

STATE OF NORTH CAROLINA

WAKE COUNTY

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

JOHN H. MCWILLIAM, Attorney,

Defendant



BEFORE THE

DISCIPLINARY HEARING COMMISSION

OF THE

NORTH CAROLINA STATE BAR

13 DHC 23

CONSENT ORDER OF DISCIPLINE

This matter was considered by a hearing panel of the Disciplinary Hearing Commission composed of Harriett Smalls, Chair, Donald C. Prentiss, and Karen B. Ray. Leonor Bailey Hodge represented Plaintiff, the North Carolina State Bar. Defendant, John H. McWilliam, was represented by Alan M. Schneider. Defendant waives a formal hearing in the above referenced matter. The parties stipulate and agree to the findings of fact and conclusions of law recited in this consent order. The parties consent to the discipline imposed by this order. Defendant knowingly, freely and voluntarily waives his right to appeal this consent order or to challenge in any way the sufficiency of the findings by consenting to entry of this order.

Based on the foregoing and on the consent of the parties, the Hearing Panel hereby makes by clear, cogent and convincing evidence the following:

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar (hereafter "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, John H. McWilliam (hereafter "Defendant" or "McWilliam"), was admitted to the North Carolina State Bar on 10 September 1993 and is 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 the relevant period referred to herein, McWilliam actively engaged in the practice of law in the State of North Carolina and maintained a law office in Garner, Wake County, North Carolina.

4. Prior to 31 May 2011, Defendant was a member of the Calder and McWilliam law firm (hereafter "Calder Firm"). While employed at the Calder Firm, Defendant maintained BB&T trust account ending in number 2917 (hereafter "BB&T trust account").

5. On 31 May 2011, Defendant formed the law firm of McWilliam, Henderson and Wall (hereafter "MHW Firm") with two other lawyers.

6. After Defendant formed the MHW Firm, he opened a new trust account at North State Bank, account number ending in 9997 (hereafter "North State trust account").

7. The BB&T and the North State trust accounts were mainly used by Defendant as general trust accounts into which Defendant deposited and disbursed all entrusted client funds.

8. The MHW Firm employed the services of a bookkeeper (hereafter "Firm Bookkeeper"). This Firm Bookkeeper had previously worked for Defendant at the Calder Firm.

9. Defendant had managerial and direct supervisory authority over the Firm Bookkeeper during her employment at the Calder and MHW Firms.

10. During her employment at the Calder and MHW Firms, Defendant delegated to the Firm Bookkeeper receipt of entrusted client funds, deposit of entrusted client funds, and maintenance of account records for the BB&T and North State trust accounts. The Firm Bookkeeper did not have signature authority for the trust accounts.

11. Defendant did not review the Firm Bookkeeper's handling of entrusted funds.

12. Defendant failed to review bank statements or any other records for the BB&T and North State trust accounts.

13. Defendant failed to reconcile, at least quarterly, the North State trust account between May 2011 and January 2012.

14. Defendant also failed to reconcile, at least monthly, his check register with his trust account bank statements and failed to instruct anyone else to conduct these monthly reconciliations.

15. Before opening the North State trust account, Defendant failed to reconcile at least quarterly the BB&T trust account.

16. Defendant also failed to reconcile, at least monthly, his check register with his trust account bank statements and failed to instruct anyone else to conduct these monthly reconciliations.

17. The Firm Bookkeeper took entrusted funds to which she was not entitled from both the BB&T and North State trust accounts.

Based upon the consent of the parties and the foregoing Findings of Fact, the Hearing Panel enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel and the Panel has jurisdiction over Defendant, John McWilliam, and over the subject matter.

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

a. by failing to review the Firm Bookkeeper's handling of entrusted client funds, and failing to review his bank statements and other trust account records which he allowed the Firm Bookkeeper to maintain, Defendant failed to make reasonable efforts to ensure that the Calder and MHW Firms had in effect measures that gave reasonable assurance that his non-lawyer assistant's conduct was compatible with Defendant's professional obligations in violation of Rule 5.3(a) and failed to supervise his non-lawyer assistant to the extent necessary to ensure that her conduct was compatible with Defendant's professional obligations in violation of Rule 5.3(b); and

b. by failing to reconcile the BB&T and North State trust accounts at least monthly and quarterly, Defendant failed to conduct the requisite monthly and quarterly reconciliations of his trust accounts in violation of Rule 1.15-3(d).

Based upon the foregoing Findings of Fact and Conclusions of Law and the consent of the parties, the Hearing Panel hereby makes by clear, cogent and convincing evidence the following:

ADDITIONAL FINDINGS OF FACT REGARDING DISCIPLINE

1. McWilliam failed to make reasonable efforts to ensure that his non-lawyer assistant's conduct was compatible with his professional obligations in the handling of entrusted funds in the trust account.

2. McWilliam's excessive delegation coupled with his failure to supervise created the circumstances that enabled the Firm Bookkeeper to embezzle entrusted funds.

3. Many of the funds the Firm Bookkeeper embezzled from the trust account were McWilliam's unearned fees that he had not yet disbursed from the trust account. McWilliam has since performed the work necessary to earn these fees.

4. McWilliam and the other members of the MHW Firm have replenished any embezzled funds that were not McWilliam's legal fee.

5. McWilliam and the other members of the MHW Firm took prompt and appropriate action after the Firm Bookkeeper's embezzlement was discovered.

6. McWilliam has closed the trust accounts from which the Firm Bookkeeper embezzled entrusted client funds. The MHW Firm now maintains a single trust account which McWilliam collectively manages with his law firm partners.

7. McWilliam cooperated with law enforcement authorities resulting in the Firm Bookkeeper's prosecution and conviction.

8. McWilliam and his firm made prompt and appropriate changes in the policies and procedures regarding the handling of trust accounts.

9. McWilliam has no prior discipline.

Based upon the Findings of Fact and Conclusions of Law above and the Additional Findings of Fact Regarding Discipline, and with the consent of the parties, the Hearing Panel makes the following:

CONCLUSIONS OF LAW REGARDING DISCIPLINE

1. The Hearing Panel has considered all of the factors contained in 27 N.C.A.C. 1B § .0114(w)(1), the Rules and Regulations of the State Bar, and concludes that the following factors that warrant suspension or disbarment are present:

(a) Negative impact of defendant's actions on client's or public's perception of the profession; and

(b) Effect and potential effect of defendant's conduct on third parties.

2. The Hearing Panel has considered all of the factors contained in 27 N.C.A.C. 1B § .0114(w)(2), the Rules and Regulations of the State Bar, and concludes that no factors that warrant disbarment are present.

3. The Hearing Panel has considered all of the factors contained in 27 N.C.A.C. 1B § .0114(w)(3), the Rules and Regulations of the State Bar, and concludes that the following are applicable in this matter:

(a) No prior disciplinary offenses;

(b) Absence of dishonest or selfish motive;

(c) Timely good faith efforts to make restitution;

(d) Defendant's cooperative attitude toward the proceedings;

(e) Defendant's remorse;

(f) Good character and reputation; and

(g) Defendant has been licensed to practice law for approximately twenty years.

4. Defendant's failure to properly maintain, manage and handle entrusted funds betrays a vital trust that clients and the public place in attorneys and the legal profession.

5. The Hearing Panel has considered all lesser sanctions including: censure, reprimand and admonition, and finds that discipline less than suspension would not adequately protect the public from Defendant's future misconduct because (i) of the gravity of potential significant harm to clients, and (ii) lesser discipline would fail to acknowledge the seriousness of the violations committed by Defendant and would send the wrong message to attorneys regarding the conduct expected of members of the Bar of this state.

Based upon the foregoing Findings of Fact, Conclusions of Law, Additional Findings of Fact Regarding Discipline and Conclusions of Law Regarding Discipline, and on the consent of the parties, the Hearing Panel enters the following:

ORDER OF DISCIPLINE

1. Defendant, John H. McWilliam, is hereby suspended from the practice of law for two years, effective 30 days from service of this order upon McWilliam.

2. Defendant shall pay, within 30 days of service of the statement of fees and costs upon him by the Secretary of the State Bar, the administrative fees and costs of this proceeding.

3. The two year suspension is stayed for a period of two years as long as Defendant complies with the following conditions:

- a. McWilliam pays the administrative fees and costs of this proceeding as assessed by the Secretary of the State Bar within 30 days of service of the statement of fees and costs upon him.
- b. McWilliam shall provide to the State Bar monthly the three-way reconciliation of all attorney trust accounts to which he has access using the reconciliation method described in the State Bar Lawyer's Trust Account Handbook, rev. 05/2011, pages 34 - 43. In addition to the three-way reconciliation report, McWilliam shall provide (i) client ledgers for each client whose funds are held in the trust account during the month covered by the submitted report, (ii) ledger for any personal funds maintained in the trust account(s) for bank or credit card fees, (iii) the general ledger(s) for each trust account to which McWilliam has access, and (iv) the bank statement, canceled checks and deposit slips for each trust account to which McWilliam has access.

- c. McWilliam shall provide any other records requested by the Office of Counsel within ten days of the request.
- d. Within six months of the effective date of this order, McWilliam shall complete the trust account continuing legal education (CLE) course taught by NC State Bar Trust Accounting Compliance Counsel Peter Bolac (usually titled "Trust Accounting Rules" or "Trust Accounting Rules: Avoid the Pitfalls.") This CLE requirement is in addition to the CLE requirements set out in 27 N.C.A.C. 1D § .1518.
- e. McWilliam shall keep the State Bar Membership Department advised of his current business and home addresses. McWilliam shall notify the State Bar of any change of address within ten days of such change. His current business address must be a street address, not a post office box or drawer.
- f. McWilliam shall respond to all communications from the State Bar, including communications from the Attorney Client Assistance Program, within thirty days of receipt of such communication or by the deadline stated in the communication, whichever is sooner.
- g. McWilliam shall participate in good faith in the State Bar's fee dispute resolution process for any petition of which he receives notice after the effective date of this order.
- h. McWilliam shall timely comply with all State Bar Membership and CLE requirements.
- i. McWilliam shall not violate the Rules of Professional Conduct or the laws of the United States or of any state or local government.

4. If McWilliam fails to comply with any one or more of the conditions set out above in this Order of Discipline, then the stay of the suspension may be lifted in accordance with 27 N.C.A.C. 1B § .0114(x).

5. If the stay of the suspension is lifted and the suspension is activated for any reason, the Disciplinary Hearing Commission may enter an order imposing such conditions as it deems proper for the reinstatement of McWilliam's license at the end of the suspension. Additionally, McWilliam must establish the following by clear, cogent and convincing evidence prior to being reinstated to the practice of law after any period of active suspension:

- a. McWilliam submitted his law license and membership card to the Secretary of the State Bar within thirty days of the date the order lifting the stay and/or activating the suspension of his law license;

b. McWilliam complied with the provisions of 27 N.C.A.C. 1B § .0124 of the State Bar Discipline and Disability Rules following entry of the order lifting the stay and/or activating the suspension of his law license;

c. McWilliam timely paid all administrative fees and costs assessed against him in this proceeding as reflected on the statement of costs served upon him by the Secretary of the State Bar;

d. That within 15 days of the effective date of the order activating the suspension McWilliam provided the State Bar with an address and telephone number at which clients seeking return of files can communicate with McWilliam and obtain such files;

e. That McWilliam promptly provided client files to all clients who made a request for return of their files;

f. McWilliam has kept the State Bar Membership Department advised of his current business and home street addresses (not post office box or drawer addresses) and notified the State Bar of any change in address within ten days of such change;

g. McWilliam has responded to all communications from the State Bar, including communications from the Attorney Client Assistance Program, within thirty days of receipt or by the deadline stated in the communication, whichever is sooner;

h. At the time of his petition for reinstatement, McWilliam is current in payment of all membership dues, fees and costs, including all Client Security Fund assessments, and other charges or surcharges the State Bar is authorized to collect from him, including all judicial district dues and assessments;

i. At the time of his petition for reinstatement, there is no deficit in McWilliams's completion of mandatory CLE hours in reporting of such hours or in payment of any fees associated with attendance at CLE programs;

j. At the time of his petition for reinstatement, McWilliam has completed the trust account CLE course taught by NC State Bar Trust Accounting Compliance Counsel Peter Bolac (usually titled "Trust Accounting Rules" or "Trust Accounting Rules: Avoid the Pitfalls."); and

k. McWilliam has not violated the Rules of Professional Conduct or the laws of the United States, or the laws of any state or local government during his suspension.

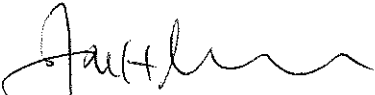
6. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C.A.C. 1B § .0114(x) throughout the period of the stay of the suspension.

Signed by the Chair with the consent of the other Hearing Panel members this the 29th
day of October, 2013.



Harriett Smalls, Chair
Disciplinary Hearing Panel

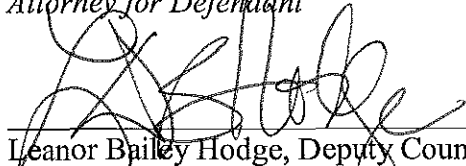
WE CONSENT:



John McWilliam
Defendant



Alan M. Schneider
Attorney for Defendant



Leonor Bailey Hodge, Deputy Counsel
Attorney for Plaintiff