

NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
13 BSR 2 and 11 DHC 15

IN THE MATTER OF)

Petition for Stay of)
GARY B. KIVETT, Attorney)

ORDER DENYING)
PETITION FOR STAY)

THIS MATTER coming before a Panel of the Disciplinary Hearing Commission for consideration of Petitioner Gary B. Kivett's Petition for Stay filed pursuant to the provisions of the Order of Discipline in this matter dated January 3, 3012 and 27 N.C.A.C. 1B §.0125. The Petition for Stay was heard on May 23, 2013. Petitioner was present and represented by Attorney Gerald R. McKinney. The North Carolina State Bar was represented by Deputy Counsel Margaret Cloutier. The Panel consisted of Chair Fred M. Morelock, and members Renny W. Deese, and Karen B. Ray. Based upon the record and the evidence presented the Panel makes the following:

FINDINGS OF FACT

1. In a consent Order of Discipline filed January 3, 2012, Kivett was suspended from the practice of law for four years effective thirty days from the date the order was served on Kivett.
2. The effective date of the Order was February 4, 2012.
3. The Order provides that Kivett may apply for a stay of any remaining period of suspension after serving one year of the active suspension and upon compliance with conditions stated in the Order. The Order provides that Kivett comply with the procedures set forth in 27 N.C.A.C. 1B §.0125(b) in applying for the stay.
4. Kivett's Petition for Stay was filed on February 12, 2013.
5. The Office of Counsel for the North Carolina State Bar filed its Objections to Petition for Stay on March 11, 2013.
6. This hearing was held pursuant to the provisions of 27 N.C.A.C. 1B §.0125(b)(7).

7. The Order requires that to be eligible for a stay of the remaining period of suspension Kivett must establish by clear, cogent and convincing evidence compliance with the following conditions:

a. That Defendant has submitted to comprehensive psychiatric or psychological evaluations, at Defendant's sole expense, by two separate psychiatrists or psychologists who specialize in treating sexual offenders in the professions and who have been approved in advance by the Office of Counsel of the North Carolina State Bar;

b. That each of the psychiatrists/psychologists have certified under oath, based on their independent comprehensive evaluations of Defendant, that in their professional opinion Defendant does not suffer from any condition creating a predisposition for inappropriate sexual behavior and that Defendant does not suffer from any mental, psychological, or emotional condition that significantly impairs his professional judgment, performance, or competence in the representation of female clients;

c. That Defendant has attached to his reinstatement petition the sworn statements from the two evaluating psychiatrists/psychologists along with releases or authorizations signed by Defendant instructing the evaluating psychiatrists/psychologists to discuss their evaluations of Defendant with, and to release any corresponding records to, a representative of the Office of Counsel;

d. That Defendant has kept the North Carolina State Bar Membership Department advised of his current business and home addresses and notified the Bar of any change in address within ten days of such change;

e. That Defendant has responded to all communications from the North Carolina State Bar within thirty 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 received after the effective date of this Order;

f. That Defendant has not violated the Rules of Professional Conduct or the laws of the United States or any state or local government during his suspension;

g. That Defendant has properly wound down his law practice and complied with the requirements of §.0124 of the North Carolina State Bar Discipline and Disability Rules; and

h. That Defendant has otherwise complied with the requirements of 27 N.C.A.C. 1B, §.0125(b).

8. By the terms of the Order, the burden of proof is on Kivett to show by clear and convincing evidence that he complied with the provisions set forth in the Order.

9. Kivett submitted into evidence a verified letter and report from Anthony D. Sciara, Ph.D., ABPP, CLCP, and Dr. Sciara testified via deposition at the hearing in this matter.

10. Dr. Sciara is of the opinion that Kivett does not fit any diagnostic categories that would cause him to be predisposed to engage in inappropriate sexual behavior or that significantly impair his ability to represent female clients.

11. Dr. Sciara opined that Kivett's professional judgment was impaired which led to inappropriate behaviors. Further, Dr. Sciara stated that Kivett tested positive for a Coping Deficit Index, an indicator of developmental immaturity.

12. Dr. Sciara's opinion is that if Kivett is allowed to practice law, Kivett should not see female clients alone and that he should be counseled by a mentor on what it means to be an officer of the court.

13. Kivett submitted into evidence a verified statement and report from Roger Wallace, M.A. Mr. Wallace testified via deposition at the hearing in this matter.

14. Mr. Wallace is of the opinion that Kivett does not now suffer from any diagnosable condition creating a predisposition for inappropriate sexual behavior and that Kivett does not suffer from any mental, psychological or emotional condition that significantly impairs his professional judgment, performance, or competence in the representation of female clients.

15. Mr. Wallace's opinion is that Kivett's sexual behavior is seen as more of an addictive-like pattern developed in response to emotional distress.

16. Mr. Wallace also recommended that Kivett undergo psycho-educational therapy involving sexual addiction and sensitivity training concerning appropriate respectful regard for women. Kivett has undergone the recommended therapy.

17. Mr. Wallace agreed with Kivett that if Kivett is allowed to practice law, Kivett should make a plan not to meet with female clients alone, widen the scope of his practice, not be on the court-appointed list, and to discuss ethics with an older more experienced attorney.

18. During the wind-down period, Kivett resolved the cases of five clients without first sending to them the required notification. Kivett's notification letter to his remaining clients was dated and sent one day before the effective date of his suspension.

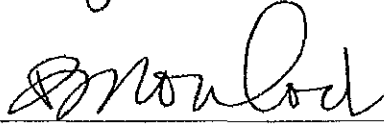
Based on the foregoing Findings of Fact, the Hearing Panel makes the following

CONCLUSIONS OF LAW

1. All parties are properly before the Disciplinary Hearing Commission and the Disciplinary Hearing Commission has jurisdiction over Petitioner, Gary B. Kivett, and the subject matter of this proceeding.
2. Dr. Sciara's assertion that Kivett does not suffer from any diagnostic categories and Mr. Wallace's assertion that Kivett does not suffer from any diagnosable conditions do not meet the requirements of the Order that Kivett show that he does not suffer from any condition that affects his representation of female clients.
3. The opinions offered by both psychologists that the only way that Kivett can resume the practice of law is with conditions and supervision, particularly with respect to female clients, do not satisfy the requirements for the granting of a stay set forth in the Order.
4. Kivett has not shown by clear, cogent and convincing evidence that he does not suffer from any condition creating a predisposition for inappropriate sexual behavior and that he does not suffer from any mental, psychological, or emotional condition that significantly impairs his professional judgment, performance, or competence in the representation of female clients.
5. Kivett did not properly wind down his practice pursuant to Rule .0124 in that Kivett did not promptly notify all of his clients of his suspension as required by Rule .0124 nor did he ensure that the written notification was received by the clients for whom he entered into any agreement with or on behalf of any such client to settle, compromise or resolve any claim, dispute or lawsuit of the client.

NOW, THEREFORE, it is hereby ordered that Petitioner's Petition for Stay is DENIED.

Signed by the undersigned Chair with the full knowledge and consent of the other members of the Hearing Panel, this 18 day of June 2013.



FRED M. MORELOCK, CHAIR
HEARING PANEL