

STATE OF NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
22 DHC 19

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

AYESHINAYE ITIHYMA HOLT SMITH,
Attorney,

Defendant

CONSENT
ORDER OF DISCIPLINE

This matter was considered by a Hearing Panel of the Disciplinary Hearing Commission composed of Margaret M. Hunt, Chair, and members Irving L. Joyner and Holly Audette. Plaintiff was represented by Thomas L. Crosby. Defendant, Ayeshinaye Itihyma Holt Smith ("Smith"), was represented by Dauna Bartley. 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. Smith has freely and voluntarily stipulated to the foregoing findings of fact and consents to the conclusions of law and entry of the order of discipline. Smith 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 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, Ayeshinaye Itihyma Holt Smith ("Smith"), was admitted to the North Carolina State Bar in 2019, 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. Defendant was properly served with process and the matter came before the Hearing Panel with due notice to all parties.

4. During the relevant periods referred to herein, Smith was engaged in the practice of law in the State of North Carolina and maintained a law office in Raleigh, Wake County, North Carolina.

5. Defendant is an attorney and managing partner at Smith Dominguez, PLLC.

6. Defendant represented B.B. in revoking B.B.'s durable power of attorney on June 4, 2021.

Previous Estate Plan and First Guardianship Litigation

7. Prior to Defendant's representation, B.B. had a long-established estate plan.

8. On August 30, 2016, B.B. executed a durable power of attorney and advance directive durable power of attorney for health care appointing her granddaughter, D.C. ("Granddaughter"), as her agent.

9. B.B. was subsequently diagnosed with dementia.

10. In April 2021, Granddaughter arranged for B.B. to live in a retirement community, Sunrise of Raleigh.

11. B.B. was housed in a locked memory care unit where she received specialized treatment and care for dementia.

12. In April 2021, B.B.'s daughter, B.W. ("Daughter"), filed a petition seeking to have B.B. declared incompetent and an application requesting that she be appointed as B.B.'s guardian.

13. In her petition, Daughter alleged that B.B. "had been diagnosed with dementia and her condition is one of [sic] which she experiences periods of lucidity."

14. Daughter did not list Granddaughter in her petition as "next of kin" or "a person known to have an interest in this proceeding."

15. On May 24, 2021, Granddaughter filed a motion to dismiss the petition and application.

16. On June 1, 2021, Daughter submitted a voluntary dismissal without prejudice of the petition and application.

17. During the pendency of Daughter's petition and application, the court appointed C.B. ("GAL"), an attorney, as guardian ad litem for B.B.

18. GAL's duty as guardian ad litem for B.B. was to meet with B.B. to determine her wishes regarding the proceeding, present those wishes to the court, and make recommendations for B.B.'s best interests if those interests differed from B.B.'s wishes.

19. GAL met alone with B.B. on two occasions, May 27, 2021 and June 15, 2021.
20. During these two meetings, B.B. was unable to correctly answer basic questions (e.g., her own birthdate, what year it was, who the President was).
21. On June 4, 2021, between these two meetings, Defendant met with B.B. and Daughter in the locked memory care unit and presented B.B. with a revocation of power of attorney, which B.B. signed.
22. During the June 15, 2021 meeting with GAL, B.B. was unable to recall meeting with Defendant, or signing any documents. When shown the revocation, B.B. had no recollection of signing it or meeting an attorney.
23. In her report to the court filed on June 15, 2021, GAL opined that “there is reasonable cause to believe that [B.B.] is incompetent due to her memory issues” and “is in a condition that reasonably appears to constitute an imminent or foreseeable risk of harm to her physical well-being, and that there is immediate need for a guardian to provide consent or take other steps to protect [B.B.]” because she cannot “make decisions regarding her appropriate care.”

Defendant’s June 4, 2021 Meeting with Client

24. On June 3, 2021, while Daughter’s petition and application were pending but not yet dismissed, Daughter hired Defendant to represent B.B. to provide legal services related to B.B.’s durable power of attorney.
25. Daughter falsely represented to Defendant that B.B. was competent and had the capacity to make decisions on her own behalf.
26. At Daughter’s request, Defendant agreed to meet with B.B.
27. Defendant prepared and brought a revocation of power of attorney to her meeting with B.B.
28. Defendant did not speak with B.B. before meeting with her.
29. On June 4, 2021, Defendant met with B.B. and Daughter in B.B.’s room in the locked memory care unit for approximately one hour.
30. Daughter was present during the entirety of Defendant’s meeting with her client, B.B.
31. When Defendant asked questions of B.B., Daughter sometimes interjected and answered on B.B.’s behalf.
32. While Defendant asked questions of B.B., B.B. sometimes became flustered, emotional, and unresponsive.

33. When Defendant asked B.B. what she desired to do with her durable power of attorney, B.B. did not clearly answer. B.B. began crying, then stated “I want our family back together.”

34. When Defendant asked B.B., “Do you want to revoke your power of attorney for [Granddaughter], the one you have?” B.B. replied, “No. I want-I want to take that and...” During that response, Daughter interrupted, “Do you want her to stay taking control of everything like she’s doing?” B.B. said, “No.”

35. At a certain point, Defendant asked B.B. what her name was and B.B. was unable to answer.

36. After B.B. was unable to tell Defendant her own name, Defendant asked B.B. what her maiden name was. B.B. could not independently recall. Daughter then prompted B.B., “When you were growing up, Mama, what was ...” After the prompt, B.B. correctly answered.

37. Immediately thereafter, Defendant told B.B. and Daughter that “everything that you’re telling me today tells me that you know what’s going on, you have capacity.”

38. Defendant explained the revocation to B.B. During her explanation, Daughter answered multiple times when Defendant asked B.B. questions.

39. For example, Defendant described the document saying, “It’s called a revocation of power of attorney and it just says that ‘Today, I, [B.B.]’; that’s you, right?” Daughter replied “That’s your last name, remember?” B.B. did not independently verbally answer.

40. Defendant reviewed the location as stated in the revocation, “‘In New Hanover County,’ correct?” Daughter answered “Right. You knew that.” B.B. did not independently verbally answer.

41. B.B. signed the revocation of power of attorney, which Defendant witnessed in her capacity as a Notary Public.

42. Daughter paid Defendant’s fee.

43. Defendant filed the revocation electronically with the New Hanover County Register of Deeds, and provided a copy of the revocation to Daughter.

44. Defendant never spoke with B.B.’s durable power of attorney and healthcare agent, Granddaughter.

45. Defendant never spoke with B.B.’s guardian ad litem.

46. Defendant never spoke with B.B.’s treating physician.

47. B.B. did not have the capacity to revoke her power of attorney.

48. Defendant should have known that B.B. lacked the capacity to revoke her power of attorney.

Second Guardianship Litigation

49. After the revocation, Granddaughter filed an emergency petition seeking to have B.B. declared incompetent and an application to be appointed as B.B.'s guardian. Daughter filed a motion to intervene, moving that she be appointed guardian. At the first hearing, the court appointed two attorneys as temporary guardians of B.B.'s person and estate.

50. B.B. was found incompetent by the court and Granddaughter was appointed as B.B.'s permanent guardian of the person and estate.

51. The costs of the litigation were taxed to B.B.'s estate in the amount of \$3,933.70.

Response to State Bar

52. In September 2021, the State Bar opened grievance file 21G0701 against Defendant to investigate her representation of B.B.

53. In Defendant's response to the letter of notice in grievance file 21G0701, Defendant stated that when viewed with "the totality of the circumstances and information available to [Defendant]," B.B. could "understand, consider, and make decisions."

54. Defendant also stated she "did not perceive any risk of harm in her client's desire to revoke the Power of Attorney."

55. Defendant further stated that at the time she represented B.B., she did not have the benefit of other documents related to the matter, including GAL's report, but "[e]ven if she had seen the other documents, it would have been appropriate for [Defendant] to regard them as documents advocating positions adverse to her client's, and to afford them little weight as compared with her client's expressed objectives for the representation."

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 failing to maintain an arms-length relationship with Daughter, who made the appointment, paid Defendant's fee, and was present and answering on B.B.'s behalf throughout the appointment, Defendant permitted a person who paid her fee to direct or regulate her professional judgment in violation of Rule 5.4(c), and

accepted compensation from a third party, without B.B.'s informed consent, that interfered with Defendant's professional judgment in violation of Rule 1.8(f);

- (b) By failing to recognize B.B.'s lack of capacity to proceed in modifying her estate plan, despite B.B.'s inability to independently and accurately respond to Defendant's questions, despite Defendant's presence in a locked memory care unit, and despite Daughter's constant presence and interference, and further by making no inquiry of nor consulting with B.B.'s chosen attorney in fact or court-appointed guardian ad litem, Defendant handled a matter that she knew or should have known she was not competent to handle without associating with a lawyer who is competent to handle the matter in violation of Rule 1.1, and failed in her duty to a client with diminished capacity in violation of Rule 1.14.

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

Findings of Fact Regarding Discipline

1. Clients deserve, and the Rules of Professional Conduct require, attorneys capable of exercising the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. An attorney's duty to zealously advocate for her client's interests requires the attorney to exercise her sound professional judgment. Here, where her client was unable at times to answer basic questions and was living in a locked memory care unit, the exercise of sound professional judgment required Defendant to either decline representation or to make additional inquiry regarding the capacity of her client to make decisions having potentially serious repercussions and regarding the capacity of her client to execute binding legal documents: by interviewing her client without the presence and interference of the client's daughter before facilitating her client's execution of the revocation of her existing power of attorney; and by inquiring of people likely to have knowledge of facts relevant to her client's capacity, which may have included her client's physician, attorney in fact, and guardian ad litem.

2. While family members, at the client's request, may participate in discussions with the attorney, the attorney must keep the client's interests foremost and must look to the client, and not family members, to make decisions on the client's behalf. Defendant should have known B.B. lacked capacity to revoke her power of attorney when she could not recall her own name or respond appropriately to Defendant's explanation of the revocation. Defendant knew, or should have known, that Daughter's behavior throughout the meeting with B.B. interfered with the representation.

3. When representing clients with diminished capacity, attorneys have a duty to look to the client's legal representatives for decisions on behalf of that client. Attorneys should be especially mindful when all communication prior to meeting with the client is with a third party, not the legal representative, and the third party is also paying the attorney's fee. Here, Defendant failed in that duty by not speaking with B.B.'s chosen attorney in fact, Granddaughter, nor speaking with B.B.'s court-appointed guardian ad litem. Defendant failed to maintain an arms-length relationship with Daughter, which allowed Daughter to direct or regulate Defendant's professional judgment, at the expense of her client.

4. B.B. was also not capable of providing informed consent to third party compensation, given her demonstrated incompetency. Defendant showed poor professional judgment by not recognizing B.B. could not provide informed consent for Daughter to pay Defendant's legal fee.

5. Defendant's actions resulted in clearly foreseeable, significant harm to her client.

6. Restoring B.B. to the position that existed before Defendant's action required multiple court hearings and multiple attorneys, at significant expense. That expense was borne by B.B.'s estate. It caused significant harm to the administration of justice by requiring the expenditure of significant court resources unnecessarily.

7. The public's perception of the legal profession was negatively impacted by Defendant.

8. While Defendant has no prior discipline, she violated the Rules less than two years after her Bar admission.

9. There is no evidence of any dishonest or selfish motive on the part of Defendant.

10. In her responses to the Grievance Committee, Defendant never acknowledged the wrongfulness of her actions. She saw no particular risk of harm to her client from revoking her power of attorney. Especially troublesome was her insistence that with the benefit of hindsight, including the guardian ad litem's report and the post-revocation litigation, Defendant would not have done anything differently.

11. After being served with the letter of notice, Defendant has taken steps to improve her representation of clients with diminished capacity. She took additional CLE courses addressing clients with diminished capacity and guardianship issues, revised her client intake procedures as follows: 1) a potential client with diminished capacity must contact her directly to request and describe the legal services they require, 2) she speaks directly with the client without anyone else present to determine what the client desires, and 3) if she drafts a document, she verifies with the client that the client understands and agrees with each provision of the document.

12. The Hearing Panel has carefully 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.

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

Conclusions With Respect To Discipline

1. The Hearing Panel has carefully considered all of the different forms of discipline available to it. In addition, the Hearing Panel has considered all of the factors enumerated in 27 N.C. Admin. Code § 1B.0116(f)(1) of the Rules and Regulations of the North Carolina State Bar and concludes the following factors warrant suspension:

- a. Intent of Defendant to commit acts where the harm or potential harm is foreseeable;
- b. Negative impact of Defendant's actions on the public's perception of the profession;
- c. Negative impact of Defendant's actions on the administration of justice;
- d. Impairment of the client's ability to achieve the goals of representation; and
- e. Effect of Defendant's conduct on third parties.

2. The Hearing Panel has considered all of the factors enumerated in 27 N.C. Admin. Code § 1B.0116(f)(2) of the Rules and Regulations of the North Carolina State Bar and concludes that no factors are present.

3. The Hearing Panel has considered all of 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 concludes the following factors are applicable in this matter:

- a. Absence of prior disciplinary offenses;
- b. Absence of a dishonest or selfish motive;
- c. Full and free disclosure to the Hearing Panel and cooperative attitude toward the proceedings;
- d. Refusal to acknowledge wrongful nature of conduct;
- e. Vulnerability of Defendant's client; and
- f. Degree of experience in the law.

4. Defendant's conduct, if continued or tolerated, poses significant potential harm to future clients and to the public's perception of the profession.

5. The Hearing Panel has considered issuing an admonition, reprimand or censure but concludes that such discipline would not be sufficient discipline because of the gravity of the

potential harm to Defendant's clients. The Panel further concludes that such discipline would fail to acknowledge the seriousness of the offenses committed by Defendant and send the wrong message to attorneys regarding the conduct expected of members of the Bar in this State.

6. This Hearing Panel has considered lesser alternatives and concludes that a stayed suspension is necessary to ensure Defendant continues her recent efforts to properly represent clients with diminished capacity and complies with necessary conditions to avoid significant harm or the potential for significant harm to clients.

7. For these reasons, this Hearing Panel finds that an order imposing discipline short of a stayed suspension of Defendant's law license would not be appropriate.

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

Order of Discipline

1. Defendant, Ayeshinaye Itihyma Holt Smith, is hereby suspended from the practice of law for three years. This suspension is stayed from its inception subject to the conditions stated below.

2. Defendant is taxed with the costs and administrative fees of this action as assessed by the Secretary. Defendant shall be served with a statement of costs and administrative fees. Defendant shall pay the costs and administrative fees within 30 days of service of the statement of costs and administrative fees upon her.

3. The three-year suspension is stayed for a period of three years as long as Defendant complies, and continues to comply during the period of the stay, with the following conditions:

a. Defendant shall establish a set of written client procedures for her practice that she will follow to ensure compliance with her obligations under Rule 1.14. No later than 75 days from the effective date of this order, Defendant shall submit these procedures to the Office of Counsel. Defendant shall make any adjustments to the written procedure required by the Office of Counsel;

b. Defendant shall make arrangements for a practice monitor who shall monitor whether Defendant is properly representing clients with potential or established diminished capacity;

1) Within 30 days of the effective date of this order, Defendant shall make arrangements with an active member in good standing of the North Carolina State Bar who practices law in the county in which Defendant primarily practices to serve as her practice monitor;

2) Defendant must submit the name and contact information of the proposed practice monitor to the Office of Counsel for approval in advance. Approval from the Office of Counsel is required as part of compliance with the preceding paragraph. Approval will not be unreasonably withheld;

- 3) The practice monitor must agree in writing to so serve. Defendant shall ensure that the practice monitor's written agreement recites all of the practice monitor's duties and contains the practice monitor's signature so indicating. The monitor must agree in writing to do the following: a) assist Defendant with development of the written client procedures required above; b) meet monthly with Defendant to review Defendant's then-current representation of clients with potential or established diminished capacity; c) communicate with Defendant during the month regarding her clients with potential or established diminished capacity and discuss procedures and techniques for representing those clients; d) provide the State Bar with a quarterly written, signed report regarding the monthly meetings with Defendant, Defendant's clients, and compliance with Defendant's written client procedures; and e) be available to counsel Defendant with any client of Defendant's who has potential or established diminished capacity during the stayed suspension period;
 - 4) Defendant must provide the Office of Counsel with the monitor's written, signed agreement to provide the monitoring services described in the preceding paragraph within 45 days of the effective date of this order;
 - 5) The practice monitor's written quarterly reports are due to the Office of Counsel of the State Bar on the following dates as they occur during the stay of this suspension: January 15, April 15, July 15, and October 15;
 - 6) This monitoring must occur for the duration of the stay of this suspension. Defendant will pay all costs, if any, related to the services of the practice monitor;
 - 7) Defendant shall meet and communicate with the practice monitor and in all ways cooperate fully with the above described monitoring;
 - 8) Defendant shall ensure the Office of Counsel timely receives the practice monitor's quarterly reports;
 - 9) Defendant shall cooperate with the Office of Counsel and make appropriate arrangements for an alternate practice monitor if needed during the stay of this suspension;
- c. Defendant must enter into a written fee agreement with every client with potential or established diminished capacity and the fee agreement must state with specificity the legal work Defendant is undertaking to perform;
 - d. Defendant shall have paid all costs and administrative fees of this proceeding as assessed by the Secretary within 30 days after service of the notice of costs and administrative fees upon her;
 - e. Defendant shall keep the North Carolina State Bar Membership Department advised of her current physical business address (not a Post Office box), telephone number,

and e-mail address and shall notify the Bar of any change in this contact information within ten days of such change;

f. Defendant shall accept 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 shall respond 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 shall timely comply with the State Bar continuing legal education requirements and shall pay all fees and costs assessed by the applicable deadline;

i. Defendant shall complete an additional twelve hours of CLE courses each year of the stay, at least six of which must be on ethics and three of which must be devoted to the topic of elder law; these courses are in addition to the normal CLE requirements required of Defendant by the immediately preceding paragraph. Defendant shall provide proof to the State Bar Office of Counsel that she completed these additional courses within ten calendar days of completing the courses;

j. Defendant shall pay all membership dues, Client Security Fund assessments, and any other related dues, fees, and/or costs by the applicable deadline;

k. Defendant shall not violate any of the Rules of Professional Conduct in effect during the period of the stay;

l. Defendant shall not violate any laws of the State of North Carolina or of the United States, other than minor traffic violations, during the period of the stay.

4. Unless Defendant's obligations under this Order are modified by further order of the DHC, Defendant's obligations under this Order end three years from the effective date of the Order provided there are no motions or proceedings pending alleging lack of compliance with the conditions of the stay of the suspension. Pursuant to § .0118(a) of the North Carolina Discipline and Disability Rules, 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 three-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.

5. If during the stay of the suspension Defendant fails to comply with any one or more of the conditions stated above, then the stay of Defendant's suspension may be lifted as provided in § .0118(a) of the North Carolina State Bar Discipline and Disability Rules.

6. If the stay of the suspension is lifted and the suspension is activated for any reason, Defendant may apply for reinstatement after serving the activated suspension, by filing a petition with the DHC demonstrating compliance by clear, cogent, and convincing evidence with the

requirements of 27 N.C. Admin. Code § 1B.0129, any requirements in the order activating the suspension, and the following requirements:

a. Defendant properly wound down her law practice and complied with the terms of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0128 of the State Bar Discipline & Disability Rules;

b. Defendant has developed the written client procedures described in paragraph 3.a. above and has engaged in the consultation regarding representing clients with potential or established diminished capacity and techniques to represent those clients described in paragraph 3.b. above.

c. Defendant kept the Membership Department of the State Bar informed of her current information for her physical address (not a Post Office box), telephone number, and e-mail address throughout the period of her suspension;

d. 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 throughout the period of the suspension;

e. 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 throughout the period of her suspension;

f. Defendant has come into compliance with any outstanding continuing education or membership obligations at the time of the filing of her petition for reinstatement;

g. Defendant did not violate any of the Rules of Professional Conduct in effect during the period of the suspension;

h. Defendant did not violate any laws of the State of North Carolina or of the United States, other than minor traffic violations, during the period of the suspension; and

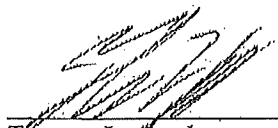
i. Defendant paid all administrative fees and costs of this proceeding as assessed by the Secretary by the date of the filing of her petition for reinstatement.

6. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0118(a) of the North Carolina State Bar Discipline and Disability Rules throughout the period of the stayed suspension.

Signed by the Chair with the consent of the other hearing panel members, this the 13th
day of October 2022.

Margaret M. Hunt
Margaret M. Hunt, Chair
Disciplinary Hearing Panel

Agreed and consented to by:



Thomas L. Crosby
Attorney for Plaintiff

10 October 2022

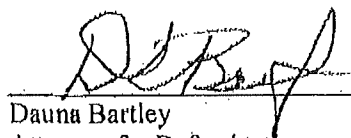
Date



Ayeshinaye Itihyima Holt Smith
Defendant

9/21/2022

Date



Dauna Bartley
Attorney for Defendant

9/21/2022

Date