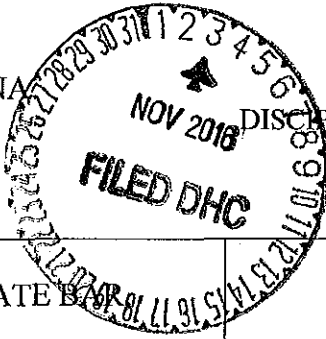


STATE OF NORTH CAROLINA

WAKE COUNTY



BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 16 DHC 28

THE NORTH CAROLINA STATE BAR

Plaintiff

v.

DARRYL G. SMITH, Attorney,

Defendant

CONSENT ORDER

This matter was considered by a Hearing Panel of the Disciplinary Hearing Commission ("DHC") composed of Fred M. Morelock, Chair, and members Richard V. Bennett and Tyler B. Morris, pursuant to North Carolina Administrative Code, Title 27, Chapter 1, Subchapter B, § .0114(h). Plaintiff was represented by Mary D. Winstead. Defendant, Darryl Smith, was represented by Thomas R. Sallenger. 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 foregoing 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, Darryl G. Smith, was admitted to the North Carolina State Bar in August 1977 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 maintained a law office in Wilson, Wilson County, North Carolina.

4. During the relevant period referred to herein, in connection with his law practice, Defendant maintained a trust account at Branch Banking and Trust ending in 9096 ("trust account").

5. On April 11, 2014, the State Bar conducted a random procedural audit of Defendant's trust account.

6. The audit revealed numerous failures of Defendant to properly maintain and document his trust account.

7. From January 2012 through April 2014, Defendant failed to do the following as specified in the Rules of Professional Conduct:

- (a) maintain client ledgers for each person or entity from whom or for whom entrusted funds were received;
- (b) conduct the required monthly and quarterly trust account reconciliations;
- (c) indicate on all checks, including checks to himself, from which client balances the checks were drawn;
- (d) identify the source of funds on all deposit slips and wire transfers;
- (e) always provide written accountings to clients at the completion of disbursement or at least annually if funds were held for more than 12 months;
- (f) use business size checks containing an auxiliary On-Us field;
- (g) escheat unidentified/abandoned funds;
- (h) promptly remove earned fees or cost reimbursement resulting in commingling of attorney and client funds; and
- (i) disbursed funds from the trust account on behalf of clients for whom Defendant had not yet deposited funds into the account.

8. On occasion, Defendant advanced funds from the trust account, disbursing more funds from the trust account for a client than were in the trust account for the client.

9. On one occasion during the time period examined by the State Bar, Defendant paid a utility bill from the trust account that should not have been paid from the trust account.

10. Defendant's trust account had been previously audited by the State Bar on July 2, 2001, and that audit revealed several of the same violations of the trust accounting rules that were found in the 2014 audit.

11. Defendant is unable to determine the beneficial owners of over \$30,000.00 in his trust account.

12. Defendant agreed to represent Annie Harris on a personal injury claim arising from an automobile collision. Defendant filed an action on Harris' behalf in 2006.

13. On June 25, 2010, Harris agreed to a \$3,000.00 settlement and signed and approved Defendant's disbursement summary.

14. Defendant disbursed the \$3,000.00 settlement in accordance with the disbursement summary.

15. In January 2011, Nash Health Care Systems sent Defendant a check for \$279.64 which was a refund for overpayment of Ms. Harris' hospital bill.

16. By July 2011, the check had not been negotiated prompting Nash Health Care Systems to write Defendant inquiring about the check.

17. In March of 2015, in response to a Letter of Notice concerning this matter, Defendant reported that he had a record of receiving the \$279.64 check, but not depositing it.

18. In June of 2015, Defendant reported to the State Bar that he had discovered that he did deposit the check in his trust account in November of 2011.

19. However, Defendant failed to notify Ms. Harris of the receipt of the check in 2011 and failed to disburse to Ms. Harris the funds she was due at that time.

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

(b) By failing to compare the balance in the account as shown on his records to the bank statement balance on a monthly basis and by failing to total client ledger balances and compare them to the bank statement balance at least quarterly, Defendant failed to perform monthly or quarterly reconciliations of his attorney trust account in violation of Rule 1.15-3(d);

- (c) By failing to identify the client on all checks drawn on the trust account, Defendant violated Rule 1.15-3(b)(2);
- (d) By failing to indicate on all items payable to him, the lawyer, the client balance from which the items were drawn, Defendant violated Rule 1.15-2(h);
- (e) By failing to identify the client on all deposit slips and electronic wire transfers, Defendant violated Rule 1.15-3(b)(1);
- (f) By failing to provide written accountings to clients with funds in the trust account for more than twelve months, Defendant violated Rule 1.15-3(e);
- (g) By failing to use business size checks containing an auxiliary On-Us field, Defendant violated Rule 1.15-3(a);
- (h) By failing to escheat unidentified or abandoned funds, Defendant violated Rule 1.15-2(q);
- (i) By failing to promptly remove earned fees from the trust account, Defendant failed to maintain his funds separate from his clients' funds in violation of Rule 1.15-2(a), and commingled attorney and client funds in violation of Rule 1.15-2(f);
- (j) By disbursing funds from the trust account on behalf of clients for whom Defendant had not yet deposited funds into the account, Defendant used entrusted property for the personal benefit of persons other than the legal or beneficial owners of that property in violation of Rule 1.15-2(j);
- (k) By failing to deposit the refund check into his trust account for nine months, Defendant failed to safeguard entrusted funds in violation of Rule 1.15-2(b);
- (l) By failing to notify Ms. Harris of the receipt of the refund check, Defendant failed to act with reasonable diligence and promptness in representing a client in violation of Rule 1.3; failed to keep his client reasonably informed about the status of the matter in violation of Rule 1.4(a)(3) and failed to promptly notify his client of the receipt of entrusted property belonging in whole or in part to the client in violation of Rule 1.15-2 (l); and
- (m) By failing to promptly provide the refund to Ms. Harris, Defendant failed to promptly pay or deliver to the client, or to third persons as directed by the client, entrusted property belonging to the client and to which the client was then entitled in violation of Rule 1.15-2(m).

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. Defendant has prior discipline in the form of a Reprimand issued by the DHC in 1991 in 91 DHC 8 for violations of Rules 1.2(C) and 1.1(B).
2. Defendant's failure to follow the trust accounting Rules had the potential for significant harm to his clients.
3. Defendant's failure to promptly inform Ms. Harris of the check he had received and to refund the monies due to Ms. Harris caused harm to the client.
4. In 2015, Defendant refunded the \$279.64 due to Ms. Harris.
5. In the two year time period examined by the State Bar, the State Bar found only one instance of Defendant paying his utility bill from the trust account. This payment of the utility bill from the trust account was an isolated incident and appears to have resulted from Defendant's overall neglect and disregard of his trust account record keeping and accounting obligations. The evidence is insufficient to establish that the isolated payment of the utility bill from the trust account was anything other than an inadvertent act.
6. While Defendant's conduct concerning the trust accounting Rules demonstrates a disregard of the Rules regarding the safeguarding of client funds, the evidence is insufficient to establish that he misappropriated entrusted funds.
7. 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 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.A.C. 1B §.0114(w)(1) of the Rules and Regulations of the North Carolina State Bar and concludes the following factors warrant suspension of Defendant's license:
 - (a) Intent of Defendant to commit acts where harm or foreseeable harm to clients is foreseeable; and
 - (b) Impairment of the client's ability to achieve the goals of the representation;

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

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

- (a) Prior disciplinary offense;
- (b) Remoteness of prior disciplinary offense;
- (c) Defendant engaged in multiple offenses; and
- (d) Degree of experience in the practice of law should have resulted in more responsible approach to the trust accounting Rules.

4. Defendant's conduct, if continued or tolerated by the Bar, poses significant potential harm to future clients.

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 the clients. The Panel further concludes that such discipline would fail to adequately protect the public 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 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, Darryl G. Smith, is hereby suspended from the practice of law for three year(s), effective 30 days from service of this order upon Defendant. The three year suspension is stayed for a period of three years as long as Defendant complies, and continues to comply with the following conditions each year the stay is in effect:

- (a) Smith will have any and all accounts into which he has deposited client funds (hereinafter "trust accounts") audited by a Certified Public Accountant within 90

days of the effective date of this order. (These audits are referred to herein as “the CPA’s initial audits”).

- i. The CPA’s initial audits must identify the beneficial owners of the funds currently in Defendant’s trust account and establish whether the balance in the account is sufficient to cover all client funds defendant should be holding in trust.
 - ii. Smith will provide the CPA’s initial audit reports to the State Bar within five days of receipt along with a proposed disbursement plan.
 - iii. Smith will remedy any deficiencies identified in the CPA’s initial audits and will bring his trust account(s) into compliance with the Rules of Professional Conduct within 30 days of receipt of the audit report. Smith will submit proof of any remedial action to the State Bar and to the CPA no later than 30 days after receipt of the CPA’s report. Said remediation shall include Defendant personally depositing funds in the trust account to replenish any deficit in the account(s) and properly disbursing entrusted funds as described in paragraphs 1(b) and (c) below.
 - iv. If the CPA determines that remedial action is required, the CPA will provide to the Office of Counsel a final audit report certifying that Smith’s trust account(s) are in compliance with the Rules of Professional Conduct no later than 30 days after receipt of the remedial information from Defendant.
- (b) Defendant shall disburse all funds in his existing trust account to the beneficial owners within 30 days of notification that the State Bar approves of the disbursement plan;
- (c) If there are funds in the account for which the beneficial owner(s) cannot be identified, Smith shall identify, maintain, and account for those unidentified funds until the beneficial owners are determined or until the funds are required by law to be escheated, at which point Smith shall escheat the funds;
- (d) After the initial audit of existing accounts, Defendant shall have a CPA audit his trust account(s) on a quarterly basis to ensure Defendant’s compliance with the Rules of Professional Conduct. The CPA must report quarterly to the Office of Counsel concerning the compliance of Defendant’s trust account(s) with the Rules of Professional Conduct, with a copy of the report(s) sent simultaneously to Defendant. The CPA report will address whether Defendant has in the trust account(s) the client funds he should be maintaining for his clients at the time, as well as Defendant’s compliance with Rules 1.15-2 and 1.15-3. The CPA’s report shall include addressing the items on the CPA Report Template form which the State Bar will provide to the Defendant. The CPA’s reports are due no later than

30 days after the end of each quarter (first quarter's report due April 30, second quarter's report due July 30, third quarter's report due October 30, and fourth quarter's report due January 30);

- (e) Each month that the Defendant possesses or controls any entrusted property as defined in Rule 1.15-1(e) and/or maintains any trust or fiduciary account(s), Defendant shall provide the Office of Counsel of the State Bar with an accurate three-way reconciliation as described in the State Bar Lawyer's Trust Account Handbook for all trust accounts maintained by him;
- (f) With the three-way reconciliations, Defendant shall provide the Office of Counsel of the State Bar with: (i) client ledgers for each client whose funds are held in the trust account during that month, (ii) ledger(s) for any personal funds maintained in the trust account(s) for bank or credit card fees, (iii) general ledger(s) for each trust account to which Defendant has access, and (iv) the bank statement(s), cancelled checks and deposit slips for each month for each trust account which Defendant maintains. These reconciliation reports and associated documentation are due on the 15th day of the following month – for example, the three-way reconciliation for the month of January is due February 15th;
- (g) If either the three-way monthly reconciliation report or the CPA's quarterly reports referenced in paragraph (c)(i) above reveal any irregularities or deficiencies, Defendant shall take all remedial action necessary to bring the trust account(s) into compliance with the Rules of Professional Conduct and shall provide proof of the remedial action and compliance to the Office of Counsel of the State Bar and to the CPA within 30 days of the date of the reconciliation report or the CPA's report;
- (h) If any of the CPA's quarterly reports referenced in paragraph (c)(i) above note any irregularities or deficiencies in Defendant's handling of entrusted funds, the CPA shall provide a subsequent report regarding whether Defendant's remedial actions were sufficient and whether Defendant's account(s) has been brought into compliance with the Rules of Professional Conduct. The CPA shall provide this report regarding remedial measures to the Office of Counsel within 30 days of Defendant's provision of proof of remedial action;
- (i) Defendant shall comply with any requests from the Office of Counsel to provide any information regarding his trust account(s) or to sign and provide any release or authorization to allow the Office of Counsel to obtain information directly from any bank at which Defendant maintains a trust account, by the deadline stated in the request;
- (j) All CPA evaluations, reports, and services and all reconciliations referred to herein will be completed and submitted at Defendant's sole expense;

- (k) It is Defendant's sole responsibility to ensure the CPA completes and timely submits the reports as required herein. Failure of the CPA to submit any report required by this Order shall be grounds to lift the stay and activate the suspension;
- (l) Within 30 days of the effective date of this order, Defendant shall have completed the On Demand Trust Accounting Series: Part I (Rule 1.15 Compliance) 2016 continuing legal education course available on the North Carolina Bar Association website, taught by Peter Bolac;
- (m) Each calendar year thereafter, beginning with 2017, Defendant shall complete the next subsequent part of the On Demand Trust Accounting Series by the end of that calendar year. In the final year of the stayed suspension, Defendant shall complete the course for that calendar year prior to the expiration of the stayed suspension. If there is no next subsequent part of the On Demand Trust Accounting Series available in a particular calendar year, Defendant shall identify an alternate trust accounting continuing legal education course to the Office of Counsel for approval at least 60 days prior to the end of the calendar year and shall take the approved alternate trust accounting continuing legal education course prior to the end of the calendar year;
- (n) On or before June 30 each year the stay is in effect, Defendant shall submit an affidavit certifying to the North Carolina State Bar that all general trust accounts, dedicated trust accounts, and fiduciary accounts maintained by Defendant or his law firm are administered, to the best of his knowledge, in compliance with the requirements of Rule 1.15 (including all subparts) or that he is exempt from this provision because Defendant does not maintain any trust or fiduciary accounts for North Carolina client funds;
- (o) Defendant shall pay all Membership dues and Client Security Fund assessments and comply with all Continuing Legal Education requirements;
- (p) Defendant shall arrange for an active member in good standing of the North Carolina State Bar who practices in the county of his practice and is approved in advance by the Office of Counsel to serve as his practice monitor. No later than 30 days from the effective date of this Order, Defendant must supply 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 his cases; (b) provide supervision to ensure that Defendant timely and completely handles client matters; and (c) 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. Defendant will be responsible for the cost, if any, charged by the monitor for this supervision;
- (q) Defendant shall meet at least once monthly with his practice monitor, to whom he shall report the status of all current client matters and provide copies of any documents filed on behalf of current clients. Defendant shall provide any

additional information the practice monitor deems reasonably necessary to ensure that Defendant is timely handling all client matters in accord with the requirements of the Rules of Professional Conduct, the North Carolina Rules of Civil Procedure, and the North Carolina General Rules of Practice, and is in compliance with the trust accounting rules;

- (r) Defendant shall ensure that the practice monitor timely submits to the Office of Counsel a written report by January 30, April 30, July 30, and October 30 describing his or her meetings with Defendant and opinion of whether Defendant is in compliance with the terms of this Order and the Rules of Professional Conduct;
- (s) Should the need arise to find a replacement practice monitor during the stay of Defendant's suspension, Defendant shall promptly provide to the Office of Counsel the name of a proposed alternative practice monitor. Defendant's failure to promptly provide the Office of Counsel the name of an alternative practice monitor will not excuse any failure to meet monthly with an approved practice monitor and will not excuse failure of an approved practice monitor to provide quarterly reports to the Office of Counsel;
- (t) Defendant shall not violate the Rules of Professional Conduct or the laws of the United States or of any state or local government during his suspension, misdemeanor traffic violations excepted;
- (u) Defendant shall keep the North Carolina State Bar Membership Department advised of his current business and home addresses and shall notify the Bar of any change in address within ten days of such change;
- (v) Defendant shall respond to all communications from the North Carolina State Bar, including communications from the Attorney Client Assistance Program, within 30 days of receipt 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 of which he receives notice after the effective date of this Order;
- (w) Defendant shall promptly accept service of all certified mail that is sent to him from the State Bar;
- (x) Defendant shall timely comply with all State Bar Membership and Continuing Legal Education requirements; and
- (y) Defendant shall pay all costs and administrative fees of this action within 30 days of the date the Order of Discipline is served on him or his counsel.

2. Failure of the Defendant to timely submit any document required by this Order shall be sufficient grounds to lift the stay and activate the suspension.

3. If during the stay of the suspension Defendant fails to comply with any one or more of the conditions stated above, the stay of the suspension of his law license may be lifted as provided in § .0114(x) 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 apply for reinstatement after serving the activated suspension by filing a petition with the Disciplinary Hearing Commission demonstrating compliance with the requirements of 27 NCAC 1B §.0125 as well as the following requirements by clear, cogent, and convincing evidence:

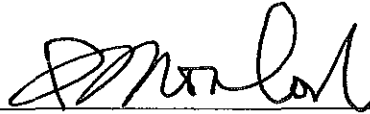
- (a) Defendant properly wound down his law practice and complied with the terms of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the State Bar Discipline & Disability Rules;
- (b) Defendant kept the Membership Department of the State Bar informed of his current information for his physical address (not a Post Office box), telephone number, and e-mail address throughout the period of his suspension;
- (c) 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;
- (d) 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 his suspension;
- (e) Defendant has come into compliance with any outstanding CLE or membership obligations at the time of the filing of his petition for reinstatement;
- (f) Defendant did not violate any of the Rules of Professional Conduct in effect during the period of the suspension, misdemeanor traffic violations excepted;
- (g) Defendant did not violate any laws of the State of North Carolina or of the United States during the period of the suspension; and
- (h) Defendant paid all costs and fees of this proceeding as assessed by the Secretary by the date of the filing of his petition for reinstatement.

5. 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 show cause proceedings pending alleging lack of compliance with the conditions of the stay of the suspension. Pursuant to § .0114(x) 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 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 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 show cause proceeding.

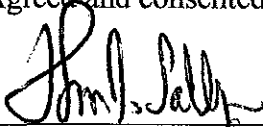
Signed by the undersigned Hearing Panel Chair with the consent of the other Hearing Panel members.

This the 3rd day of November 2016.



Fred M. Morelock, Chair
Disciplinary Hearing Panel

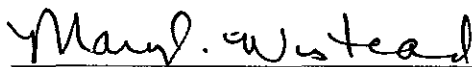
Agreed and consented to by:



Thomas R. Sallenger
Attorney for Defendant



Darryl G. Smith
Defendant



Mary D. Winstead
Attorney for Plaintiff