

STATE OF NORTH CAROLINA

WAKE COUNTY



BEFORE THE  
DISCIPLINARY HEARING  
COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
14 DHC 6

THE NORTH CAROLINA STATE BAR,

Plaintiff,

v.

ELAINE S. KELLEY, Attorney,

Defendant.

CONSENT ORDER  
OF DISCIPLINE

THIS MATTER was considered by a hearing panel of the Disciplinary Hearing Commission composed of Walter E. Brock, Jr., Chair, Irvin W. Hankins, III, and Karen B. Ray pursuant to 27 N.C.A.C. 1B §.0114 of the North Carolina State Bar Discipline and Disability Rules. Defendant, Elaine S. Kelley, was represented by Alan M. Schneider. Plaintiff was represented by Deputy Counsel Margaret Cloutier. Defendant waives a formal hearing in this matter and both parties stipulate and consent to the findings of fact and conclusions of law recited in this order and to the discipline imposed. By consenting to the entry of this order, Defendant waives any right to appeal this consent order or challenge in any way the sufficiency of the findings.

Based upon the pleadings and the admissions, and with consent of the parties, the hearing panel finds by clear, cogent and convincing evidence the following

#### FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar (hereinafter "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 Discipline and Disability Rules of the North Carolina State Bar promulgated thereunder.

2. Defendant, Elaine S. Kelley (hereinafter "Kelley" or "Defendant"), was admitted to the North Carolina State Bar on July 31, 1986, 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. On May 9, 2013, the Superior Court of Bladen County entered an order suspending Defendant's law license for six months. Defendant has not been engaged in the practice of law since entry of the May 9, 2013 order.

3. At the times of the events alleged in this complaint, Defendant was actively engaged in the practice of law in the State of North Carolina and was an assistant district attorney for the Thirteenth Prosecutorial District.

4. In 2005, Defendant entered into an agreement with Rex Gore, then the elected district attorney in the Thirteenth Prosecutorial District.

5. Pursuant to the agreement between Defendant and Gore, Defendant was employed as an assistant district attorney.

6. Defendant and Gore agreed that, in addition to salary, Defendant would be compensated for her employment as assistant district attorney by receiving reimbursement from the North Carolina Administrative Office of the Courts for mileage she did not incur.

7. Defendant and Gore agreed that Defendant would submit to the Administrative Office of the Courts expense reports representing that each week she had driven between the courthouses in Elizabethtown and Bolivia, North Carolina, although Defendant and Gore knew that her duties would not require her to make that drive.

8. After entering into this agreement with Gore, Defendant submitted to the Administrative Office of the Courts sixty-three expense reports containing false certifications of mileage.

9. Defendant signed each certification of mileage below the words "[u]nder penalty of perjury, I certify that this is a true and accurate statement of the city [sic] of lodging, expenses, and allowances incurred in the service of the state."

10. Defendant received reimbursement of \$14,190.39 from the Administrative Office of the Courts for mileage she had not driven.

11. On May 9, 2013, Respondent entered a plea of guilty to the common law offense of misprision of a felony, a misdemeanor.

Based upon the foregoing Findings of Fact, the hearing panel enters the following:

#### CONCLUSIONS OF LAW

1. All parties are properly before the Disciplinary Hearing Commission and the Disciplinary Hearing Commission has jurisdiction over Defendant, Elaine S. Kelley, and the subject matter of this proceeding.

2. Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C.G.S. 84-28(b)(1) and (2) in that Defendant violated the Rules of Professional Conduct in effect at the time of the conduct as follows:

3. By entering into an agreement with Gore to submit false certifications for reimbursement of mileage she did not incur, by submitting false certifications for reimbursement of mileage she did not incur, and by accepting and retaining funds as reimbursement for mileage she did not incur, Defendant committed a criminal act that reflects adversely on her honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b), engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

4. In addition, Defendant's conviction in state court of the common law offense of misprision of a felony constitutes misconduct and grounds for discipline in that such conviction is a criminal offense showing professional unfitness pursuant to N.C.G.S. §84-28 (b)(1) and N.C.A.C. 1B §.0115.

Based upon the pleadings and the admissions by consent of the parties, the hearing panel also finds by clear, cogent and convincing evidence the following

#### ADDITIONAL FINDINGS REGARDING DISCIPLINE

1. Defendant fully cooperated with the SBI investigation of this matter and freely admitted her conduct to the SBI, to the lawyers who prosecuted the criminal case, to the court in the criminal case, to the Grievance Committee and to the Disciplinary Hearing Commission.

2. The court in the criminal action against Defendant imposed the following sentence: 60 days incarceration, suspended; 12 months unsupervised probation; restitution of \$14,190.39 and court costs of \$334.50; and suspension of Defendant's law license for six months.

3. Defendant complied immediately with the restitution requirement of the criminal judgment.

4. Defendant has dedicated over 22 years of service to the State of North Carolina as an assistant district attorney.

5. Defendant acknowledges that she relied on the assurances of Gore, her employer, about the legitimacy of the arrangement rather than exercise her independent judgment. Defendant understands that her reliance was misplaced and that it was inappropriate to allow anyone to persuade her to do the wrong thing.

6. Defendant has expressed sincere remorse and contrition.

7. With the exception of the professional misconduct at issue in this case, Defendant has demonstrated good character in her professional life.

8. The misconduct at issue appears to be uncharacteristic of Defendant.

9. Defendant has no prior discipline.

10. Defendant has not engaged in the practice of law since she was sentenced by the court on May 9, 2013.

11. Defendant's misconduct received public attention, causing significant harm by bringing the legal profession into disrepute and significantly undermining the public's confidence in the integrity of the justice system. As a prosecutor, Defendant was a representative of the justice system and it was incumbent upon her to adhere to the highest standards. At the time Defendant committed the misconduct described herein, Defendant knew or reasonably should have known that her actions could cause significant harm to the profession and the administration of justice in the eyes of the public.

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 upon the Findings of Fact, Conclusions of Law, and Additional Findings Regarding Discipline, the hearing panel also enters the following

#### CONCLUSIONS REGARDING DISCIPLINE

1. The hearing panel has also 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 determines that the following factors are applicable in this matter:

- (a) Defendant's intent to commit acts where the harm or potential harm was foreseeable;
- (b) The circumstances reflecting Defendant's lack of trustworthiness and integrity;
- (c) The negative impact of Defendant's actions on the public's perception of the profession; and
- (d) Acts of dishonesty, misrepresentation, deceit or fabrication.

2. The hearing panel has considered 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

determines that although some factors are present the circumstances of this case do not warrant disbarment in order to protect the public.

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 determines that the following factors are applicable in this matter:

- (a) Defendant's lack of prior disciplinary offenses;
- (b) Defendant's selfish motive;
- (c) Defendant's pattern of misconduct;
- (d) That Defendant committed multiple offenses;
- (e) Defendant's full and free disclosure and cooperative attitude toward the proceedings;
- (f) Defendant's remorse;
- (g) Other than the conduct at issue in this proceeding, Defendant has demonstrated good character and judgment in her professional career;
- (h) Defendant's years of experience in the practice of law; and
- (i) Imposition of other penalties or sanctions.

4. The hearing panel has carefully considered all of the different forms of discipline available to it. An admonition, reprimand, or censure would not be sufficient discipline because of the gravity of the potential harm Defendant's conduct caused to the public, to the administration of justice, and to the public's confidence in the justice system and the legal profession.

5. The panel determines that discipline short of suspension would not adequately protect the public, the legal profession or the administration of justice for the following reasons:

- (a) The factors under Rule .0114(w)(1) that are established by the evidence in this case are of a nature that support imposition of a suspension as the appropriate discipline; and
- (b) Entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to attorneys and to the public regarding the conduct expected of members of the Bar of this state.

6. Because Defendant has not engaged in the practice of law since May 2013 and is currently suspended, it is unnecessary for her to comply with the wind-down provisions of 27 N.C.A.C. 1B § .0124 of the North Carolina State Bar Discipline & Disability Rules.

Based upon the foregoing Findings of Fact, Conclusions of Law, and Findings and Conclusions Regarding Discipline, the hearing panel enters the following

#### ORDER OF DISCIPLINE

1. Defendant, Elaine S. Kelley, is hereby SUSPENDED from the practice of law for four years effective immediately upon the filing of this Order of Discipline.
2. Defendant shall receive credit toward satisfaction of the four year suspension for the time since her law license was suspended by the court on May 9, 2013.
3. Defendant shall surrender her law license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following filing of this Order.
4. Defendant shall pay the administrative fees and costs of this proceeding within 30 days of service of the statement of costs upon her by the Secretary of the State Bar.
5. After the completion of two years of active suspension of her law license, which shall be deemed to have begun as of May 9, 2013, Defendant may apply for a stay of the remainder of the suspension upon filing of a petition with the secretary at least thirty days before any proposed effective date of the stay and demonstrating by clear, cogent and convincing evidence the following:
  - (a) Defendant has complied with the general provisions for reinstatement listed in 27 N.C. Admin. Code 1B § .0125 of the North Carolina State Bar Discipline & Disability Rules;
  - (b) Defendant has kept the North Carolina State Bar Membership Department advised of her current business and home addresses (not P.O. box) and notified the State Bar of any change in address within ten days of such change;
  - (c) Defendant has responded to all communications from the State Bar within thirty days of receipt or by the deadline stated in the communication, whichever is sooner;

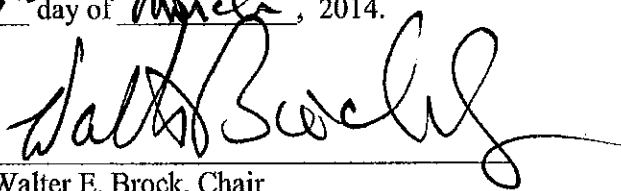
- (d) That at the time of her petition for stay, Defendant is current in payment of all Membership dues, fees, and costs, including all Client Security Fund assessments and other charges or surcharges the State Bar is authorized to collect from her, and including all judicial district dues, fees and assessments;
- (e) That at the time of her petition for stay, there is no deficit in Defendant's completion of mandatory Continuing Legal Education (CLE) hours, in reporting such hours or in payment of any fees associated with attendance at CLE programs;
- (f) Defendant has not violated the Rules of Professional Conduct or the laws of the United States or any state or local government during her suspension; and
- (g) Defendant has paid the costs and administrative fees of this proceeding as reflected on the statement of costs served upon her by the Secretary of the State Bar within thirty days of receipt of the statement of costs.

6. If Defendant successfully seeks a stay of suspension of her law license, such stay will continue in force only as long as Defendant complies and continues to comply with the following conditions:

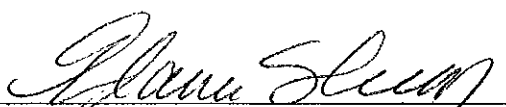
- (a) Defendant shall timely pay all Membership dues, fees and costs, including all Client Security Fund assessments and other charges or surcharges that the State Bar is authorized to collect from her, including all judicial district dues, fees and assessments;
- (b) Defendant shall timely complete all mandatory CLE hours, report such hours, and pay any fees associated with attendance at CLE programs;
- (c) Defendant shall not violate the Rules of Professional Conduct or the laws of the United States or of any state or local government during her suspension; and
- (d) Defendant shall keep the State Bar Membership Department advised of her current business and home addresses. Defendant shall notify the State Bar of any change in address within ten days of such change. Her current business address must be a street address, not a P.O. box or drawer.
- (e) Defendant shall comply with such other and further requirements as may be imposed by any hearing panel that may grant a stay of Defendant's suspension.

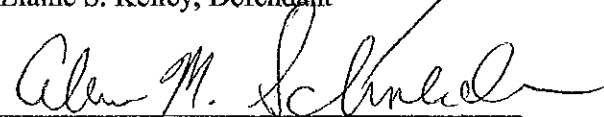
7. If Defendant does not seek or fails to obtain a stay of the active portion of the suspension, or if some part of the suspension is stayed and thereafter the stay is lifted/revoked, Defendant must comply with the requirements of paragraphs 5(a) through (g) above before being reinstated to the practice of law.

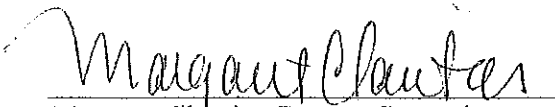
Signed by the undersigned Chair with the full knowledge and consent of the other members of the Hearing Panel, this 17<sup>th</sup> day of March, 2014.

  
Walter E. Brock, Chair  
Disciplinary Hearing Panel

Consented to:

  
Elaine S. Kelley, Defendant

  
Alan M. Schneider, Attorney for Defendant

  
Margaret Cloutier, Deputy Counsel  
Attorney for Plaintiff