STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR
21 DHC 16

FILED DHC DEC 2021

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

MARK D. LACKEY, Attorney,

Defendant

CONSENT ORDER OF DISCIPLINE

This matter came before a hearing panel of the Disciplinary Hearing Commission composed of Shannon R. Joseph, Chair, Brian O. Beverly, and Ronald C. Brinson. Margaret T. Cloutier and J. Cameron Lee represented the Plaintiff, the North Carolina State Bar. Defendant, Mark D. Lackey, appeared *pro se*.

Defendant waives a formal hearing in this matter. Defendant freely and voluntarily stipulates and agrees to the findings of fact and conclusions of law recited in this consent order and to the discipline imposed and consents to the entry of the order of discipline. Defendant freely and voluntarily waives all right to appeal the entry of this consent order of discipline.

Based upon the pleadings and the stipulated facts and with the consent of the parties, the Hearing Panel finds by clear, cogent, and convincing evidence the following:

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar ("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 (Chapter 1 of Title 27 of the North Carolina Administrative Code).

2. Defendant, Mark D. Lackey, was admitted to the North Carolina State Bar in August 1983 and is, and was at all times referred to herein, an attorney licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Rules of Professional Conduct.

3. During all or part of the relevant periods referred to herein, Defendant was engaged in the practice of law in the State of North Carolina and maintained a law office in Shelby, Cleveland County, North Carolina.

4. Lackey maintained a trust account in connection with his law practice at Bank of The Ozarks, account number ending in 6163 ("trust account").

5. Lackey held entrusted funds on behalf of clients in his trust account.

6. Between July 2016 and January 2020, Lackey failed to:

a. At least quarterly prepare reconciliation reports showing the balance that appeared in the general ledger as of the reporting date, the total of all positive subsidiary ledger balances in the trust account as of the reporting date, and the adjusted bank balance and verify that the balances were identical, and review, sign, date and retain a copy of those reports for a period of six years;

b. At least monthly reconcile the balance of the trust account as shown in his records with the then-current bank statement balance for his trust account, and review, sign, date and retain a copy of those reports for a period of six years;

c. Maintain a proper client ledger containing a record of receipts and disbursements for each person or entity from whom and for whom funds were received and showing the current balance of entrusted funds held in his trust account for each such person or entity. More specifically, a number of transactions referenced on Defendant's client ledgers did not match transactions that cleared his trust account;

d. Review the statement of costs and receipts, client ledger, and canceled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made, and sign, date and retain copies of reports of those reviews for a period of six years;

e. Promptly pay title insurance premiums on behalf of his clients;

f. Provide information identifying the clients from whose balance wire transfer fees were drawn on multiple occasions;

g. Maintain an accurate general ledger for his trust account; and

h. Take a one hour continuing legal education ("CLE") course required for lawyers exercising check signature or electronic transfer authority with respect to an attorney trust account.

Based on the foregoing stipulated Findings of Fact and with the consent of the parties, 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, Mark D. Lackey, and the subject matter of this proceeding.

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 in effect at the time of the conduct as follows:

(a) By failing at least quarterly to prepare reconciliation reports showing the balance that appeared in the general ledger as of the reporting date, the total of all positive subsidiary ledger balances in the trust account as of the reporting date, and the adjusted bank balance and verify that the balances were identical, Defendant failed to perform quarterly reconciliations of his attorney trust account in violation of Rules 1.15-3(d)(1), and failed to review, sign, date and retain a copy of reconciliations of his attorney trust account for a period of six years in violation of Rule 1.15-3(d)(3);

(b) By failing monthly to reconcile the balance of his trust account as shown on his records with the current bank statement balance for his trust account, Defendant failed to perform monthly reconciliations of his attorney trust account in violation of Rule 1.15-3(d)(2), and failed to review, sign, date and retain copies of reports of monthly reconciliations of his attorney trust account for a period of six years in violation of Rule 1.15-3(d)(3);

(c) By failing to maintain a ledger containing a record of receipts and disbursements for each person or entity from whom and for whom funds are received and showing the current balance of funds held in the trust account for each such person or entity, Defendant failed to maintain accurate client ledgers for his trust account in violation of Rule 1.15-3(b)(5);

(d) By failing to review the statement of costs and receipts, client ledger, and canceled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made, Defendant failed to perform quarterly transaction reviews in violation of Rule 1.15-3(i)(2), and failed to sign, date, and retain copies of quarterly transaction reports for a period of six years in violation of Rule 1.15-3(i)(5);

(e) By failing to timely pay title insurance premiums on behalf of his clients, Defendant failed to promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client was entitled in violation of Rule 1.15-2(n), and failed to diligently complete disbursements for client matters in violation of Rule 1.3;

(f) By failing to provide information identifying the clients from whose balance wire transfer fees were drawn, Defendant failed to maintain the minimum records required for general trust accounts in violation of Rule 1.15-3(b)(2);

(g) By failing to maintain a general ledger for his trust account, Defendant failed to maintain the records necessary to conduct quarterly and monthly reconciliations of his trust account in violation of Rule 1.15-3(d)(1); and

(h) By failing to take a required one-hour CLE course for attorneys with check signature or wire transfer authority over an attorney trust account before exercising check signature or wire transfer authority over his trust account, Defendant violated Rule 1.15-2(s)(3).

FINDINGS OF FACT REGARDING DISCIPLINE

1. The findings of fact in paragraphs 1-6 above are reincorporated as if fully set forth herein.

2. Clients expect and are entitled to have their money handled with the utmost care. Defendant's failure to properly maintain, manage, and handle entrusted funds betrayed a vital trust that clients and the public place in attorneys and in the legal profession.

3. Defendant's failure to comply with the trust account record-keeping, review, and reconciliation requirements of the Rules of Professional Conduct put entrusted client funds at risk and, therefore, had the potential to cause significant harm to clients for whom Defendant held entrusted funds.

4. Public trust in the legal profession is foundational to public faith in the legal system. Defendant's failure to properly maintain his trust account has the potential to cause significant harm to the standing of the profession in the perception of the public because it shows Defendant's disregard for certain of his duties as an attorney. Such disregard tends to erode the public's confidence in attorneys, thereby sullying the reputation of, and fostering disrespect for, the profession, and undermining the public's confidence in the legal system.

5. In 2006, Defendant's trust account was the subject of a random audit by the State Bar that revealed deficiencies in Defendant's trust account management practices also present in this case, including, but not limited to, Defendant's failure to conduct quarterly reconciliations of his trust account.

6. Defendant has been licensed since 1983.

7. Defendant has no prior professional discipline.

8. Defendant has shown remorse and accepted responsibility for his actions.

9. The State Bar's investigation revealed no evidence to suggest that Defendant had stolen or otherwise misappropriated entrusted client funds.

10. Defendant has been cooperative during the pendency of this matter before the Disciplinary Hearing Commission and has fully complied with the State Bar's inquiries and requests for information.

11. Defendant has hired a staff person whose sole responsibility is to ensure the timely payment of title insurance premiums.

12. Defendant has completed the one-hour CLE course for attorneys with check signing or wire transfer authority over a trust account as required by Rule 1.15-2(s)(3) of the Rules of Professional Conduct.

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

CONCLUSIONS REGARDING DISCIPLINE

1. The Hearing Panel has carefully considered all the different forms of discipline available to it, including admonition, reprimand, censure, suspension and disbarment.

2. The Hearing Panel has considered all the factors enumerated in 27 N.C. Admin. Code 1B .0116(f)(1) and determined the following factors are applicable in this matter:

a) Factor (A), intent of the Defendant to commit acts where the harm or potential harm is foreseeable; and

b) Factor (F), negative impact of Defendant's actions on the client's or the public's perception of the profession.

3. The Hearing Panel has considered the factors enumerated in 27 N.C. Admin. Code 1B .0116(f)(2) and determined that none of the factors that warrant disbarment are applicable in this matter.

4. The Hearing Panel has considered all the factors enumerated in 27 N.C. Admin. Code 1B .0116(f)(3) of the Rules and Regulations of the North Carolina State Bar and determines that the following factors are applicable in this matter:

a) Factor (A), the absence of prior disciplinary offenses in this state or any other jurisdiction;

b) Factor (E), a pattern of misconduct;

c) Factor (G), multiple offenses;

d) Factor (K), full and free disclosure to the hearing panel or cooperative attitude toward the proceedings;

e) Factor (P), remorse; and

f) Factor (S), degree of experience in the practice of law.

5. The Hearing Panel has considered all lesser sanctions and concluded that discipline short of a stayed suspension would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to members of the Bar and the public regarding the conduct expected of members of the Bar of this State.

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

ORDER OF DISCIPLINE

1. Defendant, Mark D. Lackey, is hereby suspended from the practice of law for two years, effective thirty days from service of this Order upon him. This suspension is stayed immediately as set forth herein, subject to the terms of paragraph 3 below.

2. Defendant is taxed with the administrative fees and costs of this action as assessed by the Secretary of the North Carolina State Bar. Defendant shall pay the administrative fees and costs of this proceeding assessed by the Secretary within sixty days of the State Bar mailing the statement of costs to Defendant at the address on file with the State Bar Membership Department.

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

a. Defendant shall ensure that all bank transactions (including all deposits, disbursements, bank charges, etc.) are recorded on the general ledger for his trust account and on any appropriate subsidiary trust account ledger and that all entries on all general ledgers and subsidiary trust account ledgers accurately reflect the corresponding bank transaction.

b. Defendant shall personally perform the monthly and quarterly reconciliations and quarterly transaction reviews of all bank accounts into which Defendant deposits funds held in trust for the benefit of any client or third party. Defendant shall perform the reconciliations using the reconciliation methods described in the State Bar Lawyer's Trust Account Handbook and using the reconciliation form provided therein. Defendant shall provide reconciliation reports and all appropriate supporting documentation to a Trust Account Monitor ("TAM") as provided below within fifteen days of the end of each quarter (each January 15, April 15, July 15, and October 15 during the period of the stay).

c. Defendant shall, at his own expense, engage the services of a Trust Account Monitor to audit his trust account on a quarterly basis to ensure Defendant's compliance with the provisions of the Rules of Professional Conduct governing trust accounts:

(1) The Trust Account Monitor must submit quarterly a written report to the Office of Counsel of the State Bar ("OOC") concerning whether Defendant's reconciliations and trust account records and activities comply with the Rules of Professional Conduct. The report must detail any accounting irregularities and any deviations from the requirements of the Rules of Professional Conduct. The Trust Account Monitor's reports are due to the OOC no later than thirty days after the end of each quarter (each January 30, April 30, July 20, and October 30 during the period of the stay), with a copy of the report sent simultaneously to the Defendant. It is Defendant's sole responsibility to ensure the Trust Account Monitor completes and submits the reports as required by this order;

(2) If any of the Trust Account Monitor's reports note any irregularities in Defendant's accounting, or deviations from the requirements of the Rules of Professional Conduct, Defendant shall take all remedial action necessary to bring the trust account into compliance with the Rules of Professional Conduct and shall provide proof of the remedial action and compliance to the Trust Account Monitor and to the OOC within fifteen days of the submission date of the Monitor's report; and

(3) Defendant's failure to ensure that the Trust Account Monitor submits any report required by this order or to take timely remedial action to correct any deficiency noted in the Trust Account Monitor's report as required in subparagraph (2), *supra*, shall be grounds to lift the stay and activate the suspension.

d. Defendant shall provide any records or information regarding his trust account(s) requested by the OOC and, when requested by the OOC to do so, sign and provide any release or authorization to allow the OOC to obtain information directly from any bank with which Defendant maintains a bank account into which has been deposited any funds delivered to Defendant in trust, within ten days of the request or by the deadline stated in the request, whichever is sooner.

e. If, at any point during the pendency of the stay of this suspension, Defendant ceases handling entrusted or fiduciary funds, Defendant shall submit to the OOC monthly an affidavit certifying that he did not handle any entrusted or fiduciary funds in that month. This affidavit shall be executed on the last day of each month and provided to the OOC by the fifth day of the following month (e.g. the affidavit for March would be executed on March 31st and provided to the OOC by April 5th).

f. Within six months after the entry of this Order, Defendant shall complete two hours of CLE approved by the OOC in the area of trust account management. This CLE requirement is in addition to the CLE requirements set out in 27 N.C. Admin. Code 1D.1518.

g. Defendant shall keep the North Carolina State Bar's Membership Department ("Membership Department") advised of his current business address. Defendant shall notify the Membership Department of any change of address within ten days of such change. Defendant's current business address must be a street address, not a post office box or drawer.

h. Defendant shall accept all certified mail from the State Bar sent to the address on record with the Membership Department and shall respond to all communications from the State Bar within thirty days of receipt of such communication or by the deadline stated in the communication, whichever is sooner.

i. Defendant shall timely comply with all State Bar CLE requirements and pay all associated fees and costs by the applicable deadline.

j. Defendant shall timely pay 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, fees, and assessments.

k. Defendant shall not violate the Rules of Professional Conduct of North Carolina or of any other jurisdiction in which he is or may become licensed to practice law or the laws of the United States or of any state or local government, other than minor traffic violations.

4. If Defendant 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, and the suspension activated in accordance with 27 N.C. Admin. Code 1B.0118.

5. If the suspension is activated for any reason, the DHC may enter an order imposing such conditions as it deems proper for the reinstatement of Defendant's license at the end of the suspension. At minimum, Defendant 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. That Defendant submitted his law license and membership card to the Secretary of the State Bar within thirty days of the date of the order activating the suspension of his law license;

b. That Defendant properly wound down his law practice and complied with the provisions of 27 N.C. Admin. Code 1B.0128 following entry of the order activating the suspension of his law license, including proper disbursement of any funds held in trust for any client or third party remaining in his trust account;

c. That Defendant 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 fifteen days of the effective date of the order activating the suspension of his law license, Defendant provided the OOC with an address and telephone number at which clients seeking return of files could communicate with Defendant and obtain such files;

e. That Defendant provided client files to all clients who made a request for return of their files within ten days of Defendant's receipt of any such request;

f. That Defendant kept the Membership Department advised of his current physical business address (not post-office box or drawer addresses), telephone number(s), and e-mail address(es) and notified the Membership Department of any change in business address, telephone number(s), and email address(es) within ten days of such change;

g. That Defendant responded to all communications from the State Bar within thirty days of receipt of such communication or by the deadline stated in the communication, whichever is sooner;

h. That, at the time of his petition for reinstatement, Defendant 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, fees, and assessments;

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

j. That Defendant completed, within the six months that immediately preceded his petition for reinstatement, two hours of CLE approved by the OOC in the area of trust account management, in addition to the CLE requirements set out in 27 N.C. Admin. Code 1D.1518; and

k. That Defendant did not violate the Rules of Professional Conduct of North Carolina or of any other jurisdiction in which he is licensed to practice law, or the laws of the United States or of any state or local government, other than minor traffic violations.

6. If the stay of the suspension is lifted and the suspension is activated for any reason, and if Defendant fails to fully comply with 27 N.C. Admin. Code 1B.0128, Defendant shall reimburse the State Bar for any expenses incurred by the State Bar in winding down Defendant's practice. Such expenses may include, but are not limited to, storage facility fees, rent payments, moving expenses, charges for secure disposal of client files, postage or other mailing expenses, and compensation paid to the appointed trustee and/or the trustee's assistant(s) for time and travel associated with the trusteeship. The State Bar shall send an invoice of the expenses incurred by the State Bar in winding down Defendant's practice to Defendant at the address on file with the Membership Department. Defendant shall pay the expenses within thirty days of the State Bar mailing the invoice to him.

7. Unless Defendant's obligations under this Order are modified by further order of the Disciplinary Hearing Commission (DHC), Defendant's obligations under this Order end two years from the effective date of this Order, provided there are no pending motions to activate the suspension of his law license alleging lack of compliance with the conditions of the stay of the suspension. Pursuant to 27 N.C. Admin. Code 1B.0118, the DHC retains jurisdiction until all conditions of the stay of the suspension have been met. If a motion or show cause proceeding alleging lack of compliance with the conditions for the stay of the suspension is pending when the period of the stay of the suspension would otherwise have terminated, the DHC retains jurisdiction and may lift the stay of the suspension and activate the two-year suspension in whole or in part if it finds that any of the conditions of the stay have not been met. The stay of the suspension and Defendant's obligation to comply with the conditions for the stay will continue until resolution of any such pending motion or show cause proceeding.

Signed by the Chair with the consent of the other Hearing Panel members this the 13th day of December, 2021.

Shannon Joseph, Chair
Disciplinary Hearing Panel

Consent of the Parties:

Margaret Cloutier

Margaret T. Cloutier, Deputy Counsel
Attorney for Plaintiff

J. Cameron Lee, Deputy Counsel
Attorney for Plaintiff

Mark D. Lackey
Defendant