

NORTH CAROLINA

WAKE COUNTY



2501

BEFORE THE
DISCIPLINARY HEARING COMMISSION
NORTH CAROLINA STATE BAR
00 DHC 25

THE NORTH CAROLINA STATE BAR,)
)
 Plaintiff,)
)
 v.)
)
 GENE H. KENDALL, Attorney,)
)
 Defendant.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER OF DISCIPLINE

This matter was heard on the 29th day of December 2000, before a Hearing Committee of the Disciplinary Hearing Commission composed of Kenneth M. Smith, Chair; W. Steven Allen, Sr., and Robert B. Frantz. The Defendant, Gene H. Kendall, appeared at the hearing and represented himself. The plaintiff was represented by Larissa J. Erkman.

Based upon the pleadings, including the Stipulations on Pretrial Conference submitted by the parties, and the evidence introduced at the hearing, the Hearing Committee hereby enters 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 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.
2. Defendant, Gene H. Kendall (hereinafter, "Defendant"), was admitted to the North Carolina State Bar in 1968 and is, and was at all times referred to herein, an attorney at law licensed to practice law in North Carolina, subject to the rules, regulations and Revised Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.
3. During the periods referred to herein, Defendant was engaged in the practice of law in North Carolina and maintained a law office in Davidson, Mecklenberg County, North Carolina.

4. On September 17, 1997, Defendant qualified as executor of the Estate of Rosalie Bacon.
5. As executor of the Bacon Estate, Defendant opened a bank account for the Estate at First Citizens Bank, designated Account Number 0131434338 (hereafter, "Bacon Estate Account").
6. On February 23, 1998, Defendant endorsed and deposited into his personal account at First Citizens Bank, Account Number 137828693 (hereafter, the "Personal Account") two checks payable to the Estate of Rosalie Bacon from Charlotte Psychiatric Associates in the total amount of \$243.86 (hereafter, the "Bacon Estate Funds").
7. Defendant deposited the Bacon Estate Funds into his Personal Account along with two checks payable to him from his mother, Bessie Kendall, in the total amount of \$500.00.
8. Defendant deposited the Bacon Estate Funds and the checks from his mother into his Personal Account on February 23, 1998 when his account balance was negative \$25.21.
9. As of February 23, 1998, Defendant was not owed any sum from the Bacon Estate in compensation of his fees or in reimbursement of expenses incurred on behalf of the Estate. Defendant's fees and expenses approved by the Clerk of Court in the Bacon Estate had been fully paid as of November 12, 1997.
10. On June 2, 1998, Defendant's Personal Account had a negative balance.
11. During the period from February 23, 1998 when he deposited the Bacon Estate Funds into his Personal Account to June 2, 1998, the Defendant's Personal Account balance repeatedly fell below \$243.86.
12. Throughout the period February 23, 1998 to June 2, 1998, Defendant used the funds in his Personal Account for personal expenditures.
13. On January 25, 1999, Defendant made a deposit of his personal funds in the amount of \$360.50 into the Bacon Estate Account.
14. Defendant deposited his personal funds into the Bacon Estate Account after he was notified that the North Carolina State Bar had initiated a grievance investigation regarding his conduct in handling the Bacon Estate.
15. Defendant deposited his personal funds into the Bacon Estate Account on January 25, 1999 to replace Estate funds that he knew he had deposited into his Personal Account on February 23, 1998. However, Defendant did not know the amount of Estate funds he had deposited in February 1998 and did not recall the source of the Estate funds. He believed that funds payable to the Bacon Estate from the Methodist Home in the

amount of \$360.50 had not been properly deposited into the Bacon Estate Account and therefore made a deposit of his personal funds to the Bacon Estate Account in that amount.

16. Defendant formerly maintained a trust account at United Carolina Bank (now known as BB&T), Account Number 5216583347 (hereafter, the "Old Trust Account").

17. Defendant's Old Trust Account was closed on July 16, 1998.

18. Defendant represented Arthur Chiluck in a personal injury claim.

19. On July 21, 1998, Mr. Chiluck reviewed and signed a settlement statement prepared by Defendant (hereafter, the "Chiluck Settlement Statement").

20. The Chiluck Settlement Statement shows a total recovery for the benefit of Mr. Chiluck in the amount of \$3,200.00.

21. The Chiluck Settlement Statement also shows that Defendant retained \$1,283.00 of the settlement funds on behalf of Mr. Chiluck for payment of medical bills owed by Mr. Chiluck to Dr. King of King Chiropractic Clinic.

22. The Chiluck Settlement Statement shows that Defendant received \$1,066.00 of the settlement funds as his attorney's fee.

23. On July 21, 1998, Defendant disbursed to Mr. Chiluck the remaining balance of the settlement funds in the amount of \$850.34 by check number 1532 issued from Defendant's Personal Account.

24. On July 22, 1998, Defendant endorsed a check made payable to "Arthur Chiluck and His Attorney Gene H. Kendall" from Nationwide Insurance Company in the amount of \$3,200.00 and deposited the check into his Personal Account.

25. Upon deposit of the Chiluck settlement check into his Personal Account, Defendant simultaneously withdrew \$1,000.00 in cash.

26. On September 8, 1998, Defendant paid to King Chiropractic Clinic \$1,283.00 in cash in full payment of Mr. Chiluck's outstanding medical bill.

27. On July 30, 1998, the balance in Defendant's Personal Account fell below \$1,283.00 and remained below \$1,283.00 up to and including September 8, 1998.

28. Between July 22, 1998 when Defendant deposited the Chiluck settlement check into his Personal Account and September 8, 1998 when Defendant paid King Chiropractic Clinic, Defendant's Personal Account balance fell as low as \$1.96.

29. On September 4, 1998, Defendant had only \$51.83 in his Personal Account.

30. On August 24, 1998, Defendant withdrew \$25.00 from his account by ATM transaction. Defendant made no cash withdrawals from his account between August 24, 1998 and September 8, 1998 when he paid King Chiropractic Clinic. On September 8, 1998, Defendant deposited \$200.00 in cash to his Personal Account.

31. Between July 22, 1998 and September 8, 1998, Defendant used the funds in his Personal Account for personal expenditures.

32. On April 6, 1999, Investigator David Frederick of the North Carolina State Bar personally served a subpoena for cause audit on Defendant, commanding him to produce for inspection, copy and audit all records relating to his handling of client funds that he was required to keep pursuant to the Rules of Professional Conduct, Rules 10.1 and 10.2, and/or the Revised Rules of Professional Conduct, Rules 1.15-1 and 1.15-2.

33. At the time the subpoena for cause audit was served on him, Defendant explained that he had not maintained a trust account for deposit of client or fiduciary funds since his Old Trust Account was closed on July 16, 1998.

34. Defendant opened a new trust account (hereafter, "the New Trust Account") in or around June 1999 in response to the State Bar's investigation.

35. During the period from July 16, 1998, to June 1999, Defendant did not maintain any trust account for the deposit of client or fiduciary funds.

36. On June 30, 1998, Defendant deposited into his Personal Account settlement funds in the amount of \$572.00 that he received from Laker Express on behalf of his clients, Garrison Management and Portside Homeowners' Association.

37. Defendant was entitled to an attorney's fee equal to one-third of the settlement amount or \$190.66.

38. Defendant disbursed \$381.34 of the settlement funds to Portside Homeowners' Association by issuing check number 1530 from his Personal Account. The check was dated July 3, 1998. The amount of \$381.34 paid by Defendant to Portside Homeowner's Association equaled the settlement proceeds less Defendant's attorney's fee.

39. Rosalie Felicia Bacon died on June 25, 1996.

40. Ms. Bacon's last will and testament was probated on September 17, 1997.

41. At the same time, Defendant applied to be executor of the Bacon Estate and completed a preliminary inventory. He also filed inventories of the contents of two safety deposit boxes.

42. Defendant qualified as the executor for the Bacon Estate pursuant to the terms of Ms. Bacon's last will and testament and the Mecklenberg County Superior Court issued letters testamentary to Defendant on September 17, 1997.

43. Defendant signed the Oath of Executor on September 17, 1997.
44. After Defendant qualified as executor, he set up a separate estate account and collected the funds held in trust for Ms. Bacon at First Citizens Bank. He also paid bills of the Estate.
45. On October 6, 1997, Defendant filed a 90-day inventory for Bacon's estate and a verified petition for interim fees for executor.
46. The verified petition for interim fees sought payment of Defendant's fees as executor in the amount of \$2,212.50.
47. The Clerk of Mecklenberg County Superior Court entered an order allowing compensation of Defendant as executor of the Bacon Estate in the amount of \$2,212.50.
48. On October 31, 1997, Defendant filed an affidavit of publication, which affirmed that the notice of administration of the Bacon Estate had been published.
49. On November 10, 1997, Defendant filed a second verified petition for interim fees for serving as executor.
50. The second petition for interim fees sought payment of Defendant's fees as executor in the amount of \$2,125.00.
51. The second petition for interim fees included a statement of Defendant's time incurred in administering the Bacon Estate.
52. The statement of Defendant's time incurred in administering the Bacon Estate included an entry for 5.0 hours for preparation of NC State Inheritance Tax Return for the Estate and preparation of an income tax return for the decedent for the tax year 1996.
53. On November 10, 1997, the Clerk of Mecklenberg County Superior Court entered an order allowing compensation of Defendant as executor of the Bacon Estate in the amount of \$2,125.00.
54. Subsequently, there was no activity in the file until September 18, 1998, at which time the Clerk of Mecklenberg County issued a Notice to File Annual Account.
55. Pursuant to this Notice to File Annual Account, Defendant was advised that he must file an annual accounting on behalf of the Bacon Estate no later than October 18, 1998.
56. The Notice to File Annual Account was served on Defendant by certified mail on September 22, 1998.

57. Defendant did not file an Annual account for the Bacon Estate by October 18, 1998.

58. The Mecklenberg County Clerk spoke with Defendant on October 27, 1998 and informed him that, if he had not filed an accounting by November 13, 1998, the clerk's office would issue an order to file an accounting and would send a copy of the order to the North Carolina State Bar.

59. On November 16, 1998, Defendant requested an extension of time to file an Annual Account and the Clerk of Mecklenberg County granted an extension to November 19, 1998.

60. Thereafter, Respondent failed to file an annual accounting or inventory.

61. On December 4, 1998, the Assistant Clerk of Superior Court, Kathy Allen Smith, issued an order for Defendant to file an accounting in the Bacon Estate.

62. Pursuant to the Order, Respondent had to and until December 24, 1998 to file an annual account or to show good cause as to his failure to do so.

63. Three attempts to serve the December 4, 1998 order on Defendant by certified mail were made, but the certified mail delivery was not claimed by Defendant.

64. Defendant did not file an annual inventory or account for the Bacon Estate and did not make the required showing.

65. Defendant did not seek another extension of time to file an annual account.

66. By order dated January 8, 1999, the Mecklenberg County Clerk removed Defendant as executor of the Bacon Estate and the letters testamentary were revoked.

67. The Clerk found as fact that Defendant "failed to properly administer the estate . . . in that he has failed to file his Account as required by law."

68. The Clerk found as fact that the Court had taken actions in an attempt to have Defendant correct the deficiencies in that:

- (a) Assistant Clerk Kathy Allen Smith talked by telephone with Defendant on several occasions and each time was advised by Defendant that he would file his Account;
- (b) Ms. Smith advised Defendant that if he had not filed his Account by November 13, 1998, the Court would issue an order to file his Account;
- (c) On December 4, 1998, the Court issued an order and directed Defendant to file his Account as required by law which order the Court attempted to serve on Defendant by certified mail, return receipt requested;

- (d) The wrapper containing the order to file was returned to the Court;
- (e) The wrapper discloses that notices to pick up the certified mailing were given to the addressee on December 8, December 18, and December 23, 1998.
- (f) The mail was not picked up by Defendant and the post office returned it to the Court with the notation that it was "unclaimed."

67. The public administrator, Frank Schrimsher, was appointed as Successor Personal Representative for the Bacon Estate on January 8, 1999.

68. Defendant was ordered to immediately turn over to the public administrator all assets of the Bacon Estate and all records pertaining to administration of the Estate.

69. On January 12, 1999, the Successor Personal Representative, Mr. Schrimsher, filed a petition for discovery of property belonging to the Bacon Estate.

70. By notice of hearing dated January 12, 1999, Defendant was ordered to appear before the Clerk of Superior Court of Mecklenberg County on February 16, 1999, to be examined under oath concerning his possession of certain property belonging to the Estate.

71. On January 26, 1999, Assistant Clerk of Court Kathy Allen and Mr. Schrimsher met with Defendant regarding the Bacon Estate.

72. At their January 26, 1999 meeting, Ms. Allen and Mr. Schrimsher pointed out to Defendant that his second verified petition for payment of executor fees stated that he had spent 5.0 hours at \$125.00 per hour preparing inheritance tax returns for the Estate and personal income tax returns for Ms. Bacon.

73. Ms. Allen and Mr. Schrimsher asked Defendant whether the tax returns had been filed.

74. Defendant admitted that he did not file the tax returns.

75. Defendant's fee for preparing the tax returns in the amount of \$625.00 was paid by the Estate on November 12, 1997 by Defendant's issuance of a check from the Bacon Estate Account to himself in the amount of \$2,125.00.

76. Defendant had not filed the tax returns by the time he filed his second verified fee petition with the court.

77. Defendant had not filed the tax returns by the time he issued a check from the Bacon Estate in payment of his fees on November 12, 1997.

78. Defendant lost his Bacon Estate file containing the tax returns on or around February 23, 1998 when he traveled to Clinton, North Carolina to visit his mother. He had not filed the tax returns as of the date he lost his file.

79. At the January 26, 1999 meeting with Ms. Allen and Mr. Schrimsher, Defendant filed an affidavit with the Court describing the assets in the Estate at the time of Ms. Bacon's death and the actions that he had undertaken as executor up to and including January 8, 1999, when he was removed as executor by order of the Court.

80. Defendant prepared and attached to his affidavit filed on January 26, 1999, a list of checks payable to the Bacon Estate and a list of checks paid from the Bacon Estate Account.

81. The list of checks payable to the Bacon Estate did not include the two Charlotte Psychiatric Associates checks in the total amount of \$243.86 that Defendant deposited into his Personal Account on February 23, 1998.

82. At the January 26, 1999 meeting with Ms. Allen and Mr. Schrimsher, Defendant promised to turn over records for the Estate as soon as he received them from the bank and promised to prepare a final account.

83. The Assistant Clerk of Court, Ms. Allen, gave Defendant an extension of 7 - 10 days to turn over the Estate records and to prepare an account.

84. Defendant did not turn over the documents or file an account.

85. On May 11, 1999, the Court issued a Notice of Hearing and scheduled a hearing on May 27, 1999, for purposes of determining the Defendant's attorney's fee.

86. Defendant met with Mr. Schrimsher and Assistant Clerk of Court, Martha Curran, on May 27, 1999.

87. At that meeting, Defendant returned \$650.00 to the Estate in reimbursement for the \$625.00 in fees paid to him for preparing the tax returns that were never filed and were never turned over to the new administrator.

88. On October 6, 1999, Defendant finally filed a Final Account for the Bacon Estate.

Based upon the foregoing Findings of Fact and the stipulations of the parties, the Hearing Committee enters the following

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Committee. The Committee has jurisdiction over the Defendant, Gene H. Kendall, and the subject matter of this proceeding.

2. The 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)(2) as follows:

- (a) By appropriating to his own use the Bacon Estate Funds that he received in a fiduciary capacity, Defendant committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b) of the Revised Rules of Professional Conduct.
- (b) By appropriating to his own use the Bacon Estate Funds that he received in a fiduciary capacity, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct.
- (c) By failing to preserve the Bacon Estate Funds that he received in a fiduciary capacity separate and apart from his own funds in a trust or fiduciary account, Defendant violated Rules 1.15-1(a) and 1.15-1(d) of the Rules of Revised Professional Conduct.
- (d) By failing to preserve the Chiluck settlement funds that he received in a fiduciary capacity separate and apart from his own funds in a trust or fiduciary account, Defendant violated Rules 1.15-1(a) and 1.15-1(d) of the Revised Rules of Professional Conduct.
- (e) By failing to promptly pay or deliver to King Chiropractic Clinic settlement funds belonging to Mr. Chiluck for medical expenses owed, as directed by Mr. Chiluck in the Chiluck Settlement Statement, Defendant violated Rule 1.15-2(h) of the Revised Rules of Professional Conduct.
- (f) By failing to preserve the funds of his clients Garrison Management and Portside Homeowners' Association that he received in a fiduciary capacity separate and apart from his own funds in a trust or fiduciary account, Defendant violated Rules 1.15-1(a) and 1.15-1(d) of the Revised Rules of Professional Conduct.
- (g) By failing to maintain a trust account, separately identifiable from any business or personal account, as a prerequisite to the receipt of funds belonging to another person or entity from a client or a third party, Defendant violated Rule 1.15-1(c) of the Revised Rules of Professional Conduct.

- (h) By failing to act with reasonable diligence and promptness in completing the statutorily required estate filings and tasks, Defendant neglected his duties and obligations as executor of the Bacon Estate in violation of Rule 1.3 of the Revised Rules of Professional Conduct.
- (i) By unduly delaying the estate proceedings and by failing to respond to and abide by the orders of the Superior Court relating to administration of the estate, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct.
- (j) By submitting a petition for fees for preparation of tax returns for the Bacon Estate and for Ms. Bacon and by collecting a fee for such services when he did not complete the services on behalf of the Estate, Defendant knowingly made a false statement of material fact or law to a tribunal in violation of Rule 3.3(a) of the Revised Rules of Professional Conduct.
- (k) By submitting a petition for fees for preparation of tax returns for the Bacon Estate and for Ms. Bacon and by collecting a fee for such services when he did not complete the services on behalf of the Estate, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct.

3. The Hearing Committee found no other rule violations as alleged in the Complaint.

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 additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. The Defendant's misconduct is aggravated by the following factors:
 - (a) Prior disciplinary offenses: In 1990, Defendant received a reprimand for violation of Rules 6(b)(3) and 7.1(a)(1) of the Rules of Professional Conduct when he delayed in filing an equitable distribution order on behalf of his client for 17 months after the equitable distribution hearing as a self-help remedy to collect a fee. In 1995, the Defendant's license was suspended for six months by the Disciplinary Hearing Commission

based on findings that that, among other things, the Defendant engaged in the practice of law while his license was administratively suspended and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of 1.2(c) by knowingly making a false statement of material fact in connection with the disciplinary investigation. A letter of warning was issued to the Defendant in 1998, for continuing to practice law after he received an order suspending his license for failure to pay dues.

- (b) Dishonest or selfish motive.
 - (c) A pattern of misconduct.
 - (d) Multiple offenses.
 - (e) Substantial experience in the practice of law.
2. The Defendant's misconduct is mitigated by the following factors:
- (a) Timely good faith efforts to make restitution or rectify consequences of misconduct.
 - (b) Full and free disclosure to the Hearing Committee or cooperative attitude toward the proceedings.
 - (c) 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

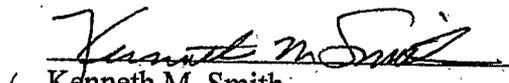
1. The Defendant is hereby disbarred from the practice of law, effective 30 days from the date of service upon him of this Order of Discipline.
2. The Defendant shall submit his license and N.C. State Bar membership card to the Secretary of the N.C. State Bar within 30 days of service upon him of this order.
3. The Defendant shall comply with all provisions of 27 N.C. Admin. Code Chapter 1B, § .0124 of the N.C. State Bar Discipline & Disability Rules, including, but not limited to, the requirement that he file, with the Secretary of the N.C. State Bar within 10 days of the effective date of this order, an affidavit showing that he has fully complied with the provisions of this Order, the provisions of §.0124 and with the provisions of other state, federal or administrative jurisdictions, if any, to which he is admitted to practice.
4. The Defendant shall violate no provisions of the Rules of the North Carolina State Bar during his disbarment.

5. The Defendant shall violate no state or federal law during his disbarment.

6. The costs of this matter are taxed against the Defendant

Signed by the undersigned chairman with the full knowledge and consent of the other members of the Hearing Committee, this the 12 day of

January, 2001.


Kenneth M. Smith
Chairman
Hearing Committee