

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
20 DHC 15

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

KENNETH T. DAVIES, Attorney,

Defendant

CONSENT ORDER  
OF  
DISCIPLINE

This matter came on for consideration before a Hearing Panel of the Disciplinary Hearing Commission ("DHC") composed of Richard V. Bennett, Chair, and members James A. Davis and Tyler B. Morris, pursuant to 27 N. C. Admin. Code 1B.0115(i). Plaintiff was represented by Mary D. Winstead. Defendant, Kenneth T. Davies, appeared *pro se*. Both Plaintiff and Defendant stipulate and agree to the findings of fact and conclusions of law recited in this Consent Order and to the discipline imposed. Defendant has freely and voluntarily stipulated to the findings of fact and consents to the conclusions of law and entry of the order of discipline. Defendant freely and voluntarily waives any and all right to appeal the entry of this Consent Order of Discipline.

Based upon the pleadings in this matter, the parties' stipulations of fact, and with the consent of the parties, the Hearing Panel hereby enters 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, Kenneth T. Davies, was admitted to the North Carolina State Bar in August 1980 and is, and was at all times referred to herein, an attorney at law 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 owned and maintained a law office, The Law Office of Kenneth T. Davies, P.C., in Charlotte, Mecklenburg County, North Carolina.

4. In November 2014, Defendant began representing Elise Siharath in connection with litigation involving a business dispute concerning Bistro La Bon, LLC, a restaurant partly owned by Ms. Siharath.
5. At the time Defendant undertook to represent Ms. Siharath, she was a defendant in a lawsuit involving the restaurant which was voluntarily dismissed in November 2014, shortly after Defendant filed a Notice of Appearance in the action.
6. After the lawsuit in which Ms. Siharath was a defendant was dismissed, Defendant filed a lawsuit concerning the restaurant on behalf of Ms. Siharath, *Siharath v. Amoorpour, et al.*, Mecklenburg Co. file no. 14 CVS 21589 (“the lawsuit”).
7. From November 2014 until December 2017, Defendant represented Ms. Siharath without a written fee agreement.
8. In the course of the representation, Defendant utilized the services of a disbarred attorney, J. Neal Rodgers (“Rodgers”).
9. From 2014 to December 2017, Ms. Siharath paid Defendant more than \$50,000.00 for his representation in connection with litigation of the lawsuit.
10. In December of 2017, after the lawsuit was placed on the March 2018 trial calendar and a motion was scheduled for hearing in early January 2018, Defendant presented Ms. Siharath with a promissory note in favor of his law firm to secure the payment of unpaid invoices totaling \$79,545.56.
11. In mid-December of 2017, Defendant also provided Ms. Siharath with a written fee agreement for the first time.
12. The fee agreement provided that Ms. Siharath agreed to “a reasonable attorney’s fee” and set out the hourly billing rates for various firm personnel.
13. Defendant did not advise Ms. Siharath in writing of the desirability of seeking independent legal counsel regarding the advisability of executing the promissory note.
14. Defendant communicated to Ms. Siharath that his continued representation of her in the lawsuit was conditioned upon her signing the promissory note and the fee agreement.
15. Ms. Siharath signed both the promissory note and the fee agreement on or about December 30, 2017.
16. The trial of the lawsuit started in mid-March 2018.
17. During the trial, a proposed settlement offer was made in which Ms. Siharath would receive \$120,000.00 and other benefits.
18. Ms. Siharath was hesitant to agree to settle the lawsuit on the proposed terms because of the amount of the settlement and Defendant’s legal fees and her concerns about what Rodgers was owed.

19. After Defendant assured Ms. Siharath that he would be fair with her, Ms. Siharath agreed to accept the settlement offer.

20. The basic terms of the settlement were announced in open court and the trial was concluded.

21. The parties were given until April 3, 2018 to fully execute a settlement agreement.

22. In the ensuing days, there was discussion and correspondence amongst Ms. Siharath, Rodgers, and Defendant about how the \$120,000.00 in settlement funds would be disbursed.

23. Defendant sent Ms. Siharath a proposed agreement settling the lawsuit which included a provision that the \$120,000.00 would be deposited in Defendant's trust account for disbursement to Ms. Siharath and Defendant for his legal fees. The proposed agreement did not specify how the \$120,000.00 would be apportioned between Ms. Siharath and Defendant.

24. On March 26, 2018, Ms. Siharath sent Defendant an email attaching thereto the proposed agreement settling the lawsuit to which she added her proposed distribution of settlement funds which included that she would receive \$80,000.00 and Defendant would receive \$40,000.00 as final payment for his legal fees.

25. On or about March 27, 2018, Defendant sent Ms. Siharath a proposed Settlement Funds Disbursement Agreement which included that she would receive \$40,000.00 from the settlement proceeds and Defendant would receive \$80,000.00 "in full settlement of Client's obligation to pay for legal fees and costs."

26. In an email dated March 28, 2018, Rodgers conveyed to Defendant that he had discussed Defendant's proposal with Ms. Siharath and that she was unhappy with that proposal, thought it was unfair, and did not agree to it.

27. Ms. Siharath was reluctant to sign the documents settling the lawsuit, in part, because the issue of attorney fees was not resolved.

28. In a March 30, 2018 email to Ms. Siharath, Defendant urged her to sign the settlement agreement, stating, "I have delivered the settlement documents to Neal. He will contact you for signatures. I told him, and I will tell you, we can discuss the disbursement of funds later, but the documents must be signed by April 3. If you don't sign you will be in breach of the stipulations in court before Judge Lewis. He could then dismiss your case or hold you in contempt of court. The disbursement agreement I sent you is not my final offer for fees. We can compromise and reach an agreement. I will not force you to sign anything. Funds are due in my trust account by April 13. We can meet and settle the disbursement issue any time before then." (emphasis in original omitted).

29. On April 2, 2018, without having further communication with Defendant and with the disbursement issue unresolved, Ms. Siharath signed the agreement to settle the lawsuit.

30. The agreement settling the lawsuit which Ms. Siharath executed on April 2, 2018 did not specify how the \$120,000.00 would be apportioned between Ms. Siharath and Defendant.

31. On or about April 6, 2018, the \$120,000.00 in settlement proceeds was deposited into Defendant's trust account.

32. Defendant did not notify Ms. Siharath on April 6<sup>th</sup> of the receipt of the settlement funds.

33. Ms. Siharath retained counsel to represent her in connection with her dispute with Defendant regarding how the \$120,000.00 should be disbursed.

34. On April 11, 2018, Ms. Siharath's new counsel sent an email to Defendant and Rodgers informing them that Ms. Siharath had retained him regarding their claims for payment of legal services, noting that the settlement funds were to be wired/deposited into Defendant's trust account on or before April 13<sup>th</sup>. The attorney further stated that he would do his best to "be in a position to communicate Elise's position by Monday, April 16, 2018."

35. Defendant and Ms. Siharath's new counsel exchanged several telephone calls and emails concerning the matter on April 11<sup>th</sup>, including an email Ms. Siharath's new counsel sent Defendant stating that given the amount Defendant and Rodgers had already been paid, "both of you are facing a severe haircut if this is to be resolved by consent."

36. Defendant responded to Ms. Siharath's new counsel by email at approximately 11:19 p.m., "We are willing to talk."

37. On the morning of April 12, 2018, with full knowledge that Ms. Siharath disputed Defendant's fee, Defendant disbursed to his law firm, from Ms. Siharath's entrusted funds, \$79,545.56, the principal amount of the promissory note.

38. Defendant disbursed the \$79,545.56 to his law firm without authorization from, Ms. Siharath or her new counsel.

39. On April 13, 2018, Defendant, by hand delivery of a letter to Ms. Siharath's new counsel, informed him that he had withdrawn the funds and enclosed the original promissory note which bore Defendant's signature under the handwritten notation, "Paid & Satisfied in full. 4/12/2018."

40. On April 16, 2018, Ms. Siharath's new counsel sent Defendant a letter demanding that he return the \$79,545.56 to his trust account by 5:00 p.m. that day.

41. Defendant did not reimburse his trust account with \$79,545.56 until April 24, 2018.

Based upon the consent of the parties and the foregoing stipulated 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 and the subject matter of this proceeding.

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

- (a) By having his client execute a promissory note for the benefit of his law office during the representation without advising the client in writing of the desirability of seeking independent legal counsel on the transaction, Defendant entered into a prohibited business transaction with a client in violation of Rule 1.8(a)(2);
- (b) By, with full knowledge that his client disputed his fee, disbursing to his law office his client's entrusted funds without the client's consent or authorization, Defendant failed to properly identify, hold, and maintain entrusted funds in violation of Rule 1.15-2(a), and failed to leave disputed amounts in the trust account until the dispute was resolved in violation of Rule 1.15-2(g), and used entrusted property for the Defendant's personal benefit in violation of Rule 1.15-2(k); and
- (c) By failing to promptly deliver to his client her entrusted funds, Defendant failed to promptly pay or deliver to the client entrusted property to which the client was currently entitled in violation of Rule 1.15-2(n).

Upon the consent of the parties, the Hearing Panel also finds by clear, cogent, and convincing evidence the following:

#### **FINDINGS OF FACT REGARDING DISCIPLINE**

1. When attorneys enter into business transactions with clients without advising the client of the desirability of obtaining the advice of independent counsel on the transaction, there is a danger of overreaching.

2. Defendant's former client is from Laos and English is not her first language. She also has 75% hearing loss in one ear. In part, because of these communication challenges, Defendant elected to rely largely on Rodgers to communicate with the client. These factors made the client particularly vulnerable to the dangers of entering into a business transaction with Defendant.

3. Defendant's timing in providing the client with a written fee agreement and promissory note just before trial effectively left the client with no choice but to sign both documents.

4. Defendant's client had to retain another attorney to attempt to settle the dispute over Defendant's fee.

5. Defendant sued his client to collect his fee and enforce the Promissory Note. That lawsuit was settled in October 2018 with Ms. Siharath receiving \$70,000 from the settlement funds and Defendant receiving \$50,000.

6. Defendant refused to return the disputed funds to his trust account until after the State Bar was notified that Defendant had disbursed disputed funds to himself.

7. Defendant prepared the promissory note to ensure payment of past legal fees and the written fee agreement to ensure payment of future legal fees. The billing rates for attorney

time set forth in the written fee agreement was consistent with the rates previously agreed to and billed in accordance with a verbal agreement. During the representation, Ms. Siharath raised an objection to an invoice that included interest on past due invoices and Defendant adjusted the billing to accommodate that concern. Defendant did not immediately return the \$79,545.56 to his trust account because he believed at the time that he was entitled to those funds pursuant to the promissory note. Approximately a week after being contacted by the State Bar and after consulting with ethics counsel, Defendant agreed to return the disputed funds to his trust account and did so.

8. Defendant has the following prior discipline: 1) Admonition in 1986 for lack of diligence; 2) Admonition in 2004 for failure to respond to a fee dispute and failure to participate in good faith in the fee dispute process; 3) Reprimand in 2017 for aiding in the unauthorized practice of law; and 4) Censure in 2018 for aiding in the unauthorized practice of law.

9. The 2017 Reprimand, the 2018 Censure, and this case involve Rodgers doing work on legal matters for Defendant's law practice.

10. Defendant has more than forty years of experience in the practice of law.

Based on the Findings of Fact and Conclusions of Law above and the additional Findings of Fact Regarding Discipline, the Hearing Panel makes the following:

#### CONCLUSIONS REGARDING DISCIPLINE

1. The Hearing Panel considered all of the factors enumerated in 27 N.C. Admin. Code 1B.0116(f)(1) and concludes that the following factors are applicable:

- (a) intent of the defendant to commit acts where the harm or potential harm is foreseeable;
- (b) circumstances reflecting the defendant's lack of trustworthiness;
- (c) elevation of the defendant's own interest above that of the client;
- (d) negative impact of defendant's actions on client's or public's perception of the profession; and
- (e) negative impact of the defendant's actions on the administration of justice.

2. The Hearing Panel considered all of the factors enumerated in 27 N.C. Admin. Code 1B.0116(f)(2) and concludes that none of the factors is applicable.

3. The Hearing Panel considered all of the factors enumerated in 27 N.C. Admin. Code. 1B.0116(f)(3) and concludes the following factors are applicable:

- (a) prior disciplinary offenses;
- (b) recency of prior offenses;

- (c) selfish motive;
- (d) a pattern of misconduct;
- (e) multiple offenses;
- (f) full and free disclosure to the hearing panel or cooperative attitude toward the proceedings;
- (g) initial refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim; and
- (i) degree of experience in the practice of law.

4. The Hearing Panel considered all of the different forms of discipline available to it, including admonition, reprimand, censure, suspension, and disbarment, in considering the appropriate discipline to impose in this case.

5. The Hearing Panel concludes that discipline short of suspension would not adequately protect the public for the following reasons:

- a) Defendant's conduct reflects adversely on his trustworthiness and fitness as an attorney; and
- b) Entry of an order imposing less severe discipline would fail to acknowledge the seriousness of the misconduct and would send the wrong message to attorneys about conduct expected of members of the Bar of this State.

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

#### **ORDER OF DISCIPLINE**

1. The law license of Defendant, Kenneth T. Davies, is hereby suspended for one year effective thirty days after service of this Order upon Defendant.

2. The one year suspension is stayed for two years as long as Defendant complies, and continues to comply with the following conditions during the stay:

- a) Defendant shall keep the North Carolina State Bar Membership Department advised of his current business and home addresses and notify the Bar of any change in address within ten days of such change;
- b) Defendant shall respond to all communications from the State Bar, including communications from the Attorney Client Assistance Program ("ACAP"), within thirty days of Defendant's receipt of the communication or by the deadline stated

in the communication, whichever is sooner, and shall participate in good faith in the State Bar's fee dispute resolution process for any petition filed with ACAP;

- c) Defendant shall remain current in payment of all State Bar 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;
- d) Defendant shall not violate the Rules of Professional Conduct or the laws of the United States or of any state or local government during the stayed suspension;
- e) Neither Defendant nor his law office shall employ or otherwise utilize the services of Neal Rodgers in connection with any legal matter;
- f) Defendant shall, at the inception of the representation, enter into a written fee agreement with each client that clearly communicates the scope of the representation and the basis or rate of the fee and the expenses for which the client will be charged;
- g) Defendant must arrange for an active member of the North Carolina State Bar to serve as his law practice monitor for the duration of the stay of his suspension. Defendant's monitor shall be an attorney in good standing who practices law in the judicial district in which Defendant practices law and who has been approved by the Office of Counsel. Defendant must provide the Office of Counsel with a letter from the approved monitoring attorney confirming his or her agreement to:  
(a) meet with Defendant monthly to review Defendant's cases to ensure that for every client, at the inception of the representation, Defendant has entered into a written fee agreement in accordance with paragraph f) above; and (b) provide written quarterly reports of this supervision to the Office of Counsel on the following dates as they occur during the duration of the stay of the suspension: January 30, April 30, July 30, and October 30;
- h) Defendant must meet with the monitoring attorney monthly for the purpose of having the attorney review Defendant's cases to ensure that for every client, at the inception of the representation, Defendant has entered into a written fee agreement in accordance with paragraph f) above. Defendant shall pay the cost, if any, charged by the monitoring attorney for this supervision. Defendant is responsible for ensuring that the monitor timely provides written quarterly reports of this supervision to the Office of Counsel on the following dates as they occur during the duration of the stay of the suspension: January 30, April 30, July 30, and October 30;
- i) Defendant shall timely comply with all Continuing Legal Education ("CLE") requirements;
- j) In addition to the CLE requirements set out in 27 N.C. Admin. Code 1D.1518, Defendant shall, within six months of the effective date of this Order, and each year of the suspension thereafter, complete at his own expense, two hours of Continuing Legal Education (CLE) in the area of trust account management; and

- k) Defendant shall pay all costs of this proceeding as assessed by the Secretary within thirty (30) days after service of the notice of costs on him.

3. If during the stay of the suspension Defendant fails to comply with any one or more of the conditions stated in paragraphs 2 (a) through (k) above, the stay of the suspension of his law license may be lifted as provided in Rule .0118(a) of the North Carolina State Bar Discipline and Disability Rules.

4. If the stay of the suspension is lifted and the suspension is activated for any reason, Defendant may petition for reinstatement after serving the activated suspension by filing a petition pursuant to Rule .0129(b) of the North Carolina State Bar Discipline and Disability Rules (27 N.C. Admin. Code 1B.0129) demonstrating compliance with the requirements therein as well as the following requirements by clear, cogent, and convincing evidence:

- a) Defendant properly wound down his law practice and complied with the terms of 27 N.C. Admin. Code 1B.0128 of the State Bar Discipline & Disability Rules;
- b) Defendant submitted his license and membership card to the Secretary of the North Carolina State Bar within thirty days after the date of the order lifting the stay and/or activating the suspension of his law license;
- c) Defendant has come into compliance with any outstanding CLE or membership obligations at the time of the filing of his petition for reinstatement;
- d) Defendant successfully completed the CLE hours as set forth in paragraph 2(j) above;
- e) Defendant kept the Membership Department of the State Bar advised of his physical address (not a Post Office box), telephone number, and e-mail address throughout the period of his suspension;
- f) Defendant accepted all certified mail from the State Bar sent to the address on record with the Membership Department of the North Carolina State Bar;
- g) Defendant responded to all letters of notice and requests for information from the North Carolina State Bar by the deadline stated therein with full and complete responses and all requested documentation;
- h) Defendant did not violate any of the Rules of Professional Conduct in effect during the period of the suspension;
- i) Defendant did not violate any laws of the State of North Carolina or of the United States during the period of the suspension; and
- j) Defendant paid all costs and administrative fees of this proceeding as assessed by the Secretary by the date of the filing of his petition for reinstatement.

5. If the stay of 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 and the Court

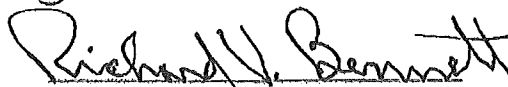
appoints a trustee to wind down any portion of Defendant's practice, Defendant shall reimburse the State Bar for all expenses incurred by the State Bar in winding down Defendant's practice. Such expenses may include, but are not limited to, storage facility fees, rent payments, moving expenses, charges for secure disposal of client files, postage or other mailing expenses, and compensation paid to the trustee and/or the trustee's assistant for time and travel associated with the trusteeship. After the Court has discharged the trustee, the State Bar shall send an invoice of wind-down expenses to Defendant at Defendant's last known address of record with the North Carolina State Bar. Defendant shall not be eligible for reinstatement until he has reimbursed the State Bar for all wind-down expenses incurred.

6. Unless Defendant's obligations under this Order are modified by further order of the DHC, or a motion or proceeding is pending alleging lack of compliance with the conditions of the stay of his suspension, Defendant's obligations under this Order end two years from the effective date of the Order. 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 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 the jurisdiction and ability to 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 proceeding.

7. Defendant is taxed with the administrative fees and costs of this action as assessed by the Secretary of the North Carolina State Bar which shall be paid within thirty days of service of the statement of costs upon Defendant.

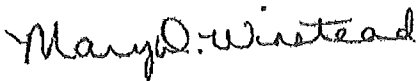
Signed by the undersigned Hearing Panel Chair with the consent of the other Hearing Panel members.

This the 21<sup>st</sup> day of August 2020

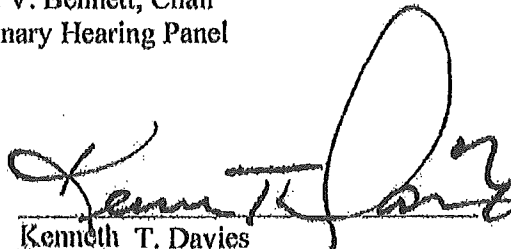


Richard V. Bennett, Chair  
Disciplinary Hearing Panel

Agreed and consented to by:



Mary D. Winstead  
Attorney for Plaintiff



Kenneth T. Davies  
Defendant