notified the IOLTA Board of Trustees of his desire to participate in the IOLTA program. He has continued since then to participate in the program.

12. By letter dated May 17, 1988, defendant purposed to pay the amount owed, \$13,568.39, to IOLTA on a monthly basis with the first payment of \$568.39 on or before June 15, 1988 and the amount of \$500 on or before the 15th of each month thereafter for the next 26 months.
13. Defendant made payments totalling \$4,068.39 through December 22, 1988. By letter dated September 5, 1989, defendant requested permission from the IOLTA Board of Trustees to defer the monthly payments of \$500 due in 1989 and to resume such payments in 1990. Defendant was granted that permission by telephone from the State Bar Office. Defendant did not make any payments in 1989. Defendant made one payment of \$500 on January 24, 1990. Defendant did not make any payments in 1991. On March 2, 1992, defendant paid the balance owed of \$9,000.
14. The North Carolina State Bar Newsletter and Quarterly have been published once each quarter throughout the year since prior to 1983. Copies of the newsletter and quarterly are mailed to each licensed member of the North Carolina State Bar at the member's address on file with the North Carolina State Bar.
15. Defendant paid income tax on the interest he earned on the Trust Account for the Client Funds between 1985 and 1988.
16. Defendant had an active residential real estate practice in 1989, 1990 and 1991.
17. Most residential real estate closings handled by defendant involved property already covered by a title insurance policy. During the times relevant herein, title insurance companies charged a lower "reissue rate" whenever a prior title policy was submitted with the attorney's title opinion, regardless of whether the prior policy was issued by the same company as the prospective company.
18. Before submitting the final title opinion, defendant at times: (1) obtained a copy of the prior title policy covering the same property, (2) used it to obtain the lower reissue rate, and (3) charged and collected from the buyer the standard or full premium for a title insurance policy as opposed to the lower reissue rate. However, in every case when the existence of a prior title policy was known by the time of closing, the client was given the benefit of the lower premium, and it was only where the prior policy was subsequently discovered that this was not done.
19. In most of these cases, defendant did not obtain the client's informed consent before paying himself the difference in premiums.

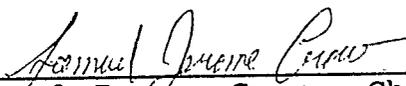
20. From 1989 through 1991, defendant retained at least \$4,671.23 representing the difference in what was collected from the client for the title insurance premium and what was actually paid for the title insurance premium.
21. Subsequent to the State Bar's investigation of this matter, defendant reimbursed all clients due any refund with interest at 8%.

Based upon the foregoing Finding of Fact, the committee makes the following:

CONCLUSIONS OF LAW

1. By failing to pay to his clients or the IOLTA program of the North Carolina State Bar the \$13,568.39 in interest earned on Client Funds from January 1985 through April of 1988, defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(C) of the Rules of Professional Conduct and DR 1-102(A)(4) of the Code of Professional Responsibility.
2. By retaining at least \$4,671.23 in title insurance premiums from 1989 through 1991, defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(C) of the Rules of Professional Conduct.

This the 15th day of March, 1993.



Samuel Jerome Crowe, Chairman
(For the Committee)

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JIM SMITH

BEFORE THE DISCIPLINARY HEARING COMMISSION
OF THE NORTH CAROLINA STATE BAR

91 DHC 19

THE NORTH CAROLINA STATE BAR,)
Plaintiff)
vs.)
BENJAMIN S. MARKS, ATTORNEY)
Defendant)

ORDER OF DISCIPLINE

This cause was heard by a duly appointed hearing committee of the Disciplinary Hearing Commission consisting of Samuel Jerome Crowe, Chairman; Paul L. Jones; and William H. White; on Friday, March 5, 1993. After entering the Findings and Facts and Conclusions of Law in this matter, the committee heard arguments concerning the appropriate discipline to be imposed. Based upon the arguments presented, the committee finds the following AGGRAVATING FACTORS:

1. Dishonest or selfish motive.
2. A pattern of misconduct.
3. Multiple offenses.
4. Substantial experience in the practice of law.

Based upon the arguments presented, the committee finds the following MITIGATING FACTORS:

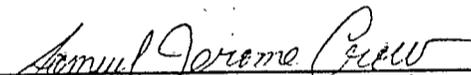
1. Absence of a prior disciplinary record.
2. Timely good faith efforts to make restitution or to rectify consequences of misconduct.
3. Full and free disclosure to the hearing committee or cooperative attitude toward proceedings.
4. Character or reputation.

Based upon the Findings and Fact and Conclusions of Law and the above aggravating and mitigating factors, the committee hereby enters this

ORDER OF DISCIPLINE

1. Defendant is hereby suspended from the practice of law for a period of three years, commencing 30 days after service of this order upon defendant.
2. Defendant may be reinstated at anytime after the end of the first six months of his suspension so long as he has complied with the provisions of Section 25(B) of the Discipline and Disbarment Rules of the North Carolina State Bar.
3. Defendant shall violate no laws of the State of North Carolina and shall violate no provisions of the Rules of Professional Conduct during the three-year stay period.
4. Defendant shall comply with all of the provisions of Section 24 of the Discipline and Disbarment Rule of the North Carolina State Bar.
5. Defendant is taxed with the costs of this proceeding.

Signed by the Chairman of the hearing committee with the full knowledge and consent of all parties and the other members of the hearing committee this the 15th day of March, 1993.



Samuel Jerome Crow, Chairman
Disciplinary Hearing Committee

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