

STATE OF NORTH CAROLINA

WAKE COUNTY

FILED DHC

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
17 DHC 33

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

KEVIN M. KENNEDY, Attorney,

Defendant

CONSENT ORDER OF DISCIPLINE

This matter came before a hearing panel of the Disciplinary Hearing Commission composed of N. Hunter Wyche, Jr., Chair, Irvin W. Hankins, III and Michael S. Edwards. G. Patrick Murphy represented Plaintiff. Defendant appeared *pro se*. Defendant waives a formal hearing. The parties stipulate and agree to the findings of fact and conclusions of law recited in this consent order. The parties consent to the discipline imposed by this order. By consenting to entry of this order, Defendant knowingly, freely and voluntarily waives his right to appeal this consent order or to challenge in any way the sufficiency of the findings.

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

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar ("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, Kevin M. Kennedy ("Defendant" or "Kennedy"), was admitted to the North Carolina State Bar in August 2002 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 Chapel Hill, North Carolina.

4. At all times relevant to this Complaint, Defendant maintained a general attorney trust account with First Citizens Bank, last four digits 1521 ("TA 1521").

5. On August 9, 2016, the State Bar conducted a random procedural audit of TA 1521.

6. The audit revealed, among other deficiencies, that Defendant was not conducting quarterly reconciliations of TA 1521 and that credit card processing fees were paid from TA 1521.

7. On September 8, 2016, Defendant was asked to provide the State Bar a true and accurate reconciliation of his trust account through the month of August 2016.

8. On September 27, 2016, Defendant responded by letter and provided a reconciliation as of August 31, 2016 that revealed negative balances in TA 1521 for clients of his law practice.

9. Defendant's September 27, 2016 response acknowledged that negative balances resulted from overpayments to his law office, over-reimbursements to clients, and overpayment of client expenses.

10. Based on his reconciliation ending August 31, 2016, Defendant calculated that a deposit of \$2,055.14 was necessary to cure negative client balances and other inaccuracies in TA 1521.

11. Defendant's September 27, 2016 letter advised the State Bar that he would transfer to \$2,055.14 from his general account to TA 1521 to cover the deficit and balance the account.

12. Defendant maintained a \$1,500 surplus or cushion of his own funds in TA 1521 to cover errors and bank service charges.

13. In January 2017, the State Bar asked Defendant to provide, among other information, a corrected reconciliation as of August 31, 2016, his reconciliation of TA 1521 for the period ending December 31, 2016, and his plan to correct over-disbursements in the future.

14. On January 25, 2017, Defendant acknowledged he needed to consult client ledgers prior to drawing funds on client account balances to prevent future over-disbursements.

15. Defendant produced the requested reconciliations on February 2, 2017. The State Bar's analysis of Defendant's revised August 31 and original December 31, 2016 reconciliations revealed that:

- a. Negative client balances that appeared on the original August 31 reconciliation were not included on the revised August 31

reconciliation and there was no documentation of any reimbursement to TA 1521 to show how the negative balances were resolved;

- b. As of December 31, 2016, no deposit had been made to TA 1521 to reimburse the trust account deficit of \$2,055.14.

16. Defendant utilized an accountant to assist in producing the reconciliations and source data for the revised August 31 and December 31, 2016 reconciliations he provided to the State Bar.

17. The items noted in paragraph 15 above were brought to Defendant's attention in a letter from the State Bar dated March 3, 2017.

18. On March 22, 2017, Defendant responded to the State Bar and incorporated a letter from his accountant as part of his response.

19. Defendant's accountant reported that:

- a. He found TA 1521 contained negative client balances from over-disbursements, and positive client balances from closed cases that had not been transferred to Defendant's general business account;
- b. To clean up Defendant's client accounts he created a journal entry that zeroed out all the client accounts and determined that an infusion of \$2,055.14 was necessary from Defendant's general account; and
- c. The \$2,055.14 deposit needed to zero out the negative balances in Defendant's revised August 31, 2016 reconciliation was posted to TA 1521 on September 30, 2016 but the funds were not deposited until January 2017.

20. Data entry comprising Defendant's reconciliations did not reflect the actual bank transaction but rather planned or required bank transactions.

21. On March 31, 2017, the State Bar requested additional information from Defendant including, among other documents, Defendant's ledger(s) for any office funds deposited or disbursed in TA 1521 for payment of credit card fees, payment of other bank fees, reimbursement purposes, or other purposes for the period December 1, 2016 through April 30, 2017.

22. Defendant responded by a letter dated May 16, 2017 that enclosed his office ledger that covered bank charges for TA 1521 ("office bank fee ledger").

23. Defendant's office bank fee ledger tracking deposits to and disbursements from TA 1521 contained negative balances between December 10, 2016 and March 31, 2017.

24. Defendant's office bank fees ledger recorded a deposit of check 4740 in the amount of \$1,442.48 to the account on December 10, 2016 when in fact check 4740 was not deposited and credited to the account until March 20, 2017.

25. The May 16, 2017 documents provided by Defendant showed continuing over-disbursements and ongoing inaccurate data entry distorting the true status of TA 1521.

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel and the Panel has jurisdiction over Defendant, Kevin M. Kennedy, and over the subject matter.

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

- a) By failing to reconcile his trust account on a quarterly basis, Defendant violated Rule 1.15-3(d)(1);
- b) By maintaining a surplus or cushion of Defendant's own funds in TA 1521 to cover errors such as over-disbursements, Defendant failed to keep entrusted property separate from property of Defendant in violation of Rule 1.15-2(a) and (f);
- c) By entering data to TA 1521 ledgers that did not accurately reflect the balance of client ledgers, Defendant failed to maintain client ledgers in violation of Rule 1.15-3(b)(5);
- d) By failing to transfer funds in TA 1521 belonging to Defendant upon the close of a client's case and maintaining those funds in TA 1521, Defendant failed to keep entrusted property separate from property of Defendant in violation of Rule 1.15-2(a) and (f);
- e) By frequently over-disbursing funds to and on behalf of clients as reflected on client ledgers, Defendant failed to maintain entrusted funds in compliance with Rule 1.15-2(a) and (n); and
- f) By making overpayments to his law office, over-disbursements to clients, and overpayment of client expenses in excess of the cushion he maintained in TA 1521, Defendant used entrusted funds for Defendant's benefit or benefit of persons other than the legal or beneficial owner of those entrusted funds in violation of Rule 1.15-2(j)1.

1 Rule violation references are to the then-applicable Rules of Professional Conduct.

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

FINDINGS OF FACT REGARDING DISCIPLINE

1. Defendant was licensed to practice law in North Carolina in 2002 and has substantial experience in the practice of law.
2. Defendant's conduct has the potential to cause significant harm to the standing of the profession in the eyes of the public because it shows his disregard for his duties as an attorney. Defendant's conduct undermines the public's confidence in lawyers' ability to safely maintain entrusted client funds.
3. There is no evidence of any dishonest motive on the part of Defendant.
4. Defendant has had prior discipline in North Carolina: an Admonition 07G0345 & 07G0348 (entering a plea in a traffic case without authorization, failing to communicate with client, and failing to timely respond to a letter of notice in a grievance proceeding).
5. Defendant cooperated with the State Bar during its investigation and prosecution of this case.

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

CONCLUSIONS REGARDING DISCIPLINE

1. The Hearing Panel has carefully considered all of the different forms of discipline available to it, including admonition, reprimand, censure and suspension. In addition, the Hearing Panel has considered all of the factors contained in 27 N.C.A.C. 1B § .0116(f)(1) of the Rules and Regulations of the State Bar and finds that the following factors warrant suspension of Defendant's license:
 - a) negative impact of the defendant's actions on clients' and the public's perception of the profession; and
 - b) intent of the defendant to commit acts where the harm or potential harm is foreseeable.
2. The Hearing Panel has also considered all of the factors enumerated in 27 N.C.A.C. 1B § .0116(f)(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 also considered all of the factors enumerated in 27 N.C.A.C. 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 dishonest motive;
- b) multiple offenses;
- c) prior discipline – Admonition 07G0345 & 07G0348 (entering a plea in a traffic case without authorization, failing to communicate with client, and failing to timely respond to a letter of notice in a grievance proceeding);
- d) experience in the practice of law; and
- e) cooperative attitude toward the proceeding.

4. Defendant's conduct resulted in potential significant harm to his clients by placing entrusted client funds at risk of misapplication and misappropriation.

5. Defendant's conduct resulted in potential significant harm to the legal profession in that his actions bring the legal profession into disrepute.

6. The Hearing Panel has considered lesser alternatives but finds that a censure, reprimand or admonition would be insufficient discipline because of the potential significant harm to Defendant's clients and the legal profession caused by Defendant's conduct.

7. The Hearing Panel finds and concludes that the public will be adequately protected by suspension of Defendant's law license, stayed with conditions imposed upon Defendant designed to ensure protection of the public and Defendant's continued compliance with the Rules of Professional Conduct.

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

ORDER OF DISCIPLINE

The law license of Defendant, Kevin M. Kennedy, is hereby suspended for two (2) years effective on the date this Consent Order of Discipline is filed. The period of suspension is stayed for three (3) years as long as Defendant complies and continues to comply with the following conditions:

- a) Within the first year of the stayed period of suspension, Defendant shall complete three (3) hours of continuing legal education in the area of trust

account management approved by the Office of Counsel of the State Bar to include, in part, attendance at the Trust Accounting Rules Continuing Legal Education Program and provide documentation of compliance with this condition to the Office of Counsel of the State Bar within 10 days of completion of the CLE. These three (3) hours are in addition to the continuing legal education requirements set out in 27 N.C.A.C. 1D § .1518;

- b) Within thirty (30) days of this order's effective date, Defendant shall, at his own expense, retain a certified public accountant or an accountant (hereafter collectively "CPA") approved in advance by the Office of Counsel who shall audit his trust accounts to identify the beneficial owners of all funds in Defendant's trust accounts and to confirm that Defendant's trust accounts are in compliance with the Rules of Professional Conduct. Defendant will cooperate with the CPA to ensure the audit is completed in a timely fashion. The CPA shall provide monthly written reports to the State Bar updating the State Bar on the audit's progress until the audit is complete. Upon completion of the audit, the CPA shall provide the State Bar with a written final audit report identifying the owner of entrusted funds in Defendant's trust accounts and confirming that Defendant's accounts comply with the Rules of Professional Conduct. The CPA's completed audit report is due, and shall be submitted to the State Bar, within ninety (90) days of the effective date of this order. It is Defendant's sole responsibility to ensure that the CPA completes and submits the reports required herein;
- c) Within sixty (60) days of completion of the CPA's audit of Defendant's trust and fiduciary accounts, Defendant shall disburse all identified client funds in Defendant's accounts that are due or overdue for distribution to their rightful owner(s);
- d) Defendant shall comply with Rule 1.15-2(r) regarding all unidentified funds in Defendant's accounts and comply with Chapter 116B of the General Statutes within sixty (60) days of being statutorily permitted to escheat funds to the State;
- e) Defendant shall provide the Office of Counsel with copies of the following trust account records quarterly, due on or before the 15th day of the month following the end of each quarter (January, April, July, and October):
 - (i) Monthly reconciliations of the balance of the trust accounts as shown on Defendant's records and the current bank balance for the trust account; and

- (ii) Reconciliations of the individual client ledger balances, the ledger of a general trust account, and the current bank statement balance for the trust account as a whole;
- f) Defendant shall provide his bank statements, cancelled checks, client ledgers, and general ledger with each quarterly submission;
- g) Defendant shall provide any other records requested by the Office of Counsel within ten (10) days of the request;
- h) During the period of the stay, Defendant will permit random audits of his trust account(s) by the Office of Counsel upon ten (10) days advance written notice. Such audit will be conducted at Defendant's expense;
- i) Beginning six (6) months from entry of this order, Defendant shall have the CPA audit Defendant's trust accounts on a semi-annual basis to ensure Defendant's compliance with the Rules of Professional Conduct. The CPA must report to the Office of Counsel concerning the compliance of Defendant's account(s) with the Rules of Professional Conduct including, but not limited to, any accounting irregularities and any deviance from the requirements of the Rules of Professional Conduct, with a copy of the report sent simultaneously to Defendant. The CPA's reports are due no later than 30 days after the end of each semi-annual audit period. Defendant shall be solely responsible for ensuring that the CPA completes and submits the reports as required herein and Defendant shall be solely responsible for all costs associated with preparation of the CPA's reports;
- j) If any of the CPA's reports note any irregularities or deficiencies, 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 Office of Counsel of the State Bar and to the CPA within thirty (30) days of the date of the CPA's report;
- k) Defendant shall keep the North Carolina State Bar Membership Department advised of his current business and home addresses; Defendant shall notify the Bar of any change in address within ten (10) days of such change. His current business address must be a street address, not a P.O. Box or drawer;
- l) Defendant shall respond to all communications from the North Carolina State Bar, including communications from the Attorney Client Assistance Program, within thirty (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. This provision applies

to all communications from the State Bar except requests from the Office of Counsel for records which is governed by paragraph g) above;

- m) Defendant shall timely comply with all State Bar membership and Continuing Legal Education requirements, and timely pay all dues, costs, fees or assessments related thereto;
- n) 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; and
- o) Defendant shall pay all administrative fees and costs assessed against him in this disciplinary proceeding within thirty (30) days of service of this order upon him.

2. If Defendant fails to comply with any of the conditions of the stayed suspension provided in paragraph 1(a) – (o) above, the stay of the suspension may be lifted as provided in § .0118(a) and (b) of the North Carolina State Bar Discipline and Disability Rules.

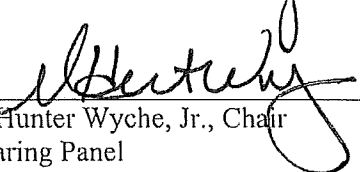
3. If the stay granted herein is lifted or the suspension of Defendant's license is activated for any reason, before seeking reinstatement of his license to practice law, Defendant must show by clear, cogent and convincing evidence that he has complied with paragraph 1(a) – (d) above and with each of the following conditions:

- a) Defendant submitted his license and membership card to the Secretary of the North Carolina State Bar within thirty (30) days after the date of the order lifting the stay and/or activating the suspension of his law license;
- b) Defendant complied with all provisions of 27 N.C.A.C. 1B § .0128 of the State Bar Discipline and Disability Rules following the order lifting the stay and/or activating the suspension of his law license;
- 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 thirty (30) days of entry of the order lifting the stay and/or activating the suspension of Defendant's law license, Defendant disbursed all identified client funds in Defendant's trust accounts to their rightful owner(s) as shown on bank records and complied with Rule 1.15-2(r) regarding all unidentified funds in Defendant's trust accounts;
- e) That within sixty (60) days of being statutorily permitted to escheat funds to the State, Defendant complied with Chapter 116B of the General Statutes;

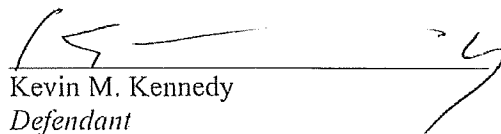
- f) Defendant has kept the North Carolina State Bar Membership Department advised of his current business and home street addresses (not P.O. box or drawer addresses) and notified the Bar of any change in address within ten (10) days of such change;
- g) Defendant has responded to all communications from the North Carolina State Bar, including communications from the Attorney Client Assistance Program, within thirty (30) days of receipt or by the deadline stated in the communication, whichever is sooner, and has participated in good faith in the State Bar's fee dispute resolution process for any petition of which he receives notice after the effective date of this Order;
- h) That at the time of his petition for stay, 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 stay, there is no deficit in Defendant's completion of mandatory Continuing Legal Education (CLE) hours, in reporting of such hours or in payment of any fees associated with attendance at CLE programs;
- j) Defendant has not violated the Rules of Professional Conduct or the laws of the United States or of any state or local government during his suspension; and
- k) Defendant has complied with all provisions of 27 N.C.A.C. 1B § .0129(b).

4. Defendant is taxed with the administrative fees and costs of this action as assessed by the Secretary which Defendant shall pay within thirty (30) days of service of the notice of costs upon the Defendant.

Signed by the undersigned Chair with the full knowledge and consent of the other members of the Hearing Panel, this is the 23 day of FEBRUARY 2018.


 N. Hunter Wyche, Jr., Chair
 Hearing Panel

CONSENTED TO BY:


 Kevin M. Kennedy
 Defendant

G. Patrick Murphy 2/22/18
G. Patrick Murphy
Attorney for Plaintiff