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NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
00 DHC 5

THE NORTH CAROLINA STATE BAR, Plaintiff	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF DISCIPLINE
v.	)	
WILLIAM L. FUNDERBURK JR., Attorney Defendant	)	

This matter was heard on September 11, 2000, before a hearing committee of the Disciplinary Hearing Commission composed of Fred H. Moody Jr., Chair; Elizabeth Bunting, and Robert B. Frantz. The Defendant, William L. Funderburk Jr., appeared pro se. Fern Gunn Simeon represented the plaintiff. Based upon the pleadings, the prehearing stipulations, and the evidence introduced at the hearing, the hearing committee hereby enters the following:

FINDINGS OF FACT

1. 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 of the North Carolina General Statutes and the Rules and Regulations of the North Carolina State Bar.

2. The Defendant, William L. Funderburk Jr. (hereafter, Defendant) was admitted to the North Carolina State Bar in 1991 and was at all times relevant hereto licensed to practice law in North Carolina, subject to the rules, regulations and Rules of Professional Conduct of the North Carolina State Bar.

3. During all times relevant hereto the defendant was actively engaged in the practice of law and maintained a law office in Eden, North Carolina.

4. Defendant was properly served with process and the hearing was held with due notice to all parties.

5. On April 28, 1994, Thomas D. Wills (Mr. Wills) retained Defendant to represent him pertaining to injuries he suffered when a dog attacked him while riding a bicycle.

6. In August 1995, Defendant filed a lawsuit on Mr. Wills' behalf against Everett Skeen, Darrell Cox and Rhonda Cox (the Coxes) in Guilford County Superior Court.

7. Defendant told Mr. Wills that the Coxes settled his claim against them for $9,750.00.

8. Defendant told Mr. Wills that he would receive $7,500.00 as his part of the settlement with the Coxes and Defendant would receive $2,250.00 as his attorney's fee.

9. On May 12, 1998, Defendant paid $7,500.00 to Mr. Wills by check number 1558 drawn on Defendant's trust account at First Citizens Bank. Check number 1558 cleared Defendant's trust account on May 13, 1998.

10. Defendant did not settle Mr. Wills' claim against the Coxes with their insurance company.

11. Defendant believed he had not timely served the Coxes with the summons and complaint in Mr. Wills' action.

12. Defendant did not tell Mr. Wills that Defendant might have damaged Mr. Wills' claim against the Coxes.

13. Defendant considered the payment of $7,500.00 to Mr. Wills as a way to settle any malpractice claim that Mr. Wills may have had against Defendant for his failure to properly serve the Coxes with the summons and complaint.

14. Defendant did not advise Mr. Wills in writing that he should obtain independent counsel before Defendant paid $7,500.00 to Mr. Wills to settle any malpractice claim that Mr. Wills may have had against Defendant.

15. Defendant wanted Mr. Wills to believe that there had been a settlement with the Coxes' insurance company when Defendant prepared various documents, including a Tortfeasor Release of All Claims for Mr. Wills' signature and a Trust Account Final Statement, showing how the $7,500 was received and disbursed.

16. On May 12 and 13, 1998, there were no funds in Defendant's trust account to which Mr. Wills was entitled.

17. Defendant spent other clients' money to pay Mr. Wills.

18. Defendant did not have his other clients' permission to use their funds to pay Mr. Wills.

19. At the time that Defendant wrote the $7,500.00 check from his trust account to pay Mr. Wills, Defendant knew that he did not have enough personal funds on hand to pay the $7,500.00 to Mr. Wills.

20. At the time that Defendant wrote the $7,500.00 check from his trust account to pay Mr. Wills, Defendant did not have sufficient funds in his law office operating account to pay $7,500.00 to Mr. Wills.

21. At the time that Defendant wrote the $7,500.00 check from his trust account to pay Mr. Wills, Defendant did not have a personal bank account from which to pay $7,500.00 to Mr. Wills.

22. Defendant intentionally appropriated other clients' money to his own use or benefit when he paid $7,500.00 to Mr. Wills.

23. On July 15, 1998, Defendant deposited $7,500.00 of his personal funds into his trust account to cover the $7,500.00 check he wrote to Mr. Wills in May of 1998.

24. Defendant did not file North Carolina income tax returns for 1994, 1995, and 1996.

25. The North Carolina Department of Revenue charged Defendant with three counts of failure to file North Carolina individual income tax returns for 1994, 1995, and 1996 in violation of N.C. Gen. Stat. Section 105-236(9).

26. On March 25, 1999, Defendant pled guilty and was found guilty of three counts of failure to file North Carolina individual income tax returns. Defendant was given a 45-day sentence that was suspended for 18 months and he was placed on supervised probation. He was ordered to perform 200 hours of community service during the first nine months of supervised probation. He was also ordered to file his 1994, 1995, and 1996 North Carolina individual income tax returns within 45 days of the court's order.

27. Defendant appealed the district court's decision to superior court.

28. On March 1, 2000, a Wake County Superior Court Judge found Defendant guilty of the three counts of failure to file state income tax returns. Defendant was sentenced to 120 days in the Wake County jail, but the jail sentence was suspended and he was placed on supervised probation for 24 months. He was ordered to pay restitution to the North Carolina Department of Revenue in the amount of $6,495.24 and costs in the amount of $184.00.

29. Carolyn D. Hailey (Ms. Hailey) retained Defendant on July 9, 1997 to represent her in a disability benefits case.

30. Defendant agreed to file a lawsuit against Ms. Hailey's former employer and others in February of 1998.

31. Ms. Hailey contacted Defendant weekly to determine the status of the lawsuit. Defendant did not respond to Ms. Hailey's requests for information.

32. On April 21, 1998, Ms. Hailey and her husband went to Defendant's office and asked for a copy of the complaint and an update on her case.

33. Defendant gave Ms. Hailey a copy of a complaint captioned "Complaint for Specific Performance, Monetary Damages" wherein she was listed as the plaintiff and Avery Dennison and others were listed as defendants. A certificate of service, dated March 13, 1998, was attached to the complaint. Defendant told Ms. Hailey and her husband that he had filed the complaint on March 13, 1998 and that the opposing parties were served with the action in March of 1998.

34. Defendant had neither filed nor served the lawsuit on Avery Dennison and the other parties as of April 21, 1998 when he spoke with Ms. Hailey.

35. After March 13, 1998, Ms. Hailey checked with state courthouse personnel and learned that no lawsuit had been filed in her disability case.

36. Ms. Hailey telephoned Defendant on numerous occasions between March 13 and August 28, 1998 to determine if a complaint had been filed in her case.

37. Defendant did not return Ms. Hailey's telephone calls.

38. Defendant filed Ms. Hailey's lawsuit in Rockingham County Superior Court on September 18, 1998.

39. In late 1998, Ms. Hailey asked Defendant to return her file to her. Defendant finally returned the file to Ms. Hailey on February 5, 1999.

40. In March of 1997, Gyrome Brim (Mr. Brim) retained Defendant to handle a car warranty case.

41. In April of 1997, Mr. Brim paid Defendant $500.00 as his attorney's fee.

42. On June 9, 1997, Defendant filed a lawsuit on Mr. Brim's behalf against Crown Automotive Company (hereafter Crown) and American Honda Finance Corporation (hereafter AHFC) in Guilford County Superior Court.

43. On May 1, 1998, David Sar (Mr. Sar), attorney for Crown, served Crown's First Set of Interrogatories and Request for Production of Documents on Defendant, as Mr. Brim's counsel.

44. Defendant did not respond, on behalf of Mr. Brim, to Crown's First Set of Interrogatories and Request for Production of Documents within the time allowed by the North Carolina Rules of Civil Procedure.

45. On May 19, 1998, Mr. Sar served Crown's Second Set of Interrogatories and Requests for Production of Documents on Defendant, as Mr. Brim's counsel.

46. Mr. Sar sent Defendant a letter dated June 9, 1998 inquiring about Mr. Brim's failure to respond to Crown's First Set of Interrogatories and Request for Production of Documents. Mr. Sar asked that Defendant contact him about producing the requested information and documents.

47. Defendant did not respond to Mr. Sar's June 9, 1998 letter and Defendant did not respond to Crown's request for discovery.

48. Mr. Sar filed a motion to compel discovery respecting the first interrogatories and request for production of documents on June 17, 1998.

49. On June 24, 1998, Mr. Sar advised Defendant that he had not received responses to Crown's Second Set of Interrogatories and Request for Production of Documents.

50. In June of 1998, Mr. Sar filed a Motion for Partial Summary Judgment and a Motion for Dismissal as Rule 37 Sanction or in the Alternative, Second Motion to Compel. AHFC's attorney also filed a Motion for Summary Judgment in June of 1998.

51. Notice of the hearing on these motions was properly made on Defendant. The hearing was scheduled for July 6, 1998.

52. On July 6, 1998, Crown's and AHFC's motions were heard in Guilford County Superior Court before Judge William H. Freeman.

53. Neither Defendant nor Mr. Brim attended the motions hearing on July 6, 1998.

54. Judge Freeman ruled in open court that the parties had until July 24, 1998 to reach a settlement or he would enter summary judgment or allow Mr. Brim to take a voluntary dismissal of his action.

55. Defendant did not give Mr. Sar a definite answer concerning a settlement amount prior to July 24, 1998, despite Mr. Sar's efforts to negotiate a settlement with Defendant.

56. On October 13, 1998, Judge Freeman entered an order granting summary judgment for AHFC, partial summary judgment for Crown and dismissing Mr. Brim's action as a Rule 37 sanction in favor of Crown.

57. Defendant did not keep Mr. Brim updated about the events in his case, such as the motion to compel discovery, the motion to dismiss the case and the order allowing summary judgment and dismissal of Mr. Brim's claims.

58. In late 1998 or early 1999, Ms. Joan Ziglar (Ms. Ziglar), an attorney for the Commonwealth of Virginia and a friend of Mr. Brim, contacted Defendant to get an update on the status of Mr. Brim's case. Defendant told Ms. Ziglar that the defendants in Mr. Brim's case were granted summary judgment, but that Defendant, Crown and AHFC were in settlement negotiations in order to stave off an appeal of the case by Mr. Brim.

59. Ms. Ziglar learned from Mr. Sar that neither his client nor AHFC were in settlement negotiations with Defendant after the court granted summary judgment.

60. On March 20, 1999, Defendant gave Mr. Brim check number 2421, drawn on Defendant's trust account, in the amount of $4,500.00. Defendant wrote the words, "Brim-Settlement", on the check.

61. Neither Crown nor AHFC settled Mr. Brim's case for $4,500.00.

62. Defendant deposited $4,500.00 of his personal funds into his trust account and wrote check number 2421 in the amount of $4,500.00 to Mr. Brim.

63. Defendant did not tell Mr. Brim or his parents the source of the $4,500.00 check that Defendant identified as "Brim Settlement".

64. On March 22, 1999, Ms. Ziglar wrote Defendant and requested the return of Mr. Brim's file.

65. On April 2, 1999, Defendant responded to Ms. Ziglar's request for Mr. Brim's file by asking that Mr. Brim send a release for the file.

66. Mr. Brim did not receive his file. Ms. Ziglar again requested Mr. Brim's file in a letter dated August 19, 1999 to Defendant.

67. Mr. Brim has never received his file from Defendant.

68. In February of 1995, Kenneth Hawkins Jr. (Mr. Hawkins) and his wife hired Defendant to handle a bankruptcy action.

69. Mr. Hawkins paid Defendant $840.00 as his attorney's fee to handle the bankruptcy case.

70. Defendant did not file a bankruptcy action for Mr. Hawkins and his wife.

71. Mr. Hawkins filed a grievance against Defendant on June 28, 1999 with the North Carolina State Bar (State Bar).

72. On July 9, 1999, Defendant was served with a letter of notice and substance of grievance from the State Bar that apprised him of Mr. Hawkins' allegations.

73. Pursuant to State Bar rules, Defendant was required to respond to Mr. Hawkins' grievance within 15 days of receiving it.

74. Defendant did not seek an extension to respond to Mr. Hawkins' grievance. Defendant did not respond timely to Mr. Hawkins' grievance.

75. By letter dated August 30, 1999, the North Carolina State Bar Office of Counsel gave Defendant an extension until September 9, 1999 to respond to Mr. Hawkins' grievance.

76. Defendant did not respond to the grievance on or before September 9, 1999.

77. On September 20, 1999, the North Carolina State Bar issued a subpoena to appear and produce documents or objects. Defendant was required to appear at the State Bar office and respond to Mr. Hawkins' grievance on October 13, 1999.

78. Defendant was served personally by the sheriff with the State Bar's subpoena on September 22, 1999.

79. Defendant did not appear at the State Bar office on October 13, 1999 pursuant to the subpoena.

80. Defendant finally responded to Mr. Hawkins' grievance with a response dated October 19, 1999.

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

CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over Defendant and the subject matter.

2. Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(1)(2) as follows:

(a) By appropriating other clients' money to his own use or benefit and without their consent to pay $7,500.00 to Mr. Wills, Defendant has committed criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b), engaged in conduct involving dishonesty, fraud, or

deceit in violation of Rule 8.4(c) and failed to maintain client funds in his trust account in violation of Rule 1.15-1(a) and (c).

(b) By depositing his personal funds in the amount of $7,500.00 into his trust account, Defendant commingled client and personal funds in violation of Rule 1.15-1(e).

(c) By settling a potential claim for malpractice with Mr. Wills without first advising him in writing that he should seek independent counsel about Defendant's possible malpractice liability, Defendant violated Rule 1.8(h).

(d) By failing to file North Carolina individual income tax returns for 1994, 1995, and 1996, Defendant committed criminal acts which reflect adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 1.2(b) and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1.2(c).

(e) The offenses of which Defendant was convicted are criminal offenses showing professional unfitness in violation of N.C. Gen. Stat. Section 84-28(b)(1) and Section .0103(17) of the Discipline and Disability Rules of the North Carolina State Bar and reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 1.2(b).

(f) By failing to file North Carolina individual income tax returns for 1994, 1995, and 1996, Defendant committed criminal acts which reflect adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 1.2(b) and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1.2(c).

(g) The offenses of which Defendant was convicted are criminal offenses showing professional unfitness in violation of N.C. Gen. Stat. Section 84-28(b)(1) and Section .0103(17) of the Discipline and Disability Rules of the North Carolina State Bar and reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 1.2(b).

(h) By not returning Ms. Hailey's telephone calls and not keeping her updated on the status of her case, Defendant failed to keep a client reasonably informed about the status of a matter in violation of Rule 1.4.

(i) By not telling Ms. Hailey the truth about the status of her case, Defendant has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(d) and failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of Rule 1.4(b).

(j) By not promptly returning Ms. Hailey's file to her, Defendant failed to surrender papers and property to which the client was entitled in violation of Rule 1.16(d).

(k) By not responding to Crown's discovery requests in Mr. Brim's case, Defendant failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3.

(l) By not appearing in court on July 6, 1998 to represent Mr. Brim in the opposing parties' motions hearing, Defendant failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3.

(m) By not cooperating in resolving Mr. Brim's case by July 24, 1998, as ordered by the court, Defendant failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3 and engaged in conduct that was prejudicial to the administration of justice in violation of Rule 8.4(d).

(n) By not informing Mr. Brim about the various motions that Crown and AHFC filed and by not informing Mr. Brim that he had lost his case due to Crown's and AHFC's successful prosecution of their motions for summary judgment and dismissal, Defendant did not keep a client reasonably informed about the status of a matter in violation of Rule 1.4(a) and did not explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of Rule 1.4(b).

(o) By stating that the $4,500.00 that Mr. Brim received came from the opposing parties as settlement of the case, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c).

(p) By depositing his own money in the amount of $4,500.00 into his trust account to pay Mr. Brim a "settlement" in his case, Defendant commingled his personal funds with trust funds in violation of 1.15-1(a) and (e).

(q) By not returning Mr. Brim's file as he requested, Defendant violated Rule 1.16(d).

(r) By not filing a bankruptcy action for Mr. Hawkins and his wife in the four years that he represented them, Defendant failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3.

(s) By not responding to Mr. Hawkins' grievance until after he was subpoenaed by the State Bar, Defendant violated Rule 8.1(b).

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the evidence and arguments of the parties concerning the appropriate discipline, the hearing committee hereby makes the additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. The defendant's misconduct is aggravated by the following factors:

(a) dishonest or selfish motive;
(b) a pattern of misconduct;
(c) multiple offenses; and
(d) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply rules or orders of the disciplinary agency when he did not respond to the State Bar's First Request for Production of Documents by the deadline ordered by the DHC.

2. The defendant's misconduct is mitigated by the following factors:

(a) absence of discipline imposed by the North Carolina State Bar;
(b) personal or emotional problems;
(c) physical or mental disability or impairment in that defendant suffered from depression; and
(d) remorse.

3. The aggravating factors outweigh the mitigating factors.

Based upon the foregoing aggravating and mitigating factors and the arguments of the parties, the hearing committee hereby enters the following

ORDER OF DISCIPLINE

1. The Defendant, William L. Funderburk Jr., is hereby disbarred from the practice of law beginning 30 days from service of this order upon him.

2. Defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon the defendant.

3. Defendant shall reimburse the North Carolina State Bar in the amount of $495.40, which is the cost of his deposition.

4. Defendant shall reimburse the North Carolina State Bar in the amount of $164.83, which is the expense incurred by the North Carolina State Bar when the defendant did not appear at his noticed deposition on June 16, 2000.

5. Defendant shall also pay the costs of this proceeding as assessed by the Secretary of the North Carolina State Bar.

6. Defendant shall comply with all provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the N.C. State Bar Discipline & Disability Rules.

Signed by the chair with the consent of the other hearing committee members, this 9 day of October 2000.

Fred H. Moody Jr.
Hearing Committee Chair