

7708

WAKE COUNTY

NORTH CAROLINA



BEFORE THE
 DISCIPLINARY HEARING COMMISSION
 OF THE
 NORTH CAROLINA STATE BAR
 04 DHC 24

THE NORTH CAROLINA STATE BAR)
 Plaintiff)

v.

W. KELLY ELDER, ATTORNEY)
 Defendant)

) FINDINGS OF FACT
) CONCLUSIONS OF LAW
) AND ORDER OF DISCIPLINE

THIS MATTER came on to be heard and was heard on Oct. 13, 2004 before a duly assigned committee of the Disciplinary Hearing Commission composed of M. Ann Reed, Chair; John M. May and R. Mitchel Tyler. Carolin Bakewell represented the N.C. State Bar. The Defendant, W. Kelly Elder, did not appear nor was he represented by counsel. Based upon the pleadings and the evidence introduced at trial, the hearing committee hereby enters the following:

FINDINGS OF FACT

1. The 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. The Defendant, W. Kelly Elder (Elder) was admitted to the North Carolina State Bar in 1977, 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 all of the periods relevant hereto, Elder was engaged in the practice of law in the City of Burlington, North Carolina.

4. In 1991 Derek C. Trucks (Trucks) retained Elder to provide general legal guidance, estate and trust planning services to Trucks and his business entities, including The Derek Trucks Band.

5. Trucks is a musician and spends a substantial amount of time away from home. At Elder's suggestion, Trucks executed a power of attorney which authorized Elder to pay bills for Trucks and his various business concerns. The power of attorney did not authorize Elder to use any funds or property belonging to Trucks or his businesses for Elder's personal benefit.

6. At various times, at Elder's suggestion, Trucks signed blank checks for Trucks' "CAP" checking account # 9070135524 at First Union Bank (CAP account) and Trucks' Medallion account #41831875770 at Triangle Securities (Medallion account). Elder was authorized only to use the checks to pay legitimate obligations of Trucks and his business entities.

7. Between January 2001 and April 2002, Elder withdrew approximately \$62,600 from Trucks' "CAP" checking account using blank checks previously signed by Trucks. Elder misappropriated all or a portion of these funds for his own use and benefit without Trucks' consent.

8. Between January 2001 and April 2002, Elder withdrew at least \$6,800 from Trucks' Medallion account using blank checks previously signed by Trucks. Elder misappropriated all or a portion of these funds for his own use and benefit without Trucks' consent.

9. Between Jan. 1, 2001 and April 2002, Elder withdrew approximately \$21,310.34 from the Derek Trucks Band merchandise bank account #2080000744782 at First Union Bank. Elder misappropriated all or a portion of these funds for his own use and benefit without Trucks' consent.

10. On or about Aug. 2, 2001, Elder withdrew \$40,000 from a line of credit account # 4386550320069099 at First Union/Wachovia Bank (line of credit account). Elder misappropriated all or a portion of these funds for his own use and benefit without Trucks' consent.

11. On or after Aug. 2, 2001, Elder acknowledged to Trucks that he had used the money taken from the line of credit account for personal expenses. Although Elder promised to replace all of the money, he failed to do so.

12. In or prior to April 2002, Elder opened a First Union Bank credit card account # 4264 2985 5323 2300 in Trucks' name. Elder used the card to obtain more than \$5,000 in cash advances, all or part of which he misappropriated for his personal use and benefit without Trucks' consent.

13. Prior to June 2002, Trucks obtained a payment of \$35,000 from the Allman Brothers Band. These funds represented an advance payment of salary and fees to be earned by Trucks while on tour with the Allman Brothers Band in 2002.

14. Trucks agreed to permit Elder to borrow the \$35,000 advance on the express condition that the money was to be repaid on or before Dec. 31, 2002.
15. Elder did not advise Trucks in writing to consult independent counsel before Trucks agreed to lend the \$35,000 to Elder, nor did Elder adequately disclose to Trucks that Elder was experiencing financial difficulties and that there was a substantial risk that he would not repay Trucks on a timely basis.
16. Elder did not tell Trucks that Elder had previously made unauthorized withdrawals of funds belonging to Trucks.
17. Trucks would not have agreed to the loan had he been aware that Elder had misused funds belonging to Trucks and that Elder was experiencing substantial financial difficulties.
18. Trucks did not give informed consent in writing to the terms of the loan transaction.
19. Elder did not repay the \$35,000 loan.
20. Prior to March 19, 2003, Trucks retained the services of Philip H. Goodpasture (Goodpasture), then a partner in the law firm of Christian Barton in Richmond, Va., to assist in resolving Trucks' concerns over the manner in which Elder had handled funds and property belonging to Trucks.
21. On March 19, 2003, Goodpasture wrote to Elder on Trucks' behalf and demanded that Elder produce various financial records relating to funds and property belonging to Trucks.
22. Elder did not respond to Goodpasture's letter, nor did he provide the requested financial records or otherwise account for the funds belonging to Trucks.
23. On April 24, 2003, Trucks discharged Elder as his attorney and directed Elder to return to Trucks his client files and all personal property in Elder's possession.
24. Elder has failed and refused to return Trucks' client files and items of personal property to Trucks.
25. On or about Aug. 18, 2003, Trucks filed a grievance against Elder with the N.C. State Bar.
26. On Oct. 14, 2003, the N.C. State Bar personally served Elder with the letter of notice and substance of grievance regarding Trucks' grievance. The

letter of notice directed Elder to file a written response to the letter of notice no later than Oct. 29, 2003.

27. Elder did not respond to Trucks' grievance.

Based on the foregoing Findings of Fact, the hearing committee hereby makes the following:

CONCLUSIONS OF LAW

1. The Disciplinary Hearing Commission has jurisdiction over the person of the Defendant and over the subject matter of this proceeding.

1. By withdrawing approximately \$62,600 from Trucks' CAP account # 9070135524 and misappropriating all or a portion of the proceeds for his own use and benefit without Trucks' consent, Elder committed criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b), engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); engaged in a conflict of interest in violation of Rule 1.7 and used entrusted property for his personal benefit in violation of Rule 1.15-2(j).

2. By withdrawing at least \$6,800 from Trucks' Medallion account #41831875770 at Triangle Securities and misappropriating all or a portion of the funds for his own use and benefit without Trucks' consent, Elder committed criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b), engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); engaged in a conflict of interest in violation of Rule 1.7 and used entrusted property for his personal benefit, in violation of Rule 1.15-2(j).

3. By withdrawing approximately \$21,310.34 from the Derek Trucks Band merchandise bank account and misappropriating all or a portion of the funds for his own use and benefit without Trucks' consent, Elder committed criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b), engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); engaged in a conflict of interest in violation of Rule 1.7 and used entrusted property for his personal benefit in violation of Rule 1.15-2(j).

4. By withdrawing \$40,000 from a line of credit account # 4386550320069099 at First Union/Wachovia Bank in Trucks' name and misappropriating all or a portion of those funds to his own use and benefit without Trucks' consent, Elder committed criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b), engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of

Rule 8.4(c); engaged in a conflict of interest in violation of Rule 1.7 and used entrusted property for his personal benefit in violation of Rule 1.15-2(j).

5. By obtaining more than \$5,000 in cash advances from First Union Bank credit card# 4264 2985 5323 2300 in Trucks' name and using all or a portion of the proceeds for his own use and benefit without Trucks' consent, Elder committed criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b), engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); engaged in a conflict of interest in violation of Rule 1.7 and used entrusted property for his personal benefit in violation of Rule 1.15-2(j).

6. By inducing Trucks to lend him \$35,000 without revealing that he had previously misused funds belonging to Trucks, Elder engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Revised Rule 8.4(c).

7. By obtaining a \$35,000 loan from Trucks without first advising Trucks in writing of the advisability of seeking independent legal counsel, without adequately disclosing the risks associated with the transaction and without obtaining informed written consent to the transaction from Trucks, Elder engaged in a conflict of interest in violation of Revised Rule 1.8(a).

8. By failing to account to Trucks regarding all funds entrusted to and handled by Elder, Elder failed to provide a written accounting to his client, in violation of Revised Rule 1.15-3(d) and (e).

9. By failing to deliver all client files and property belonging to Trucks upon being discharged in April 2003, Elder failed to surrender all papers and property to which his client was entitled, in violation of Revised Rule 1.16(d).

10. By failing to respond to the letter of notice and substance of grievance regarding Trucks' complaint Elder failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b).

Based upon the foregoing Findings of Fact and Conclusions of Law, the hearing committee enters the following

FINDINGS OF FACT REGARDING DISCIPLINE

1. Elder's misconduct is aggravated by the following factors:
 - a) Selfish and dishonest motive
 - b) Indifference to restitution

- c) Prior discipline
 - d) Pattern of misconduct
 - e) Multiple rule violations
 - f) Substantial experience in the practice of law
 - g) Bad faith obstruction of the State Bar's investigation by failing to comply with the Chair's order compelling responses to the State Bar's interrogatories and requests for production of documents.
 - h) Refusal to acknowledge wrongful nature of conduct.
2. There are no mitigating factors present.
 3. The aggravating factors substantially outweigh the mitigating factors.
 4. Elder's misconduct has caused substantial actual harm to his client, Derek Trucks and has also harmed the standing of the legal profession in the eyes of his former client.

5. An order of discipline short of disbarment would not sufficiently protect the public for the following reasons:

a) Elder engaged in multiple violations of the Revised Rules of Professional Conduct over a substantial period of time. His conduct therefore was not the result of an aberration or mistake, but is the product of a serious personality flaw that is not readily changeable.

b) Elder has offered no evidence that he has addressed the problem or flaw that motivated his criminal conduct and other violations of the Revised Rules of Professional Conduct. Indeed, he has ignored and obstructed the State Bar's attempts to investigate this matter. Consequently, the Committee finds that there is a substantial risk that Elder would continue to engage in misconduct if he were permitted to retain his law license.

c) Elder was disciplined by the Disciplinary Hearing Commission in May 2000. The prior order of discipline, which suspended Elder's law license and stayed the suspension, apparently failed to prevent Elder from engaging in additional, more serious violations of the Revised Rules of Professional Conduct. Indeed, most of the misconduct mentioned in this Order occurred while Elder was "on probation" as a result of entry of the May 2000 order.

d) If Elder's law license was merely suspended for a term certain, he would be permitted to resume the practice of law without first having to demonstrate that he has reformed and is no longer a threat to the public. Only an order of disbarment shifts the burden of proof to the attorney to demonstrate rehabilitation and good character before reinstatement occurs.

e) Entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses which Elder committed, would be inconsistent with orders of discipline entered by the Commission in similar cases and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar of this State.

f) Elder's misconduct has jeopardized the profession's ability to remain self regulating. Lawyers cannot continue to enjoy this privilege if members of the Bar do not respond to lawful inquiries of the regulatory authority.

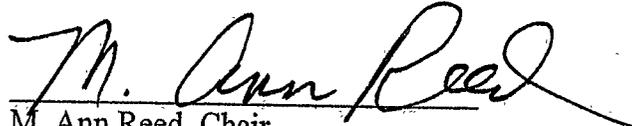
BASED UPON the foregoing Findings of Fact, Conclusions of Law and Findings of Fact Regarding Discipline, the hearing committee hereby enters the following:

ORDER OF DISCIPLINE

1. The Defendant, W. Kelly Elder, is hereby DISBARRED from the practice of law in North Carolina.
2. The costs of this action are taxed to Elder. He must pay the costs within 30 days of service of the statement of costs by the Secretary.
3. Elder may not seek reinstatement of his license to practice law until he submits written proof to the Counsel of the N.C. State Bar that he has made full restitution to Derek Trucks and the business entities mentioned in this order. If any or all of the losses incurred by Trucks and his business entities are reimbursed by the Client Security Fund of the N.C. State Bar, Elder must present written proof that he has made restitution of all amounts paid by the Fund before filing a petition for reinstatement of his law license.
4. Elder shall provide to the Counsel of the N.C. State Bar copies of all documents described in the Plaintiff's First Request for Production of Documents within 20 days of the date of this order.

This the 28th day of October, 2004.

Signed by the Chair of the Hearing Committee with the knowledge and consent of all Committee members.


M. Ann Reed, Chair
Disciplinary Hearing Committee